Civil Procedure
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Essay Question #1 – Criminal

A and B drove through a neighborhood of vacation homes in the off season looking for an unoccupied residence. They found a house with no lights on at the end of a cul-de-sac. Breaking a rear window, they entered the house.

Once inside, they located the master bedroom and began putting jewelry into a pillowcase. They were suddenly interrupted by the homeowners’ son C, who lived there in the off season. A struck C with his flashlight, knocking him unconscious. Panicked, A and B fled the home, with the pillowcase, in A’s vehicle. C recovered consciousness and called the police to report a break-in.

A and B drive several miles away and park the vehicle in order to examine the jewelry. Officer Smith, on routine patrol, notices the vehicle parked in an area known for drug trafficking. After viewing the car and its occupants for over 15 minutes, he approaches the vehicle and asks the occupants for identification. He shines his flashlight into the car and views the pillowcase on the passenger side floor. Suspicious, he asks the occupants to exit the vehicle and places them in handcuffs in his police car. He returns to A’s vehicle and examines the pillowcase, discovering the jewelry. He transports A and B to the police station where they are put in separate interrogation rooms for questioning after receiving the appropriate Miranda warnings.

B is questioned by Detective Wesson for over one hour. He consistently denies any involvement in any crime. Detective Wesson leaves the room, telling B he is going to speak with the detective questioning A. Upon his return, Detective Wesson tells B that he thinks that A has told the police that “It was all B’s idea and B hit the kid.” At the time he makes the statement Detective Wesson
does not know what A has said to the detective questioning him, if anything. B then admits his involvement, but denies hitting anyone, saying “A did that.”

B has retained your firm for representation in this matter. The partner to whom you report has asked you to review the above facts and prepare a memorandum setting out the possible crimes for which your client can be indicted and any defenses B may have in this matter.

Prepare the Memorandum

SAMPLE ANSWER A – CRIMINAL LAW

MEMORANDUM

To: Partner
From: Candidate
Date: February 26, 2009
Re: State v. B

POTENTIAL CRIMINAL CHARGES.

B has admitted to the police his involvement in an incident at a local home. As a result, there is a possibility that B could be charged with several crimes. First, B may be charged with Burglary. At common law, burglary is the breaking and entering the dwelling house of another at night with the intent to commit a felony therein. B broke into the home via a rear window and entered the house belonging to C’s parents. Based on the presented fact, it cannot be stated for sure whether the entry was at night, however, we know that the house did not have lights on at the time of the crime which would have indicated that someone was home and that the police officer used his flashlight to see into the vehicle when he stopped A and B. From this information, we can conclude that the breaking and entering occurred at night. Many states are also either dropping the night (time) requirement or expanding its applicability. B also had the requisite intent at the time of the breaking and entering. He, and A, intended to enter the home without permission or consent in order to steal valuable items. This can be shown because B went immediately up to the master bedtoom and located the owner's jewelry which he proceeded to take.

B may also be charged with Larceny or theft. Larceny is the taking and carrying away (however slight) of the personal property of another without consent with the intent to permanently deprive. Here, B took the owner's personal property - her jewelry - without consent and carried
it out of the house. There was no indication that he thought the jewelry rightfully belonged to him. Instead B and A intended to steal the jewelry.

Additionally, B may be charged with assault and/or battery. Battery requires a harmful or offensive contact with the person of the plaintiff without consent that causes injury. Here, under the facts, A was the co-defendant who actually struck C with his flashlight, knocking him unconscious and satisfying the elements of battery. If the contact caused an immediate apprehension in C, there could also be a charge of assault. Even though A was the actual perpetrator of the assault and battery, B may be liable as a co-conspirator or accomplice.

A conspiracy requires a meeting of two or more guilty minds who enter into an agreement. The parties must intend to enter into the agreement and intend on accomplishing the goal of the agreement. Generally, there must also be an overt act in furtherance of the conspiracy, even something as minor as mere preparation. These elements are clearly met by the facts. A and B agreed to drive through a neighborhood of vacation homes in the off season to look for an unoccupied residence which they could rob. In a conspiracy, co-conspirators will be liable for all foreseeable consequences and results of their actions. Similarly, accomplice liability may be invoked because accomplices are also liable for the criminal acts of their co-accomplices. Thus, even though A perpetrated the assault and battery on C, B may still be liable and share in the charge.

B may also be liable for robbery which is a larceny and an assault. Is is the taking and carrying away of the personal property of another without consent and from the person of the plaintiff with threats of force or bodily injury with the intent to permanently deprive. This may be another charge based on the aforementioned elements under larceny and assault.

Finally, B may be charged with trespass or criminal trespass. He intentionally entered the property of another without consent and he intended to commit a felony thereon. This interfered with the owner's rights of possession.

POSSIBLE DEFENSES

B will likely be able to assert that the jewelry discovered by the police officer at the site of the stop should be suppressed and B will likely succeed. B and A were stopped by Officer Smith following the burglary. There was no warrant for their arrest and Officer Smith had no information at the time regarding the burglary, the identity of the suspects or a description of their car. Smith had no reason to believe that A and B were involved when he pulled them over. Instead, Officer Smith noticed A and B because they were parked in an area known for drug trafficking. After following A and B for approximately 15 miles, Smith then pulled them over. The general rule, is that an officer must have reasonable suspicion that criminal activity is afoot to pull over a vehicle and make a stop. Here, the fact that A and B were parked in an area known for drug-trafficking does not provide the officer with reasonable suspicion that they were involved in criminal activity. Additionally, there was no indication that during the 15 minutes that Smith followed A and B, that he observed any erratic driving or traffic violations that would justify the stop.
Generally an officer may not make a warrantless search. However, under an exception to this forth amendment rule, an officer may make a warrantless search during a vehicle stop. The vehicle stop must have been valid and made with reasonable suspicion which is not the case here. Moreover, because Smith did not have a warrant or reasonable suspicion, the court would also consider the fact that it was an invasion of a place where A and B had a reasonable expectation of privacy in which an officer cannot interfere without meeting the exeception. When Smith did make the stop and noticed a pillowcase in the car, there is no other evidence that would warrant the officer to believe that the pillow case contained contriband or illegal evidence. Finally, when officer smith examines the jewelry, there was no indication that it was stolen at that time. During the stop, A and B were outside of their vehicle and in handcuffs.

At no point during the stop was B told that he was arrested or given his miranda warnings. It was not until A and B were brought to the police station for individual and separate interrogation that they were given their warnings. the general rule is that miranda applies whenever a person is in police custody. Custody means that a person is not free to leave. A and B were placed in handcuffs at the scene, placed in the police vehicle and then taken to the station for questioning. Interrogation includes any time in which the police are likely to know that the circumstances or questioning could result in something incriminating against the defendant. Here, A and B should have been given their Miranda warnings at the scene of the vehicluar stop. Because they weren't, we could argue a violation of B's miranda rights and a violation of the fourth amendment's right against unreasonable searches and seizures.

**SAMPLE ANSWER B – CRIMINAL**

RE: Client B

**Crimes of B**

In the present case against B, the following crimes will possibly follow the indictment: conspiracy, burglary, larceny, battery, and robbery.

Based upon the facts presented, A and B have entered into a conspiray to commit burglary. The elements of a conspiracy involve an agreement and an act in furtherance of the conspiracy. Here, A and B had an agreement in place to search for an empty house in which they would attempt to enter for criminal purposes. The act in furtherance is a minimal requirement, the driving through the neighborhood looking for a location would qualify. Based upon the conspirator relationship, B will be liable for any act that the A commits while carrying out the crime.

The crime in which the two perpetrators will be charged with is that of burglary. The elements of burglary involve breaking and entering a dwelling with the intent to commit a crime. In this case, the neighborhood of residences qualifies as a dwelling, the breaking of a rear window qualifies as entering, and the larceny of the jewelry inside the home was the crime. Burglary requires a specific intent criminal state of mind. In this case, based upon the fact the two
perpetrators had actively sought out a residence of a particular kind to then enter and steal from, it is assumed that their intent was to specifically enter for criminal purposes.

Once inside the residence, A and B committed larceny of the residence's jewelry. Larceny is the unlawful taking of another's property with the intent to deprive that person of the use of the item in a permanent manner. Larceny is theft of the item. In this case, the two perpetrators actively began putting jewelry into the pillowcase for the purposes of depriving the true owners. The two specifically intended to steal this jewelry, as evident by the search and overall exigence of finding the master bedroom so that they could find the jewelry.

When C interrupted the two perpetrators in the process of loading the pillowcase with jewelry, he was abruptly hit with a flashlight rendering him unconscious. A committed the actual act of hitting C, however B is still liable as this act was during the commission of the crime that the two perpetrators had conspired to perform. In this case, there is a charge of battery against C to be brought against the defendants. Battery is the unlawful application of force against a victim, there needs to be specific intent to batter as well. In this case, A's hit of C with the flashlight qualifies as unlawful application of force against the victim. Further, A specifically intended to hit C with the light so that the two perpetrators could make a clean getaway from the residence. Dependent upon the level of force applied against C, and whether or not that force rose to a level of deadliness, A and B could be charged with attempted murder dependent upon the aggressiveness of the prosecution. Any blow that will knock someone unconscious is serious enough to be considered as deadly. However, this is a weaker claim that that of battery.

While the charge of battery and larceny are pending against A and B, the charge of robbery presents itself. Robbery is the unlawful application of force for the intent of committing larceny. Or, in other words, the use of force to steal an item from an individual. In this case, the timeframe of the larceny and battery overlapped enough to amount to a charge of robbery. Robbery requires a specific intent to perform, in this case, A and B specifically intended for the application of force against C to allow them the opportunity to fulfill the elements of the theft. The overlap of the facts leads to a situation where the prosecution will bring a charge of robbery of C as C was involved when discovering the two individuals in the room at a later time.

Defenses of B

The initial defenses of B will relate to B not meeting the elements of the crimes to be charged. Further, B has claims of unlawful search and seizure under the 4th Amendment, as well as unlawful interrogation methods in violation of the 5th and 6th Amendment.

In response to the charge of conspiracy against A and B, B will defend on the grounds that there was no agreement to commit the crimes. However, the standard for the conspiracy agreement is a rather low standard, and a the facts as presented give a weak defense against the conspiracy charge. B can defend this charge based upon not meeting the elements of conspiracy in that he never actually intended or meant to commit an act in furtherance of the conspiracy. This is a weak argument though. B's best defense against conspiracy is to create a situation in which impossibility plays a significant factor. In this jurisdiction, if A is not charged with any crimes or
indicted for conspiracy, B cannot be charged for conspiracy. There is no single person conspiracy by definition, as it would be an impossibility to have only a single culpable individual committing a conspiracy.

In defense of burglary, B will make the claim that they did not intend to enter for the purposes of committing a crime. Based upon the facts as presented, they simply broke and entered to get into the house and then later on committed a crime. There is a concurrence problem between the entering and the crimes committed. A concurrence problem will break the chain of elements necessary for the burglary charge. Further, the intent of the individual is always a defense to crimes of specific intent. If B did not specifically intend to commit these crimes, he will further break the elements needed for this crime.

The defenses to battery will lie hand in hand to that of the defense to conspiracy. If there was no conspiracy, B will not be liable for the acts committed by A. The acts will not be imputed upon him since a single person conspiracy cannot exist. However, even so, B can be held for accomplice liability as he provided considerable help in furtherance of the crime that resulted in the battery to C.

The larceny charge against B will be the hardest to defend based upon the initial facts. It is rather evident that the two individuals fled the home with the property that did not belong to them, and they intended to keep this property, and understood it was someone else's. The best defense to this crime results from the two individuals getting the evidence excluded from the case by means of an unreasonable search and seizure by the arresting police officer.

The office on routine patrol that eventually arrested A and B must comply with the constitutional protections afforded the citizens of this country. A and B have a right to privacy and reasonable searches and seizures.

A reasonable search and seizure can exist only in a location where the individuals have a no expectation or privacy or, with an appropriate search warrant and probable cause, in a location that the individuals have an expectation of privacy.

In the automobile of A and B, there existed a reasonable expectation of privacy from government intrusion. For the officer to make a search there must be reason for him to do so. The officer relies upon the Terry doctrine that gives him the reasonable suspicion necessary to make a brief stop and frisk of the individuals and the car. Based upon the facts of the case, the two individuals stopped in a drug trafficking area for an extended time gave the officer the reasonable suspicion that illicit activity might be going on. Reasonable suspicion is not a hunch, it is a collective reasoning based upon the totality of the circumstances, that will give the officer a reason to investigate. The officer had plenty of reason to approach the car and ask the two what was going on, he then frisked the individuals for protective reasons and gazed into the open area of the car.

The open areas of the car led to an application of the plain view doctrine, in which the officer then saw the pillowcase on the back seat. The seeing of the pillowcase gave the officer probable cause to search the car. The probable cause to search the car came with an exception to the
warrant requirement of exigent circumstances as the officer was alerted to the disappearance of a pillow case full of jewels and a pillowcase in the back seat of a car is not something that is standard to every individual.

Further, the fact that the officer arrested the two individuals gave rise to a search incident to arrest. In a search incident to arrest, the officer may search the car, except for the trunk, for dangers to himself and others. In this search, the searching of the pillowcase would be allowed as weapons or other dangers could be contained inside of this.

B's greatest defense to these searches and seizures come from breaking the chain of causation between the reasonable suspicion leading to the probable cause and search incident to arrest. If he can show the officer had not indication of reasonable suspicion, the evidence that was gathered will be excluded as unlawfully obtained. Further, the officer incorrectly arresting the two individuals without any probable cause would exclude evidence gathered from this means. The more that B can exclude from the prosecutions case, the better he will be.

In addition to challenging the validity of the search and arrest by the officers, B has defenses against his eventual confession made to the detective. However, this is weaker argument that the others as it appears the detectives complied with the Miranda doctrine fully in this interrogation. Miranda requires that B is read his rights as pursuant to the 5th amendment right against self incrimination. He was read his rights and then placed into police custody for the purposes of interrogation. The fact the prosecution used a white lie to try and coerce the confession is perfectly legal, this is a police tactic that is in full compliance with the constitution. Further, the 1 hour confession was not an unreasonable length of time for questioning. The overall defense against the confession is weak from a 5th amendment standpoint, unless the defendant was due the right to counsel in this matter. The 6th amendment will guarantee B a right to counsel if requested. The charges to these crimes amount to a level where counsel will be appointed if needed as well. The greatest defense to the confession will be that B was taken in due to an unreasonable arrest, and therefore the confession should be excluded as an unlawful interrogation was undertaken. The fruits of the Miranda interrogation will be excluded as well if the interrogation was taken in an illegal manner.

The best advice to B from this law firm would be to seek a plea arrangement with the prosecutors, as the case against him and A is rather strong.

Essay Question #2 – Property

In 1970 Steve purchased Lot 1, which is located on Pine Street. In 1977, Liz purchased Lot 2, which adjoins Lot 1. Lot 2 is located at the corner of Pine and Main Streets with its driveway entrance on Main Street. However, because Main Street is a heavily traveled road, Liz always felt safer entering and leaving Lot 2 by using Lot 1’s driveway, the entrance to which is located
on Pine Street. Thus, Liz did not use Lot 2’s driveway. Steve and Liz never discussed Liz’s use of Lot 1’s driveway became overgrown with bushes.

In 1985 Liz sold Lot 2 to Rich, and Rich continued to use Lot 1’s driveway. In 1989 for a period of one week, Steve placed saw horses on his driveway which prevented Rich from using it. However, at the end of the week, Steve removed the saw horses and Rich resumed using the driveway.

During 2008, Rich launched an internet business form his home. As a result, large trucks now use Lot 1’s driveway to make deliveries and pick-ups from Rick’s house. This use has increased the wear and tear on the driveway. Steve has placed a permanent barricade on the driveway effectively blocking any vehicles from using it to access Lot 2. Rich has commenced an action to have the permanent barricade removed.

Lot 3, owned by Ellen, is located behind Lot 1. Lot 1’s elevation is higher than Lot 3’s such that Lot 1 slopes down to Lot 3. Some years ago Steve had a one-foot-side by foot-foot-high stone wall built along a portion of the boundary line with Lot 3. The stone wall is located entirely on Lot 1. Last month Ellen had some excavation done on Lot 3. After the excavation began, Lot 1’s soil subsided along the entire boundary line with Lot 3 and the stone wall collapsed.

Steve retains your law firm. You are asked to prepare a memorandum analyzing all of Steve’s potential rights, obligations, and liabilities with respect to Rich and Ellen.

Prepare the Memorandum

SAMPLE ANSWER A – PROPERTY

To: Steve
From: Attorney
Re: Rights, obligations and liabilities with respect to Rich and Ellen.

Rich: With respect to Rich, the issue is whether Rich has an easement to use thru driveway on Lot 1, and whether Steve has the right to block Rich’s use of the driveway.

An easement is a non possessory interest in another person’s real property. The type of easement suggested here is an easement appurtenant, where one parcel (the dominant parcel) has some rights to use another parcel (the servient parcel) to the benefit of the dominant parcel. An easement can be created in four ways: by prescription (owner of the dominant parcel uses the easement in such a way that the elements of adverse possession are met); implication (prior use of both parcels by a common owner implies continued use in the same fashion); necessity (use of the easement is necessary to use enjoyment of the dominant parcel); and grant (written permission to use the servient parcel in the desired way). Since there was no common ownership
of Lots 1 & 2, an easement by implication did not arise. Since Lot 2 did have access to Main Street (i.e.: was not a land locked parcel and had access to a public street), an easement by necessity did not arise. Even though Liz preferred to use the Pine Street driveway, Parcel 2 did have access to a main road. An easement by grant presumably did not arise because there is nothing to suggest a writing granting the easement (by deed or otherwise). The only possibility would be easement by prescription if the elements of adverse possession were met by Liz and/or Rich. To obtain title by adverse possession, use must be continuous, open and notorious, actual and hostile. The adverse possessor must actually and continuously use the land for the statutory period, and such use must make use of the property as an actual owner would, without permission of the record owner. Here, the facts do not state the statutory period, but it appears Liz and Rich used the driveway on Lot 1 continuously for 31 years (from 1977). Rich can “track” his time of use on to Liz’s time. However, it does not appear that the use of the driveway was hostile to Steve’s ownership of the driveway as part of Lot 1. Steve and Liz never discussed her use of the driveway. Steve could make the strong argument that he gave Liz (and later Rich) his permission to use the driveway, thus defeating the hostile element of adverse possession. In addition, Steve’s placement of the sawhorses on the driveway showed control and ownership over the driveway, which could also defeat a claim of Rich to title to the driveway by adverse possession. Therefore, it is unlikely that an easement by prescription arose.

The use of the driveway by Liz and Rich probably would be considered a license granted by Steve. A license is a non possessory interest in land; however unlike an easement it is freely revocable. When Rich greatly expanded the scope of the license to use Steve’s driveway by allowing the trucks to enter, Steve effectively revoked the license by barricading the driveway. If in fact it was a license, Steve was entitled to do this. Even if a court found that Rich had acquired title to the driveway on Lot 1 by adverse possession (easement by prescription), his expansion of the scope of the easement would be improper. The original use appeared to be for ingress and egress of a single car, and Rich expanded it to large trucks making multiple pickups and deliveries. Steve would be able to enjoin Rich from using the driveway in this way, even if an easement existed.

Ellen: Property owners have a right to subjacent support from adjoining property.

Where land is improved, if an adjoining landowner causes the property to subside the property owner must show either (a) that the excavation of the adjoining landowner would have caused the property to subside even if it were unimproved; or (b) negligence on the part of the excavating adjoining landowner. Here, Steve would have to prove that either his property would have subsided due to Ellen’s excavation even if the stone wall had not been built, or in the alternative, that Ellen’s excavation was negligent in some way.
To: Supervising Attorney
From: Associate
Re: Steve’s Rights & Liabilities

Steve v. Rich

Rich (R) has a valid easement appurtenant (EA) in Lot 1’s driveway and Steve (S) probably cannot enjoin its use although he may have some rights due to the change in use.

An EA is a non-possessory interest in land allowing the holder some use or enjoyment in the land of another which benefits him in the use/enjoyment of his own land. EAs can be created in 4 ways: by express grant, implied by prior use, necessity or prescription.

Here, S never granted L or R an EA, and no easement can arise from necessity or implication b/c the land was never in common ownership, the driveway isn’t reasonably necessary to use of Lot 2, just more convenient b/c of lighter traffic and Lot 2 isn’t land locked the bushes on the driveway just need to be removed.

However, an EA by prescription has been created by L & R’s use. Prescription or adverse possession arises from open/notorious, open and continuous, actual and hostile (not permitted) use of another’s land for a statutory period. Not permitted just means permission was never given. A successor can add his use on to his predecessor’s use to satisfy the statutory period if there is privity between them, i.e. some non-hostile nexus.

Here, L & R both continuously used Lot 1’s driveway. The use was open and actual and hostile b/c S never discussed the matter with either L or R. There is a grantor/grantee relationship between L and R (privity) so R can tack on his use on to L’s to meet the statutory period. Assuming that it has been met, the EA has been established by prescription. Most states have a statutory AP period from 10-20 years. Liz began using Lot 1 in 1977 and it has been continually used until 2008. Steve did not terminate the easement in 1989 by putting up sawhorses for a period of one week. That kind of temporary blockage for such a short period cannot oust an adverse possessor.

So, R has a valid EA but S may have some ability to limit its use, but probably not. Once an EA has been established the dominant tenement (EA holder) is entitled to make all reasonable uses of the EA and the servient tenement (Lot 1) cannot object, unless disturbance is extreme. Additionally the EA holder is entitled to reasonable increases in his use but cannot unilaterally change uses completely. S should argue that the use of Lot 1 used to be purely residential and now R is using his house for a business which is unilaterally changing the easement’s scope. Besides that there is another path of ingress and egress, Lot 2 has a driveway that the large trucks could use so that Lot 1’s driveway doesn’t get torn up. That argument probably won’t be successful. Increased wear and tear on the driveway is really just a result of increased use to which the dominant tenement is reasonably entitled. S will have to tear down the permanent barrier.

Steve v. Ellen
Ellen (E) may be liable to S for the damage to the stone wall, but only if the excavation was done negligently or S can prove the soil would have subsided w/o the wall on it.

Adjacent landowners are entitled to some amount of lateral support from the property of their neighbors. This means that a neighbor could be liable for activities done on their land that cause yours damage b/c of collapsing soil.

A neighbor will be held strictly liable (SL) for excavation on their property if it takes away lateral support to another’s land but SL only attaches if the other’s land is in its natural state, i.e. unimproved. Liability for damage to improved land due to excavating only attaches if it was done negligently or the damages property owner can show that the land would have been damaged if it were in a natural state.

Here, only the land under the stone wall subsided, from which it can be inferred that the soil may not have subsided in its natural state. As such E will be liable to S for damage to the wall only if he can make out a prima facie case in negligence.

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Essay Question #3 – Evidence

Darryl and Laura, husband and wife, are accused of stealing 500 pounds of apples from John’s Farm. At their joint trial, they will be represented by different lawyers. Laura’s attorney plans to call her to the stand to testify she participated in the theft because Darryl had threatened to send unflattering pictures of Laura to her co-workers over the internet.

In its pretrial motion, the State advises the Court it intends to offer the following evidence:

(1) The testimony of Darryl’s sister, Sue, that she had received a handwritten letter, apparently mailed from jail by Darryl, which she gave to the prosecution, in which Darryl admitted the theft;

(2) The handwritten letter itself;
(3) The testimony of Sam, a fellow jail inmate, that he rode in the jailhouse elevator with Darryl and his attorney and heard the lawyer say to Darryl: “I would never let you, a guilty man, take the stand”, and

(4) The testimony of Farmer John that his inventory records show 500 pounds of apples are missing.

In his pretrial motion, Darryl seeks an Order:

(5) Prohibiting Laura’s testimony;

(6) Allowing the testimony of his seven-year-old nephew, Nate, that he was with Daryl at the time of the theft, many miles from John’s Farm; and

(7) Admitting the testimony of Doc, his longtime psychiatrist, that Darryl always discusses his “bad behavior” during therapy but that Darryl vehemently and repeatedly denied involvement in the apple theft.

You are the law clerk for the judge who has asked you to prepare a memorandum on all proffers of evidence.

Prepare the Memorandum

SAMPLE ANSWER A – EVIDENCE

To: Judge
From: Law Clerk
Re: State v. Darryl & Laura

The following memorandum discusses the proffered evidence in the case against Darryl and Laura who are both charged with stealing 500 pounds of apples from John's Farm.

1) The testimony of Darryl's sister, Sue, that she received a handwritten letter, apparently mailed from jail by Darryl, which she gave to the prosecution, in which Darryl admitted the theft.

Generally, all relevant evidence is admissible. Evidence is "relevant" if it tends to prove or disprove an element or aspect of the case any amount. An exception to the general rule is that hearsay evidence is generally inadmissible unless an exception applies. A statement is hearsay if it is an out of court statement, other than currently made by the declarant currently on the stand, that is being offered for the truth of the matter asserted in the out of court statement. An exception of the hearsay rule is "party admission" where a current party to the action's own out of court statement is used against him. The exception exists because the party has an opportunity to deny the statement and the reliability of the statement is more assured.
Furthermore, testimony as to the contents of a writing must be made by someone who has 1st hand knowledge of a writing's content (i.e. by actually having entered/writtend the writing or actually having seen what the writing reports). However, if the person's only knowledge is from reading the writing then the original or a authentic copy of the writing must be used because of the best evidence rule.

Here, the hand written letter is hearsay because it is offered for the truth of the matter asserted (i.e. that Darrl is guilty and admitted to committing the crime). However, it falls under the party admission exception because it is being used against Darryl and Darryl was the person that wrote the letter. However, the Best Evidence rule applies here because the contents of the writing are being testified about by person (Sue) whose only knowledge is from reading the writing.

Thus, Sue should only be allowed to testify about the fact that she received a letter from Darryl from jail, that she gave the letter to the Prosecution and possibly that she recognized the handwriting as that of Darryl. However, Sue should not be allowed to testify as to the Writing's content.

2) The handwritten letter itself.

As demonstrated above, the letter is admissible (although hearsay) under the Party Admission exception to the hearsay rule. The facts indicate that the hand written letter is hearsay because it is offered for the truth of the matter asserted (i.e. that Darrl is guilty and admitted to committing the crime). However, it falls under the party admission exception because it is being used against Darryl and Darryl was the person that wrote the letter.

The issue here is that the writing must also be authenticated by the party submitting the evidence. A writing can be authenticated in 3 ways: 1) by a person who is familiar with the defendant's handwriting (or the person who allegedly wrote the letter's handwriting) before the charges were brought and can testify to the person's belief that it is the alleged person's handwriting; 2) by an expert who will compare it to a known handwriting sample; and 3) by the jury themselves who can compare the writing with a known handwriting sample.

Here, Sue could testify for the State as to the authenticity of Darryl's handwriting as long as she was familiar with his handwriting before the trial started.

Thus the letter is admissible.

3) Testimony of Sam.

Generally any conversation between an attorney and his client, pursuant to legal representation that are made in confidence are not admissible as evidence against the defendant unless the defendant waives his privilege. However, the privilege is lost if the statements are made infront of a 3rd party because the statement is not made in confidence due to the presence of the 3rd party. Here, the statement made by Darryl's attorney are not protected by the Attorney-Client privilege because the statement was not made in confidence since Sam was present.
Furthermore, although Sam's testimony will be hearsay because it is being offered for the truth of the matter asserted, the Party admission exception applies again. The exception applies because it extends to statements made by the defendant's agent. Here, the attorney is the defendant's agent and thus the exception applies.

However, the statement should not come in because the Agent admission exception cannot be used against a defendant in a criminal trial unless it was a statement made by a co-conspirator during the conspiracy.

4) Testimony of Farmer John regarding his inventory records.

Again as written above a statement is hearsay if it is an out of court statement, other than currently made by the declarant currently on the stand, that is being offered for the truth of the matter asserted in the out of court statement. Another exception of the hearsay rule is a Business Records exception, which applies when the out of court statement (which can be a writing) was made in the regular course of business by a person who regularly records the statement.

Here, the inventory record is hearsay because it is being offered to prove the matter asserted in that it is being offered to prove that 500 pounds of apples are missing. However, it falls under the Business records exception as long as the record has been authenticated by the custodian. Thus if authenticated, Farmer John could read the inventory's record or even admit the record as evidence itself.

Thus the testimony is admissible.

5) Darryl's pretrial motion to Prohibit Laura's testimony.

The Federal Rules of Evidence recognize two privileges that apply to married individuals. The Spousal Private Communication Privilege states that a spouse cannot be forced to testify about any private communication between spouses made while the spouses were married. This privilege can be invoked by either spouse even if the testifying spouse is willing to testify. This privilege was created to encourage free communications between spouses.

Here, Darryl's pretrial motion seeking to prohibit Laura's testimony should not be granted by the court. Although the Private Communications Privilege should normally apply to this situation because the facts indicate that the testimony concerns communications that were made during the marriage in confidence between the spouses, the privilege should not apply because an exception applies. An exception to the Private Communications Privilege is that the privileged does not cover any communications between co-conspirators in furtherance of criminal activity. Here, the facts indicate that this exception applies because Darryl made the statements while blackmailing Laura into participating.

Thus, Darryl's pretrial motion seeking to prohibit Laura's testimony should not be granted by the court.

6) Allowing the testimony of Darryl's 7 year old nephew, Nate.
In order for a witness to testify, the witness must be competent and take an oath to tell the truth. The person does not actually have to take an oath as long as the witness promises to tell the truth. The issue here is whether a 7 year old child is competent to testify. Under the Federal Rules of Evidence, a child is competent if the court reasonably believes that the child know the difference between truth and lie and will testify truthfully.

Here, Nate could be competent to testify if the court determines that Nate knows the difference between truth and lie and will testify truthfully.

Thus, Nate should be allowed to testify.

7) Admitting the testimony of Doc.

The issue is whether the defendant in a criminal trial can offer evidence of habit to show that the defendant acted in conformity with the habit.

Under the Federal Rules of Evidence, a defendant may offer evidence of the defendant's habit to prove that the defendant acted in conformity with the habit. A habit is a repeated action to a certain circumstance or situation. Example: that the defendant always put the mail outside at 9 am can be used to show that the defendant actually put the mail outside at 9 am.

Here, Doc's testimony is regarding Darryl's habit because Doc will testify that Darryl always discusses his "bad behavior" during therapy. Furthermore, the fact that Darryl vehemently and repeatedly denied his involvement in the apple theft tends to prove that he did not act in conformity with the habit.

Thus, Doc's testimony should be admitted.

SAMPLE ANSWER B – EVIDENCE

To: Judge  
From: law clerk  
Re: Admissibility of evidence in trial against Darryl and Laura

(1) The testimony of Darryl's sister, Sue, may not be admitted. The issue is whether testimony regarding a writing may be admitted to prove the contents of the writing. The best evidence rule states that when the contents in a writing are to be used for their truth, then the writing itself must be admitted. Here, the contents of the letter to Sue is being offered for its truth. Therefore the letter must be admitted into evidence.

It should be noted that if the best evidence rule does not apply or if the letter is lost or destroyed or otherwise unavailable for some good faith reason, then the testimony may be admitted.
The letter may be admitted into evidence. The issue is whether a letter written by a party may be admitted by the opposing side in order to prove its contents. The rule is that foundation must be laid by a witness with first hand knowledge of the writer's handwriting and the writing must be an original. First, foundation must be made by a lay witness attesting to that the handwriting in the letter is Darryl's. Since Sue is Darryl's sister and could be shown to be familiar with her handwriting, she may do so. Expert opinion is not required. If the letter is the original letter then it may be admitted into evidence. Note that if the letter is a copy of the original, Darryl may object to it's admissibility and it will not be allowed in as evidence.

The next issue would be whether the statements made in the letter would be admissible. Hearsay is any out of court statement made for the truth of the matter asserted. However, statements made by a party in the trial may be used against them by the opposing side as non-hearsay. Since the letter was written by Darryl the statements made within may be treated as admissions by a party opponent. Therefore, the letter may be admitted in this case.

The testimony of Sam, a fellow inmate, would be allowed since the statements made by the attorney are not privileged. The issue is whether statements made in the presence of third parties excludes the attorney-client privilege. The rule is that statements made between an attorney and his client are privileged under the attorney-client privilege. However, there are certain exceptions to this rule. When statements are made in the presence of third parties not included in the representation, then the privilege is lost. In this case, the attorney made these statements in the presence of Sam while they were all in the elevator together. Since Sam was not assisting in the attorney's representation and was not necessary in the representation of Darryl, the statements made in his presence lose their status as privileged.

The testimony of Farmer John regarding his inventory records are admissible as business records. The issue is whether statements made regarding business records are admissible to prove the absence of inventory. The rule is that records made in the ordinary course of business in a regular and systematic way are admissible to prove the statements made in the records or the absence of records. Here, Farmer John made records in the ordinary course of business regarding his business practice. The absence of the record can be used to prove that the items did not exist and that the apples were missing. His testimony is admissible because even though ordinarily the best evidence rule requires the admission of the writing itself, in the case of a business record the custodian of the record must testify as to it's creation and that it accurately reflects the statements in question. Also, he may testify as to the meaning of the record and explain the fact that certain things are missing. Therefore, his testimony is necessary for understanding the record and may be admitted to prove the missing contents in the business record.

Darryl may prohibit Laura's testimony. The issue is whether a spouse may prevent another from testifying against them in a criminal matter. The rule is that one spouse may prevent the other from testifying against them in court on a criminal matter. If the statements were made while the spouses were married, then the spouse may not testify to it if the other objects. This is spousal communication privilege that may only be waived by both spouses. In this case, Darryl objects to the testimony, therefore Laura may not testify against him. Laura's statements would be admissible if they were made in connection to a crime prepetrated by both
spouses or in connection with a crime. However, in this case the statements Laura plans to testify to were made after the criminal endeavor had already ceased and the conspiracy had ended. Also, the only other way Laura could testify is under spousal testimonial privilege, which the testifying spouse could waive in a civil matter as long as the spouses are currently married. Since this does not apply, Darryl can prevent Laura from testifying against him.

(6) Nate may testify that he was with Darryl at the time of the theft. The issue is whether Nate, a 7-year-old, may testify in court. The rule is that one is competent to testify may do so. There is no specific age limit to testifying as long as the witness can appreciate the oath and can promise to abide by it. The witness must also be able to recollect the events and be able to have relevant testimony helpful in the case. Although Nate is a child, he is not precluded from testifying for Darryl as long as he recollects the events with Darryl and can clearly state them in court while appreciating the oath and the consequences of committing perjury on the stand. Therefore, the judge may voir dire the witness to determine whether he qualifies under this standard and whether the testimony will be relevant in the case. Then the jury will be left to determine whether the witness is credible.

(7) Darryl will be allowed to offer testimony of his psychiatrist during his trial. The issue is whether a defendant may waive the psychotherapist-patient privilege. The rule is that statements made by a patient to a psychotherapist are not admissible in a trial against him. Therefore, if the state wanted to present this evidence, Darryl could raise this privilege and prevent the testimony from getting in. However, when the testimony is offered for the defense and the defendant as holder of the privilege waives it, the testimony by the therapist may be allowed in for consideration by the jury. Here, Darryl may call his therapist to testify on his behalf.

Statements made for their truth by someone other than the person who made them are hearsay and must be admitted as non-hearsay or as an exclusion to the rule. Here, the statements made by Darryl would only be considered non-hearsay admission if they were being offered by the prosecution. Since he is offering them for his defense they can not come in since they do not fall under any exclusion to the hearsay rule.

**Essay Question #4 – Constitutional Law**

In an effort to increase female-owned enterprises’ participation in municipal business, Jamona City (the “City”) has proposed enacting an ordinance setting aside twenty-percent of its public works contracts to qualified female entities. Mayor Illene, who made the set-aside a key initiative of her campaign, intends to use the ordinance to steer contracts to major campaign contributors as a reward for their support. The City, however, has no recent history of discriminating against female-owned businesses.

The City’s Administrator, Harolina, used her City-issued cell phone to text-message to the news media about Illene’s intended use of the proposed ordinance. Harolina’s messages also revealed rumors about Illene’s and her paramour’s venereal diseases. Ironically, Illene’s paramour frequently gave campaign speeches on her behalf that emphasized a desire to “clean up” sexually-transmitted diseases.
When the messages were published in the local newspaper, Illene suspected Harolina as the most likely source. As a result, Illene requested immediate termination of Harolina’s employment, seizure and search of the cell phone records, and pursuit of a defamation action against both Harolina and the newspaper.

Illene asks you, the City’s Corporation Counsel, to prepare a memorandum assessing the constitutional propriety of the proposed ordinance, her other requests, and any other constitutional issues this situation might raise.

Prepare the Memorandum

SAMPLE ANSWER A – CONSTITUTIONAL LAW

Memorandum

From: City Corporation Counsel
To: Mayor Illene
Re: Constitutional Matters

The issue of the matter of the proposed ordinance setting aside 20% of the public works contracts to female entities will require some proof by the city to prove that the ordinance is substantially related to an important government interest. This is so because under the Supreme Court’s reasoning, gender based discrimination falls under the intermediate scrutiny in which case the ordinance must be enacted to remedy some sort of past discrimination and must be substantially related to an in important government interest in remedying that past discrimination, or an important government interest in increases female-owned enterprise participation in municipal business. As such, this burden falls completely on the city to prove the important basis that it seeks to promote as well as the substantial relationship between the purpose and the law.

In this case, it is unlikely that the statute would survive the intermediate review. Although there is an important government interest in promoting female-owned enterprises, gender-based discrimination is not valid, especially in relation to such a large percentage of contracts. Moreover, without some sort of past discrimination on the part of the city, there is unlikely to be found adequate support to allow such an initiative.

Moreover, as related to the fact that Mayor Illene intends to use these contracts as a reward for support, that is not allowed and is illegal. In the public sector there must be fair and equal participation and opportunity. In light of this fact that state actors cannot discriminate in hiring, or interfere in interstate commerce, as such, this type of action cannot be allowed.

As to you and you(sic) paramour’s alleged venereal diseases as stated by Harolina and published by the newspaper, you might have a defamation claim. Although the 1st Amendment to the Constitution states that there is a right to free speech, that speech right is limited by certain factors, including defamation, obscenity, hate speech, speech that would incite violence, etc. In
this case, one of the classes of unprotected speech in defamation is imputing the unchastity of a woman, as well as imputing a loathsome disease on someone (including leprosy and venereal diseases). As such, Harolina undoubtedly made these statements and are defamation per se by what they conveyed. Defamation also requires the “publishing” of the statement which merely means that the statement be made to a party other than the party to whom it relates. In this case, Harolina, by text message, published those statements. Had she made them to you, or your paramour, it would not be defamation. Moreover, the text message format affirmatively attributes the statements to Harolina because of text messaging. An electronic “tag,” “signature,” or number is always attached to a text message which allows for its tracking and sending. Accordingly, the texts can be traced back to Harolina and attributed to her. The newspaper by definition has committed libel as a form of defamation in printing these defamatory statements.

However, since you both you and your paramour are public figures because the position of mayor is a publicly elected official and paramour makes public speeches on you(sic) behalf, that amounts to status as public figures. As such, public figures must bear a heightened standard of proof in defamation cases. Public figures, in proving defamation, must prove more than mere negligence in the publishing of the defamatory statement. Public figures must prove recklessness, or knowledge by the part of the publisher, in this case Harolina and the newspaper, as to the veracity or lack thereof of the statement. Public figures must also prove pecuniary damages as a result of the statement, and if the statement was made in relation to a public matter, the standard is heightened further. In this case, you both must prove recklessness or knowledge as to the lack of veracity of the statements published and must prove also that there was significant pecuniary damage to them by way of the publishing of the statement. However, Harolina and the newspaper can use truth of the statement as a defense to the claim of defamation.

As to Harolina’s termination, this may be in violation of her rights in her employment. Public employees are viewed to have a right to their employment and cannot be terminated as a result of the exercise of their free speech. As to Harolina’s statements regarding the contracts Harolina cannot be terminated. She was free to state what she desired about those contracts. There is some difference as related to her function as a public official related to public matters, but she cannot be terminated for speaking out about the contracts. In the case of the termination of public employment, there must be notice and hearing to terminate such rights and that notice and hearing must happen before the termination. In this case, that did not happen and there might be a claim by Harolina against the City for unlawful termination. However, since she is a public official her protection as to speech under the 1st Amendment is limited as to speaking on public matters, as an official, which she is, the Administrator, who would normally speak on such matters as related to public contracts. Therefore, her speech as related to those contracts may not be protected and she may be terminated.

However, the order to seize and search all cell phone records of Harolina is not allowed. This would be an invasion of Harolina’s privacy. If the cell phone by which she was transmitting the messages was issued by the City, then there is no invasion of privacy. Public employees have no right of privacy in their computers, work space, files and any other publicly issued equipment by which they conduct their work. If the cell phone is a private cell phone, then it would be an
invasion of her privacy because there is a reasonable right to privacy in one's phone records. Absent a warrant, or other legal instrument that is court ordered, the City cannot seize and search Harolina’s cell records. If conducted by you, Mayor Illene, that would be a gross abuse of power and you could be held liable.

Consequently, there are a number of constitutional questions as related to the ordinance, the defamation claims, the termination of Harolina, and the privacy invasion that might occur. As such, the ordinance should not be enacted or enforced, the defamation claims against Harolina and the newspaper should be pursued, knowing the heightened standards and truth defense, and the employment termination and invasion of privacy claims should be kept in mind when dealing with Harolina and her cell phone.

SAMPLE ANSWER B – CONSTITUTIONAL LAW

To: Illene
From: Counsel

Constitutionality of the Proposed Ordinance

The proposed ordinance to be enacted by Jamona City likely violates the Fourteenth Amendment Equal Protection Clause. Under the Fourteenth Amendment, the discrimination must be on the face of the statute, or it must be shown to have a discriminatory motive. Here, the Statute that Illene seeks to pass discriminates based on gender. Pursuant to the Fourteenth Amendment, in order for the constitutionality of the statute to pass muster, the burden is on the city to show that the statute is substantially related to furthering an important governmental interest {In U.S. v. Virginia in regard to gender discrimination it was "exceedingly persuasive justification" must be shown}. Here, the city has not met its burden. Intending to steer contracts to major campaign contributors as a reward for their support is certainly not related to furthering an important governmental interest. Moreover, while on some occasions the courts have found that states or cities may enact statutes to remedy specific injustices against women {title IX} {cannot enact to prevent overall societal injustice though}, here the city has had no recent history of discriminating against female-owned businesses. Thus, it is likely that a court will find that the city has not met its burden of establishing that the ordinance is substantially related to furthering an important governmental interest.

Defamation Suit Against Harolina

The First Amendment products an individual's freedom of speech. However, the First Amendment does not protect defamation. Here, Illene is a public figure and the speech relates to a public matter. Thus, in order for Illene to succeed against Harolina she must show that Harolina made a defamatory statement of or concerning her and there was a publication. She must also show the falsity of the statement and fault {In showing fault she must show that Harolina made the statement knowing it was false or with reckless disregard as to falsity of the
statement. Here the statement by Harolina was libel {thus no need to prove special damages} when she issued text messages to the various media outlets.

The statement was defamatory {claiming that she and her husband had a venereal disease}, it was coerced by Illene, and it was certainly published {to various media outlets}. Next, you must show the falsity of the statement against her {we do not know if the statement is false or not}. Lastly, if Illene did not have a venereal disease there are some facts to show that Harolina acted with malice {mass texting to the various media outlets}. However, here we must know more about Harolina's state of mind and what she actually knew to determine whether she acted with malice. Thus, at this time Illene may be able to proceed with a suit against Harolina but will likely need more facts to establish malice in order to succeed.

Defamation Against Local Newspaper

As noted above, the First Amendment does not protect against defamation. In order for you to succeed against the Local Newspaper she must show that there was a defamatory statement of or concerning her and publication of the statement. She must also show the falsity of the statement and the fault on the publisher {either that the statement was made with knowledge that it was false or with reckless disregard as to the truth of the statement}.

The newspaper published the statements in the local newspaper. Thus, you are probably able to show that there was a defamatory statement made by the newspapers of or concerning her and that there was adequate publication. The trickier issue is whether you can establish malice against the newspaper. Assuming that you do not have a venereal disease, The newspaper will likely argue that it do not act with knowledge or reckless disregard in its publications because Harolina, the city administrator, texted them with the knowledge. Thus, while determing whether the Newspaper acted with malice requires a bit more information, the fact that they received this information from you from a trusted government official, probably will make it hard to prove that they made the publication with malice.

Harolina's Employment with the city

Another issue that may arise is whether Harolina's termination was constitutional. If Harolina was an employee who could only be fired for good cause, her procedural due process rights were violated by her firing. Pursuant to the Procedural due Process Clause of the Fourteenth Amendment, an government employee who can only be fired for good cause must be given prior notice and prior opportunity to respond, with a subsequent evidentiary hearing regarding her firing. Thus, in determining whether Harolina's firing was lawful we should determine whether she was an employee who could only be fired for cause.

Cell Phone Records of Harolina's Government Issued Cell Phone

Harolina did not have a valid expectancyof privacy in her city issued cell phone.

The Fourth Amendment prohibits an unreasonable search and seizure against an individual's property. However, Harolina did not have a valid expectation of privacy rights to the city.
issued cell phone {the phone was the cities, they had ownership of it}. Thus, her phone records may be adequately searched and seized by the city in conducting its investigation.

Essay Question #5 – Civil Law

You are the law clerk to a state trial judge in New Jersey. The following facts are presented in connection with a motion before the court.

In the summer of 2007, Peter, a resident of New Jersey, vacationed in Delaware. David, a resident of Delaware, drove through a red light while Peter was crossing the intersection on foot and struck him, causing injuries.

In the fall of 2007, Peter filed a lawsuit against David in New Jersey state court seeking damages for his injuries. Peter hired a process server to serve the complaint at David’s home in Delaware. The affidavit filed by the process server as proof of service of the complaint recited that he left the summons and complaint at David’s home address with the girl who answered the door. Her physical description was set forth and her age estimated at sixteen or seventeen.

David did not answer or otherwise respond to the complaint. After the time for David to do so lapsed, Peter obtained entry of default. Following the proof hearing, default judgment was entered against David in the amount of $150,000 in November 2007. Peter took steps to collect the judgment, and in December 2008 he obtained a levy on a bank account in David’s name in Delaware. In January 2009, David filed a motion to vacate the default and default judgment and to dismiss the complaint, challenging both the sufficiency of the service of process and the assertion of in personam jurisdiction. The levy was stayed pending resolution of David’s motion.

David’s affidavit in support of the motion asserts that he shares his Delaware home with his wife and eight-year old twin boys, and that if a girl as described in the process server’s affidavit did answer the door, it must have been his children’s tutor.

You are asked to prepare a memorandum for the court in connection with the motion. You are to set forth the applicable legal standards for each part of the motion, analyze their application to facts presented, and make a recommendation to the court as to how it should rule. If there are fact issues that you believe must be determined on any aspect of the motion before a ruling can be made, identify those issues.

Prepare the Memorandum

SAMPLE ANSWER A – CIVIL

MEMORANDUM
To: Judge  
From: Clerk  
Date: February 26, 2009  
Re: Peter v. David -- Defendant's Motions

1. David's Motion to Vacate the Default Judgment

The Court should grant David's motion to vacate the default judgment because David was not given notice of default before the default judgment was entered against him. In order for a default judgment to be proper, it must have been issued on proper grounds, and the plaintiff must have taken reasonable steps to serve notice to the plaintiff of the default, prior to the entry of default judgment. While the Court had grounds to issue the default judgment, David was not given proper notice.

In New Jersey, the Superior Court may properly enter default judgment against a defendant who has been properly served, but who has failed to answer or otherwise respond to a complaint, within the time periods prescribed by the New Jersey Rules of Civil Procedure for doing so. Thus, the Court had grounds to issue the default. A defendant may petition a court to allow him to defend himself, and to undo the default judgment, if he does so within a reasonable time and has a legitimate reason for his failure to respond to the complaint.

Ordinarily where a defendant wishes to challenge the entry of default or default judgment against him based on improper grounds, or by providing an adequate excuse as to why he could not appear, the defendant must ordinarily do so within one year of the entry of judgment. However, David was not given proper notice of the entry of default, or any time to respond, before the default judgment was entered, so he had no opportunity to reply. So although David filed his motion to vacate the default over two years later, David must be given the opportunity to provide an explanation why he did not respond to the complaint.

David has adequate grounds for not responding to the complaint. Process was not properly served upon him and so he had no notice of the suit. Therefore, David's motion to vacate the entry of default and the default judgment should be granted.

2. David's Motion to Dismiss Based on Improper Service of Process

David's Motion based on improper service of process should be granted. New Jersey allows process be served by a third party not interested in the lawsuit, and permits it to be served at the defendant's home. However, process must be served on someone who lives at the Defendant's home. Here, process was served on his children's tutor. The process server was required to take care to ensure that the person to whom it served process was an appropriate party. The babysitter does not live at the Defendant's home. As a result, David never got notice of the suit. Thus, process was insufficient and David's motion should be granted.

3. David's Motion to Dismiss Based on Lack of Personal Jurisdiction
In New Jersey, for a court to exercise personal jurisdiction over the defendant, the exercise of personal jurisdiction must comply with both Constitutional minimums of due process and the New Jersey long-arm rule. The New Jersey long-arm rule essentially imposes the same requirements as the Constitution. The long-arm rule simply states that a New Jersey court's exercise of personal jurisdiction over a defendant must comport with the due process afforded by the United States Constitution.

Under the Constitution (and therefore, in New Jersey), in order for a court to exercise personal jurisdiction over a David, David must have had (1) sufficient minimum contacts in the state of New Jersey, and (2) such that exercising jurisdiction would comport with traditional notions of fair play and substantial justice.

First, the court can dispense with some of the more obvious bases for personal jurisdiction: residency in the state, service of process while in the state, or consent. David does not appear to a resident of New Jersey, because his home is in Delaware. If he has been living in Delaware, and has expressed the intent to stay in Delaware and make it his residence, then that is where his residence lies for the purposes of personal jurisdiction. David was not served process in New Jersey. He was allegedly served in Delaware. Finally, David has not consented to personal jurisdiction in New Jersey, at least not expressly or by appearing in court there. Thus, the court must establish whether personal jurisdiction is proper based on David's contacts with the state of New Jersey.

Therefore, in order for a New Jersey Court to properly exercise personal jurisdiction over David, it must be established that David had sufficient minimum contacts with the State of New Jersey. The extent of a defendant's contacts can lead to either general jurisdiction or specific jurisdiction. David's involvement with New Jersey is not so pervasive and consistent that New Jersey courts would be able to assert general jurisdiction over David—that is, jurisdiction for any lawsuit whatsoever. Rather, the Court will have to invoke specific jurisdiction over David for this particular case.

David's contact with the state of New Jersey, based on the facts given, is almost non-existent. David's only contact with the state of New Jersey that we know of is that David injured a citizen of New Jersey. While violating a Delaware motor vehicle law, David struck a pedestrian with his car while that pedestrian happened to be in the state of Delaware on vacation, crossing a street. The pedestrian happened to be a citizen of New Jersey.

In determining whether there are sufficient minimum contacts, a court might also consider whether the defendant purposefully availed himself of some right within the state. However, David does not appear to have taken any affirmative steps to create any involvement with New Jersey. Another factor a court should consider is the relationship between David's contact with New Jersey to this particular claim, and the incident or transaction that gave rise to the claim. This analysis is not particularly illuminating because David has essentially no contact with New Jersey. The claim arises out of his driving his car on a road in Delaware. If David was driving his car on an interstate highway in Delaware, as opposed to a local Delaware road, then the plaintiff would have a stronger argument that it would not be fair to impose upon Dave the duty to appear in court in another state for injuring one of their citizens in an auto
accident. This argument would be based on a kind of implied consent. However, we do not know these facts.

In considering "fair play and substantial justice" prong of the test, a court should consider both the public and private interests. Here, the private interests do not substantially weigh in Dave's favor. Haling him into court in New Jersey would impose any great injustice or convenience. Delaware and New Jersey are neighboring states. As for the public interests, Delaware has an interest in enforcing its traffic laws. New Jersey has an interest in ensuring that its citizens who are injured by drivers of other states can recover for their tort injuries. That said, the fact that David has so few contact with New Jersey, and no purposeful availment, the New Jersey courts cannot exercise personal jurisdiction over David. Therefore, the Court should grant the motion to dismiss based on lack of personal jurisdiction.

**SAMPLE ANSWER B – CIVIL**

TO: State Trial Judge  
FROM: Law Clerk  
RE: Civil Procedural Issues

You have asked me to prepare a memorandum for the court in connection with David's motion to vacate the default and default judgment and motion to dismiss the complaint for lack of personal jurisdiction and insufficiency of service of process. The analysis is below.

As an initial matter, we must determine if personal jurisdiction is proper over David (D). The accident occurred in Delaware, allegedly due to D's running a red light while Peter (P) was crossing the street, causing P injury. There are 5 bases of proper personal jurisdiction in New Jersey. They are: consent, personal physical service in the jurisdiction, general appearance/waiver, domicile/incorporation, and long-arm jurisdiction based on due process factors. Here, it appears that the first four bases do not apply, and P would have to prove personal jurisdiction through long-arm jurisdiction. To prove personal jurisdiction under a long-arm analysis, a plaintiff must prove that 1) the defendant has such minimum contacts with the forum state and 2) such that the traditional notions of fair play and substantial justice will not be overwhelmed. This can be difficult, as D does not have minimum contacts with the forum state that would reasonably lead him to believe that he would be haled into court there(WORLD WIDE VOLKSWAGEN). Nor has D placed any objects of trade into the commercial stream of commerce to fall under a stream of commerce test seen in Asahi. Because D does not have any minimum contacts with the state and the cause of action did not arise out of any such illusory minimum contacts, P cannot prove either general or specific jurisdiction. The fairness factors of the second prong of minimum contacts requires a balancing test between the burden on the defendant, the interest in the forum state, and the interest of the plaintiff in litigating in the forum state. Although P could argue that the burden to travel to NJ from DE is not too great a burden, P will not be able to show that D has availed himself in any way of the benefits and protections of the forum state. As such, it is unlikely that NJ has personal jurisdiction over D.
On another preliminary matter, parties may file a motion to dismiss for lack of personal jurisdiction, insufficiency of process, or failure of service of process in their pre-answer motions. If they do not file these three motions in their pre-answer motions, they must file them in their answer, along with a follow-up motion 90 days after the answer has been filed. If they do not do either of these actions, the rights to object for all three reasons (lack of personal jurisdiction, insufficiency of process, or failure of service of process) are deemed to be waived.

Lastly, for personal service to be valid, the process server, sheriff, or any competent party not a party to the action may serve process upon the party. Here, the facts indicate that a process server served process, so that is not an issue. However, the server must leave the summons and complaint with a competent member of that party's family if they are served at their residence (if a corporation or municipality, the server may serve process upon any higher-level employee, such as a partner, manager, etc.). D's affidavit indicates that he does not have a daughter around the age of the young woman whom the process server encountered. Thus, it appears that P's process server did not leave the summons and complaint with a competent member of D's household, and the service was invalid.

At issue before the court is whether D's motion to vacate the default and default judgment against him is valid. Under New Jersey Rules of Civil Procedure, a Motion for Default may be entered before trial if the opposing party has not entered any appearance. A Motion for Default may be overturned if the party moving to vacate files the motion within one year of the motion for default and shows that he had a valid meritorious defense available but did not avail himself of the defense due to other factors such as mistake, excusable neglect, or some other valid reason. D will fail with this argument because he did not file the motion within one year of the default judgment. The default judgment was filed in November 2007 and D filed his motion to vacate in January 2009, so more than one year has passed. However, a default motion must be overturned if the forum state lacked personal jurisdiction or failed to obtain valid service of process. This is because to refrain would violate a defendant's Due Process rights under the 5th Amendment to the U.S. Constitution, as applicable to the states through the 14th Amendment. Here, we have already established that New Jersey does not have valid personal jurisdiction over D and as such, the motion to vacate must be granted. Moreover, D's affidavit states that he does not have a daughter. Because of this, the service attempted by P's process server was invalid and D's motion to vacate must be granted for failure to serve process.

D's motion to dismiss for lack of personal jurisdiction and insufficiency of process, although very late, should be granted. It is for these reasons (particularly the second) that he did not defend his claim in a timely manner. Thus, D's motion to vacate the judgment must be granted and D's motion to dismiss for lack of personal jurisdiction and insufficient service of process should be granted as well.

**Essay Question #6 – Torts**

Lindsay and Paris, at age 16, left Smalltown High to seek fame and fortune in Hollywood. Paris was fortunate and has become a world famous “Hollywood party girl.” Lindsay tried to ride her friend’s coattails, but is now back in Smalltown waiting tables.
Lindsay is bitter and angry now that Paris has stopped inviting her to the wild and glitzy Hollywood parties. She constantly complains to her friend, Gus, the owner and publisher of the Smalltown Gazette, that Paris has dumped her.

In one of her rants against Paris, which several people overheard, she told Gus that Paris comes back to Smalltown only because she is having an affair with her financial adviser, Bernie. Bernie is the town’s only certified public accountant. He is married with 4 children. He is also the chairman of the town council and a board member of his house of worship and many local civic groups.

Gus writes a weekly newspaper column entitled “Heard About Town.” Without asking anyone else, he wrote the following:

“We are seeing a lot of Paris around here…seems that Bernie, the CPA, is her latest flame.”

Shortly after the column was published, Bernie was asked to leave the board of his house of worship. His wife filed for divorce and many clients did not return to have their taxes prepared. Bernie was so distraught by these events that he called all his business clients and asked them to stop advertising in the Smalltown Gazette. Many of his clients did cancel their ads as a show of support. He also told many of his clients that Paris stopped calling Lindsay because of her drinking problem. Lindsay is a recovering alcoholic.

Paris and Bernie both deny the affair and have filed suit against Lindsay and Gus. Both Lindsay and Gus have counterclaimed against Bernie.

You are the law clerk to the judge assigned to hear this case. Prepare a memorandum to discuss the following:

1) Bernie’s claim against Lindsay and any defenses she may raise;
2) Bernie’s claim against Gus and any defenses he may raise;
3) Paris’s claim against Lindsay and any defenses she may raise;
4) Paris’s claim against Gus and any defenses he may raise;
5) Gus’s claim against Bernie and any defenses he may raise; and
6) Lindsay’s claim against Bernie and any defenses he may raise.

Prepare the memorandum

SAMPLE ANSWER A – TORTS
Bernie's claim against Lindsay and Defenses

Bernie may sue Lindsay for defamation. Under the common law of torts, defamation requires a defamatory statement about the plaintiff made by the defendant, it must be published, and the plaintiff may have to prove damages. Furthermore, with regard to defamatory statements involving public figures or public concerns first amendment defamation would apply.

The basic elements for defamation may be satisfied against Lindsay. In this case, Lindsay made a defamatory statement. Defamatory statements are those that affect one's character and may include statements regarding honesty, loyalty, sexual modesty, or competence. Here, since Lindsay's statement touched upon Bernie's faithfulness to his wife by alleging that he was having an affair with Paris the statement was defamatory because it related to his sexual modesty. Furthermore, the statement was published when Lindsay related the story to Gus. In addition, Bernie may have to prove damages because Lindsay only made a oral statement. Oral defamation qualifies as slander. If the slander is slander per se no damages need to be proven by the plaintiff. Slander per se includes statements about one's business, crimes of moral turpitude, sexual chastity, and another I forget. None of the slander per se categories seem to apply because the defamation was about Bernie's loyalty to his wife. Therefore, he must prove damages against Lindsay. This would be ease for Bernie because he ultimately lost business and his marriage. Therefore, the basic elements for defamation have been met.

Furthermore, the first amendment elements for defamation may be satisfied against Lindsay. Under first amendment defamation, the plaintiff must prove falsity and fault. In this case, Lindsay's statements were false and may be shown as such by Bernie. In addition, Bernie may be able to prove fault. As a public figure, since he is the chairman of the town council and a board member of his house of worship and local civic groups he would have to show malice. Malice is shown when the defendant either knowingly or recklessly published the defamatory statements. In this case, Bernie may show that Lindsay acted recklessly by including Bernie in her lie about Paris. Therefore, Bernie may win his claim against Lindsay under first amendment defamation.

Bernie may sue Lindsay for violation of his privacy under a false light claim. Under the common law of torts, a false light action may be alleged when the defendant made false representations about the plaintiff to a wide number of people and a reasonable person would think that false representation as offensive. In this case, Lindsay made a false representation that Bernie was having an affair and most people would find this offensive. Although Lindsay did not tell a wide number of people she did tell Gus who was a newspaper writer. Therefore, she
had the intent to spread this false representation to a wide audience and may be found liable for an invasion of privacy upon false light.

Bernie's claims against Gus and defenses

Bernie will have a valid defamation claim against Gus for the same reasons he had against Lindsay. Under the law of torts, subsequent republications of a defamatory statement are separate claims that the plaintiff may assert. The only alterations would be that Bernie would not have to prove damages for the claim against Gus because the defamation was libel which does not require a showing of damages. Furthermore, under the first amendment defamation requirements, Gus was reckless because he did not verify that what Lindsay was saying was true before he published the story in the newspaper.

Gus may try to argue that he was privileged and so the defamation claim should not apply to him. Under tort law, a qualified privilege exists to protect those who divulge otherwise defamatory statements if society has a need to encourage such candor by such people. So long as the privileged individual acts in good faith and does not exceed the scope of the privilege by including irrelevant information the privilege will apply. For reports and journalists this usually requires the reporter to check the accuracy of the statement and be fair. Bernie may argue that he falls under a qualified privilege for being a writer for the newspaper. However, he did not check the accuracy of the statements he received from Lindsay so this privilege will likely fail.

Paris's claim against Lindsay and defenses

Paris may bring a claim of first amendment defamation against Lindsay for the same reasons Bernie had against Lindsay. The only changes would be that Paris would not have to prove damages under the defamation claim because Lindsay's statements would be slander per se against her. They would constitute slander per se because they reflect upon Paris's sexual chastity. Only females may apply this per se category and since Paris is a female it would apply to her. Paris may also bring a claim against Lindsay for violation of her privacy under a false light claim as Bernie could. Under the common law of torts, a false light action may be alleged when the defendant made false representations about the plaintiff to a wide number of people and a reasonable person would think that false representation as offensive. In this case, Lindsay made a false representation that Paris was having an affair with a married man and most people would find this offensive. Although Lindsay did not tell a wide number of people she did tell Gus who was a newspaper writer. Therefore, she had the intent to spread this false representation to a wide audience and may be found liable for an invasion of privacy upon false light.

Paris's claims against Gus and defenses

Paris will have a valid defamation claim against Gus for the same reasons she had against Lindsay. Under the law of torts, subsequent republications of a defamatory statement are separate claims that the plaintiff may assert. The only alterations would be that Paris would not have to prove damages for the claim against Gus because the defamation was libel which does
not require a showing of damages. Furthermore, under the first amendment defamation requirements, Gus was reckless because he did not verify that what Lindsay was saying was true before he published the story in the newspaper.

Gus may try to argue that he was privileged and so the defamation claim should not apply to him. Under tort law, a qualified privilege exists to protect those who divulge otherwise defamatory statements if society has a need to encourage such candor by such people. So long as the privileged individual acts in good faith and does not exceed the scope of the privilege by including irrelevant information the privilege will apply. For reports and journalists this usually requires the reporter to check the accuracy of the statement and be fair. Bernie may argue that he falls under a qualified privilege for being a writer for the newspaper. However, he did not check the accuracy of the statements he received from Lindsay so this privilege will likely fail.

Gus’s claims against Bernie and defenses

Gus may claim that Bernie is liable for intentional interference with a business. Under the common law of torts, a person may sue another if the defendant interferes with an existing contract or future contract, with the intent to disrupt that contract, the defendant had no justification or was not privileged to do so, and the plaintiff suffered actual damages. Here, Gus had several advertising contracts with may business people. Bernie intentionally told the business people not to contract with Gus anymore due to Gus's publication of the story about Bernie so there was an intentional interference with a current contract. Bernie may defend that he was justified to disrupt the contracts because of Gus's statements about him, but Gus may argue that Bernie was not privileged to so disrupt his contracts because Bernie's act was a separate wrong. Gus suffered damages from this conduct because advertising is part of this revenue source. Therefore, Gus may prevail.

Lindsay’s claim against Bernie and any defenses

Lindsay may file a claim that Bernie violated her privacy rights by disclosure. Under the common law of torts, a disclosure action may be alleged when the defendant made true representations about the plaintiff to a wide number of people and a reasonable person would think that true representation as offensive. In this case, Bernie may have made a true representation that Paris stopped calling Lindsay because of her drinking problem since Lindsay is a recovering alcoholic. Most people would find such disclosure of a drinking problem offensive and Bernie disclosed it to a wide audience. Therefore, Lindsay may prevail.

Lindsay may also file a defamation claim against Bernie.

SAMPLE ANSWER B – TORTS

To: Judge
From: Applicant
Re: Bernie/Paris Case
Below are the possible claims that each party may bring against the named defendants.

Bernie

Bernie will likely bring a defamation claim against both Lindsay and Gus. Defamation consists of a defamatory statement made by the defendant, published to another person that resulted in damages. Damages are either implied if the statement is one of libel (written words) or slander per se (dealing with business, morality, promiscuity or infectious diseases) or must be proven with pure slander, or spoken words. If the plaintiff is a public figure or public officer there are the added elements of falsity and fault, for which the standard is malice. If the person is not a public official or figure, but the issue is a public concern, the elements are falsity and fault, for which the standard is negligence - and if malice is proven damages are implied.

Bernie would have a valid defamation claim in tort against Lindsay. She made a defamatory statement that he was cheating on his wife with Paris, did so directly to Gus and where others could hear so it was published, and since it was about his sexual affairs it was slander per se and thus damages are implied. Lindsay would likely argue that Bernie is a public figure given all of his involvement in the town - being chairman of the town council, a board member of his house of worship and in many local civic groups. This would mean he would have to prove falsity and malice. If this failed she could say that this was at least a public issue since it dealt with someone so involved in the civic groups and a person with fame like Paris, thus forcing Bernie to prove falsity and negligence.

The only real fact indicating that Bernie is a public figure/official is his position as chairman of the town council. The other positions he holds are probably insufficient to qualify as a public official or figure. Furthermore, just because Paris is famous does not mean this is a public issue. If Bernie is able to successfully claim this is simply a matter of tortuous defamation he should win based on this evaluation. However, if it is deemed a matter of First Amendment defamation, Bernie will likely lose since he can not prove malice on Lindsay's part directed towards him (only Paris) and proving the falsity of the claim will be extremely difficult.

This same analysis applies with Bernie's defamation suit against Gus. The success of the suit will come down to whether or not this is deemed a public figure/official or a public concern case or not. Furthermore, Bernie will have a tough time proving any fault and almost certainly have no claim for malice on Gus' part since he just relayed the information he heard is his "heard about town" column which suggests all content is simply rumor. Again, if the case is only one of private defamation, he should win since damages are presumed with the newspaper article based on libel.

If these claims fail, Bernie could bring tort claims for false light or public disclosure of private facts against Gus. False light applies when someone publishes a statement that is inherently objectionable, and there is intent, causation and damages. Public disclosure of private facts is applied when someone publishes statements that are so private and sensitive in nature that any reasonable person would be adverse to having them disclosed. Although the subject matter is probably not sensitive enough to qualify as a public disclosure of private facts since it is simply a rumor of Paris being his "flame" and nothing highly sensitive, Bernie may be able to win on a
false light claim since this statement is objectionable to any married person, let alone one who is so involved in the community. Since Bernie has suffered significant damages in his professional and private life due to this information being published, damages are present as well.

Paris

Paris will also likely bring defamation claims against both Lindsay and Gus. Pursuant to the elements of defamation raised above, Paris will have to prove all three elements in tort plus falsity and malice since she is a public figure given her world famous persona. This means that Paris has no real claim against Gus since from the facts given, he will easily be able to defend a case against him based on the fact that he has no malice. Paris has a better argument for malice against Lindsay since she was fueled to make these statements to get back at Paris, but Lindsay will still defend on the element of falsity and Paris still has the burden of proving this which is difficult. Thus Paris' defamation claim is weak and she is probably better suited, like Bernie, to bring a claim for false light based on objectionable information that is published here. Paris' problem, unlike Bernie, is that she is world famous for being a "party girl." Therefore, any false light claim will be defended on the notion that the statements made about her do not necessarily putting her in any false light and any damages resulted from this since it is arguably in line with the persona she has created for herself. Based on the foregoing, I do not anticipate Paris having a strong case.

Gus

Gus should bring a claim of tortious interference with contractual rights. This claim is successful when a plaintiff proves that defendant knew of plaintiff's contractual relationship with another and intentionally acts to disturb this relationship by inducing the third party to end its relationship. In this case, Bernie intentionally contacted all of the clients he knew were advertising with Gus's newspaper and induced them to stop doing so. Bernie may defend by saying that Gus has no real economic interest with the advertisers since he is simply a columnist and not an owner. Gus will probably be able to win on this claim as long as he is able to show that he either had an economic interest in the newspaper's profits that was injured by this action or that he suffered economically as an employee because of Bernie's actions.

Lindsay

Lindsay is likely to bring a privacy tort claim against Bernie as well. Similar to Bernie and Paris, she could bring a defamation claim based on slander per se. The success of this claim would probably depend on whether or not Lindsay proves that alcoholism is a disease or a statement on moral character and thus under the realm of slander per se. If not, she would have to prove damages which she has not stated. She could obviously bring a false light claim or a private disclosure of facts claim which would depend on a jury's interpretation of the sensitivity of this subject matter. Bernie could defend a defamation claim on the basis that this is not a defamatory statement necessarily, but a real problem that Lindsay has. As previously stated, he could also claim there are no damages as this is not slander per se and she has no real damages caused by this statement.
Essay Question #7 – Contracts

Buyer needs a car. He and his wife agree to spend not more than $25,000. Buyer finds an ad in a local newspaper, placed by Auction Company, which is owned by Owner 1 and Owner 2, about an upcoming public auction. Buyer gets to the auction lot, bids on a Delorean, and wins the bid. The auctioneer yells “Sold for $75,000” to Buyer’s offer—three times what his wife had agreed upon—but the car is a collector’s item, a 1982 DeLorean in excellent shape, one of the few such vehicles in existence. He cannot believe his luck; the car is worth twice as much.

Buyer meets with Owner 1 right afterward and gives the car a closer inspection. Buyers gets Owner 1 to lower the price to $65,000 because of some minor transmission damage, and to accept a $5,000 down-payment. Although Owner 1 insists it is unnecessary, Buyer writes on the back of the check “$5,000 down-payment for $65,000 sale of DeLorean.” Buyer and Owner 1 also sign a standard sales contract setting forth the precise payment schedule. Buyer proudly drives the car off the lot with the title and registration papers to begin arranging for final insurance coverage, having already arranged for interim protection.

When Buyer’s wife gets home from work, she hits the ceiling at the news. Without Buyer’s knowledge, she calls the bank and stops payment on the check.

The next day Buyer gets a call from Owner 2. Owner 2 apologizes: it was all a misunderstanding. The DeLorean was not for sale and had been purchased by Owner 2 only as an investment. Owner 1, partner/co-owner of Auction Company, did not know of this or of the car’s true sales value. Somehow, the DeLorean wound up parked in the auction lot. Anyway, he had also been contacted by the bank about the canceled check. Owner 2 wants his car back.

Buyer still wants the car at the price he agreed to pay for it. He comes to your law firm. Your supervising partner directs you to prepare a memorandum analyzing all the claims and defenses.

Prepare the Memorandum

SAMPLE ANSWER A – CONTRACTS

MEMORANDUM

TO: Partner
FROM: Associate
RE: Buyer’s Contracts
Buyer has entered into various agreements concerning the purchase of vehicle. Some of these are valid binding contracts for which his performance is required and under which he has rights. Others amount to unenforceable agreements. Each is discussed below.

1) **Buyer’s agreement with wife**

Buyer and wife agreed to spend no more than $25,000 on a car. This agreement, though, does not meet the requirement for valid contract formation. In order to be validly formed, a promise must be exchanged for consideration. To be a contract, the agreement would have to be understood as a promise to pay no more than $25,000 for a car in exchange for the same promise from the other spouse. Because, under such circumstances each could buy a car, and neither would have breached his or her obligation, and such a result is clearly contrary to the parties’ intention, there is no real meeting of the minds. The agreement amounts to an informal understanding of the appropriate price to be paid for a vehicle.

2) **Buyer’s agreement w/ Owner**

Buyer entered a winning bid of $75,000 on the car at auction. A contract for goods exceeding $500 must be in writing to be enforceable under the statute of frauds. The “sale” for $75,000 was not binding until a written instrument reflecting the sale was produced.

Alternatively, even if some special auction rule accepted oral auction bids from the statute of frauds, the resulting modification of price would be valid. Under the UCC, contracts for goods can be modified in good faith as between merchants. In cases involving merchants and non-merchants, as here, a contract may nonetheless be modified with consideration. In this case, the merchant accepted a lower purchase price from the buyer in exchange for delivering a vehicle with defects undiscoverable and unknown to Buyer when he entered his bid. In essence, the first contract, if any, was mutually revoked and a second contract for a slightly different vehicle was entered into by Buyer and Owner 1.

Owner 2 will defend on several distinct grounds: that the Buyer repudiated or materially breached the contract, that Owner 1 could not validly have contracted without Owner 2’s consent and that the contract is voidable due to unilateral mistake (although this last ground may more rightly be attributed to Owner 1).

**The stopped Check**

Owner 2 will argue that the stopped payment on the check is either a material breach or an anticipatory repudiation. However, the contract has not specified that time is of the essence, and in any event, it is not clear from the given facts whether Buyer’s first payment has even become due. At most, seller can demand assurances from the buyer that the buyer will be able to perform the contract as it is written.

**Lack of Owner 2’s Consent**
Owner 2 will argue that Owner 1 did not have authority to contract without his consent. This argument fails because of agency and partnership law principles. A partner has apparent authority to act on behalf of the partnership. Thus the contract of any one partner is properly attributed to the partnership is principal. Owner 2 is bound by the contract Owner 1 made with apparent authority to make it.

Unilateral Mistake

In order for either Owner to establish that the contract is voidable through the doctrine of unilateral mistake, he must demonstrate that the non-mistaken party knew of or had reason to know of the mistake and took advantage of the mistaken party. Here, if Owner 1 were to defend on unilateral mistake grounds, Buyer could effectively rebut by offering evidence that he bought the car at an auction and thus could not have known of owner 1’s mistake as to the car’s value. However, the subsequent negotiations resulting in the $65,000 contract should have revealed that to Buyer that Owner 1 was mistaken as to the car’s value. Nonetheless, courts will generally not rule a contract voidable when the only unilateral mistake complained of is as to the value of the property in question. The other apparent “mistake” regarding the car – that it was parked in the wrong lot – was not known nor could reasonably have been ascertained by Buyer at the time of contract.

Thus, Buyer can probably overcome all defenses and enforce the contract for the purchase price of $65,000.

SAMPLE ANSWER B – CONTRACTS

This case involves the formation and enforcement of a contract (k) for the sale of a car. Under modern contracts law, a valid contract formation requires 3 things:

1) Offer – offer must clearly state the description of the good or service and price if applicable.

2) Acceptance – the party accepting the offer must accept in unequivocal language, including conduct.

3) There must be consideration provided by both sides for the contract to be valid. This is also commonly known as the bargain exchange Doctrine.

In this case, Buyer went to the public auction based on an ad in local paper. Advertisements are not generally considered to be offers. They are solicitations for offer. Thus, when the Buyer placed the bid of 75K for the car, he made an offer to the Auction Company. The Auction Company validly accepted the Buyer’s offer by shouting: “Sold for 75”. The consideration here is the Buyer’s implied promise to buy the car, and the Auction Company’s implied promise to sell Buyer the car. Under contract law, exchange of promises is valid considerations, unless the promise is illusory. Illusory promises are promises made by either party without placing them under any obligations to actually perform the terms of the contract. This is not the case here.
The Buyer reduced the sale price of the car down to 65K from the originally agreed price of 75K. Generally, the modifications of a contract require new considerations under the pre-existing duty doctrine. This doctrine states that one party is not liable for extern considerations if the other party is essentially performing the same service.

Here, the contract modification is valid because Buyer agreed to give 5K as down payment. This new consideration would make the modification valid. Even if the court does not consider the 5K down payment as adequate new consideration, in a UCC Article 2 contract, modification is okay if made in good faith. Buyer points out minor transmission damage, and reduces contract price is considered good faith.

However, Buyer #2 can claim that the contract is unenforceable due to a lack of written agreement under Statue of Frauds. Under Statue of Frauds, any sale of good (which is governed by UCC Article 2) over 500 dollars must be in writing. The original contract to sell the car was not in writing. Buyer can claim that he already has possession of the good, thus proper delivery is made and no Statue of Fraud writing is required.

Owner #2 can also claim unilateral mistake on the part of Owner #1, thus prevent the formation of the contract. However, the Contract Law of unilateral mistake states that: generally unilateral mistake on the part of one party is not sufficient to prevent the formation of a contract unless the opposing party has reasons to know of the mistake.

This is possibly Owner #2’s strongest argument because Owner #1 did make a honest mistake as to the value of the car and mistakenly put it up for auction. Normally this would not be enough to prevent the formation of the contract. However, the facts state that the Buyer knew the car was sold at half its value. Hence, Buyer potentially knew of Owner #1’s mistake. Thus, the contract would be voidable.

Buyer can claim that his knowledge of the true value of the car does not matter in this case due to the nature of the sale. The car was sold at a public auction and it is common that good sold at auctions can be sold for less than their true value. Hence, even though Buyer may know the car’s true value being higher than its sale price this does not imply that Buyer knew of Owner #1’s mistake in assessing the value of the car.

Owner #2 can further claim that Buyer’s wife cancelling checks constitutes a breach of the contract. When a party fails to perform his end of the bargain in a contract, the non-breaching party may sue for partial damages or full damages depending on the severity of the breach. In a sales contract, a breach is considered minor if there has been substantial payment on the good. The breach is material if the buyer makes no payment on the good. Material breaches entitle the non-breaching party for the full value of the contract.

In a UCC, however, seller generally has no right to reclaim goods sold for non payment unless they knew the Buyer was insolvent and demanded the return of goods with 10 days of delivery.

Here, Buyer was not insolvent at the time when he bought the car, thus, Owner #2 can sue for payment on the car, but has no right to reclaim title and possession of the car.