Essay Question #1 – Criminal

Amory and Barbara, 9th graders, are at the Mall one evening. They find a set of keys with a remote car door opener. The key chain has a Mercedes emblem. Amory pockets the keys, and after walking around the Mall for thirty more minutes, calls his twenty-one-year-old brother, Charles, for a ride home.

When Charles picks them up, they show him the key chain. He says, “Let’s see which car this opens.” Charles begins to drive through the parking lot, with Amory pointing the door opener out the car window and pressing the “Open” button at every Mercedes. They pass a Mall security vehicle while Amory is pointing the door opener out the window. After the cars pass, Barbara becomes worried and demands to get out of the car. Charles stops the car, and Barbara runs back to the Mall.

Amory’s operation of the door opener causes the lights to flash on a 2007 Mercedes. Charles immediately stops the car, and he and Amory jump out and approach the Mercedes. The vehicles owner, Edward, standing by his car, sees Amory and Charles coming towards him. He screams, attempts to run away but falls, knocking himself unconscious. Amory and Charles run back to the car, see that Officer Doug has seen Edward fall, and flee the Mall parking lot. Regaining consciousness, Edward uses his cell phone to call the local police department and give a partial description of Charles’ automobile and its occupants.

Amory and Charles immediately drive to their family’s home and park the automobile. Subsequently, their mother, Frances, takes this automobile to pick up dinner. She drives past Lt.
Gail, who has heard the description of the incident at the Mall over her police radio. Lt. Gail observes the car drive by and pulls Frances over. She asks Frances if she has been at the Mall that evening, which Frances denies. Using her flashlight to illuminate the interior of the car, Lt. Gail sees the key chain on the passenger seat. Lt. Gail orders Frances out of the car and searches its interior. In Frances’ pocketbook, Lt. Gail finds a vial of cocaine. Frances is arrested and in the course of her interrogation, she states her sons had gone to the Mall earlier that evening in that automobile. Lt. Gail then proceeds to the family home and knocks on the front door. Although no one responds, Lt. Gail can hear movement behind the door. She enters through an unlocked door, sees both Amory and Charles, and arrests them.

You are a clerk at the county prosecutor’s office. Your supervisor has asked you to prepare a memorandum on all possible charges that can be brought concerning the above incident as well as any defenses that can be asserted by any defendant.

Prepare the Memorandum

Sample Answer #1

MEMORANDUM

TO: Supervisor
FROM: Clerk
RE: Possible Charges

As per your request, I have prepared a memorandum outlining the possible charges and defenses regarding the present incident. My findings are as follows.

(1) Frances may be charged with possession of cocaine, and should not be convicted.

Possession of cocaine requires that the individual be in possession of cocaine without a valid excuse.

Here, the officer found possession in Frances’ purse that was in a car she was driving. As such, there is little doubt that the cocaine was in her control at the time, and she has met the requirements for a conviction for possession of cocaine.

The primary defense Frances may raise is that the cocaine evidence is not admissible. Such a defense is likely to fail, however. The exclusionary rule prevents the admission of evidence obtained by a government officer in violation of the warrant requirement without an exception to the rule. Here, the officer pulled Frances over. To pull a vehicle over, an officer must have reasonable suspicion that a crime has occurred. As the officer had been informed over the radio that a crime had occurred involving this vehicle, and the information was obtained from the victim of the crime, probable cause likely exists. Frances may argue that the description was only
a partial one and that she was a female old enough to have a 21 year old child -- not two young
boys – and thus that she did not sufficiently meet the description the officer had obtained. The
standard here is merely a reasonable suspicion, however, and thus the description from the victim
should be sufficient for stopping the car. The goal of limiting the risk of the suspects escaping or
causing more harm adds further credibility to the stop.

Once the vehicle has been validly stopped, the officer was permitted to look inside the vehicle
under the plain view doctrine, and any evidence viewed by the officer would be
admissible. Here, the officer saw the key chain on the passenger seat in plain view, confirming
that this was the vehicle used in the earliest incident. This confirmation would give the officer
probably cause to arrest the drive (who was currently in possession of the keychain as the drive
and sole occupant of the vehicle). Here, however an arrest did not occur and there was no valid
reason for the officer to search the interior of the car. The item in question (the keychain) was
already located, and the alleged assailants could not have been hiding in the purse. As such, the
officer would have had probable cause to arrest Frances, but did not do so, and thus no exception
applies permitting him to search the passenger compartment of the vehicle.

Frances in unlikely to be convicted of possession of cocaine.

(2) Amory and Barbara may be charged with larceny of the key chain, and this charge may
succeed.

Larceny is the unauthorized taking and carrying away of the property of another with the intent
to permanently deprive the rightful owner of possession.

Here, Amory and Barbara found the keys with the remote door opener in the mall. They then
picked up the opener, walked around with the opener for 30 minutes, and then called for a ride
home. Their actions of not turning the key chain in to mall security for 30 minutes and then
calling for a ride home shows that they intended to keep the key chain and take it home with
them. As such, they have committed larceny.

Although the two may allege that they are minors and thus cannot be charged with larceny, as
ninth graders they would likely be old enough to be charged with this crime despite their under-
18 status unless there were some unusual factors regarding their intelligence. IF the two are over
18, such an argument would have no merit.

(2) Charles and Amory may be charged with attempted larceny of the vehicle, but this charge is
likely to fail.

Larceny is the unauthorized taking and carrying away the property of another with the intent to
permanently deprive the rightful owner of possession. An attempted larceny requires that the
individual in question act with the specific intent to commit the crime.

Here, Charles and Amory have driven around the parking lot in an attempt to have the remote
signal which vehicle it operates. Although we can argue that his driving by a security vehicle
without turning the remote over (or asking what the appropriate action is) implies an intent to
keep the remote, Charles remained in the parking lot until he found the correct vehicle and approached the vehicle despite the fact that there was a man standing right next to it (who ultimately turned out to be the owner). Therefore, the facts would suggest that Charles actually intended to return the remote to its rightful owner, drove around until he found the car, and then approached the owner who was next to the vehicle to turn over the keys. His immediately stopping and stepping out of his vehicle (without parking it) further suggests that his actions were being taken in the open and that he intended to return to his car shortly (and thus not take the car away). Being that attempt of a crime requires proving that the defendant actually intended to carry out the crime, we are unlikely to succeed with this charge. As such, there is sufficient evidence to charge Charles with attempted larceny, but such charges are unlikely to result in a conviction.

Insofar as Amory is concerned, his youth will provide one defense, and his following Charles’ actions in finding the owner and returning the keychain will provide him with a similar defense to Charles on this suit.

In the event that charges are brought against Charles and Amory, their warrantless arrest at the home will likely be found to be permissible and will not serve as a defense. Although arrests in a suspect’s home normally require a warrant, the police may avoid this requirement may be waived when the police know the location of a suspect and knock and announce their presence before entering. Here, Frances has told the police the location of Charles and Amory, and that they are in their home. We will be able to argue that the police’s actions were appropriate, as they immediately went to the home to arrest these two suspects of a violent crime (assault). They knocked and announced their presence as required, and only entered when they heard noise in the home. As such, the arrest was appropriate with the knowledge of the suspect’s presence, the knock and announce, and the hearing of activity. Therefore, the arrest will not serve as a defense to any charges and will not serve to preclude any evidence for any charges.

(3) Assault may be charged against Charles and Amory, but it is likely to fail.

Assault is an intentional act causing reasonable apprehension of immediate harm in a victim.

Here, Amory and Charles approached the mercedes owned by Edward and Edward (who was next to the vehicle). Seeing the two approaching, Edward screamed and attempted to run away, at which point he fell. Amory is a ninth grader, and Charles is 21.

Clearly, Amory and Charles have engaged in an intentional act (walking towards the mercedes) which resulted in Edward being placed in fear (exhibited by his screaming and running). The key is whether Edward was reasonably in fear of Amory and Charles. There is no evidence that Amory and Charles engaged in any threatening action other than walking towards Edward; neither was armed. The prior circumstances also do not imply that Edward thought they were armed and attempting to steal his car; the facts state that the keys were found, not forcibly taken off of Edward. Although Edward may argue that there were two individuals approaching him (and he was alone), this would cause fear in a reasonable person, the credibility of this argument is limited by the fact that Amory is only a 9th grader and Edward was in a public place (with a security guard nearby).
As such, the conduct by Amory and Charles was not sufficient to place a reasonable person in fear of an immediate battery, and thus assault is unlikely to succeed against them.

(4) Conspiracy to commit larceny charge against Barbara. A conspiracy charge is likely to fail.

Conspiracy requires that two parties agree to commit a crime, and that the charged party actually intend to commit the crime. Some jurisdictions also require that the party also take an actual step toward completion of the crime.

Here, Barbara was in the car with Amory and Charles while Charles was driving and Amory was attempting to identify which car the keys belonged to. Barbara’s mere presence in the car, without more, will not suffice to be considered an agreement to commit the crime. Even if this was the case, Barbara would be innocent in jurisdictions requiring an action to complete conspiracy, because Barbara committed no actions in furtherance of the conspiracy once it was formed. Such a view is supported by Barbara’s exiting the vehicle shortly after seeing authorities and realizing that Charles failed to stop the vehicle to inform the authorities of his finding of the keys, and thus his true intentions.

As such Barbara is unlikely to be convicted of conspiracy.

Sample Answer #2

MEMORANDUM

TO: Supervisor
FROM: Clerk
Re: Charges

Amory & Charles

The possible charges/defenses with respect to Amory & Charles are very similar and will be discussed together. First, although there is a rebuttable presumption of no criminal liability when a suspect is under 14, Amory is taken to be 14 or 15, and Charles is 21, so neither could be construed as a child for liability purposes.

First, Amory found the keys in the mall and put them in his pocket. Larceny is a specific intent crime which requires a taking that is wrongful from another of the other’s property with intent to deprive the owner of possession at the time of taking. There is no evidence that Amory did not intend to return the keys to the “lost and found” or to Edward, the owner. Further, during the search for the Mercedes, there is no evidence to prove that Amory ever had the intent to steal the
car. He may have assumed finding the car would find the owner. Therefore, there is no evidence of intent to deprive Edward of the keys, or more importantly, the car. Amory can thus not be guilty of larceny. Likewise, that Amory fled after Edward fell is not evidence of guilt, but only that he may have been scared. Because there is no intent for larceny, there is also no intent to find Amory guilty of attempted larceny. Attempt requires the taking of a substantial step in furtherance of a crime. Since there is no evidence to find guilt of larceny, there is likewise no evidence to find guilt of attempted larceny.

All of the above is also applicable to Charles, since there is no evidence that purports to show that Charles had any intent to attempt larceny or commit larceny. Therefore, Charles may not be charged with either crime.

Charles’ statement “Let’s see which car this opens” is further not evidence of conspiracy. As discussed above, there is no evidence that either Charles or Amory had the intent to agree to commit an unlawful act.

Conspiracy requires intent to agree, agreement, and intention to commit an unlawful acts and in a majority of jurisdictions, an overt act. Again, neither Charles nor Amory has been shown to possess the intent to commit larceny. Therefore, neither can be convicted of found guilty of conspiracy.

When Lt. Gail arrives at the house of Charles and Amory, she arrested both illegally. Both Charles and Amory had a 4th Amendment right against illegal search and seizure. Such a right is guaranteed when a person is subject to government action and has a reasonable expectation of privacy. Certainly Charles and Amory had an expectation of privacy in their own home. Therefore, any arrest, especially of a person in his home, requires a warrant, unless an exception applies. Here, there is no exception and therefore the arrest of Charles and Amory was illegal.

Although the government may assert that it had consent to search the house from Frances, the presumed owner, who was presumably arrested and in Gail’s car, there is no evidence of any such consent.

Barbara

Barbara is likewise presumed to be 14 or 15 and so no defense applies with regard to her stating that she is not an adult.

Much of the analysis with respect to Amory applies to Barbara, of course only to the conduct with which Barbara was concerned.

There is no evidence of any intent to deprive Edward of the keys or his car on the part of Barbara. Therefore she is not guilty of larceny or attempted larceny. Further, any potential conspiracy with respect to Charles’s statement occurred after Barbara had been “picked up”. Although there is not guilt of conspiracy to Charles or Amory (which means Barbara is not guilty either), Barbara committed no overt act. Further, she at least attempted to withdraw from any
potential situation by getting out of the care and leaving. Therefore, there is no criminal liability on Barbara for anything.

**Edward**

Edward may try to assert that he was assaulted by Charles and Amory, which requires threat of an immediate battery. Although Edward fell and hurt himself, there is no evidence of a specific intent of Charles or Amory to commit a battery, which is a harmful or offensive touching and contact with the person. Therefore, Edward would not prevail on an assault charge.

**Frances**

Frances’s car was stopped legally because there was a reasonable suspicion that it had been involved in a crime. However, if Gail heard a “description of the incident”, she also heard Edward’s description of the “occupants” of the vehicle as well. This may serve to clear Frances of any reasonable suspicion since she was clearly not her 2 sons.

However, when Gail saw the keys in plain view, she was lawfully allowed to take Frances into custody.

The search of Frances’ pocket book, which was incident to a lawful arrest, was lawful because Gail was allowed to search the wingspan of Gail which presumably included her pocket book. Frances would try to assert that because the keys were confiscated, that Gail had no right to look in her pocketbook because there was no evidence for Gail to search for. However, Frances will likely lose because Gail may conduct a search incident to a legal arrest for weapons. The cocaine is thus admissible in Court.

Because Frances was in custody and being interrogated, she was lawfully due Miranda warnings. Because she was not given them, her statement that her sons went to the mall is likely inadmissible. However, because the fruit of the Poisonous Tree doctrine does not apply to Miranda violations, any potential illegality of Gail’s driving to the house and finding Frances’s sons will not hinge on the lack of Miranda. I refer any potential violations of the apprehension of the sons to that separate discussion above.

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**Essay Question #2 – Constitutional Law**

Xenophobia City (the “City”) has enacted legislation entitled the “Illegal Immigration Relief and Gun Control Ordinance” (the “Ordinance”) to combat what it considers an unacceptable influx of illegal aliens and rising violence. The Ordinance states “It is unlawful for any business entity to hire or continue to employ an illegal alien to perform work within the City.” Federal law, with an extensive regulatory regime, also prohibits employment of illegal aliens. City officials hope the Ordinance and the publicity associated with its enactment will discourage “foreigners” from
working and living there. The Ordinance’s gun control provision prohibits owning or carrying handguns within the City’s limits if they were not registered before January 1, 2008, and also requires anyone applying for a permit to submit to an iris scan for security purposes.

Amber, an illegal alien, works in a City firm. She fears losing her job and being deported. Amber also happens to be a gun enthusiast and maintains an arsenal of pistols in her City home. Last week, Amber’s application to register her weapons were rejected because she missed the deadline and refused to submit to the iris scan, as her religious principles forbid recordation of body images. Now, Amber is concerned her weapons will be confiscated.

Amber and an immigrant rights group (the “Group”) come to your law firm seeking advice on how they should proceed. Amber and the Group (which will finance the potential litigation on behalf of its membership) would like to challenge the Ordinance in federal court. They ask you to prepare a memorandum outlining the constitutional claims each may assert and the potential defenses they will likely face.

Sample Answer #1

To: Amber and the Group

From: Lawyer

Dear Amber and the Group:

Both of you may challenge the Ordinance as unconstitutional. The first issue is whether you have standing. I do not believe the Group does. To bring an action in federal court a party must have an injury in fact which is specific to that person, and the remedy granted by the court must redress any wrongdoing.

The Group is not specifically injured here. Each member must suffer a specific injury that is the same. Here, the Group will need to show this and should elect one member to go to court.

Amber may also have an issue challenging the Immigration part of the legislation because her case is not ripe. Ripeness means that the party has suffered an injury and is looking to the court to cure it. Here, Amber has not been fired from her job, so she has not been injured. However, an exception exists when the hardship that will be suffered is great. Amber can say that she will lose her job if the Ordinance is followed, and she may also be deported which is severe. Amber should therefore overcome the ripeness hurdle.

The next issue Amber can raise is that the State Ordinance is superceded by federal law and therefore is against the Supremacy Clause. Under the doctrine of Federalism and the Supremacy Clause, where the federal government intends to control an entire field with its legislation, the state is forbidden from enacting legislation in that area.
Here, it says that the Federal law has an extensive regulatory regime and prohibits the employment of illegal aliens. The extensive regime shows that although the Federal government did not openly say it was to govern this area, it is implied. Therefore, the state may not be able to even pass this legislation.

The State will argue that its legislation does not conflict with federal law and both can be followed by doing the same conduct, and should therefore not be superceded.

The next argument Amber can make is that the Ordinance violates her Equal Protection Rights. The Due Process Clause of the 5th Amendment is applied to the states through the 14th Amendment. The Equal Protection Clause applies 3 levels of scrutiny to government conduct which discriminates. Strict Scrutiny is applied to laws which discriminate based on suspect class, including race and alienage. In order to overcome strict scrutiny the State will have the burden of showing that the law is necessary to further a compelling state interest. It must be the least restrictive means possible. The law must also discriminate, either on its face or through its implementation.

Here, the law discriminates on its face because it singles out illegal aliens. The interest the City has is to discourage foreigners from living and working in Xenophobia. This is not a compelling interest. There are no facts indicating that aliens amount to a high proportion of criminals or there is overcrowding.

The law should therefore violate Equal Protection Clause.

Because the Immigration section of the Ordinance violates the Equal Protection Clause, Amber will most likely not have to challenge the law as a violation of Substantive Due Process. The Due Process Clause of the 5th Amendment is applied to the states through the 14th. It applies the same strict scrutiny test when the government infringes on a fundamental right.

The City would win the challenge because the law removes people from their jobs. Because working is not a fundamental right, a rational basis test will be used. The law will be valid if Amber shows it is not rationally related to a legitimate government purpose. Although the facts state no real interest other than publicity, the state may not be able to overcome this burden. However, the state will only have to create a valid interest and the law will likely be upheld.

**The Gun Provision**

Amber may also challenge the gun provision of the ordinance as being unconstitutional. The issues are whether it is an ex post facto law and whether the iris scan violates Ambers’ 1st Amendment rights to exercise her religion.

One important note is that the state can control the possession of firearms. The 2d Amendment’s right to bear arms is one section of the Bill of Rights that is inapplicable to the states.
An ex post facto law makes activity criminal which was previously legal. It punishes people for retroactive crimes, or crimes that happened in the past.

The ordinance is punishing those who hold guns without a permit. It does not seem to be punishing holding guns before the Ordinance took effect. Therefore, the Ordinance is most likely not ex post facto.

The requirement for an iris scan may violate Amber’s 1st Amendment rights. The issue will be whether Amber’s religious expression is being limited. The free exercise clause gives citizens the right to practice their choice of religion free from government intrusion. If the government does intrude on the exercise, strict scrutiny is applied. However, rules of general applicability which do not seek to limit exercise of religion are generally constitutional.

Here, the law requires everyone who wants a permit to get an iris scan. This section applies to everyone and seems to be in Xenophobia’s best interest. Eye tests should be administered before guns are registered to owners.

Therefore, Amber will probably not be able to rely on the Free Exercise Clause to find the Ordinance unconstitutional.

Overall, Amber, you should proceed with your case and Group, you should finance Amber’s suit because the affect of Amber’s decision will benefit you greatly.

Sample Answer #2

Amber and the group have the following potential claims: 1) the statute prohibiting the hiring of illegal aliens violates the 14th amendment’s equal protection clause or is invalid due to the Supremacy Clause; 2) the City’s handgun ban violates the 2d amendment’s right to bear arms and 3) the requirement of an iris scan violates Amber’s right to the free exercise of her religion.

The preliminary issue is whether Amber and the group have standing. Amber has standing on all three points above since the statutes cause her an injury. In fact, by making it illegal to employ her and threatening her with the loss of her guns and inability to get a permit. The group has organizational standing because members of the group such as Amber have standing to obtain a declaratory judgment against these statutes.

The first claim, to strike down the ordinance prohibiting the hire of illegal aliens, can be made most strongly on supremacy clause grounds. Federal regulations regarding the hiring of illegal immigrants preempts local (or state) laws on the same subject. Although the city will claim the statute is not preempted because it is complementary to the federal las, where, as here there are
extensive federal regulations that can be said to occupy the whole field even non-conflicting local laws will also be permitted. Further support for this conclusion comes from the fact that the federal government has sole power over immigration and this statute may be considered due to that.

The second argument against the anti-illegal immigrant statute is that violates the equal protection clause of the fourteenth amendment because it discriminates against illegal immigrants. Equal Protection claims are subject to varying levels of scrutiny dependent on whether the discrimination against the group is an insular minority who has been historically subject to persecution. Illegal immigrants are not considered to be a protected group and their claims will be subject to the rational basis test which will require them to prove the statute has no rational relationship to a legitimate interest. It is unlikely that this can be proven due to the burden of rational basis. The law is related to police functions of the state and will probably be upheld. A potential hope is that evidence that the law is based on hate or fear of “foreigners” will help show it is based on discriminatory motive not on a rational basis. (in the past the Supreme Court has shown sympathy to such arguments even in rational basis cases such as Doe v. Plyler, Cleburne, and Lawrence v. Texas, which applied what is commonly referred to as rational basis with bite). A better approach to challenging the law on equal protection grounds would be to recruit a legal immigrant who has faced difficulties due to the statute. In that case, since alienage is a protected category, if he could show an injury from the statute he can invoke strict scrutiny which would require the government to show that the law addresses a compelling government issue by the least restrictive means that cannot be shown here and the evidence of anti-foreigner bias should be enough for the invalidation of the ordinance.

No similar privileges and immunities claims is applicable here since no citizens are barred from working.

The second potential claim is that the gun control ordinance violates Amber’s second amendment rights to gun ownership. This claim’s value cannot be accurately evaluated at the present time. There is a current split whether the second amendment secures an individual right, and the majority of circuits have held that there is no right. The one Supreme Court case, Miller, is subject to varying interpretations. The issue is currently before the Supreme Court and a decision is likely by June. Even if the 2d Amendment secures an individual right, there remains the issue of whether it will be incorporated by the 14th Amendment. The Supreme Court has held that not all rights are incorporated. The Fifth Circuit has held that there is incorporation so may be found if there is an individual right. The case before the Supreme Court will not settle the issue because it involves D.C. not a state. The third unknown issue is what standard should be used. The D.C. Circuit in a similar case struck down a registration law by using strict scrutiny. The Fifth Circuit, in a dissimilar case, used a lower level of scrutiny. Therefore, my best advice would be to wait and see what the court decides is better before suing on that claim. It may also be advisable to recruit a citizen on that claim to avoid standing issues.

The third claim based on the free exercise clause of the first amendment to the U.S. Constitution is a weak claim. Under Smith, a facially neutral ordinance that incidentally burdens religion is valid unless a discriminatory motive can be shown. The ordinance is facially neutral and
appears to have security, not a religious purpose. A better bet would be to try a state constitutional grounds since many states have retained the old Yoder/Sherbert standard would require an accommodation if the law places a substantial burden on religious exercise unless the government can prove the ordinance is necessary to achieve a compelling government interest.

Essay Question #3 – Evidence

Vick is a quarterback with the Vultures. One year ago, federal law enforcement officials descended upon his home to investigate his possible involvement in dogfighting. Once inside, Investigator answered Vick’s telephone and heard the following: “Vick, this is Higgins. I’ve got those Rottweilers you said you needed for the dogfights. Come get them and bring cash.” The call ended. Investigator then turned his attention to the area around the home, where he found dogs and evidence suggesting the home was used in a dogfighting operation. Vick is then charged with promoting dogfighting.

During discovery, Vick’s attorneys learn that Pennington, the informant relied upon by law enforcement, was Vick’s rival. Pennington had no knowledge of any wrongdoing but made allegations to disrupt Vick’s season.

At the pre-trial conference, Vick’s attorneys moved in limine for a ruling excluding statements made by Pennington and by the caller to Vick’s home. As to Pennington’s statements, the prosecution argued the statements started the entire investigation and should be admitted. As to the call, the prosecution argued the jury should be made aware the caller believed Vick was looking for dogs for fighting. The judge granted the motion regarding Investigator’s testimony of the call, but denied the motion regarding Pennington’s statement. The prosecution also moved for a ruling excluding Vick’s witnesses from the courtroom during their case. Vick’s attorneys objected, arguing trials must be public to everyone. The judge nevertheless granted the motion.

At trial, Vick’s attorneys offer the testimony of the Vultures’ owner (“Owner”), who testifies about Vick’s work with the Foundation for Homeless Children. Before completing his testimony, however, Owner surprisingly states, “I always felt he did those things to cover-up something sinister.” Upon hearing this testimony, Vick’s attorneys then request to treat Owner as a hostile witness and to ask him leading questions about Owner’s attempts to cancel Vick’s long-term contract. The judge denies the request, stating, “You can only lead during cross-examination, counsel. Continue.”

In response to prosecution evidence linking the property to dogfighting, Vick’s attorneys call Cesar “the Dog Whisperer,” a certified dog trainer, to testify that Vick’s property was a licensed and functioning dog kennel. The prosecution objects, arguing that the case is about dogfighting, not about kennel operations and licensing. The judge allows Cesar to testify. The defense rests. In rebuttal to Cesar, the prosecution offers in evidence a certified judgment of conviction.
Sample Answer #1

Memorandum

To: Judge

From: Law clerk

In re: Evidentiary rulings

There are many evidentiary question in this case, Whether they are admissible or not are discussed herein, categorized by issue. It should be noted that all the evidence here is admitted or excluded pursuant to the federal rules of evidence.

TELEPHONE CALL

The phone call was properly admitted into evidence. The issue here is whether the phone call is hearsay and if it is, whether it fits into one of the many hearsay exceptions. If it is non-hearsay, the evidence is admitted.

Hearsay is an out of court statement offered by someone other than the declarant at trial offered into evidence for the truth of the matter asserted. Hearsay evidence will be excluded unless there is an exception. An out of court statement can be non-hearsay if it is to prove certain legal acts or legally operative facts (like an oral contract), effect on the hearer or listener, or the state of mind of the defendant.

It should be noted that this evidence is relevant. Relevant evidence tends to the make the existence of a fact that is a consequence to the outcome of an action more or less probable than without the evidence. This evidence would be very relevant because it will tend to make the existence of Vick's dogfighting charges more or less probable.

The telephone may not be hearsay. This evidence may not be offered for the truth that Vick needed the dogs for the dogfights, but for the fact that Vick has the state of mind that he is going to have dog fights. This evidence would be non-hearsay. However, if the evidence is being offered to show that there is dogfighting, which is for the truth of the matter asserted, then it is
inadmissible without an exception. It maybe admissible here if it to prove the state of mind exception to hearsay that has to do with perception, sensation and physical status. Here it can be admitted to show this.

The evidence will most likely be admitted because it is non-hearsay, but could possibly be an exception to hearsay also.

PENNINGTON'S STATEMENT

Pennington (Penn) made a statement leading to the dogfighting takedown of Vick. This evidence is inadmissible because it does not have the proper foundation to be admitted.

For a statement to be admitted into evidence, the person making the statement must have personal knowledge. This statement would be hearsay. Hearsay, defined above, would not allow statement into evidence that do not have truth and veracity. Hearsay is based on the principle that evidence will not be admitted if it does not pass certain safeguards. This is because the defendant does not have an opportunity to develop the statement and cross examine the declarant because they are out of court. This is precisely the kind of evidence that should be excluded because it was made for an improper purpose and without any personal knowledge what so ever, which is the first requirement for a statement when it is to be admitted.

Therefore, the exclusion of the statement is proper.

EXCUSING WITNESSES

Vick's attorney is incorrect in stating that all trials must be public to everyone. The issue is when the court must be kept open for others.

The federal rules state that a hearing can be kept from the public when there is a public policy concern to keep the hearing out of the ear of the public. However, most of the time, this requires that there be a significant reason to keep a hearing from the public. It is up to the judge as to whether the court should be open to public.

TESTIMONY OF OWNER

Vick's Attorney, "VA," will be able to ask leading questions to Owner because he is now a hostile witness. The issue is when one can ask leading direct questions on direct examination.

Leading questions should not be asked on direct examination and should only be asked on cross examination, however, there is an exception when there is a hostile witness. Leading questions can be asked on direct when the witness is hostile, does not remember certain facts, or is uncooperative.

When owner gave the surprising statements to VA, he then had the authority under the federal rules to ask him direct questions because he was no longer being a cooperating witness.
In conclusion, the direct examination should allow leading questions when a witness has become hostile.

CEASARS EXPERT TESTIMONY

Cesars expert testimony is permitted for the defense because the evidence relevant and the expert is qualified. The issue is the elements to qualify an expert and relevancy.

It should be noted that this evidence is relevant. Relevant evidence tends to the make the existence of a fact that is a consequence to the outcome of an action more or less probable than without the evidence. This evidence would be very relevant because it will tend to make the existence of Vick's dog fighting charges more or less probable.

If Caesar can show that Vick's property was a dog kennel and not a dogfighting arena, then the charges against him would be less likely to be probable. This evidence is extremely relevant and can only be excluded if the prejudice substantially outweighs the probative value.

An expert can be put on the stand when the issues he discusses will be helpful to the trier of facts. The expert must have the required knowledge, education, and skill to be an expert in the industry. Furthermore, the expert must show that he has conviction in his assertions as to what facts he is discussing. and finally, there must be proper factual basis, meaning the witness can be asked certain facts at trial, things can be brought to his attention in court, and he can give an opinion.

Ceasar is an expert in the field and if her can show the jury that he has dogs on his property for dog kennel purposes, then his testimony should be admitted.

Note- relevant evidence will be excluded if it leads to waste of time, undue delay, confusing the jury, misleading the jury, unfair prejudice and comprehensive information. If the testimony would lead to any of this, it would be excluded.

CONVICTION EVIDENCE

The conviction against Vick cannot be admitted because he has never taken the stand and there is no way for the impeachment evidence to be offered. The issue is whether the prosecution laid the proper foundation in offering the evidence or if it was proper at all.

Evidence of convictions can be offered against a witness when the conviction is within ten year, has to do with turhfullness, or is a felony. However, this will not be proper if the person the evidence is offered against is not the person the evidence has anything to do with.

The prosecution offered evidence of Vick's conviction in rebuttal to Ceasar's testimony. This was completely improper because it has nothing to do with impeaching him. had it gone to truth against ceasar, then it would have been admissible (following other guidelines). In addition, this evidence can only be offered against Vick to impeach him and he has not even taken the stand, Therefore, this evidence is improper and should be excluded.
Evidence that conforms with the Federal Rules of Evidence (FRE) and is relevant will be admissible. Relevant evidence is evidence that tends to prove or disprove an element of the case. We must look at each of the trial court’s evidentiary rulings and determine whether they are correct.

First, the trial judge denied Vick’s motion to exclude statements made by Pennington. In order to testify as to relevant facts, a witness must lay a foundation of personal knowledge. Here, Vick’s attorneys have learned that Pennington had no knowledge of any wrongdoing. Without personal knowledge, Pennington’s testimony cannot be used to prove an element of the case. As a result, Pennington’s testimony should be excluded.

Next, the trial judge granted the motion excluding statements made by the caller to Vick’s home. The statements would certainly be relevant, because they tend to prove an element of the dogfighting case. However, they are hearsay. Hearsay is an out of court statement offered to prove the truth of the matter asserted. The statements here were made out of court and are offered to prove that Vick was going to buy dogs to use for dogfighting, so they are hearsay. Hearsay evidence is inadmissible unless one of the exceptions is met. Some exceptions include party admissions and statement against interest. This would certainly qualify as a statement against interest, where a statement is made by a declarant that is against their own interest at the time. This statement would be incriminating against Higgins, so it would meet the statement against interest exception to hearsay. This statement is admissible.

Next, the trial judge granted a motion excluding Vick’s witnesses from the courtroom during the case. A trial judge may exclude witnesses from the courtroom if she feels it would unfairly prejudice a party. Here, the judge may have felt that Vick’s witnesses might be influenced by other testimony. It is within her discretion to exclude them from the courtroom. Only Vick has a constitutional right to be present during the trial. As such, the trial court’s ruling should be upheld.

Next, the trial judge denied Vick’s attorneys’ request to treat a witness as hostile and ask leading questions. The judge stated that an attorney can only lead during cross. This statement is not true. While most leading questions occur during cross, there are other times it is permitted. Leading questions can be asked to lay a basic foundation for a witness on direct to get them comfortable. Leading questions are also permitted for a hostile witness. A hostile witness is a party’s witness that offers statements against them on direct. Owner was clearly a hostile witness because he surprised Vick’s attorneys with damaging testimony. Leading questions should have been permitted. As such, the ruling at trial was incorrect.

Next, the trial judge overruled the prosecution’s objections to the testimony of Cesar. The prosecution argued that the testimony was irrelevant because it was about kennel operations and licensing, not dogfighting. Only relevant testimony is admissible at trial. Relevant testimony is that which tends to prove or disprove an element of the case. The fact that Vick ran a licensed
kennel on his property could provide a good reason for any interest of his in dogs. This is relevant testimony, and the trial judge was correct to admit it.

Finally, the judge allows in evidence of a conviction of similar dogfighting charges. Prior convictions are not admissible in the case in chief except for a few exceptions. One of those exceptions is modus operandi. A prior conviction could be used to show that this is how defendant operates. So the evidence would be admissible to show how Vick uses his kennels to promote dogfights. It could be a problem that it is not a felony conviction. It would not be admissible to impeach.

Essay Question #4 – Torts

Alan recently bought his dream vacation home in the mountains, a “fixer-upper” with a deck that jutted out over the river. During the summer and fall he worked on outdoor repairs, including replacing many, but not all, of the rotted railings on the wooden deck. In January, Alan invited his friend Todd, a licensed electrician, to his home for the weekend. They planned for Todd to do some needed indoor wiring and for both of them to get in some skiing.

After working indoors all day, Todd was relaxing on the outdoor deck. When Todd leaned against the railing it felt a little loose and wobbly, but he straddled the railing to get a better view of the icy river. Within thirty seconds, the railing gave way and Todd fell into the water. Alan heard a scream and a crash, raced outside, and saw that the railing had collapsed. As Alan ran down the steps he yelled to his wife to call 911.

Alan jumped into the water but could not rescue Todd. Within ten minutes the Township Volunteer Emergency Squad arrived. The only means of reaching the men was from the river bank. The ambulance did not have any rescue ropes on board, but did have a ladder. One Emergency Medical Technician (EMT), Larry, waded into the river with the ladder to try to reach the men, but he tripped and was swept away by the current. Since the ambulance was not equipped with any means of rescue, the second EMT immediately called the 911 operator to ask for the firefighters’ assistance.

The firefighters arrived forty-five minutes later, because the 911 operator had given them the incorrect address. Upon arrival, the firefighters used their 200-foot long ropes and rescued all three men.

All three men suffered permanent physical injury as a result of being in the water for more than thirty minutes. They file suit. They learn during discovery that there is no specific, state-mandated requirement for equipping an ambulance with 200-foot long rescue ropes and that the Emergency Squad receives some funding from the Township.

You are the clerk to the judge assigned to hear this case. Prepare a memorandum as to all causes of action Alan (the homeowner), Todd (the friend), and Larry (the EMT) can assert and the defenses available to each possible defendant.
Sample Answer #1

Todd v. Alan

Negligence Action – a negligence action involves a duty, breach, cause-in-fact, proximate cause and damages.

At issue in the Todd v. Alan action is what duty is owed to Todd. Typically, friends invited to stay at one’s house are considered licensees. If Todd was a licensee, Alan was required to warn Todd of all known dangers, including the rotted railing. As Alan did not warn Todd about the railing, he would be viewed as breaching his duty to Todd.

However, the facts also indicate that Todd was a licensed electrician who was at the house to aid Alan with repairs. Typically, repairmen and individuals who come onto the land pursuant to a business purpose or duty are considered invitees. A high duty of care is owed to invitees. Alan was required to inspect the premises and make it safe. As Alan failed to make the premises safe for Todd to come onto the land for repairs, Alan breached his duty of care to Todd.

Alan’s negligence was also the cause-in-fact and proximate causes of Todd’s injuries. Alan’s negligence is a but-for cause of the accident because “but for” Alan’s negligent maintenance of the railing Todd would not have fallen in the water. Alan’s negligence is a proximate cause because it is foreseeable that due to negligence maintenance of a railing a licensee or invitee may fall from the deck.

Finally, Todd suffered personal injury. He, therefore, has damages and can seek recovery from Alan (and/or) the Emergency Squad.

Defenses

Alan can raise the issue of assumption of risk. Assumption of risk is when a plaintiff knowingly and voluntarily assumes a known risk.

Alan will have a difficult time proving assumption of risk because Todd did not know that the railing was rotted. Although he did feel that it was a “little loose” and went onto straddle it, he probably did not appreciate the risk because he did not know of the rotted condition of the railings.

Depending on the jurisdiction Alan can claim contributory negligence as a complete bar to recovery or in a comparative negligence jurisdiction to reduce Todd’s damages. New Jersey uses the unit rule for comparative negligence. Todd’s recovery would be reduced because he
negligently straddled the railing when he knew it was loose. Alan could also implead the Township for the negligence of the Emergency Squad and 911 operator (if they are not already a party). However since the injuries are not distinct, or severable, or divisible Alan and the Emergency Squad would probably be jointly and severely liable. Todd could therefore sue either Alan or the Emergency Squad for the whole recovery.

**Larry v. Alan**

**Negligence Action**

A negligent tortfeasor has an independent duty to rescuers to refrain from conduct that poses an unreasonable risk of harm.

Although, Alan may argue that it was not foreseeable that Larry would fall into the water during his rescue, this argument would not be upheld by the court. Rescuers are deemed to be foreseeable and within the zone of danger (under the Cardozo view). Alan therefore owed a duty to Larry. He breached the duty by negligently maintaining the railings on his home. But for Alan’s negligent maintenance of the railing, Larry would not have needed to wade into the water to perform rescue.

Alan’s best defense against Larry’s negligence action is that typically one is not liable public/government rescue personnel such as firefighters and policemen. There is, therefore, an issue as to whether, Larry would qualify under this exception. He is a “volunteer” Emergency worker. Therefore, he may be able to defeat Alan’s defense because he is not receiving compensation for his duties and public policy would aim (to) justify Larry’s position. The Township would want to promote recruitment of volunteers and limiting Alan’s liability may discourage their recruitment process.

**Alan, Todd, Larry v. Township**

**Negligence Action**

As previously stated in a negligence action, the plaintiff must plead and prove duty, breach, cause-in-fact, proximate cause and damages.

The Township had duty to act with reasonable care under the circumstances.

The plaintiffs may claim that the town failed to act with reasonable care by not requiring the Emergency Squad to carry rescue ropes. The plaintiffs may also claim that the Township is liable for negligence of the 911 operator in relaying the address of the house to the firefighters under a theory of respondeat superior. Under the theory of respondeat superior, an employer is liable for the negligent acts of their employees committed within the scope of employment.

The Township’s attorneys may raise the defense that there is no specific, state statute requiring that an ambulance be equipped with rescue ropes. However, the statute, or absence thereof, only provides evidence of the minimum standards of the State. The fact there is no statute requiring
that ropes be placed on the Squad does not absolve the Town of liability. If there was a statute, it merely would have provided a basis for the plaintiffs to claim negligence per se.

The Township may also claim that Emergency Squad are not employees of the Town and they, therefore, not liable for their torts on a theory of respondeat superior. However, the plaintiffs may argue that the Emergency Squad receives funding from the Township. The Squad is, therefore, employee by the town and under their control.

Once the plaintiffs establish that the Town had a duty of care and that they breached that duty of care, they must establish causation.

The plaintiffs may argue that but for Emergency Squad’s failure to carry rope and the 911 operator’s failure to relay the right address to the firefighters, they would have been rescued earlier and not have sustained permanent physical injury. Additionally, the plaintiffs must argue that it was foreseeable they could sustain injury as a result the Rescue Squad’s failure to carry the appropriate equipment and the 911 operator’s negligent transmission of Alan’s address.

Finally, the plaintiffs must prove damages, which as previously discussed, they are capable of proving.

In defense, the Township may assert any negligence on the part of the plaintiffs. As previously discussed, Alan and Todd were both negligent. The Township would probably be joint and severally liable for Todd and Larry’s injuries with Alan. Todd and Larry could recover the full amount from either tortfeasor because they both caused indivisible injuries to two of the plaintiffs.

Additionally the court would apportion liability for Todd’s negligence under comparative. If Alan is capable of recovering under the jurisdiction’s comparative negligence statute, his negligence would also reduce his recovery from the town.

Sample Answer #2

Todd the friends first claim is against Alan the homeowner. Todd can sue allan for negligence under a theory of landowner liability. Negligence requires four elements, Duty, Breach,
Causation, and Damages. In this case the duty is probably determined by Todd's status on the land if the majority categorical approach to landowner liability is followed. (note the minority is reasonable care to all persons lawfully on the land). Under the majority approach Todd would probably be an invitee because he was invited on the land by Alan to provide alan with some benefit (the wiring work). Based on this Alan would have a duty to protect Todd from all known dangerous artificial conditions on the land and to inspect for hidden dangers. If Todd had been a mere social guest then he would be a licensee and Alan would not have to inspect but would still have to warn Todd of all dangerous artificial conditions. Here Alan breached this duty by not repairing all of the rotten railings and failing to warn Todd of the rotted railing. The next question is causation. It is likely the court will find that the breach proximately caused Todd's injuries even though there is a question as to how much he would have been injured if the firefighters had been on time or if the EMT's had had the proper lines because the courts have held that a negligent rescue is reasonably foreseeable and does not work as a superceding cause to break the chain of causation. Finally, Todd suffered permanent damages in the form of permanent injuries. The only question or defense here is whether a reasonable person would have realized that the rails were rotten because they "felt a little loose" and if a reasonable person would have straddled the railing to get a better view of the icy river. If this is deemed to be not reasonable Todd would be either contributorily or comparatively negligent for his harm. If the jurisdiction uses contributory negligence Todd would be barred from suing completely. If the jurisdiction uses comparative negligence Todd would either have his recovery reduced by his level of fault (pure comparative negligence) or reduced unless his fault exceeded Alan's (modified comparative negligence.) Note this behavior of straddling the rails could also be considered the assumption of risk of falling. In most states where a person voluntarily assumes the risk of injury any recovery is barred. A court could find that by straddling the loose rails to get a better look Todd assumed the risk of falling and should therefore recover nothing from Alan for his injuries.

Todd can also potentially sue the 911 operator for giving the incorrect address. In order to succeed on this claim Todd would have to prove that the 911 operator owed a duty of reasonable care by beginning to assist in his rescue. That this duty was breached and that this breach proximately caused him damages. Todd would argue this was breached when the operator negligently and unreasonably gave the incorrect address and that this extra time in the water is what caused his permanent injuries. The potential problem here would be to prove that the firefighters would have rescued him in less then 30 minutes if they had not been delayed and arrived 45 minutes later. If this could not be proven the lateness would not be a legal and proximate cause of Todd's damages and he could not recover despite any negligence by the 911 operator. Todd's negligence in his original accident would probably not be a defense to a negligent rescue as doctor's and medical providers cannot use the original cause of harm to justify negligent treatment and rescue (such as in a medical malpractice situation).

Todd could also potentially sue The Emergency Squad for not having 200 foot long rescue ropes or in the alternative for having no other means of rescue other then the ladder. To do this he would have to prove that they had a duty to him once they began their rescue and that this duty was breached by not having the ropes. The fact that these ropes are not required by law is not dispositive though it would probably be strong evidence that the EMT's did not violate their duty of reasonable care. It would be questionable however whether an EMT should have reasonably
have more means of rescue then just a ladder. The jury may consider the custom in the industry to determine the standard of reasonableness here. If the jury was to find that such conduct was unreasonable and that absent this unreasonable conduct Todd would have been immediately saved the Emergency Squad would probably be liable to Todd. Another problem here is that the EMT's might have some claim of sovereign immunity due to the fact that they receive some funding from the Township. The question would be if the funding was enough to make them a de facto township agent and if they were engaging in a government function. If there is sovereign immunity it can only be waived by the township or state through a pertinent Tort Act (such as the Federal Tort Claims Act). The fact pattern is silent as to whether such an act exists but absent such an act a lawsuit would be barred jurisdictionally. Finally, a good samaritan act may prevent todd from suing his rescuer for simple negligence in the rescue though these acts are usually only applicable to private citizens and not to Emergency Rescue Groups.

Allen could potentially sue the Emergency Squad and 911 operators under the same theories as Todd (lack of rescue ropes or other means of rescue and wrong address see above). However, since Allen, unlike Todd, had a duty to rescue Todd his negligence in causing the position of peril would also extend to injured rescuers which would probably make Allen comparatively or contributorily negligent for his initial negligent conduct lessening or preventing his own recovery. Also, the 911 operator and Emergency squad could argue that by attempting rescue Allen assumed the risk of his own injury. In most states where a person voluntarily assumes the risk of injury any recovery is barred. Under these facts, Allen voluntarily waded into the river to rescue Todd and could probably be seen as assuming the risk of his own injury. Finally, the same defense of sovereign immunity would apply to Allen with respect to the Emergency Squad if they were found to be a government agency.

Finally, Larry the rescuer can probably sue Allan for his initial negligence. The law states that a negligent party is liable for all foreseeable injuries and to all foreseeable plaintiffs. The courts have held that rescuers and medical providers who are injured during a rescue are foreseeable plaintiffs as a matter of law. This means that the negligence of Allen against Todd (as an invitee in regard to the failure to warn of the rotten railings see above) will be imputed and used by Larry to recover for his injuries. However, this may be barred by a Firefighter Rule or similar statute. These rules work to insulate persons who start fires or emergencies from the injuries sustained by those who are attempting to rescue them or their property from some peril. Occasionally, these laws have been extended to other types of rescue personnel such as police or emt's. There are no facts to be able to discern whether such a law exists in this jurisdiction.

Larry can also sue the 911 operator for giving wrong information under the analysis for Todd and Alan above. The question again would be whether the delay actually was the proximate cause of Larry's injuries and whether the 911 operator owed larry a duty when she began her rescue of him.

Larry probably cannot sue his own Emergency Squad even if they are found to be negligent for not having more rescue equipment because such a claim is probably barred by the Worker's Compensation statute of the state as the Emergency Squad is larry's employer and he was injured in the scope of his employment.
Essay Question #5 – Property

Arnold owns a large tract of land. From 1980 through 1990 Arnold permits commercial waste haulers to dump garbage on his land. In 1995 residential homes are built near Arnold’s land.

In 2000 Barry, a waste hauler, asks Arnold if he can deposit garbage on Arnold’s land. Arnold agrees. Arnold tells Barry he will charge him based on the quantity of each deposit. He tells Barry that each time he comes on the land, Arnold will designate the area where he can dump his garbage. Barry sends Arnold a note stating: “I agree to your terms.” Barry commences depositing garbage on Arnold’s land.

Arnold constructs several new roads on his land to allow Barry access to different areas to deposit garbage. This construction causes water to run off Arnold’s land and onto the surrounding residential properties. When it rains, these properties flood.

The owners of the surrounding properties tell Arnold to stop the dumping on his land. They complain of terrible odors, and they fear vermin may infest their properties and harm their children. They want Arnold to address the flooding in their yards. They tell Arnold if he does not act quickly, they will sue him.

Arnold mentions the property owners’ concerns to Barry. Barry tells Arnold he will sue Arnold if he is not permitted to continue dumping on Arnold’s land.

Arnold comes to your law firm. He wants to know what his rights and obligations are and how he should proceed. You are the associate asked to prepare the memorandum setting forth all potential claims that might be brought against Arnold by the property owners and by Barry (other than a breach of contract action by Barry), all Arnold’s possible defenses and the likelihood of success of each claim.

Prepare the memorandum

Sample Answer #1

This memo addresses the various claims that may be brought against Arnold for activities on his land by (1) neighboring property owners and (2) Barry, a business acquaintance.

(1) Claims by Neighboring Property Owners
(A) Nuisance

The property owners living near Arnold’s tract of land complain of “terrible odors” and accumulation of vermin on his land. The neighbors may sue Arnold for nuisance if they can prove that Arnold’s activities are substantially interfering with their enjoyment of their land. Property owners have a right to use their land in a manner that maximizes their enjoyment and productivity of and on the land. Where one property owners use of land substantially impairs another property owners use and enjoyment of land, courts will weigh the relative burdens and benefits of the conflicting parties. A nuisance arises if the detriment to one property owner is greater than the benefit enjoyed by another property owner in using his land. When a court finds a nuisance, the suing party is entitled to injunctive relief if they show that pecuniary damages are not sufficient, they are asserting a valid right, that the equitable relief requested is enforceable, and the burdens to P outweigh the benefits of D.

In this case, Arnold’s use of land as a waste repository substantially impairs the ability of his neighbors to enjoy their land due to the offensive odors associated with the garbage and the possibility of vermin making their children ill. However, Arnold enjoys an economic benefit from allowing Barry to dump garbage on his land. Nonetheless, the benefit enjoyed by Arnold (money) is likely outweighed by the burden suffered by many neighboring property owners. Thus, there is a valid claim for nuisance. Further, the court should grant injunctive relief because money damages will not make the property owners whole, they have a right to enjoy their land, the burden to neighbors exceeds the benefits reaped by Arnold, and a court can easily enjoin Arnold from permitting the disposal of garbage on his land. Arnold’s best defense is to show that the neighbors complaints are unreasonable and that the benefits to him exceed the burdens on the neighbors: Arnold is likely to fail on this showing.

(B) Surface Water -- Common Enemy

Arnold’s neighbors have threatened to sue for the flooding of their property resulting from the diversion of surface water from Arnold’s land to their land caused by roads built on Arnold’s land to facilitate garbage dumping.

At common law, water on the surface of land is viewed as a “common enemy” and landowners are entitled to divert the water in any manner off of their land. Under this rule, the fact that Arnold’s roads divert surface water onto neighboring lands (which results in flooding) does not give rise to a cause of action.

However, many jurisdictions have adopted a more modern approach with regard to surface water, finding that landowners may divert the common enemy of surface water in any reasonable manner so long as it does not cause detriment to the land of others. Under this modern approach, Arnold’s neighbors can sue him for the flood damage on their property and can seek an injunction to prevent him from continuing to allow surface water to drain onto their land. The showing for an injunction is discussed in part A, and the case of the neighbors is boosted by the fact that this harm is likely to continue each time it rains absent the granting of injunctive relief.

(C) Possible Defenses
Arnold used his land for waste collection for 10 consecutive years prior to the construction of the neighboring residential area. He is attempting to argue that this put property owners (who built their homes 5 years after Arnold stopped using his land for waste) on notice of his activities and serves as a bar to suit. However, Arnold had not used his land for waste collection for 5 years prior to the building of the homes, so it is not reasonable to estop them from suing for nuisance or trespass to chattels (via the flooding) they did not have reason to believe that Arnold would resume using his land for waste collection.

(D) There are no valid claims by neighbors for restrictive covenants or equitable servitudes b/c the facts do not suggest that there was ever a written instrument controlling land use.

(2) Claims by Barry

(A) Barry may attempt to sue Arnold for violating the terms of a lease of land or easement for a specific use if Arnold refuses to allow him to continue dumping waste on his land. However, any interest in land must be evidenced by a signed writing describing the land and the respective rights of the parties due to the statute of frauds. These facts do not indicate that there was a valid writing conveying an interest in land, as the written acceptance by Barry does not satisfy the requirements of the statute of frauds (signed by party being sued, describes land and interests of the parties).

Rather, the facts suggest that Barry has a license to use Arnold’s land for his garbage dumping. Unlike a conveyance of an interest in land, a license is freely revocable. Thus, Arnold is free to deny Barry from continued use of the land. A license is a mere privilege granted by the landowner to make some specified use of the property and it may be freely revoked. Thus, Barry’s best hopes of recovering anything from Arnold would be to sue Arnold for damages under an equitable theory that he reasonably relied on a promise or assurance by Arnold to his own economic detriment and that Arnold could have foreseen such damages.

Sample Answer #2

To: Partner

From: Associate

Re: Claims against Arnold

Claims by the property owners

Private nuisance:
The property owners can file a tort claim against Arnold for private nuisance and will likely succeed. The issue is whether Arnold’s use of his property substantially interferes with his neighbors’ use and enjoyment of their own property.

A property owner may bring a claim for private nuisance against an owner whose use of his land substantially interferes with another’s use or enjoyment of his/her own land. Here, the neighbors complain of terrible odors, and they fear that vermin may infest their properties and harm their children. A nuisance substantially interferes when it is such that it would annoy or aggravate an ordinary person within the community. Here, the complaints are such that they would annoy an ordinary person within the community. Ordinary persons would not wish to be subjected to horrible odors from waste in the vicinity of their homes on a constant basis. In addition, an ordinary person would be upset if a nuisance may subject his/her property to infestation by vermin (which can cause disease and other negative health problems, damage to the homes, etc.). Thus, the property owners will likely win a private nuisance claim against Arnold.

Arnold may attempt to defend by claiming that the neighbors came to the nuisance since he was there first, but this is not a valid defense and would be rejected by the court.

Injunctive relief:

The homeowners may also bring a suit for injunctive relief and would likely succeed. In order to have standing to request injunctive relief, a plaintiff must show irreparable injury, and causation and redressability.

Here, the homeowners would have to show that the odors or the vermin infestation would cause irreparable harm if it continues. The odors, although offensive, would not suffice to show irreparable harm. The vermin infestation, however, may do so because contracting a disease from a rodent could possibly cause irreparable harm. Thus, the property owners would be allowed to sue for injunctive relief and would likely succeed.

Trespass to land:

Finally, the property owners may sue for trespass to land. The issue is whether the run off of surface water constitutes a trespass.

Trespass occurs where a defendant has caused a physical invasion on the property of another. The physical invasion may be direct or indirect. Here, Arnold constructed new roads to allow Barry access to different areas to deposit garbage. The construction caused water to run off Arnold’s land and onto the surrounding residential properties. By constructing the roads, Arnold has indirectly caused the surface water to run onto the neighbor’s properties. Thus, a trespass has occurred. The trespass itself need not be intentional. The act which causes the trespass need only be intended.

Arnold may defend by asserting that a property owner has the right to cause surface water to be removed from his land. Surface water is viewed as a common enemy. Thus, a property owner may rid himself of surface water. Any attempts at doing so, however, must be reasonable in the
way it affects other surrounding properties. Here, Arnold is not using his land for residential purposes and did not intentionally cause the water to run off. The court, however, may find that his use is unreasonable because he is not getting rid of the water to protect his land. It is just a side effect of allowing waste to be dumped on his land. The side effect is affecting the surrounding properties to a great degree as well because it is causing flooding. Thus, a court would likely find that Arnold needs to do something to cause the land to run so that his neighbors properties aren’t being flooded.

Claims by Barry

Easement in gross:

Barry may sue Arnold to ensure the continued use of his property by claiming that he has an easement in gross. Barry will not succeed. The issue is whether Barry’s use of Arnold’s property entitles him to an easement in gross, and whether the statute of frauds applies.

An easement in gross exists where the use of the property confers a pecuniary or personal advantage upon the holder of the easement at the expense of the servient tenement. Here, Barry is a commercial waste hauler. He is using the property to dump garbage there. Thus, the advantage Barry gains is not related to any of his own property (there is no dominant tenement). He is gaining a pecuniary advantage because it is beneficial to his business.

Arnold may raise the defense of the statute of frauds and will likely be successful. Any transfer involving real property requires a writing. Here, the facts indicate that the only writing that existed was Barry’s note which stated: “I agree to your terms.” The writing does not describe the land or the material terms of the contract (who, what). In addition, for the writing to be useful, it must be signed by the person who is asserting the defense of statute of frauds. In this case, Arnold would have needed to sign any writing in reference to this transfer. Thus, the statute of frauds will apply and Arnold will have a valid defense.

License:

Barry may claim that he has a license to use the property and he will likely succeed. However, Arnold will be entitled to revoke the license. The issue is whether the oral grant of the easement created a license, and whether Arnold will be estopped from revoking the license.

A license allows a person to use the property of another for a particular purpose with that person’s permission. Generally, it is freely revocable. Where an oral agreement fails due to the statute of frauds, courts will generally find a license. Here, there was an oral agreement to grant an easement. Thus, the court will likely find that Barry has a license.

Arnold, however, may assert his right to revoke the license. Barry could attempt to argue that he relied on the license and will be harmed by it, but this will not likely succeed. The property is not unique or necessary, and Barry did not expend any money in regard to the license. Barry is a commercial waste hauler. Presumably, he owned the trucks he used to haul the waste prior to his
agreement with Arnold. Thus, he incurred no financial debt based on the agreement. As such, Arnold will be allowed to revoke the license.

Essay Question #6 – Contracts

On January 12, 2007, Seller sent Buyer a written offer to sell and install a sprinkler system ("sprinkler") for $225,000. On February 2, 2007, Buyer sent Seller Purchase Order 1234-07, which identified Seller as the vendor and set installation for September 15, 2007.

Before February 2, 2007, and without Buyer’s knowledge, Seller reached an agreement with Installer. Installer would install the sprinkler and receive $100,000 for installation and $50,000 for Seller’s past due account payable to Installer.

On February 3, 2007, Seller faxed Buyer the following letter:

“Seller’s joint venture partner, Installer, will install Purchase Order 1234-07. Seller hereby authorizes Installer to invoice Seller and collect the $225,000. Buyer shall make payment in the name of both Installer and Seller.

Acknowledgment of Invoice Conditions outlined above:

Please sign and make a copy for your records.”

Before receiving the February 3rd letter, Buyer did not know about Installer’s involvement. Buyer’s CEO handwrote the following notation on the February 3rd letter: “As I understand this, you want me to pay $225,000 for the sprinkler. Check should be payable to Seller/Installer.” Buyer then signed and returned the letter to Seller. Buyer neither spoke nor dealt nor had any previous dealings with Installer.

Because Buyer had poor credit but wanted the sprinkler early, Buyer’s CEO called its largest customer, Green Meadows, and said, “I have a proposal for you. I have ordered a $225,000 sprinkler. If you guarantee my payment for the sprinkler, I will discount our current lawn maintenance agreement with you by twenty percent (20%). If you agree, please call Seller and Installer directly and let them know the guarantee is legitimate.” Green Meadows’ CEO responded, “Sounds good, we accept.” As promised, Green Meadows called and informed Seller and Installer.

Buyer’s plan worked. Installer installed the sprinkler ahead of schedule on April 15, 2007. On April 15, Seller sent Buyer a $225,000 invoice, which only referenced Purchase Order 1234-07; the invoice did not mention Installer or the February 3rd letter. Seller then sent the same invoice to Installer except Seller typed on Installer’s copy, “make check payable to Seller and Installer.” On April 25, Buyer sent Seller a $225,000 check made payable to Seller. On April 30, Seller deposited the check into Seller’s account and failed to pay Installer.
You have been asked to write a memorandum discussing contractual claims, defenses and remedies of all the parties.

Prepare the memorandum

Sample Answer #1

MEMORANDUM

To:       Jersey Partner
From:   Associate
Re:       Buyer, Seller, Installer and Green Meadows Question

This memorandum addresses your inquiry regarding the contractual situation related to the sprinkler system purchased by Installer. The contractual causes of actions are discussed below organized by the point of view of Installer, who is the most peripheral and damaged party in the situation.

Preliminary issue: nature of Seller-Buyer contract

As a preliminary issue however, the first question is as to whether or not Seller and Buyer had a valid contract between the two. In this situation it appears that both Seller and Buyer were contracting for goods and services -- a sprinkler system that was to be installed. The Uniform Commercial Code applies to goods, which it defines as anything tangible that is movable. Services are not covered. In the cases where there is a mix of goods and services for the purposes of the provisions of the Code, the Code will apply to the goods.

The Uniform Commercial Code ameliorates the strictures of the common law requirements of a contract -- offer, acceptance supported by consideration with a meeting of the minds. Instead, an offer may be made by one party to the other and the expression of acceptance and willingness to enter into the agreement is enough to form a contract. Here, the facts indicate that on January 12, 2007 Seller sent Buyer a written offer to sell and install the sprinkler system for $225,000. There was a definite and complete term as to what was being sold and what the price would be. Buyer manifested his intent to enter into the agreement and their accept the offer by sending on February 2, 2007 her Purchase Order as the vendor and setting an installation date for September 15, 2007. Note that at common law, the additional term of September 15, 2007 would have violated the so-called mirror-image rule and constituted instead of an acceptance, a counteroffer to the original offering party. But, the UCC allows for the addition of terms that do not materially alter or contradict the existing agreement. Here, the additional term for an installation is not a term that contradicts or materially alters the existing agreement.
The February 3, 2007 letter that Seller faxed Buyer arguably also did not materially alter or contradict the original agreement. The new language was directed towards identifying Installer as the one to install the sprinkler and it also further specified the name of the payees as Installer and Seller. The previous September 15 purchase order identified Seller as the vendor and made no mention of the installer or the manner of payment. Therefore, these terms of the February 3 document were incorporated into the agreement between Seller and Buyer.

Even if the February 3, 2007 communication was a counteroffer with materially new terms, Buyer's CEO who handwrote a notation on the letter restating the terms was an acceptance that created a contract.

Therefore, there was a valid contract between Buyer and Seller with the conditions stated and reaffirmed on February 3, 2007.

Installer versus Seller

Installer may sue Seller based on a theory that he was assigned rights to the Seller-Buyer contract.

Parties may assign their rights to other parties absent any contrary provisions in a contract. Even non-assignability clauses will be construed to limit delegation and not the assignment of rights, unless the language explicitly indicates otherwise. The assigned party then generally has the power to sue the other party for its rights. Assignment of rights may be gratuitous (which become irrevocable if they are written) or they may be made with consideration. Such a legal assignment per contract law may be analyzed according to the contract rule that both parties must have legal detriment in order for it to constitute a valid contract.

Here, the facts indicate that Seller and Installer had a valid agreement, because Installer bargained its detriment to install the sprinkler for $100,000 as well as $50,000 from Seller's past due account with Installer. Seller's detriment was that he would be foregoing some of the money from the sale of the sprinkler system to assign that money to Installer.

The facts do no indicate that there was a term as to how the monies were to be distributed to Installer. But the term remains that there was to be an assignment of a portion of the proceeds from Buyer to Installer. Because Installer did not receive the $150,000.00 it was promised, it can sue Seller based on a theory of breach of contract and receive the full contract price.

Installer versus Buyer

Installer may sue Buyer based on a theory that he is a non-incidental third party beneficiary with rights breached.

A third party-beneficiary is one who is a non-trader; that is he is not one of the two contracting parties initially, but instead receives a benefit from the arising contract. Her rights are that she is owed the benefits, if her rights vest. A non-incidental beneficiary is one that has rights owed to
it. There are a number of ways that her rights may vest, she may perform detrimentally on
reliance of the contract or she may merely sue a party.

Here, Installer is a third-party beneficiary (creditor, according to the old First Restatement
terminology, which distinguished between creditor and donee beneficiaries) because she was to
receive a portion of the monies as noted in the contract between Buyer and Seller; the payment
from Buyer to seller was to be payable to Seller/Installer. Installer performed to his detriment,
relying on the payment when he went ahead and installed the sprinkler system. Thus his rights
vested upon his acts that he relied to his detriment.

Installer can sue Buyer based on this theory and recover the promised amount to him of the full
$225,000.00. This full amount is correct because that is what the original agreement between
Buyer and Seller stated. Buyer may then sue Seller for contribution for his payment to Installer.

Installer versus Green Meadows

Installer may sue Green Meadows, but he will not prevail.

A surety is one who promises to pay the debts of another. At common law there was a distinction
between a surety and a guaranty, based on either the promise to pay or the ability to stand in the
shoes of the debtor via subrogation, but these distinctions have disappeared with time and almost
invariably surety encompasses the general notion of one who promises to pay the debts of
another in a contractual sense. The relevant legal requirement here is that sureties are subject to
the Statute of Frauds and requires a signed writing, by the party to be charged in order for it to
satisfy the Statute.

Here, the agreement between Buyer and Green Meadows satisfies all the mechanics and
requirements for a contract -- offer, acceptance and consideration -- but it is missing the writing
requirement, since all the transactions were done orally. Therefore, the contract will not
enforceable by a court.

Installer consequently is not able to sue Green Meadows, nor anyone for that matter.

Sample Answer #2

BUYER

A contract requires an offer, an acceptance of that offer, consideration, and a lack of defenses to
the formation of the contract. Consideration is the bargained for detriment or benefit given in
exchange for the other party's return detriment or benefit.

A sale of goods will be determined under the Uniform Commercial Code (UCC) and a mixed
contract will be determined on the greater part of the contract. In this case, the contract is
primarily for the sprinkler system, so the UCC will apply to the sale and the installation portions of the contract.

In this case, Buyer formed a valid contract with Seller for the sprinkler system on February 2, 2007, when the buyer sent the acceptance of the Seller's written offer.

Buyer is liable to Seller for the purchase price of the sprinkler system under the original contract.

In this case, however, the Seller has assigned his right to payments under the contract to a 3rd party, Installer. Under the February 3, 2007, fax, the entire rights to all monies have been transferred to Installer. While this might have been objected to by Buyer, the CEO for Buyer sent back a handwritten note acknowledging the changed beneficiary to Seller/Buyer. Since this is a UCC contract and both parties are merchants, this changed provision is non-material so it will become part of the contract if no objections are received in 10 days.

Buyer has now breached the changed contract term by sending the check to the wrong party and payable to the wrong party. Under the UCC, each side is required to tender perfectly. The failure to send the check with the correct payee is a breach. (If this had not been for a sale of the sprinkler system, then the parties would only be required to make substantial performance.)

Buyer may assert the Statute of Frauds to try to void this contract term. The Statute of Frauds requires a writing on any sale of goods over $500. The writing must include at least the quantity term and be signed by the party against whom the enforcement is sought. Because of the handwritten note coupled with the written purchase order, this defense will not succeed. Buyer will be liable for the payment.

Finally, if Buyer defaulted on the payment under the contract, Green Medows was a surety to pay the agreement. (Please see Green Medows discussion.) If Green Medows had been required to pay, Buyer would have been liable to Green Medows.

SELLER

Seller has a valid contract with Buyer and is required to provide the sprinkler system. (See above)

Seller also has a valid contract with Installer. (Please see below for discussion.)

Seller is liable to Installer for the misappropriated payment. Installer had provided consideration for the creditor-beneficiary so the Seller could not withdraw the assignment. As a result, Seller had no right to take the money from Buyer. Thus, Seller is liable to the Installer for the $150,000.

Finally, if Buyer has to pay Installer, then Seller is liable to Buyer.

INSTALLER
Installer is the 3rd party delegee and assignee of the seller's obligation to and from the buyer. In other words, Installer was to perform the duties that Seller had promised to Buyer. Installer was also supposed to receive the benefit that Buyer would pay to Seller. Because the assignment of the money was in part payment on a existing debt, Installer is a 3rd party creditor-beneficiary. The rights for Installer vest when Installer assented to the assignment and agreed to take this as a accord for the loan. As a creditor beneficiary, Installer may "stand in the shoes of" the party that originally assigned the debt. This means that Installer can sue Buyer under the original contract terms.

Thus, Installer may sue Buyer under the original contract. Buyer's defense will be in equity that he already paid Seller. However, Buyer sent back the handwritten changes indicating that he was aware of the assignment. Buyer's remedy in that situation is to sue Seller for the money.

Installer may also sue Seller under the terms of the assignment. Seller had formed a valid contract for Installer to both do the work and remove a preexisting debt. This preexisting debt then has become part of the new agreement, called accord, and Installer cannot sue under the prior debt. Seller is liable for the agreement to pay Installer.

GREEN MEDOWS

Green Medows has formed a contract to be a surity, meaning they will guarantee the payment from Buyer in case the Buyer defaults. A contract requires an offer, acceptance, consideration, and no defenses to the formation. In this case, Buyer has offered to discount the current agreement with Green Medows by 20% if they will promise Seller that Green Mountian would pay the invoice if Buyer defaults. The acceptance of this forms a valid contract between Green Mountian and Buyer. Seller is the intended third-party beneficiary of the agreement, in that they receive the assurance for the payment.

Usually, the Statute of Frauds requires that a contract to be a surity must be in writing. In the situation where the surety is primarily acting to benefit themselves, the statute of frauds requirement is waived. In this case, Green Medows is receiving a 20% discount on a prior agreement for this new obligation. Thus, the statute of frauds is not a defense of the formation.

Green Medows will be liable to Seller if Buyer defaulted. Since buyer did not default to Seller, Green Medows has not liability.

**Essay Question #7 – Civil Law**

You are an associate attorney in a law firm. Your supervising partner presents to you the following assignment for client, Escrow Agent.

**Part I**
Buyer and Seller entered into a contract under which Buyer was to purchase a business from Seller for $800,000. Buyer made a 10% ($80,000) deposit against the purchase price, which, pursuant to the parties’ written contract, was deposited with Escrow Agent. The escrow terms provided the deposit would be (i) paid to Seller at closing, (ii) returned to Buyer if the closing did not occur through no fault of Buyer, or (iii) paid to Seller as liquidated damages if Buyer breached the contract.

Disputes arose between Buyer and Seller. Buyer asserted a right to cancel the contract and demanded return of the deposit. Seller claimed cancellation was a breach, by which Seller was entitled to retain the deposit. Buyer and Seller both demanded that Escrow Agent release the escrowed monies to them. Escrow Agent advised them he could not release the monies to either without consent of the other. Each then sent notice that unless the monies were released to him immediately, he would sue Escrow Agent and seek damages and attorney fees. Escrow Agent has come to your office for advice. Partner instructs you to prepare a memorandum for the client (i) discussing what legal proceedings could be initiated by Escrow Agent to avoid being named as a defendant in a lawsuit or to enable Escrow Agent to obtain a resolution of the threatened claims, and (ii) explaining how each such procedure would be pursued and how it would protect Escrow Agent.

Prepare the First Memorandum

Part II

Despite your advice, Escrow Agent did not act promptly. Buyer and Seller have both filed suit against Escrow Agent, which have been consolidated in a single action. For reasons you accept as valid, your supervising partner has determined Escrow Agent cannot obtain dismissal or summary judgment, and must defend the lawsuits. Partner directs you to prepare a memorandum to the Escrow Agent identifying the discovery procedures you will use to gather facts and information to prepare for trial, describing and explaining the differences among the procedures you identify.

Prepare the Second Memorandum

Sample Answer #1

MEMORANDUM

TO: Supervising Partner
FROM: Associate Attorney
RE: Escrow Agent Case
As per your request, I have reviewed the Escrow Agent file issues. My findings are as follows. Importantly, any action taken by Escrow must be undertaken promptly, as a filing of suit by either Buyer or Seller may deny him the right to these actions.

(I) Suggested course of action for escrow agent to avoid being named a defendant.

(a) Escrow should file an action for declaratory relief.

When grounds for a suit are sufficiently clear but neither party has yet committed a wrong, the party risking committing a wrong may file an action for declaratory relief so that they may avoid committing the wrong.

Here, there is a defined and clear threat of a suit. Escrow agent must undertake one of two actions -- paying the escrow funds to the buyer or the seller -- and each action will likely result in a lawsuit and possible liability. As such, rather than committing a wrong, Escrow may request that the court provide him with guidance as to what the appropriate action is. Escrow may then follow the court's guidance with the protection of a prior judicial decision on the matter.

(b) Escrow should file an interpleader action.

Traditionally, a suit occurs between a plaintiff and a defendant, with the two parties arguing about proper possession of an item, be it an actual item or damages. One disadvantage of this format is that when there are multiple plaintiffs and multiple suits filed against the defendant regarding a single item, the multiple cases may both be resolved against the defendant, effectively rendering him liable twice for the same item.

The solution for this dilemma created by the courts is the impleader action. In this action, the party with current possession of the item in question may bring suit against both of the parties with a desire for the item in question -- when it is known that one of the two other parties has a legal claim to the item -- and permit the two other parties to argue the claim without exposing himself or herself to liability.

Here, Escrow has possession of the escrow funds, which both Buyer and Seller have a desire for. It is known that either Buyer or Seller has a legal right to these funds, but it is not clear who has this right. As such, separate suits by Buyer and Seller against Escrow may result in Escrow being held liable twice for the funds, once to Buyer and once to Seller. Therefore, Escrow has the option of filing an interpleader action to resolve the issue of possession of the escrow funds.

(II)

MEMORANDUM

TO: Escrow Agent

FROM: Associate
RE: Discovery Procedure

Below, I have discussed the different discovery procedures that may be used in our pursuit of this action on your behalf.

(1) Interrogatories

One tool that we will be using to obtain additional information in this suit are interrogatories. Interrogatories are simply questions asked to another party in a case regarding the case. Under the New Jersey rules, we may ask as many interrogatories as we like, as long as they are relevant, are not intended to harass the other party, and there is no protective motion filed against further interrogatories. The answers to these questions must be accurate after a reasonable investigation by the answering party, and the answering party is under a continuing legal duty to correct the answers if later obtained information or developments reflects that these answers are incorrect. If the opponent does not answer these questions in a reasonable period, penalties -- such as fines and determinations in our favor -- may be assessed. This method of discovery is mutual, and the plaintiffs may make similar requests of our office.

Interrogatories will be used by our office on your behalf to obtain basic information that can be clearly asked and answered. For instance, we will request the addresses and other contact information of the parties with this device. Using this device, we will request important dates in the development of the sales contract, such as when the buyer asserted the right to cancel the contract, when the seller alleged a breach had occurred, when the house went on the market, when the sales agreement was made, etc. Information regarding the specific damages and their amounts will also be obtained through this device, as this evidence is helpful in determining the validity of the liquidated damages clause.

Notably, form interrogatories may also be required in this area. These are interrogatories that are required to be answered in all cases of a certain type.

(2) Depositions

A second tool that we will be using is the deposition. This is simply a session during which we ask another person -- be it a party or another individual -- to verbally answer questions in real time. Like interrogatories, we are not limited in our reasonable use of this method, and this method is mutual between parties. Importantly, this is the only way to obtain information from non-parties to the suit, and if used on a non-party, we must request their appearance by subpoena and request that they bring any documents we wish them to produce.

Depositions are helpful for learning about more intricate issues that need deeper questioning depending on the answer given. For instance, a thorough understanding of the grounds of the alleged breach should be developed through this method in questioning both the buyer and the seller. We should also attempt to discover in detail why the parties agreed on $80,000 as the deposit, as this is relevant for determining the enforceability of the liquidated damages clause. (Such a clause is valid only if the actual damages were not predictable with reasonable accuracy and the amount is not a penalty). Additionally, if any other parties were involved in the
breach, we will need to obtain their depositions prior to trial and have them bring any desired evidence at that time.

(3) Request for production.

We can also request that the other parties produce certain documents we find necessary, to the extent that such production is reasonable, the materials are not privileged, and the production does not place an undue burden on the producing party.

Here, we should request that the Buyer or Seller produce the sales agreement, any necessary information regarding the house, and any information concerning their claimed damages or breach. Documents regarding damages would include documents setting for the extra costs in finding a new home for the buyer, extra costs in finding a new buyer for the seller, and any losses resulting from these respective actions.

(4) Request for inspection.

We can also request the opportunity to inspect relevant items for your defense of this claim.

This would involve going to the property in question and reviewing the tangible cause of the buyer's assertion of the right to cancel, if it was related to the property.

Sample Answer #2

MEMORANDUM

TO: Partner/Escrow Agent

FROM: Attorney

Since New Jersey civil procedure primarily follows the federal rules with regard to the procedural rules at issue in this case, we will refer to the applicable New Jersey rule and highlight any differences with the federal rules.

PART I

Interpleader Action

Escrow Agent could commence a state court or federal court interpleader action. EA can bring the action in federal court if there is a federal subject matter jurisdiction. Since the amount in dispute is $80,000, this meets the amount in controversy requirement assuming the buyer and seller are from different states which satisfies diversity jurisdiction. Also, EA could bring an
action for intervention if there is already lawsuit in progress between buyer and seller and wants to avoid being impleaded as a third-party defendant by either.

An Interpleader action can be brought by a party who seeks an adjudication regarding property which he/she has in his/her possession and no one has yet commenced a lawsuit. This would appear to be the most appropriate type of proceeding to commence based on the given facts.

If either Buyer or Seller had previously commenced an action, then EA could commence an intervention action whereby a non-party to an existing litigation can ask to participate in the case since the parties already in the case will not be able to adequately represent the non-parties interests.

Here, since both Buyer and Seller already threatened to sue EA prior to any litigation commencing, it is clear that neither will adequately represent EA’s interests in any litigation that is actually commenced by either Buyer or Seller.

EA could also file a declaratory judgment action against both Buyer and Seller. Such actions seek equitable relief from the court by requesting a declaration by the court of the party’s respective rights in relation to a given dispute. Based on the facts given, this would be another good choice for EA since he could ask the court in such an action to render a decision regarding the proper disposition of the $80,000 deposit.

Finally, EA could ask a NJ Chancery Court to provide equitable relief and hold the $80,000 as a constructive trust until buyer and seller can settle their dispute. This way EA cannot be accused of fraud or collusion with either party and the deposit will be kept safe.

PART II

1. Written Interrogatories

EA can serve written interrogatories upon both Buyer and Seller to determine the nature of their allegations against EA and as against each other. In federal court, each party is limited to 25 interrogatories including subparts and must file a motion if it wishes to serve additional interrogatories. Upon service of interrogatories, the responding party would have 35 days to serve its response (30 days under the federal rules).

2. Requests for Production of Documents

EA can serve requests for production of documents on the other parties seeking any and all relevant documents to the lawsuit. Relevant is much broader than admissible as applied to both interrogatories and requests for production so material/information that is inadmissible may still be required to be produced if the material may reasonably lead to the discovery of admissible evidence. As with interrogatories, a party responding to requests for production must serve its response within 35 days (30 days in federal court).
If a party fails to respond within the required time, the seeking party may file a motion to compel; and if a response is still not forthcoming, file a motion to strike pleadings or defenses.

3. **Depositions** (oral and written)

Any party may seek the oral or written deposition of any party or non-party upon proper notice (45 days written) or (10 days oral).

Here depositions would be the most useful mechanism next to obtaining copies of the written contracts between the parties, to determine what each party’s understanding was with respect to the disposition of the deposit monies.

4. **Requests for Admissions**

May be served by any party on any other party upon 45 days notice and if not responded to within that time, the matter for which the admission is sought is deemed admitted.

Responding party must admit, deny, or give reason why they cannot admit/deny to each allegation.

5. **Mental/Physical Exams**

Where consent is an issue as it is here, EA can request such an exam to determine whether B & S were physically mentally capable of entering into a contract. Notice of 35 days required.

In federal court, party seeking such an exam must file a motion.

6. **Expert Disclosure**

EA may want to retain an expert to testify on his behalf.