QUESTION 1 - CONSTITUTIONAL LAW

The recently elected Mayor and Council of Anytown, New Jersey, have pledged to crack down on illegal immigration and have taken several actions in furtherance of this policy.

First, the town passed an ordinance amending the public school registration policy to require that all Anytown students prove either their United States citizenship or their status as a legal immigrant, prior to being enrolled in school. No student who fails to do so may be enrolled in the Anytown Public Schools.

Second, the town passed an ordinance prohibiting the employment of illegal immigrants. Seeking to enforce this ordinance, Anytown police officers have approached several local businesses to check the immigration status of their employees. Employees who are determined to be in the United States illegally are detained and turned over to United States Immigration and Customs Enforcement officials.

Outraged, pro-immigration community activists have begun publicizing the police immigration checks on Chatter, a social networking website, posting the locations targeted by police. The most recent posts led to an impromptu protest at the Anytown Supermarket, just as police were detaining 5 illegal immigrants found to be employed there. A clash between police and protesters led to numerous arrests for disorderly conduct and assaults upon police officers.
In response, the Anytown Council passed a third ordinance prohibiting the communication of the location of any present or future law enforcement immigration-related activities to anyone outside the law enforcement community, including the news media.

You are the Town Attorney. The Mayor informs you that several immigration rights groups have threatened to sue Anytown if the three ordinances described above are not immediately rescinded. The Mayor requests that you prepare a memorandum detailing the legal arguments that can be made in support of and against the ordinances and the likelihood of success of the threatened lawsuit.

The Mayor further informs you that the local newspaper, The Anytown Gazette, has obtained information regarding the location of the next police immigration check, which it plans to publish. The Mayor requests that you also include in your memorandum an explanation of the legal arguments that can be made for and against publication and the likelihood of their success.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 1A

MEMORANDUM

TO: Mayor

FROM: Town Attorney

DATE: February 24, 2011

RE: Legal analysis of recently enacted town ordinances

Mr. Mayor:

Per your request, and in response to that several legal threats to our Town made by immigration rights groups, I have prepared my detailed findings as to the constitutionality of the three ordinances which we have recently enacted.

Ordinance #1: Proving US Citizenship for enrollment in Anytown Public School system.

The central issue surrounding the constitutionality of this ordinance is whether our municipality is in violation of the any fundamental rights protected by the US Constitution. As you are aware, our constitution and US Supreme Court caselaw has made classifications of certain groups of individuals to determine their rights. Suspect classifications are race, alienage and national origin. States cannot pass laws which discriminate based upon suspect classifications, which
would be in violation of the Equal Protection Clause, imposed upon New Jersey through the 14th Amendment.

When passing laws that infringe upon the national citizenship, "alienage", of a natural person, the constitutionality of our laws will be subjected strict scrutiny. That is, our law must be narrowly tailored to meet a compelling government interest. However, our case at hand is not so "bright-line" because we are dealing with "illegal" immigration as opposed to proper, legal immigration. In that regard, we must separate the rights of illegal immigrants, and the children of illegal immigrants to determine if this ordinance can survive constitutional scrutinization.

While "illegal" immigration is not a suspect classification, the US Supreme Court has held that children of illegal aliens are "quasi-suspect" class. Here, our ordinance must meet the requirements of intermediate scrutiny, where we must use the least discriminatory means of enforcing our important governmental interest. In that regard, it is impermissible punish the children of illegal immigrants solely based upon the wrongs of committed by their parents (unlawfully entering our country). Although "education" in and of itself is not a fundamental right, a child of illegal immigration has a "fundamental" right to education and that right cannot be denied based upon the illegal citizenship status of their parents.

Because children of illegal immigrants are deemed to be a "quasi-suspect" class, the first ordinance which we have passed must be narrowly tailored to meet our important interest of "cracking down" on illegal immigration. Here, our Town leaves no ample alternative avenues for children of illegal immigration to seek education. We cannot simply deny their "right" to obtain public education system. Where a child cannot prove US citizenship or legal immigration, our Town provides no alternative avenues for them to seek education. This is unconstitutional and must be changed.

Ordinance #2: Prohibiting employment of illegal immigration with the use of state action.

The threshold inquiry in analyzing the constitutionality of this ordinance is to determine whether our municipality is in violation of the Supremacy Clause of the US Constitution. As you are aware, although we are a town within New Jersey, we are to be treated as the "sovereign" of New Jersey. Because the power to regulate and control national citizenship is a power vested exclusively with the Congressional branch of the US government, we must keep mind as to not violate the Supremacy Clause of the US Constitution.

Here, our town has passed an ordinance which prohibits the employment of illegal immigration and Anytown police officers have been vested with the right to approach local businesses to check the status of the employees. This is a violation of substantive due process. "State action" arises, in one instance, where police power is used to enforce laws.

Although the right to employ or be employed is not a fundamental right, substantive due process provides that before the state may take away a vested liberty or right from an individual, notice and opportunity to be heard shall be given. Here, through state action, our ordinance threatens to violate substantive due process by allowing police officers of our town to approach local businesses (many of which are privately owned) to check the immigration status of their
employees. In doing so, we seem to provide too much leeway to police officers in making such determinations. Are we to require that all individuals working in Anytown carry around US passports? Are we to require that all Anytown citizens obtain government issued identification? The ordinance is overly broad here, and in that regard, there is too much room for our police officers to violate fundamental rights or privacy while seeking to determine the citizenship status of people employed within our community's businesses.

Ordinance #3: Prohibiting the communication of immigration-related activities AND the issue regarding The Anytown Gazette's intended publication:

The issue here is whether or not our ordinance is in violation of the First Amendment Freedom Of Speech. Here, our law must be narrowly tailored to meet a compelling government interest when we seek to prohibit newsworthy speech. Our ordinance is content-related, and must pass muster under strict scrutiny, which it does not do so.

Here, Anytown's ordinance is placing a "prior restraint" on speech and prohibits communication based on its content. That is, where communication relates to the location of any present of future law enforcement immigration-related activities, our Town prohibits the dissemination of such information. The US constitution does not protect speech intended to incite riots or speech that is patently offensive in nature.

There is an argument to be made in support of our ordinance that, because of recent clashes between police and protestors, our town has an important interest in protecting the safety of our officers AND our citizens. Particularly, when citizens act in a disorderly fashion, we are not arresting them based upon their speech, rather we are prohibiting them from breaching the peace.

On the other hand, it must be found that we are "chilling" speech that is newsworthy. Disseminating the location of an immigration-related activity is a newsworthy event and the US constitution, along with our state constitution, have always been weary of prohibiting the speech of press.

SAMPLE ANSWER 1B

To: The Mayor  
From: Candidate  
Re: 3 ordinances and the Gazette  
Date: 2.24.2011

Dear Sir,

The following are the legal arguments that can be made in support of and against the
ordinances. At the end of each analysis of the legal arguments are the conclusion for the likelihood of success based on the legal arguments.

1. School registration policy

The town may argue that education is not a fundamental right guaranteed by the Const. When a policy, reg. or law is made regarding education children of illegal aliens, the courts will look over the rules/regulations/policy with intermediate scrutiny. Therefore if the town has a legitimate/substantial interest in regulating the said policy/registration/rule, the court will look favorably upon the said regulation.

The immigration rights will argue that under section 5 of the 14th Amendment, states or state actors are to give equal protection. Discriminations based on race/nationality is looked upon with strict scrutiny by the courts – meaning those must be a necessary/compelling reason for an important government function for the law to stand. And even though education is not a fundamental right, if the said statute discriminates against education simply due to nationality or race, the courts have looked upon such policy as unconstitutional. One such prominent example is districting by race. Although the state was still offering education, though in differing districts, the courts have held such statutes/policies as unconstitutional. Therefore success of this litigation will turn on if the town has at least an important/legitimate reason for governing to implement such policy of school registration.

2. Prohibition of employment of illegal aliens

To practice a trade or profession is not a fundamental right. The government only needs to give a rational reason for the government policy. The town may say that to protect the interest of the citizens, citizens of the town who may have employment instead of the illegal aliens is rational reason enough.

This may prompt the rights group to say that this violates the Privileges and Immunities Clause. However, the Privileges and Immunities Clause does not apply to illegal aliens. The rights group may argue that the ordinance violates the undue burden on the Commerce Clause. However, this is not an overly broad restriction that discriminates against out of staters necessarily. Also there are other means that the said of the employee may be fulfilled by hiring legal aliens/US citizens.

Therefore on the question of prohibition of employment, the government needs to show that there is legitimate interest of the government in protecting jobs of the town citizens against employment of illegal aliens who are not afforded constitutional right. Also it needs to be shown that this prohibition is legitimate without overly burdening interstate commerce. This ordinance will likely be allowed by the courts.

3. Prohibition of communication

Content-neutral restriction on freedom of speech is allowed if the time/manner/place regulation allows for other alternative means. Also the communication prohibition may not be overly broad
and must be unambiguous. The freedom of speech is a right that is zealously guarded by the courts. However, if the communication is inciting illegal activity the courts have said government is allowed to restrict the speech. But the speech has to incite illegal activity and the activity must be imminent. Since this prohibition is not content-neutral the town must have a compelling reason for the prohibition if the security of the town is threatened with these communications, the prohibition may be allowed to stand, if there is actual inciting of illegal activity through the communication. However, the restriction seems overly broad as it prohibits any such communication, even the media, regardless of whether the communication incites an illegal activity or not, this ordinance may fail due to unconstitutionality.

4. Finally, regarding the prior restraint of media – it is difficult to restrain the media. Unless threat of national security exists, it is very difficult to restrain public media from broadcasting/printing materials obtained from the government, particularly if the media obtained the information legally. Even if media has obtained the information illegally, if the media itself did not perpetrate the illegality and there was important public information, the courts would be reluctant to issue a restraining order.

Hence on the likelihood of ordinance one, it is likely that the rights group will succeed, unless the town can show legitimate/substantial interest relating to government function. On ordinance 2, unless the rights group can show undue burden on the commerce, the town will likely succeed. On the 3rd ordinance, seeing the ordinance on its face, it is likely the courts will not allow it to stand. Finally, the courts will most likely not allow prior restraining of Gazette.

Respectfully submitted,
Candidate

QUESTION 2 – EVIDENCE

Lily, a freelance reporter for Hometown’s local newspaper, also publishes OurTown, an online newsblog on which she posts stories of local interest. Hometown’s mayor (“Mayor”) sued Lily for defamation for claiming in OurTown that Mayor was receiving money from the owner (“Owner”) of a “gentleman’s club,” which the Hometown Town Council has failed to shut down despite the club’s numerous zoning and nuisance ordinance violations.

At a pre-trial conference, Mayor advised the judge as follows:

1. He is seeking an order, over Lily’s objection based on the newpersons’ privilege, requiring Lily to disclose the identity of her sources of information regarding Mayor’s alleged receipt of money from Owner.

2. He wants to offer the testimony of Brittany, a dancer at the club, that when Brittany asked Lily why she was “making up lies” about Mayor, Lily just laughed and walked away.
3. He also wants to offer the testimony of Greg that, several years ago, his friend Susan mentioned she and Lily were thinking about starting a blog but worried that “the only way to make any money with a blog is to come up with a juicy story about a big-shot.”

At the same pre-trial conference, Lily advised the judge she wants to offer the following evidence:

4. The testimony of Jill, a police officer in Sea City, where Mayor has a summer home, that in Sea City, Mayor has a “shady” reputation and, in her opinion, “nobody would be surprised if he was taking bribes.”

5. The testimony of Dan, a bartender at the club, that he saw Mayor take an envelope from Owner and overheard Mayor tell Owner, “You can make the rest up later, I know things are a little slow now.”

6. Lily’s testimony that Mayor told her, “Look, I’ve probably done a few things I shouldn’t have so I’ll make a deal with you. I’ll drop the lawsuit if you pay me $10,000 and don’t mention me again in OurTown. But if you don’t agree, there’s going to be a problem.”

You are the trial judge’s clerk and are asked to prepare a memorandum advising the court how to rule on the evidentiary issues raised by the parties.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 2A

TO: Trial Judge
FROM: Clerk
RE: Evidentiary issues raised in pre-trial conference of Mayor v. Lily

You have asked me to advise you as to how to rule on several evidentiary issues raised in the pre-trial conference. My recommendations are detailed below.

1. Mayor's request for order requiring Lily to disclose the identity of her sources of information

The Mayor's request should be denied; Lily's assertion of a journalist privilege should be recognized and enforced.

As a general matter, the law does not recognize an absolute privilege protecting journalists from having to disclose their sources in litigation. However, most jurisdictions do recognize a limited privilege. The extent of this privilege depends on weighing the public interest in informative news and the interest in obtaining the truth in litigation. In the abstract, at least, protecting journalist's from having to disclose their sources promotes the public interests in obtaining important information from the press, since sources will likely be more forthcoming with journalists if they know the reporters cannot be compelled to disclose their identities in the event of litigation. As noted, however, courts have not held that journalists have a privilege not to
disclose their sources’ identities under the First Amendment. On the other hand, there is also an important interest in ensuring the truth-finding ability of courts, and that ability will be impaired to the extent privileges protect journalists from identifying the source of their information.

Here, the balance tips in favor of Lily. Even though the information about the mayor was published in an online newsblog rather than the local newspaper, the purpose served by the information is the same. Regardless of the precise forum of publication, citizens have a particular interest in knowing whether elected officials are corrupt. If their identity may be revealed in court, persons are especially unlikely to reveal information about public corruption to reporters because they will fear reprisals from public authorities who often wield significant power. On the other hand, the harm to the truth-seeking function of courts that will result from recognizing the privilege, while undeniable, is not an overriding consideration here. On the facts before us, it appears the most important issue will be whether the mayor is, indeed, accepting bribes from the gentleman's club. There are other sources of information bearing on that question besides the "confidential" sources on which Lily's report relied. Moreover, the court can condition recognition of Lily's asserted privilege on Lily's not being allowed to submit evidence of this confidential information in the course of trial. This condition would appropriately balance the public interest in news against the interest in fairness to all litigants.

2. Brittany's testimony about Lily's laughing

This testimony should be admitted, although there are questions about its relevance.

As a general rule, relevant evidence is admissible. Evidence is relevant if it has any tendency to make the existence of a material fact more or less likely than it would be without that evidence. Here, the Mayor will argue that Lily's response to Brittany's question about why Lily was "making up lies" is probative to whether Lily believed her report about the mayor was accurate. This issue is relevant because in order to recover for defamation based on the blog report--a report about an issue of public concern and directed against a public official--the Mayor will need to show that the story was false and that Lily knew it was false or was reckless with regard to the risk of falsity. It is questionable whether Lily's response--mere laughter--is really probative of this important fact. Although laughter might be consistent with Lily's agreeing with Brittany's premise that she was indeed "making up lies" about the Mayor, it may also be consistent with Lily's dismissive scorn toward that premise.

Despite this ambiguity, the threshold of relevance is extremely low. Relevant evidence, as noted, need only have some tendency to make a fact at issue more or less likely. Although a jury could conceivably interpret Lily's laughter in different ways, that alone is not enough to find that the evidence fails the relevancy test. Because a jury could plausibly conclude that Lily's response to Brittany's question makes the probability that she was lying about the mayor greater-or less--the information should be considered relevant.

Even relevant information should be excluded, however, if it is substantially more prejudicial than probative. That test is not met here, however. As noted, the evidence is not particularly probative. But on the other hand, it is not particularly prejudicial. Evidence is prejudicial if it is likely to confuse or mislead the jury about the issues or waste court time. Here, the evidence will
take only a moment to introduce and so will not require much time. In addition, although a jury could assign varying significance to the laugh, this does not mean that it will mislead them or distract them from the real issue--whether Lily knew her report was false. Accordingly, the evidence should not be excluded on the ground that it is substantially more prejudicial than probative.

Finally, the evidence should not be excluded on the ground that it is hearsay. Generally, hearsay describes an out-of-court statement offered for the truth of the matter asserted. Brittany's proffered testimony falls into this category; she would testify to Lily's out-of-court response to Brittany's out-of-court query in order to show its alleged "truth," i.e. that Lily need her report was false. Because Lily is a party, however, the statement qualifies as a party admission, which is not considered hearsay.

For the reasons, Brittany's testimony should be allowed

3. Greg's testimony

Greg's proffered testimony should be excluded as inadmissible hearsay.

As noted, hearsay is an out-of-court statement offered from the truth of the matter asserted. Here, Greg will testify as to an out-of-court statement by Susan mentioning that she and Lily were thinking of starting a blog several years ago but worried that the only way to make any money is to come up with a juicy story about a big-shot. Susan's statement is offered for the truth of the matter asserted, i.e. that Lily thought blogs needed to be fueled by juicy stories about important people. The implication is that Lily's concern at the time is probative of the fact that her story about the Mayor was fabricated.

Susan is not a party and her out-of-court statement does not come within an exception to hearsay. It should therefore be excluded. The statement should also be excluded on the ground that it is substantially more prejudicial than probative. The statement that a blog needs to come up with a juicy story about a big-shot does not imply that the story should be fabricated, but a jury might easily be confused given the context in which the statement is presented and give it inappropriate weight as supposed evidence of Susan's mendacity.

4. Jill's testimony about the Mayor's reputation

This testimony should be admitted because it bears on a material issue in the trial.

Generally, evidence of character is inadmissible for substantive (i.e., non-impeachment) purposes in civil trials. Where character is a material issue in the trial, however, evidence of character may be presented, either in the form of opinion testimony, testimony about reputation, or testimony about specific acts.

In a defamation suit such as this one, which involves a public official, the truth vel non of the defamatory statement about the plaintiff's character is directly relevant because it goes to the issue of damages. Defamation requires the plaintiff to satisfy the element of showing harm to his
reputation. If the plaintiff already has a reputation for the things the allegedly defamatory statements accuse him of, then he cannot be harmed, or his injury is diminished. Here, Lily's report accused the mayor of taking bribes. Jill proposes to testify about the mayor's reputation and her opinion that no one would be accused if he were taking bribes. This evidence is offered in a proper form and bears directly on the material issue of damages. Although the evidence relates to the mayor's reputation in Sea City rather than Hometown, where the alleged defamation occurred, a jury could nonetheless infer either that the Sea City reputation is suggestive of the Mayor's reputation in Hometown, or that the Sea City reputation is nonetheless relevant to the extent of the Mayor's damages. Accordingly, Jill's testimony should be allowed.

5. Dan's testimony

Dan's testimony should be allowed. The testimony is directly relevant to the key issue of whether the mayor was actually taking bribes. If the mayor was taking bribes, Lily's report was true and the mayor will be unable to recover for defamation. Dan personally witnesses seeing the Mayor take an envelope from the club owner, so he has an adequate foundation to testify as to this perception. His testimony as to the Mayor's apparently incriminating statement that Owner could "make up the rest later" is an out-of-court statement. It is not, however, actually offered for the truth of the matter asserted, i.e. that the Mayor was actually allowing the Owner to "make up the rest later." It is instead offered for the fact that the mayor made the statement, which together with the conveyance of the envelop may permissibly contribute to a jury inference that the mayor was accepting a bribe.

In any event, if the statement were being offered for the truth of the matter asserted, it would not be hearsay because it is a party admission.

6. Lily's testimony about the Mayor's offer to settle

This proffered testimony should not be allowed because it would violate the rule prohibiting evidence of offers to compromise.

To promote the public interest in the settlement of claims, the rules of evidence prohibit parties from offering evidence relating to settlement negotiations in order to prove the liability or damages. On the other hand, the rules do not exclude evidence of conversations that do not represent genuine efforts to settle a disputed claim but are rather confessions of the merit or meritless of a particular claim.

Here, the Mayor's supposed statement might possibly be construed as the latter. The Mayor acknowledged that he "probably" did a few things wrong and arguably threatened Lucy with "a problem" if she didn't pay him $10,000. This might be interpreted as not a genuine offer of compromise but instead a confession of that Lucy's report was true and that the Mayor had no claim. On the whole, however, the statement is too ambiguous to allow such a confident interpretation. The public policy in favor of promoting settlement negotiations thus dictates excluding the evidence. The Mayor's reference to "a few things" that he did wrong is not a clear
enough admission that Lily's report about his specific bribery offenses is true and thus not a clear admission that his claim is meritless.

**SAMPLE ANSWER 2B**

To: Judge
From: Clerk
Re: Mayor v. Lily Evidentiary Issues

You have asked me to prepare a memorandum advising the court how to rule on various evidentiary issues which have arisen in the defamation lawsuit against Lily by Mayor.

(1) The Court should not require Lily to reveal the identity of her sources. The issue is whether Lily's newsperson privilege extends to sources she uses in her activities related to her writing for her blog. The resolution of this issue turns on the nature and content of Lily's blog, such that it would be acceptable to extend a newsperson privilege to sources she uses while blogging. Here, it appears that Lily's blog is solely for the purpose of sharing stories of local interest to the community (its name "OurTown" also supports this interpretation). The Mayor could challenge this conclusion, questioning why Lily needs both a blog and a job as a reporter for the local paper; however, there is no restriction on Lily's ability to maintain both her news reporting position and her news blog. Furthermore, it certainly appears that the story about the Mayor is a "news-type" story, despite its publication on the blog as opposed to in the newspaper. Although the Mayor could likely argue that perhaps the story is on the blog because the paper did not find it newsworthy or fit to print, this does not change the fact that the story is of a news-related nature, about a public figure, on a news-type blog. The nature of Lily's story and its publication on the news blog thus suggests that any sources Lily consulted in connection with this story are entitled to protection under Lily's newsperson privilege.

(2) The Court should allow Brittany's testimony. The issue is whether silence/failure to deny can constitute an admission, such that it could be offered against an opposing party as a nonhearsay "statement." As a general rule, silence/failure to deny constitutes an admission when the party against whom the silence is being offered heard the statement, had the opportunity to respond, and a reasonable person would have denied the statement. Here, Brittany's testimony purports to demonstrate that Lily heard Brittany ask her why she was "making up lies" about the Mayor, but rather than respond, Lily apparently laughed when she heard the statement before walking away. Furthermore, a reasonable person in this situation would likely have denied what Brittany said if it was not true. Thus, Lily's failure to deny the statement should be admissible against her as the admission of a party opponent.

(3) The Court should not allow Greg's testimony. The issue is whether the conversation between Greg and his friend Susan is hearsay such that it should be excluded from the current proceedings. As a general rule, hearsay is an out of court statement being offered in court to prove the truth of the matter asserted. Statements are not hearsay if they are not being offered for their truth and are instead being offered for some other purpose, such as revealing a person's then-existing state of mind or intent. Here, Greg's testimony is not being offered for its truth (i.e., to show that Lily and her friend Susan wanted to start a blog, or that they worried about
monetary concerns with starting a blog). Rather, the statement tends to show that Lily's friend (and purportedly Lily) was aware of the nature of blogging, and what would allow a blog to be successful. However, this is not directly a statement about Lily's then-existing mental state from Lily -- rather, it is hearsay within hearsay (because it is Lily's friend Susan relating the conversation to Greg, rather than Lily herself). If the testimony were being offered through Susan, rather than through Greg, the testimony may be admissible. However, in its current form, it is inadmissible hearsay within hearsay.

(4) The Court should allow Jill's testimony. The issue is whether character evidence in a civil action is admissible on a given trait when that trait is at issue in the litigation. Although character evidence is normally inadmissible in civil actions, it is admissible when it relates to a character trait that has been placed at issue in the litigation. In this defamation action, Lily seeks to introduce evidence of the Mayor's character for dishonesty, which is at issue in this action because it relates to Lily's likely defense that the material she published in OurTown was true. Thus, the evidence is admissible if it is in its proper form. The party can seek to prove the character trait at issue by reputation and opinion evidence (i.e., offering testimony from others in the community regarding the opposing party's reputation in the community and the witness's opinion on that party's character on the trait). Here, Jill's testimony would be in that format - she would testify as to the Mayor's shady reputation (related to his character for dishonesty), and her opinion that it would be unsurprising if the Mayor was taking bribes.

(5) The Court should allow Dan's testimony. As a preliminary matter, this is a statement by the Mayor, and thus it is the non-hearsay admission of a party opponent, and it is admissible if it is relevant. Evidence is relevant if it tends to make the existence of a particular fact more probable than it would be without the evidence. Here, the Mayor's statement to the Owner and conduct in taking the envelope is clearly circumstantial evidence of the Mayor's taking money from the Owner, and it is thus admissible unless it is more prejudicial than probative. Here, an analysis of the words and conduct suggest that it is more probative than prejudicial, because there is nothing particularly inflammatory about the statement, nor would it lead to jury confusion or unnecessary delay. Thus, the evidence should be admitted through Dan's testimony.

(6) The Court should not allow the testimony regarding the $10,000 settlement offer by the Mayor. The issue is whether statements made in connection with settlement are admissible. As a policy matter, such statements are not admissible because it is undesirable to chill settlement communications between parties when a matter is in dispute (the key being that the matter must actually be disputed at the time the settlement offer is made). Here, it is clear that the issues between Lily and the Mayor were already disputed at the time of the Mayor's statements, because he stated that her that if she accepted his settlement offer, he would drop the lawsuit. Thus, the offer to pay Lily $10,000 is inadmissible. Although some of the other statements in the Mayor's communication ("I've probably done a few things I shouldn't have") would otherwise be an admission of a party opponent, it seems that the appropriate result here would be to consider this a statement in connection with the settlement agreement (i.e., an admission of liability for purposes of settlement only) and keep the statements out of Court.
QUESTION 3 - CONTRACTS

In July 2009, Builder was awarded a $3,000,000 contract from Purchaser, a New Jersey municipality, to complete a new bridge over the Delaware River. The bridge would link Purchaser to Pennsylvania’s third largest city reducing travel time from 90 to 20 minutes and directing motor vehicle traffic to its new sports arena.

The contract provided that “time is of the essence and that the bridge must be completed by Memorial Day, May 31, 2010, the grand opening of the new sports arena.” The contract further required a “$1,000,000 down payment from Purchaser, with the remainder due upon completion.” Lastly, the contract provided that “all cost overruns are limited to $1,500,000 and must be mutually agreed to by both parties but consent shall not be unreasonably withheld.”

Upon receiving the $1,000,000 down payment, Builder began work in late August 2009 but soon learned the river sediment at the designated site was unsuitable to support the bridge. The river would have to be drained and bedrock trucked in at an additional cost of $1,000,000 in order to provide a suitable foundation for the bridge. Even with the additional bedrock, Builder indicated “there was no guarantee that the bridge would hold.”

Builder offered to build the bridge five miles north or south of the designated site where the riverbed was more suitable at the same original cost, but Purchaser rejected these offers. Builder refused to continue work at the original site until the bedrock issue was resolved. In November 2009, Purchaser agreed to pay an additional $1,000,000 for the bedrock foundation because it “wanted the bridge completed on time.”

Shortly after construction began again, the price of steel doubled. Builder demanded another $1,000,000 to absorb the additional cost of steel. Initially, Purchaser refused to pay, and Builder stopped work. Purchaser agreed to pay the additional sum in December 2009 because it “wanted the bridge completed on time.”

Shortly after, work began again. In January 2010, Builder’s bridge workers engaged in a labor strike and refused to work on the bridge. Builder had no money to resolve the labor dispute and sought a $1,000,000 loan from Purchaser to pay for non-union labor to finish the bridge. Purchaser refused and immediately barred Builder from the construction site.

Without notifying Builder, in March 2010, Purchaser contracted with Third-Party Contractor to complete the bridge by May 31, 2010, or as soon thereafter as possible for $3,000,000. The bridge was completed on July 15, 2010, but on its opening day suffered a structural failure due to an unstable bedrock foundation and was deemed unsafe for motor vehicle traffic.

You are an associate in the law firm representing Purchaser and have been assigned to prepare a memorandum discussing all causes of action, likely defenses and probable outcome of each cause of action among Purchaser, Builder, and Third-Party Contractor.
To: Purchaser  
From: Associate  
Date: 2/24/2011  
Info: Contracts

There are several causes of action that can be addressed in this contract dispute. We must lay a foundation first, and then address the potential:

1) Formation

Under NJ law a contract is formed under the following circumstances: There is an

i) offer  
ii) acceptance  
iii) consideration  
iv) no existing defenses to formation

There are two types of contracts: Unilateral and Bilateral. Unilateral contracts usually occur when an offer is made and acceptance is achieved by performing the offer (ex. offer for a rewards). A bilateral contract is an offer that has a meeting of the minds between two parties with regard to an offer by one and an acceptance of the offer by another.

A contract will be governed by either Common Law or Article 2 of the UCC. Common Law governs the sale of real property and service contracts while the UCC governs sales of goods (IE all tangible personal property).

In this situation, Purchaser awarded Builder a $3,000,000 contract to complete a new bridge. Under the circumstances, this would be a bilateral performance contract and thus governed by Common Law. Purchaser made the offer to Builder, Builder Accepted the Offer, consideration was given by both parties ($3,000,000 payment by Purchaser and Performance of Construction by Builder using Builder's materials and time). Purchaser also made an initial down payment of $1,000,000. There appear to be no existing defenses.

2) Terms

The terms seem to be legitimate with regard to both parties

The Time is of the essence term is valid, due to the Purchaser's interest in having the bridge ready by the opening of the stadium and paying money upfront in the $1,000,000 to ensure it would be valid consideration as well.
The only one being questionable would be the limitation on damages. Both parties agreed to the $1,500,000 cost overrun agreement, so they have accepted this term and unless courts later decided that the term is unconscionable in favor of one party it will likely be upheld.

3) Breach

There are several areas which could be considered Breach of contract between Purchaser and Builder and Purchaser and Third Party Contractor. We will address the Builder first.

i) Purchaser and Builder Breaches

a) Sediment

With regard to the Builder's offer to build the bridge 5 miles north or south of the designated area and his subsequent refusal to continue work, it would most likely not be considered a breach on the Builder's part.

Under contract law, if the purpose of a contract becomes impractical due to unforeseen circumstances duty to perform may be excused or discharged. In this situation, the Builder felt that construction of the bridge was impractical because the river sedimt made the site unsuitable to support the bridge. Therefore his duty to perform was excused at the time being. Builder did not refuse to perform, but offered solutions to the problem by offering to builder at a more suitable site and requesting to have bedrock supplied to fortify that ground the bridge was to be built on. Even after the bedrock was supplied the Builder did not promise that it would be enough to support the bridge. His refusal to perform would be justified therefore, and not considered a breach.

Purchaser may argue that performance was not impossible and that builder should have attempted anyway but that would have been an unsafe practice.

Purchaser's additional payment to supply the Bedrock was necessary to achieve the purpose of the contract, though its validity might be questionable due to the lack of consideration for the payment on the Purchaser's behalf. Simply stating that he wanted "the bridge done on time" was a restatement of the original time is of the essence portion of the original contract, and therefore no new consideration was supplied for his payment. This is an issue to be questioned.

b) Price of steel

The rise in the price of steel for the Builder was not foreseeable and may therefore make builder's performance impractical due to loss of revenue. This however would not discharge builder from the contract. The builder would likely have to complete the contract with the materials that he had or breach by not performing it.
In defense under Common Law, the Purchaser could have tried to elicit either i) specific performance of the service or ii) hire another party to due the job and sue builder for damages and breach of contract. The damages would likely be quantifiable on the original contract price between Purchaser and Builder adjusted by how much the Purchaser had to pay the third party to complete the Builder's performance and tasks.

c) Labor Strike

The Labor Strike was an unforeseeable obstacle to the Builder's ability to perform the contract, and should not be considered breach. Under Common law the Purchaser would have to give builder a reasonable time to deal with this unforeseeable issue and finish work on the contract. Purchaser may defend that the time is of the essence doctrine in the contract was violated, but this will not be applicable to the Builder in this situation.

By barring the Builder from the Construction site and hiring a Third Party the Purchaser may have committed breach and the Builder may have an action against the Purchaser for anticipatory repudiation. His defense would be to complete performance and then sue for breach and damages under Common Law. Partial performance by builder will not suffice.

ii) Purchaser and Third Party

In this situation the Purchaser contracted with the Third Party to complete the bridge by May 31, 2010, OR as soon thereafter as possible for $3,000,000. The Third Party completed the contract on July 15, 2010 but the bridge suffered structural failure.

Purchaser may try to assert the time is of the essence doctrine from the first contract and sue Third Party for breach, but this is unlikely due to the new contract's term of "as soon thereafter as possible".

Purchaser also may try to bring suit for improper performance by the Third Party due to the structure failures of the bridge, but this is unlikely to be upheld because of impracticability of the Sediment in the river which was through no fault of the Third Party. Once Third Party completed the performance it was the Purchaser's problem. Under Common Law Buyer assumes liability for the construction once it is handed over to them. Here Third party will not be liable.

**SAMPLE ANSWER 3B**

To: Firm  
From: Associate  
Date: 24 February 2011  
Re: Causes of action arising in contract disputes between Purchaser, Builder, and Third-Party Contractor
ISSUE ONE: WHETHER BUILDER BREACHED ITS CONTRACT WITH PURCHASER BY FAILING TO COMPLETE WORK BY THE TIME OF THE ESSENCE DATE

Builder will be liable to purchaser if it breached their contract by failing to complete work by the "time of the essence" date. A contract is a voluntary agreement between competent parties, containing definite terms and supported by valid consideration, and not induced by any fraud or misrepresentation, in which both parties agree to do or not do a certain thing. It is formed by an identical offer and acceptance, and law will provide a remedy if it is breached.

A breach may be immaterial or material. Where a breach is immaterial, the nonbreaching party is still obligated to complete performance, but may seek damages for reduced value of the breaching party's performance. But where a breach is material, the nonbreaching party no longer has any duty to perform. Generally whether breach is material is determined by whether there has been "substantial performance" (if so, any breach is immaterial). When a date is made "time of the essence," it will be a material breach if the contract is not completed by that date.

Builder failed to complete work by the "time of the essence" date, therefore absent any defenses by Builder, its conduct constituted a material breach, and relieved Purchaser of its duty to perform under the contract. Therefore, it was permissible for Purchaser to seek a different contractor to complete the contract (in other words, Purchaser did not breach at this point, since Builder had already materially breached).

ISSUE TWO: WHETHER BUILDER CAN ASSERT THE DEFENSE OF IMPOSSIBILITY OF PERFORMANCE

The only way in which Builder could be excused from its performance, and deemed not to have breached, is if can be excused by the defense of impossibility of performance. This defense arises in three ways: if performance has truly become physically impossible (for example, due to a natural disaster, or the destruction of the subject matter of the contract); if it is commercially impracticable, meaning it has become prohibitively expensive to complete the contract due to unexpected circumstances which arose which were not foreseeable by the parties at the time of contracting; or where there is frustration of purpose, meaning the contract could be performed but its value to one or both parties has been totally eliminated by circumstances that were not foreseeable by the parties at the time of contracting. A mere large swing in prices will not be sufficient to make performance commercially impracticable, since such price changes are foreseeable and the parties should take account of their possibility when they enter into contracts.

Builder can attempt to assert impossibility on the basis of three events: the unexpectedly unsuitable nature of the river sediment, the doubling of the price of steel, and the occurrence of a labor strike.

First, Builder learned that the river sediment at the site where the bridge was to be built could not support such a bridge. This event was not foreseeable by the parties at the time of contract. Constructing a bridge remains possible, but with the certainty that the bridge would immediately collapse and be unfit for its intended use. Performance here is commercially impracticable, because completing the contract is extremely expensive for reasons that were not
within the contemplation of the parties when the contract was formed; frustration of purpose may also apply, since even if the bridge were built it would not serve the function it was intended for. Therefore, if Purchaser did not remedy this situation by helping Builder to afford the cost of additional remediation of the site, Builder would have been able to successfully assert the defense of impossibility of performance. However, Purchaser supplied Builder with the necessary funds to complete performance in this case, so Builder does not have this defense.

Next, Builder found that the price of steel had doubled. This large swing in prices was unexpected, however mere price changes are not sufficient to support a defense of commercial impracticability because they should be foreseeable to the parties. Therefore, Builder cannot assert a defense of impossibility on this basis. Purchaser could not have legally denied Builder the 100,000 of cost overruns due to unsuitable sediment conditions, because such consent would have been unreasonable given that performance was impossible without this payment; in contrast, here Builder owed performance regardless of the provision about cost overruns because it had no defense on the basis of a large change in prices. If Builder had continued to stop work on this basis, it would have been in breach, but here it continued because it received the additional money for cost overruns for which it contracted.

Finally, Builder experienced a labor strike. Builder could again attempt to assert that performance was commercially impracticable on this basis, since other workers could be hired to complete the project but at much greater expense than foreseen at the time of contracting. However, a greater cost to complete the contract alone is not a sufficient excuse to support a claim of impossibility of performance, since this was foreseeable by the parties at the time of contracting. While Builder was entitled to the additional money for cost overruns for which it contracted so long as consent was not being withheld "reasonably," it had already used 200,000 of such overruns and was not entitled to any more. Purchaser did not have any further obligation under this clause to provide Builder with money for cost overruns, and Builder had no impossibility defense, therefore Builder was in breach when it said it could no longer perform unless it was provided with more money.

ISSUE THREE: WHETHER THIRD-PARTY CONTRACTOR IS LIABLE TO PURCHASER DUE TO THE FAILURE OF ITS BRIDGE

Third-Party Contractor contracted with Purchaser to build a bridge by May 31st or as soon thereafter as possible. Third-Party Contractor did in fact build this bridge, but it immediately had a structural failure due to a poor foundation, and it was not usable for a bridge's usual purpose of supporting car traffic.

A party to a contract warrants that the item sold will be suitable for its ordinary purpose. Parties to a contract additionally have a duty of good faith and fair dealing in performing under the contract, meaning they should not impair the other party's rights to receive all the benefits of the contract. By failing to construct a structure that adequately supported cars, Third-Party Contractor breached its warranty of merchantability (that the item was suitable for its usual purpose) and therefore breached the contract. Additionally, if Third-Party Contractor knew that the site was unsuitable for building a bridge due to an unstable bedrock foundation, then it breached its duty of good faith in nonetheless building a bridge that it knew would ultimately
fail. However, Third-Party Contractor substantially performed the contract because it constructed the entire bridge, even though the bridge ultimately failed. Since it substantially performed, Purchaser can get damages for the lesser of the cost to fix the performance so that it can be as originally intended, or the reduced value to Purchaser of the performance compared to the value it should have received under the contract. Here, Purchaser will likely receive the damages to fix the cost of performance if it can be fixed without too much expense; otherwise, it can only get the reduced value of the bridge as it exists, possibly suitable only for pedestrian traffic (which may still be a large sum of money).

QUESTION 4 - TORTS

Alan, an accountant, Bob, President of Smalltown Bank, and Carl, Chairman of Smalltown Bank’s Board of Directors, were playing together in the local charity golf tournament. Alan is Bob’s personal accountant and also the accountant for Smalltown Bank. Alan was quite annoyed with Bob’s scorekeeping. Throughout the game, Bob consistently gave himself fewer strokes than he actually scored. When they finished they all went into the crowded clubhouse for drinks. The golf club president announced that Bob won a new set of clubs for shooting the lowest score. Upon hearing this, Alan was so enraged that he yelled for all to hear, “Bob, you keep score like you keep your tax records, no wonder that IRS agent denied all your phony deductions at the last audit.” Bob’s face turned red and he yelled back to Alan, “Keep your mouth shut or I’ll shut it for you.” Bob then thrust his fist towards Alan, Alan ducked, and Bob hit Carl instead, breaking Carl’s nose.

Later that week, the bank’s Board of Directors demanded that Bob appear at an emergency meeting. Bob appeared and admitted he was audited and his deductions were disallowed. The Board forced him to publicly apologize to Carl for hitting him. Bob was so upset by these events that he has been unable to sleep or concentrate; he is fearful of losing his job and is being treated for anxiety by a psychiatrist.

Bob comes to your law firm seeking to file suit. Your senior partner asks you to prepare a memorandum discussing all causes of actions Bob may have, any potential counterclaims that could be raised against him by Alan and/or Carl, and any defenses Bob could raise.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 4A

MEMORANDUM
Bob's best available claim is a negligence claim against Alan for breach of his duties as Bob's accountant. Bob may also have a claim against Alan for intentional infliction of emotional distress, and for various privacy torts, depending on the facts.

Bob's best chance of success may be in a claim against Alan for negligence. A negligence claim involves breach, duty, causation, and damages. Duty is to foreseeable plaintiffs and the duty owed is the standard of care a reasonable person in a similar situation would use. A member of a special profession, such as an accountant, must exercise the standard of care of someone with an average level of knowledge and skill for that profession. Causation exists when the breach of such duty is the but-for cause of the injuries causing damages. As Bob's accountant, Alan has a duty of confidentiality with respect to Bob's tax information. Alan's statement breached such a duty, and directly caused harm to Bob in the form of subsequent distress. The question may be whether such distress is reducible to damages - presumably his lost deductions, to the extent illegal and invalid, would not be valid damages. If there are damages available, this claim has a strong chance of success because each factor in a negligence claim appears to be met. Alan could defend by claiming that Bob had some level of comparative fault or assumption of risk for his actions, but this essentially presumes that Alan was justified in his actions and such defenses appear unlikely to succeed.

Bob may also have a cause of action against Alan for intentional infliction of emotional distress. Such an action would require showing extreme or outrageous conduct on the part of the defendant, and severe emotional harm on the part of the plaintiff. Bob was in fact severely emotionally affected due to Alan's statement and the forced public apology. It is not clear whether such emotional harm was reasonably likely, or whether Alan actually exhibited extreme or outrageous conduct, and these facts will need to be more fully reviewed to determine the claim's viability. Alan might defend that his conduct was premised on his anger with Bob's scorekeeping, perhaps resulting in some form of implied consent by Alan, but it is not clear that such a defense would be successful and it is unlikely that Bob's actions showed any consent to Alan's statements.

Defamation involving private individuals and a nonpublic matter requires 1) a defamatory statement, 2) of or concerning the plaintiff, 3) publication to a third party, and 4) damages. Damages may be shown if there is libel or slander per se, which may occur upon slander relating to, among other things, one's business or profession. Truth is a defense to defamation.

Here, Alan made a statement against Bob that was defamatory, due to its implications relating to Bob's business and character. The statement was about Bob, and was made in a crowded clubhouse. To the extent the statement is deemed to relate to Bob's business, it would meet a prima facie case for defamation. The statement itself does not relate to his business or
profession, but rather his taxes, and thus it seems unlikely that this element is met. Furthermore, if Alan's statement was true (implied by Bob having his deductions denied), Alan would have a valid defense against Bob. Incidentally, although privilege is a valid defense to defamation, it relates to communications made pursuant to that privilege, not open statements of the sort made here.

Bob could alternately allege that Alan committed a false light tort, which involves widespread dissemination of an untrue statement regarding the plaintiff objectionable to the reasonable person, or a tort regarding the invasion of Bob's privacy, which involves widespread dissemination of confidential information regarding the plaintiff objectionable to the reasonable person. If Alan's statement was false, the former tort would be used; if true, the latter tort would be used. Bob's defense against the former would depend on the truth of the statement made; his defense of the latter might depend on whether there is widespread knowledge of such information. The validity of either claim is dependent on the facts.

BOB'S CAUSES OF ACTION AGAINST CARL

Bob has a poor chance of succeeding in a cause of action against Carl for intentional infliction of emotional distress, previously described above. Intentional torts require that an action cause harm if they are a substantial factor in the harm - in this regard the forced public apology by Bob was also a cause of his emotional distress. Even to the extent Bob did suffer severe emotional distress, however, Carl's action in forcing Bob to apologize likely do not show extreme or outrageous conduct. Furthermore, it is not clear that Carl is responsible for the forced apology, as the facts only show that the board demanded that Bob apologize.

CARL'S COUNTERCLAIMS

Carl has a strong claim against Bob for battery. Battery occurs when there is harmful or offensive contact with the plaintiff's person. Bob hit Carl, causing a harmful contact, and thus appears to be liable. Even though Bob's punch was directed at Alan, the intent of a battery can be transferred to a different plaintiff; thus, Bob's intent to hit Alan is transferred to Carl and there is a valid intentional tort claim against Bob. Bob does not appear to have any defense for his action premised upon consent, justification, or other defense to intentional torts. Thus, Carl's claim will be likely to succeed.

Carl may also have a negligence claim against Bob to the extent an intentional tort claim does not succeed. Such a claim would require showing that Bob failed to exercise the standard of care of a reasonable person in hitting Carl, causing Carl's injuries and resulting damages.

ALAN'S COUNTERCLAIMS

Alan has a claim against Bob for assault. Assault occurs where the defendant creates a reasonable apprehension in the plaintiff of an imminent battery. Here, because Bob thrust his fist towards Alan, and prefaced this action with language potentially indicating an intent to strike Bob, Alan could be seen as reasonably apprehensive of harmful contact with his person. Even though Bob actually struck Carl, the clear intent of his action was to hit Alan, and thus Alan
would be the plaintiff in an assault action. As with Carl, Bob does not appear to have any
defense for his action premised upon consent, justification, or other defense to intentional
torts. Thus, Alan's claim will be likely to succeed.

SAMPLE ANSWER 4B

Memo
TO: Senior Partner
FROM: Associate
RE: Bob's causes of action; potential counter claims that Alan or Carl could raise and their
defenses

Bob's Claims

Defamation

Defamation on the part of Alan. Defamation is a statement made by def taht adversely affects
the plaintiff's reputation. An opinion by someone will be considered defamatory of the opinion
has a factual underpinning. Such a statement must be published; either wrtitten which is libel or
spoken with at least 1 other person around to hear it which is slander. Libel damages are
presumed. Slander per se damages are also presumed. Slander per se includes statement about
ones business, moral turpitude, loathesome disease, and sexual tendencies. All other defamatory
statement require a proof of actual harm. Defense to defamation is truth of the statement or
privledge.

Here Bob proclaimed in front of a crowded room that Bob kept his tax records in a poor manner
and as a result the IRS denied his phony deductions at the last audit. Because this is a statement
that adversely affects Bob's reputation it is defamatory in nature. Although it was an opinion on
behalf of Alan there was a factual underpinning. Because Alan was an accountant reasonable
people would take his word on matters related to tax issues. Further Alan is Bob's personal
accountant who has knowledge of such sensitive information. It was published because Bob and
Alan were in a crowded room. This is not slander per se because it does not fall init any of the 4
categories for slander per se mentioned above. Bob must prove actual harm. Bob will show that
he has not been able to sleep or concentrate; he is fearful of losing his job; and has anxiety. Such
harm is actual and Bob would be able to recover for defamation agaisnt Alan pending Alan's
defenses.

Bob is not a public figure in this case because as President of a small bank he does not rise to the
level of a public figure. The Statement by Alan was not a public matter because it was to the
heart of Bob's personal tax keeping.

Disclosure of Private Information

If it is found that Alan's defamatory statement was true and Alan is not liable for defamation Bob
has a cause fo action for disclosure of private information. This is a privacy tort that allows a
plaintiff to recover damages against a defendant who publishes confidential information about a plaintiff that a reasonable person would object to. A defense to such a tort is consent.

Here Alan remarked to everyone in the crowded room that Bob keep poor tax records and was denied deductions because they were phony. A reasonable person would consider this information to be confidential and would be harmed if a person communicated it to the public. Because Alan communicated to the crowded room that Bob had phony deductions Alan is liable for the tort of disclosure of private information.

Intentional Infliction of Emotional Distress
Bob has a claim against Alan for Intentional Infliction of Emotional Distress. Intentional Infliction of Emotional Distress occurs when defendant makes an extreme and outrageous statement or conduct and the plaintiff is severally distraught/emotionally hurt by the conduct. Physical harm is not required just severe emotional distress.

Here Alan's conduct was extreme and outrageous because a reasonable person would not yell in a crowded room that someone was trying to commit tax fraud. Bob also has a fiduciary relationship with Alan in which Alan is expected not to divulge information that he has obtained in the course of his employment with Bob. Further, Carl who is on the Board of Directors at the same Bank which Bob is President at, would be appalled with such behavior of Bob. Because of those circumstances Alan's statement in such conditions were extreme and outrageous. Bob suffered severe emotional distress because he has been unable to sleep or concentrate and he is being treated for anxiety.

Negligent Infliction of Emotional Distress (NIED)

NIED occurs when a defendant breaches his duty to a plaintiff and the plaintiff suffers physical harm as a result (physical symptoms). One such category is a breach of duty between confidential parties. For instance Doctor/patient.

Here Bob and Alan were in a confidential relationship as accountant and employer. Alan breached his duty to Bob by telling everyone his personal tax issues. As a result of Alan's breach he suffered physical symptoms. He was forced to be treated for anxiety by a psychiatrist. Such a result meets the level of physical harm required to be successful for a NIED claim.

Alan's Counter Claims and Defenses

Defenses

Alan will successfully be able to defend the defamation action of Bob. Truth of the matter published will be an absolute defense for a defendant in a defamation action.

Evidence shows that laster in the week Bob admitted to the Board of Directors at the Bank he was audited and his deductions were disallowed. Because Bob has admitted to the truth of Alan's statement Alan will successfully defend the claim of defamation.
As to the private information disclosure Alan could argue that it was his duty as accountant for the Bank to disclose information about their President (bob) and his fraudulent deductions claims.

Alan's Claim

Alan has a claim of assault against Bob. Assault is the apprehension of an immediate battery on the part of the defendant in the midst of the plaintiff. The defendant must intend his conduct and the fear of immediate harm must be reasonable within the plaintiff. Assault does not require the battery to occur. Fear of the battery is sufficient.

Here Bob thrust his fist towards Alan and Alan responded by ducking. When Alan saw Bob thrusting his fist it reasonable created a fear of an immediate battery (getting punched). ALan need to be harmed by the punch to be successful for a claim of assault. Here Alan will be successful in his claim of assault on Bob.

Carl's Claims

Carl can assert a valid claim for battery. Battery is the harmful or offensive touching of another person. The doctrine of transferred intent imposes liability on the defendant if he acted with the intent to commit an intentional tort on one victim but instead actually committed the tort on an unintended victim.

Here Bob intended to punch Alan. He had the intent to commit the intentional tort of battery against Alan. However his intent missed Alan and he struck Carl. This the doctrine of transferred intent. Intending battery on Alan but actually causes battery on Carl. The touching of Carl was harmful because Carl suffered a Broken nose.

QUESTION 5 – CIVIL

In 1980, Company, a closely-held Missouri corporation, moved its principal place of business to New Jersey and thereafter conducted its operations from New Jersey. Company was owned and operated by Minority Shareholders A, B, and C, and Majority Shareholder, MS, all New Jersey residents. MS and A are also employees of Company. Pursuant to a written agreement, all Company shareholders have $3,000,000 in life insurance that will be paid to Company upon the shareholder’s death, and Company has the right of first refusal to purchase the decedent’s Company shares.

From 1980 through 2008, Company held its regular Board meetings following proper protocol and producing requisite financial records. In August 2009, MS sold part of Company’s assets for
$20,000,000 but failed to pay any dividends, make any distributions, or distribute any financial records or information regarding the sale. When A complained to MS, MS fired A. A later learned the $20,000,000 sale proceeds were missing and not included as part of Company’s assets.

Upon learning about the missing $20,000,000, B died of a heart attack, and B’s estate filed a claim with Insurer. A immediately contacted Insurer and told it not to release insurance proceeds to Company, as the proceeds belong to A, C, and the estate of B. Lastly, after terminating A, MS, without informing any other shareholder, changed Company from a Missouri corporation to a Delaware corporation in an attempt to defeat a minority shareholder oppression suit which could be viable under either New Jersey or Missouri law.

A has come to your office for legal advice with respect to the following questions: (1) Does New Jersey have jurisdiction to hear a lawsuit seeking A’s share of the $20,000,000 and, if so, on what basis? (2) Because A believes MS pocketed the sale proceeds, may A, after filing suit, obtain MS’ tax returns, and, if so, through what procedure(s)? (3) How, before trial, may A obtain documents and “evidence” regarding the missing $20,000,000 in sale proceeds? (4) What litigational options are available to resolve the issue of who is entitled to the insurance proceeds?

PREPARE THE MEMORANDUM

SAMPLE ANSWER 5A

Memo
To: File
From: Applicant
Re: Company

NJ has jurisdiction to hear the lawsuit seeking share of the $20,000,000. In order to prove A's case, there are a few procedural mechanisms available to obtain MS's tax return and other evidence regarding the missing $20mil in sale proceeded. Finally, A has a few different litigation opportunities available to her.

1. Jurisdiction

In order for NJ courts to have jurisdiction over a case, NJ needs to have subject matter jurisdiction and personal jurisdiction. NJ state courts have general jurisdiction to hear state law claims and federal law claims. The only claims that the courts cannot hear are cases of exclusive jurisdiction to other courts (like some federal statutes say those claims are exclusive jurisdiction of federal court). This question regarding dividends is a corporate law claim. Corporate law is state law. Subject matter jurisdiction in NJ's general jurisdiction courts is appropriate here.

NJ also has personal jurisdiction over Company. There are two different types of jurisdiction - general jurisdiction and specific jurisdiction. General jurisdiction means you can sue the
defendant (D) on any claim in NJ, even a claim that happened outside of NJ. Under specific jurisdiction NJ only has power to hear a suit related to those specific acts of the D in NJ.

There are 4 ways to get general jurisdiction over a D: personal service in NJ, waiver (appearing in an NJ action without contesting personal jurisdiction), residency in NJ, consent, and also if NJ is the corporation's principal place of business or state of incorporation. In this case, the relevant general jurisdiction option would be the corporate principal place of business (PPB). In 1980 Company moved its PPB to NJ. It appears that around 2009 Company changed its state of incorporation from MO to DE. Supposedly MS changed the state of incorporation to DE to avoid a suit that would be viable under MO or NJ law, but there is no information in that facts to say that while the state of incorporation changed to DE, that NJ is not still the PPB of the company. If NJ is still the PPB of the company, NJ courts will have general jurisdiction over the company. If NJ is no longer the PPB of the company, general jurisdiction will not be met. We would look at the residency of the corporation at the time the case is filed to determine personal jurisdiction, and if the company has already moved out of NJ before the case is filed, that is a problem.

If general jurisdiction is a problem, there are also ways to get personal jurisdiction over Company under NJ's unenumerated long arm statute. NJ's long arm statute allows personal jurisdiction over a D as long as there are minimum contacts with the state so as not to go against traditional notions of fair play and justice. Looking at minimum contacts, the court will look at whether the company purposefully availed itself of NJ law and could foresee being haled into court here. In this case, NJ was the company's PPB. It chose to do business here and purposefully availed itself of NJ law. And for fairness, we consider the burden to the D, the interest of the plaintiff and the interests of the forum state. Because company did business here for so many years, this action arises out of that connection to this state and it was bad faith to avoid laws that drove the company to move (if it moved out of NJ) traditional notions of fairness would not be violated by having the company subject to personal jurisdiction here.

The suit A brings may be a shareholder derivative suit suing the company, or it could be a direct suit against MS. There would be general jurisdiction over MS as described above, because MS is a NJ resident so MS could be sued on any case here and jurisdiction would be proper.

2) Obtaining MS' tax returns

There are a few options to obtain MS tax returns. After a complaint is filed, the defendant answers the complaint. Then, the next stage of the case in preparation for trial is that discovery begins. During discovery each side submits document production requests to the other side and also interrogatories, and the parties conduct depositions to gain evidence for trial. In this case, there are 2 options to obtain MS' tax returns.

First, A could make a document request to MS to turn over his tax returns. In responding to a document request, the other side has to provide all documents requested as long as the documents are relevant to the case and not confidential. In this case, asking MS for her tax return would be relevant to discovering where the $20mil missing assets went. MS should have to provide A with the tax returns as a document production request. If a party fails to comply
with a document request through bad faith or fraud, that is a discovery, trial procedure violation. In NJ if there is a trial violation, the court could impose sanctions such as: default judgment in favor of the other party, an adverse inference instruction (meaning drawing an inference from the fact that the document was not produced to mean it would show something in favor of the other side), or holding the party that didn't follow directions in contempt of court.

Courts also have the power to subpoena third parties to supply records. It might be possible to subpoena the IRS for MS' tax returns. That is an issue I would like to research in more detail.

3. Obtaining evidence relating to the missing $20 mil in sale proceeds

As discussed in the previous answer, discovery goes on after filing the case and before trial. In this case, we, as As attorneys, should ask interrogatories to MS about the missing money. In NJ each side gets an unlimited number of interrogatories. We can also direct interrogatories about the missing money to the Company since we will probably sue both MS and the company here.

As discussed in above, we can also submit document request to MS and the company requesting information relating to the sale of the $20mil and the company's bank records to show if/when the money was deposited or withdrawn. We might ask that anyone in the company turn over any documents they have related to the sale of those assets.

Most companies have a document retention policy. Once a case is filed, or the company reasonably believes a suit is coming - there should be a litigation hold put on the documents. In this case, we have evidence that MS does in fact expect litigation because she changed the state of incorporation of the company to avoid a suit. Any documents she destroyed after she knew or should have known there would be a case coming, should be a discovery violation (and I discussed possible sanctions above).

4. Litigation Options for the insurance proceeds

There are a few litigation options for the insurance proceeds. First, the insurance company between the insured and the beneficiary is a contract. A could choose to do this case under contract law. That is a legal claim, and would be in the Civil division of the NJ Superior Court. Note that if this is in NJ civil court a jury trial is an option. There will 6 jurors and you need 5/6 to convict. Because you need 5/6 to convict in NJ, defendants prefer federal court where you need a unanimous verdict. The company or MS might try to remove to fed ct. To go to fed court you either need diversity of citizenship or a federal question. Even if the plaintiff files in state court, a defendant can move to remove to federal court if it could be brought in federal court. There is no federal question here. There is also no diversity of citizenship. A and MS are from NJ. Additionally, MS can't remove because she is a resident of NJ. When you are a resident of the state where the case is in state court, you cannot remove to federal court. Companies are residents where ever they are subject to personal jurisdiction - and as described earlier, the company is subject to personal jurisdiction in NJ so there is no diversity there either. This case can stay in state ct.
There is also an option to proceed with this as an equity claim. There is another court in NJ that has jurisdiction (Chancery) over Equity, Family Law, and probate. Life insurance is not part of probate - it is a contract that passes outside of probate. However, at this point the life insurance proceeds have not been paid out. There can be an equity claim - a preliminary injunction to stop the company from issuing the proceeds to the Company. There is no jury trial available in equity court. Note that even if we decide to fight this a legal claim, or equity claim - both the ct of law and the ct of equity in NJ have the authority to decide any tangential law/equity claims even if that is not their area.

SAMPLE ANSWER 5B

To: Partner
From: Associate
Date: February 24, 2011
re: Memo re: A, Company, and Investigation into Missing Assets

I have reviewed the issues A has requested, and my findings and analysis are as follows.

1. Does NJ have jurisdiction to hear lawsuit

The New Jersey courts likely do have jurisdiction to hear A’s proposed lawsuit, on the grounds that the corporation itself has a domicile here. New Jersey courts are courts of general jurisdiction in this state, meaning that they will hear all cases in law and equity that arise out of claims in this state. Such courts have subject matter jurisdiction to hear claims that arise under the laws of New Jersey.

Here, the subject matter of claim is essentially what is known as a shareholder derivative lawsuit, where shareholders sue to enforce shareholder rights. A wants to make a claim, as a shareholder, to investigate what MS has done with the 20,000,000 dollars in missing funds from the sale of the Company's assets in 2009, and therefore, has a cause of action as a shareholder derivative lawsuit. New Jersey courts would have subject matter jurisdiction over the claim because New Jersey recognizes such a cause of action in business corporations with shareholders.

Further, it should also be noted that the courts likely will also have personal jurisdiction against all parties to such a lawsuit when it commences. The necessary parties to such a lawsuit are normally the offending directors and officers (or in this case, MS, who is also an employee of Company), and to join the corporation itself as a necessary party defendant. Personal jurisdiction may be asserted over a person by personal service of process of the summons and complaint on a New Jersey resident who claims domicile in the state. Corporations may have more than one domicile: their place of incorporation is their domicile, and they may also have a domicile where their principal place of business is located.

Here, it is clear the New Jersey courts would have personal jurisdiction over all the shareholders, because they are all New Jersey residents. Once they are personally served with the summons and complaint, that act is sufficient for the courts to assert jurisdiction over them and the claim against MS, specifically. Finally, it is also clear that the New Jersey courts would have
jurisdiction over Company, a corporation, because its principal place of business has been in New Jersey since 1980. It is immaterial that it is incorporated in Missouri; Company may also be served and sued as a necessary party in New Jersey, where its principal place of business is located.

In this same line of reasoning, MS attempt to change the state of incorporation of Company in order to avoid the minority derivative lawsuit to Delaware is irrelevant. The corporation still has a place of residence in New Jersey where its PPOB is, so the New Jersey courts would still have jurisdiction to preside over it, and adjudicate such a claim under New Jersey law. Since the corporation does in fact still have a domicile in New Jersey by means of its PPOB, it is subject to the laws of New Jersey, and thus a minority shareholder derivative action against it and MS would stand in New Jersey courts.

Therefore, the New Jersey courts would have both subject matter jurisdiction over the claim, and personal jurisdiction over the parties and Company.

2. Tax Returns

A's best chance of obtaining MS' tax returns would be through the discovery process once the lawsuit has been filed. Discovery is the process during a lawsuit by which parties make written requests to one another, to which the opposing party must respond under oath. These requests include document requests, interrogatories (questions going to issues in the case), requests for admission, site examination requests and sometimes psychological, physical or mental examinations. A party to which a discovery response is directed shall serve responses under oath, accompanying any documents that may relate to that request. If the responding party fails to do so or responds with insufficient or inadequate responses, or persists in meritless objections to the responses, the requesting party may make a motion to compel the responses, and the court will impose monetary sanctions against a party that unreasonably loses a motion to compel (either party). Discovery devices are designed to lead to the discovery of admissible evidence, or what areas could be admissible evidence; still, "fishing expeditions" are not permitted, and parties may move for protective orders if necessary to protect themselves from such requests.

Here, since A wants to obtain copies of MS' tax returns after the filing of the lawsuit, he should consider doing so by directing document and admission requests to MS (or his attorney, if represented). Such document requests could ask for the tax returns directly, or be slightly broader so as to encompass other documents which may reference the missing funds, but would not show up on a tax return (i.e. if they were hidden in another account, or disguised as another type of investment). MS would then have to respond under oath stating what happened to the funds, if he knows, and provide copies of the requested documents.

A should be aware, though, that MS may respond by filing a motion for a protective order, which is designed to prohibit the discovery into matters of a party on grounds of undue burden, embarrassment or harassment. If the court finds the party seeking discovery of the evidence has shown good cause for doing so, then the court will not grant the protective order, or, limit it such that the discovery is no more burdensome and invasive than necessary.
Here, while the court may find that discovery into MS' finances is a particularly private subject and area, it may also find, based on the extraordinary amount of money missing, the circumstances surrounding A's termination as a result of his inquiry into the missing funds by MS, and considering MS is the only employee of the closely held corporation who is a shareholder other than A who had access to the funds and the records, the court would likely find good cause for discovery of the tax returns on the evidence provided.

3. "Evidence" and Documents, Pre-Trial

The best way to obtain solid documents and evidence to be used at trial are either the discovery requests as mentioned above, or depositions, another type of discovery device. In a deposition, a party (or non-party, if by subpoena) is requested to appear give testimony under oath by a deposition officer, based upon questions asked by the attorneys representing the parties in the litigation; the deponent may also be requested to examine, review and authenticate exhibits and documents to which the witness may be questioned upon. Since such testimony is given under oath, it may be used to impeach the witness at trial; it may also be used as "evidence", to the extent it is admissible under the rules of evidence, for example, as a prior consistent or inconsistent statement, to come in substantively.

Here, A should consider both taking the deposition of MS, and also perhaps requesting the records from Company to show the consistency and accuracy of the records over the past 28 years until this crucial loss in 2009. Since the facts state that the Company held its regular meetings from 1980 to 2008, the minutes of the board of directors and other corporate records would show that Company maintained regular books and finances. The glaring absence of 20,000,000 dollars in those records in 2009 would be a startling departure a court or jury would likely find compelling against MS, also considering the circumstances regarding A's inquiry of what happened to the funds, and subsequent termination by MS. As far as MS deposition, A could use those records to force MS to admit the fairly regular nature of the corporate records prior to 2009, and then directly inquire as to what happened to funds.

4. Interpleader/Alternate Dispute Resolution

There are several ways the parties may dispense the insurance proceeds, with respect to interpleader, or alternate dispute resolution ("ADR"). Interpleader is a lawsuit which is initiated by the insurance company, when there appears to be a contested dispute as to whom insurance proceeds should be distributed. The insurer joins all the claimants on the proceeds into one action, places the proceeds as a "pot" into the action, and then removes itself from the action, to permit the claimants themselves to fight over who is entitled to the proceeds.

Here, interpleader may be a viable option, for it would allow A to fight out the claim with MS over the proceeds of B's life insurance policy proceeds. It would be expensive and costly, since A plans to litigate another shareholder derivative lawsuit against MS as well, but at least it would prevent the insurance company from making a wrongful disbursement of the funds.

ADR is another alternative to litigation, which involves possibilities such as mediation or arbitration. Mediation is an informal process where a mediator, who acts as a third-party neutral,
helps the parties to resolve the dispute, hopefully without litigation. Arbitration is a more formal proceeding, where a third-party acts effectively as a judge, loosely using the rules of evidence, and then making a decision called an arbitration award, which may be confirmed, and in turn, may be enforced like a court judgment.

A should consider some form of ADR before proceeding into yet another lawsuit for the insurance proceeds. It could help the parties resolve the dispute in a less expensive, less litigious fashion. Further, ADR often helps the parties reflect on the merits of their cases, and doing so might alert A to the fact that the insurance proceeds of the shareholders are supposed to be paid, pursuant to the written agreement, to the Company, not to the shareholders individually.

QUESTION 6 - PROPERTY

Decedent passed away several years ago leaving a validly executed Last Will and Testament which provides that House was left to Alexa for as long as Alexa wants it, and then to Chris. Alexa moved into House. Recently Chris discovers that Alexa has moved out, House is in great disrepair, and the property taxes have not been paid in years.

Matt purchased Lot 2 from Lisa when Lisa subdivided a large lot. Lisa retained Lot 1, which fronts on a lake. At the time Matt purchased Lot 2, Lisa told Matt he can use a footpath over Lot 1 to access the lake. A few years later, Matt sold Lot 2 to Chris and told Chris she can continue using the footpath to access the lake. Thereafter, Lisa installs shrubbery which blocks the footpath. Chris is upset as the only other access to the lake is located one mile away.

Jim owns Lot 3, which abuts Lot 2. Chris tells Jim he can take water from the well on Lot 2 to irrigate Jim’s large garden. Thereafter Jim subdivides Lot 3 into two lots, retaining one lot for himself. Chris learns that Jim tells Fran, the purchaser of the newly subdivided lot, that he can also take water from the well on Lot 2. Chris is angry.

Chris comes to your law firm with the following issues: (1) Chris wants to sell House but wants Alexa to pay the back taxes and pay to repair House; (2) Chris wants the shrubbery on Lot 1 removed; and (3) Chris does not want Jim or Fran taking any more water out of her well.

You are asked to prepare a memorandum outlining all of Chris’s potential rights, obligations, and liabilities with respect to these issues.
SAMPLE ANSWER 6A

To: Chris
Frm: Attorney
Re: Rights, obligations and liabilities with regard to the land disputes

1. With regard to Alexa, you cannot force her to sell the house as you have a vested remainder that vests when Alexa no longer wants the property. You can however seek to have her pay the taxes because she has a duty to pay these as a life tenant and further you can have her repair the home.

A remainder is an interest in land granted to a third party by a grantor that is capable of taking possession at the termination of a the preceding estate. The interest is freely devisable, descendible and alienable during life. The grantor retains a reversionary interest. The remainder interest is vested if there is no condition precedent to the taking and the reminder is ascertainable at the time of the grant.

A life estate is an interest in land granted to a third party by granter that is for the duration of grantee's life or for the duration of another's life, a pur ature vie life estate. The interest is freely devisable, descendible and alienable during life subject to the life estate.

Here, Alexa has a life estate for as long as she wants it and on the termination of her wanting it, the interest will vest in you. You have a vested remainder because he is ascertainable and there is not condition precedent to your taking. You will take upon the termination of the life estate in Alexa.

A holder of a life estate is entitled to the ordinary uses and profits of the land, but they are not permitted to engage in waste. There are three types of waste: (1) affirmative, an overt act that causes physical destruction or decrease in value (2) permissive, or neglectful waste and (3) ameliorative, where the value of the land is increased, without the consent of all known beneficiaries.

Here, Alexa has moved out and left the house in great disrepair and has failed to pay the taxes. As a life estate holder, she has a duty to make ordinary repairs of the home and she has a duty to not commit waste by letting her neglect decrease the value of the home. She is responsible for all the taxes due. Because she has committed waste and failed to maintain the land as required, you may seek damages from her and seek to enjoin her from continuing the behavior.

Since she has moved out and you may not be able to locate her, we might consider this a surrender of the home, indicating she no longer wants the home, in which case the remainder interest in you would become possessory and you might seek to properly quiet title in your name.
2. With regard to your request to have the shrubbery removed from Lot 1, it is unlikely that we will be able to succeed. The issue is whether an easement was validly conveyed to you such that you have an easement to use Lot 1.

An easement is a non possessory interest in land whereby the holder of an affirmative easement has a right to do something on another's land, the servient estate. A negative easement gives the easement holder the right to demand that another servient estate refrain from doing something on their land.

An affirmative easement is conveyed in a number of ways: by express grant via a deed, by necessity, by implication, or by prescription. An affirmative easement may be conveyed by way of transferring the dominant estate and pass with the servient estate, unless the purchaser purchases for value and has no notice of the easement. For relevance purposes here, a grant of an easement by deed requires that the grant be in writing and signed by the party to be charged and must meet the requirements of the statute of frauds. An easement by necessity exists when a landowner divides a parcel into two and conveys the second parcel, such that the new grantee or landowner has an easement over the servient land by necessity because he would be landlocked without this easement.

In contract, a mere license to use someone's land is a privilege to use another's land for a particular purpose and may be revoked at any time.

Here, Lisa orally granted to Matt the right to use her land as a footpath to access the lake. Because this permitted him to use her land but was not in writing, it will not qualify as an affirmative easement by grant. Because the facts indicate he was unable to access the lake by other means, the easement was not created at the time Lot 2 was conveyed to Matt by necessity. Rather, she orally granted him the right to use her land to access the lake. Matt was given a license to use the land and it was limited in scope and not able to be conveyed to others. She is free to revoke it at any time. Therefore, Matt's conveyance of his parcel did not operate to convey to you the right to use the footpath. That was a license granted by Lisa and she was free to revoke it at anytime. Moreover, the right or license to use the land was never granted to you. You will not be able to successfully pursue a claim against her to have the shrubbery removed.

3. With regard to whether we can prevent Jim or Fran from taking water from your well, we will likely succeed in doing so.

At issue are the water rights of a person to the well. Here because you own the lot on which the water well is on, you have the right to permit others to access your well, however, you would not necessarily have the rights to forbid others from drilling their own wells to access underground water, in which case they could make reasonable use of the water, whether it affects your use or not.

A profit in gross is a grant to another to use one's land and to take and carry away the soil and its contents. The burdened estate is the servient estate. The right is not transferrable unless it is commercial in nature. This must be granted in writing and be signed by grantor, similar to easements.
Here, you granted Jim the right to take from your land. You appear to have granted him a profit in gross to take from your water well. This right granted to him cannot be transferred to another party without your permission, moreover it is not commercial in nature, so Jim could never convey it to another. However, because your grant was oral, and not in writing, we can argue it was a mere license to use the land and you can freely revoke it with regard to Jim.

Further, you are able to pursue a claim of trespass against Fran should she come onto your land and take from the well. A claim for trespass requires the unlawful and unpermitted physical invasion, by tangible object, or otherwise, onto another's land, the soil below and the airspace directly above. Here, if Fran enters your land without permission, you may seek an action for trespass against her.

SAMPLE ANSWER 6B

MEMORANDUM

TO: Senior Partner

FROM: Associate

DATE: February 24, 2011

RE: Chris' potential rights, obligations and liabilities.

Our client Chris has come to us for advice on the following enumerated issues. I have addressed each for your review.

1) CLIENT'S QUESTION: Chris wants to sell House but wants Alexa to pay back taxes and pay to repair House.

The first issue which needs to be addressed is what type of ownership Chris (C) and Alexa (A) have in House. House was granted to A by will, with C retaining a future interest. That is, A was granted a life estate in House, subject to her not wanting it anymore, and C is a vested future remainder in fee simple absolute because there are no contingencies or interests which might interfere with C taking title to the property either after A abandons House or after A dies, if she chooses not to abandon House. Therefore, C would have proper standing to bring a cause of action against A under the doctrine of waste, which is be discussed below.

Here, there is clear indication from the facts that A has abandoned House because C discovered that she is not there anymore, House is in disrepair and property taxes have not been paid in years. Mere non-use of a property is not an indication of abandoning a property. Rather, there must be an overt act or indication that indicates that the party has abandoned use. It seems quite clear here that A does "not want" House anymore, which is what was required under the will for C to vest his title. Thus, Chris now has a vested present estate in House in fee simple absolute and is deemed to be the valid owner of House.
"The Doctrine of Waste": The main issue at hand is whether or not C has a cause of action against A under the doctrine of waste. Under this doctrine, a future interest may enjoin or seek damages against a present interest who is currently in possession of the real property. A present estate commits waste when he or she depleats the land of its resources, when he or she substantially changes or destroys the property or when he or she allows the property to run into disrepair. While a present estate is not liable for paying the mortgage on the real property, should one exist, the present estate IS liable for paying taxes on the real property because such duties run with the land. Thus, a future interest can seek an injunction against the present estate, enjoining her from her activities which decrease the value of the land and the future estate can also seek damages for having to pay taxes, which should have been paid by the present estate when she occupied the land.

Here, A left house in "great" disrepair and has also failed to pay taxes. C is entitled to seek damages for back taxes from A. Although C cannot seek to enjoin A from committing the waste that she has already allowed to occur on House, C can seek damages to restore the value of house to its fair market value.

2) CLIENT QUESTION: C wants Lisa (L) to remove the shrubbery which blocks a footpath which accesses the lake.

The first issue to be determined is whether an easement was created between L and Matt (M) the original owner of Lot #2 as to the footpath leading to the lake. Prior to M conveying Lot 2 to C, L gave permission for M to use a footpath over Lot 1 (L's property) to access the lake.

Unlike a covenant, which usually restricts the use of one's land, an easement grants a dominant estate the right to use a subservient estate. An easement can be created in four ways: (1) an easement by prescription, which is acquired in the same fashion as acquiring adverse possession, (2) an easement by implication, which is when a common land owner uses a part of her estate for the benefit of another part then subdivides both parcels to two different parties, (3) an easement by grant, which is an easement between two parties in writing and (4) an easement by strict necessity, which also requires a common land owner to subdivide her land where one subdivision is landlocked.

Here, L gave M permission to use the footpath, so M's use was not hostile, and therefore not an easement by perstration. The agreement between the two was not memorialized in a signed writing, nor was it recorded to give constructive notice to subsequent purchasers of the land, therefore it is not an easement by grant. Nor is it an easement by implication or an easement under a strict necessity because L still lives on her land and no portion of her land was subdivided by her. Therefore, C will not be able to argue that an easement was created. In that regard, C will not be able to enforce the agreement between L and M as an easement running with the land. Although M gave C permission to continue using the footpath, it was not a permission that A gave. Rather than an easement being created, A will likely defend that the original permission to access the lake was a "license." Unlike a tradition easement, a license allows the grantor to revoke the permission at any time. Furthermore, a license is not assignable, thus, M giving C permission is of no consequence. Had L granted M a right to take something from her land for
his benefit, then it could be argued that a "profit" was created, allowing for the possibility of an assignment, but that is not the case here.

Thus, C has not cause of action against L to allow her to use the footpath.

3) CLIENT QUESTION: C does not want Jim (J) or Fran (F) to take anymore water from her well.

The issue here is whether C granted a profit to J to take water from C's well.

A profit allows a dominant "estate" to sever something from the dominant estate for his or her own personal benefit. Where the severing is done by the servient landowner, then the issue is governed by UCC contract law which considers the severed material to be goods. However, when a dominent "estate" severs something from the land, then real property law governs. The term "estate" must be used loosely when describing profits, because the dominant "estate" is not actually an abutting land. Rather, the person severing something from the servient estate's land is just an individual, who is granted a profit right. Therefore, a profit is distinguishable from an easement. For example, a profit can be granted to allow for the removal of gravel on a servient estate to be used by the dominant estate to make cement.

It must be noted that under common law, water is deemed to be owned by no one. However, in our case, the water that J and F want to use, comes from a well that is located on C's estate, rather than from a natural body of water, for example. Therefore, the real issue here is not whether J and F may take water from C's land, but rather, whether or not J and F may use C's well to extract something from her land.

A profit which allows the severer to take "all" of the named resource is a profit in gross, which allows the severer to freely assign her profit right to other parties. However, when there is not a profit in gross, the profit is NOT freely assignable because that would allow for a depletion of the resource from the land that was not originally agreed to by the servient estate.

Here, C did not create a profit in gross because C only allowed J to take water from her well for the purpose of watering J's large garden. J and F could argue on the contrary, that F allowed J to take water from C's well for the sole purpose of watering the garden on their now, subdivided land. However, the facts given are unclear as to whether the large garden is on J's portion of Lot 3 or on F's portion of Lot 3. If both J and F take just the amount of water needed to water the garden, then they might be able to argue that J's assignment of his profit right is allowed.

However, if it is found that J is still taking water from C's well, and F is also taking water from C's well for other purposes, then there is a strong likelihood that J's assignment of his profit to C will deplete the land of the resource.
QUESTION 7 – CRIMINAL

Peter lived in a single family home in a residential neighborhood. He was a Gulf War veteran who often suffered from flashbacks and nightmares. As a result, he generally avoided contact with anyone in his neighborhood. His neighbor, Victor, believing Peter to be a “weirdo,” was consistently rude to him and mocked him as Peter entered and exited his home.

Victor’s actions made Peter withdrawn and fearful. He complained about Victor to his friend, Alan. Alan counseled Peter that he should not put up with any of Victor’s abuse. Peter responded, “I have called the police, but they tell me that there is nothing I can do since Victor has not done anything.” Several days later Alan brought a pistol to Peter’s house. Alan told Peter to keep it handy “just in case.”

One morning two months later, Peter was leaving his house after spending a sleepless night. Victor was in his driveway and started laughing at Peter, calling him a “nutcase” and “loser.” Peter became enraged and attacked Victor, wrestling him to the ground. As he held Victor on the ground, he was overcome with a feeling of revulsion for his actions. He released Victor and said, “Sorry.” He then went back inside his house.

Victor followed Peter into Peter’s house by pushing open the front door. He screamed, “Where are you? We’re not done yet.” Peter picked up the pistol and shot Victor once in the head. Victor was transported to the hospital and placed on life support. Six months later his family decided to remove the life support and Victor died.

You are an Assistant Prosecutor in the county where this incident occurred. Prepare a memorandum for your office enumerating the potential charges that can be brought against Peter and Alan as well as an analysis of the defenses each may be expected to assert.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 7A

To: Partner
From: Applicant
Date: 24 February 2011
Re: Potential charges against and defenses of Peter and Alan

The following charges may be brought against Peter and Alan; potential defenses are raised and their strength discussed as a part of the discussion of each charge.

1. Alan: Solicitation
Solicitation is a request to commit a crime; it is the "offer" in an illegal contract to commit a crime. Solicitation is an element of the crime of conspiracy and so will merge into it if both can be proven.

Here, Alan gave Peter a pistol and told him to keep it handy "just in case," because Peter had told Alan about the harassment of a neighbor. While this may be a suggestion that Peter could use the gun to harm Victor, it does not rise to the level of a request or offer to commit a crime. Rather, it could be a suggestion that Peter could use the gun against Victor if Victor eventually criminally attacked Peter and he needed to use it in self-defense. Therefore, although his actions were slightly unsavory, Alan can not be found guilty of solicitation.

Since there is no solicitation, there can also be no conspiracy between Alan and Peter (as conspiracy is a solicitation plus an acceptance, an illegal agreement to commit a crime).

2. Peter: Battery (renunciation - too late for battery)

Battery is intentionally causing harmful or offensive contact. The mens rea for this crime is intent. While provocation may provide a partial excuse for a battery if it is of a kind that would cause a reasonable person to become violent (inducing an extreme emotional disturbance), it does not justify the battery so it is not a complete defense.

Here Peter intentionally attacked Victor, wrestling him to the ground, which is a harmful contact. Peter was provoked by Victor, who was laughing at him and calling him names. Though this may provide some excuse for Peter's conduct it does not justify it; therefore, Peter may be found guilty of battery.

After attacking Victor, Peter said sorry and returned into his house, so he may try to assert the defense of renunciation (or "withdrawal"). Renunciation arises where the defendant wholly gives up his criminal purpose by deciding not to commit the crime, and in fact does not commit the crime.

However, Peter cannot use the defense of renunciation here because by the time he went back to his house, he had already done everything necessary to constitute a battery. Therefore, Peter has no defenses to this crime.

3. Peter: Intentional murder (defenses: heat of passion; insanity)

Intentional murder is with the intent to cause the death of a person, causing the death of that person or a third person. Some jurisdictions additionally require that the intent to cause the murder be formed with "premeditation and deliberation;" that is, cool calculation to commit the murder. However, New Jersey does not have this requirement. A person is presumed to intend the natural and probable consequences of his actions. Courts will assess whether a person intended to kill by considering what type of weapon was used, what type of the body was attacked, and the nature of the attack (e.g., how many times was the victim stabbed, etc). To have committed a murder, the defendant must have proximately caused the death of his victim; at common law, this meant that the victim had to die within a year and a day of the attack. However, today that is not required, and instead the defendant must simply be the
proximate cause of the death, where death is defined as the irreversible cessation of breathing and heartbeat. Because life support artificially mechanically continues these bodily processes, removal from life support does not constitute an intervening act that breaks the chain of proximate causation.

In this case, Peter shot a gun at the head of Victor. Both using a gun, and aiming it at a place like the head which is almost certain to cause death, indicate that Peter's act was intentional. Death is the natural and probable consequence of being shot in the area of the head. Victor's heartbeat and breathing irreversibly ceased as a proximate result of the shot, because there were no intervening causes to break the chain of causation. Although Victor continued to be kept alive by life support for six months, his family's choice to remove him from life support was not an intervening cause of death. Therefore, Peter intentionally proximately caused the death of Victor, and he is guilty of intentional murder.

Peter may raise the defense referred to at common law as "heat of passion," and in some states as "extreme emotional disturbance." That defense reduces murder to manslaughter where the defendant was acting under the influence of an extreme emotional disturbance that would cause a reasonable person to have the irresistible desire to kill. The EED must be that which would disturb a reasonable person, making this an objective standard; it is not a defense if a person is particularly subjectively prone to being emotionally disturbed due to their own nature. The most common example of this defense is where the defendant finds his or her spouse committing adultery, but such a disturbance may also result from a severe battery, or an attack upon a close family member. Extreme emotional disturbance can only exist where there has been no "cooling off period" in which the disturbance had a chance to dissipate.

Here, Peter probably cannot claim extreme emotional disturbance. Although he fought with Victor physically after Victor taunted him, Peter started the physical altercation. He was not seriously battered or attacked by Victor. Additionally, he had a "feeling of revulsion" about his behavior, apologized, and retreated from the situation, giving him a chance to cool off. And although Peter is a gulf war veteran possibly suffering from post-traumatic stress disorder and making him more than usually prone to emotional disturbances, the standard for EED is that of a reasonable person, not a person with post-traumatic stress. Since there was no sufficient disturbance from the standpoint of a reasonable person and since Peter had the chance to cool off, he was not acting under the influence of a disturbing event when he shot Victor, and cannot use the defense of EED.

Peter may also try to claim he acted in self-defense and therefore that the killing was justified. Self-defense is an affirmative defense which must be raised and proven by the defendant by a preponderance of the evidence after the prosecution proves all elements of the crime beyond a reasonable doubt. It arises where a person uses force that would be otherwise unlawful to repel the unlawful force of another; it must be proportional to the force used to attack the defendant rather than excessive. Generally there is a duty to retreat before using deadly force if the defendant knows he has a completely safe avenue of retreat. Deadly force can be used in self-defense only under a couple of circumstances: where the defendant is met with deadly force from his attacker, or where he is attacked inside the home, because there is no duty to retreat when inside the home.
Here, even though Peter shot Victor inside his home, he cannot claim self-defense. Victor followed Peter into his home and yelled at him; however, Victor did not use any force against Peter. If Victor had attacked him physically, Peter would have been justified in using force to repel him, but instead he used force when Victor had not done so yet, which is not proportional. Peter's use of deadly force was clearly not proportional here either, since Victor was not threatening him with deadly force, nor was he attacking Peter; it's irrelevant that Peter had no duty to retreat inside his home if he never had any force to defend against in the first place. Therefore, Peter cannot claim self-defense as a defense to the intentional murder of Victor.

4. Alan: accomplice liability for Peter's intentional murder

The final possible charge is against Alan as an accomplice of Peter for the intentional murder he committed. Accomplices are persons who either render assistance or aid before the crime with the intent that the crime be committed, or who solicited/commanded/controlled the crime or were on the "inside" of the criminal operation. Each accomplice is liable for all the reasonably foreseeable crimes of the other accomplices. Generally, merely providing supplies that were used to commit a crime is not enough for accomplice liability, unless they were provided with intent that the crime come about.

Here, Alan provided Peter with the instrumentality that Peter used to commit the crime. Whether he has liability as an accomplice depends upon whether he intended that the gun be used for the crime to be committed. Here, it seems clear that he did not; he did not know that Peter would end up using the gun in the way that he did, and though his words suggested he thought Peter might eventually need to use the gun against Victor, there is no indication that either he or Peter knew or planned that it would be used to kill Victor intentionally rather than used in self-defense.

Since there is not proof beyond a reasonable doubt that Alan intended Peter to use the gun to commit a crime against Victor, Alan does not have liability for the intentional murder as an accomplice of Peter.

SAMPLE ANSWER 7B

To: Office
From: Assistant Prosecutor
Re: Charges and defenses for Peter and Alan

Charges for Peter:

Murder- Peter can be charged with the murder of Victor because Victor died from being shot within a year and a day of Peter firing a pistol at him. Murder is defined as the unlawful killing of another human being. There are certain degrees of murder. First degree murder involves premeditation and planning to kill someone. All other killings are either second or third degree. Based on the facts, it does not appear that Peter had the requisite intent to kill Victor when Victor entered the house. Peter can be charged with second degree murder.
Manslaughter- Peter can be charged with manslaughter if a judge or jury finds that peter was provoked to kill based on the actions of victor. Victor consistently ridiculed peter and therefore there was adequate provocation. Also, he said to peter right before peter shot him "where are you? we are not done yet.". This is adequate provocation to reduce the murder charge down to manslaughter. It is up for a jury to determine whether or not to charge peter with manslaughter or murder.

Conspiracy- Peter can be charged with conspiracy with alan to commit the murder of victor. Alan recently visited peter and left behind a pistol to be used just in case victor had teased peter again. The normal use of a pistol is to cause death or serious bodily injury. As such, Peter can be tried for conspiracy with alan to commit the murder of victor. By accepting the handgun, he entered into a conspiracy although there was no formal agreement. This is known as an implied conspiracy. The overt act requirement is the accepting of the pistol by peter.

Charges for Alan-

Conspiracy- Alan can be properly charged with conspiracy to commit murder. The facts indicate he left the gun with peter to use just in case. Although there was no formal agreement, he knew that victor had constantly ridiculed peter and that the gun would be used to protect peter. As such, alan is a co-conspirator and he may be charged with murder or manslaughter of victor.

Murder- As stated above, alan is involved in a conspiracy. Therefore, he is liable for all actions that a co-conspirator may take. Since peter shot and killed victor, alan can be charged with the murder of victor. Not only did Alan supply the gun, he aided and abetted peter to use the gun just in case. Alan can be properly charged with the murder of victor. The degree of murder is up to the judge or jury to determine but murder is a proper charge against alan.

Defenses of Peter-

Peters best defense is that he was adequately provoked and that the killing should be reduced to manslaughter. The constant making fun of, and the actions by victor on the day of the shooting would lead any reasonable person to the conclusion that victor was out to get peter. Peter may be justified in shooting victor if he believed he was in serious harm. Another defense available is defense of property. He can assert defense of property because victor entered his home without permission and tried to start another fight with peter. This defense is likely to fail. Deadly force is never allowed for the defense of property. As such, peter may try the defense of property, although it is most likely he will not succeed.

Peters last defense is self defense. Peter may contend that he was not the initial aggressor and that he was acting in self defense. Self defense is allowed but only to the force proportionate to stop the intial aggressor. Here, there is no indication that victor intended to use deadly force to get back at peter for beating him up. Based on the preceding, it is most likely that a defense of self-defense would not be highly successful in peter's situation.

Defenses of Alan-
Alan will try to prove there was no conspiracy and that he should not be tried for murder, manslaughter, or conspiracy. In order for there to be a valid conspiracy, there must be a formal agreement and some overt act. Based on the law of conspiracy, Alan will not likely be successful. He intentionally left the gun with Peter and told Peter to use the gun just in case. Although not express, a conspiracy can sometimes be implied given the facts of the case. Here, it is implied a conspiracy existed and therefore Alan should be held liable if he asserts there was no conspiracy.

Alan can also contend that he did not know Victor, and therefore did not intend to kill him. If the judge or jury decides there is a conspiracy, it does not matter whether or not Alan knew Victor or whether he intended to kill him. He will be found liable for the death of Victor not only because he entered into a conspiracy with Peter, but Peter used the gun supplied by Alan to commit the crime. By giving Peter the gun, he took a substantial step in completing the crime of murder or manslaughter. Saying the words "just in case" also implies that Alan condoned the shooting of Victor.