Essay Question #1 - Torts

Todd and Lisa have been best friends since childhood and now attend the same college. Todd was celebrating his 19th birthday with friends at the local pub. He sat at the table, and his 22-year-old friend bought pitchers of beer and refilled Todd’s glass all night.

Todd saw his former roommate, Alan, walk into the pub with his arm around Lisa. Alan and Lisa began arguing. Todd heard them yelling and then saw Alan raise his hand to Lisa. Todd rushed over and confronted Alan about Alan’s treatment of Lisa.

Todd shoved Alan. Lisa moved away because she knew Todd had a bad temper when drunk, and she could tell Todd had been drinking. Lisa screamed when she saw Todd shove Alan. Alan fell over a chair and then toppled onto Lisa, pushing her to the ground. As a result, Lisa fractured her leg.

Our State law has a Dram Shop Act and provides that no alcohol shall be served to anyone under 21.

Lisa wants to bring a civil suit for damages. You are an associate to the partner who asks you to prepare a memorandum that addresses all potential claims. Lisa may have and include any possible defenses.

Prepare the memorandum

Sample Answer #1 – Torts

Memorandum Re: Potential Civil Suit: Lisa
1. Negligence action against Todd.

Lisa may have a claim in negligence against Todd for her injuries. The elements of negligence are: i) duty, ii) breach, iii) causation, and iv) damages. All four elements are present here. Todd owed Lisa a duty of reasonable care as a person with physical proximity to him not to engage in activities that could harm her. The duty of reasonable care dictates that individuals should act with the same degree of care as a reasonably prudent person under the circumstances. Todd breached that duty where he shoved Alan because shoving Alan was outside of the scope of how a reasonable person would behave under the circumstances. Todd shoving Alan was both the actual and proximate cause of Lisa’s injury. But for Todd shoving Alan, Alan would not have fallen over a chair, toppling onto Lisa, and causing her broken leg. This constitutes actual cause. Todd was also the proximate cause in that it was foreseeable that shoving Alan while Lisa was standing there might possibly cause him to stumble into her. There were no intervening forces between the shove and Alan falling onto Lisa. Finally, Lisa suffered damages in that she was physically injured - she broke her leg. Negligence actions are actions of law and Lisa may be entitled to recover her medical expenses and pain and suffering. Ultimately, the jury will determine whether Todd actually breached his duty to Lisa under the reasonable person standard.

Todd may assert defense to the negligence claim. He may assert that Lisa was not a foreseeable victim and that his actions were not a proximate cause of her injuries. However, under the Cardoza approach, Lisa was within the zone of foreseeable victims and therefore Todd will be held liable for her injuries. Todd might also claim that Alan’s stumble, or the placement of the chair, are superseding forces relieving him of liability. The jury will ultimately decide, however, Alan’s stumble over a chair is a foreseeable result of having been shoved by Todd.

Todd’s intoxication will not be a defense. He is reasonable for acting like a reasonably prudent sober person - an objective test - regardless of any actual impairment at the time.

Finally, Todd may assert a defense of others defense. When someone reasonably believes that another person is in imminent danger, and that that person would be entitled to use self-defense to defend themselves, a third party may use the same degree of reasonable force to defer the threatened party. Here, Todd may claim that he reasonably believed that Lisa was in danger because Alan raised his hand to her, and that he acted in her defense. A party defending themselves or another should use only the degree of force necessary to defend themselves against the threatened force and should not escalate the physical confrontation. Here, a jury would decide whether Todd's actions were justified in Lisa’s defense based on the reasonableness of his belief and the imminence of the perceived threat, and would determine whether or not it is available as a defense based on the reasonableness of the force used to defend Lisa. If it was found reasonable and justified, it might negate the element of “breach” in the prima facie negligence case, and therefore relieve Todd of liability.

2. Lisa v. Todd’s friends in negligence.

Lisa might also explore a negligence case against Todd’s friends based on their breach of a duty of care in serving Todd alcohol even when he was visibly intoxicated. Under per se negligence, the fact that his friends violated the Dram Shop Act Statute may provide proof of a breach.
Where a party violates a Statute, and the subsequent harm is the type of harm that the Statute was intended to protect against, that violation acts a conclusive proof of a breach of duty (unless not violating the Statute would have resulted in even greater harm - which is not the case here.) Here, Todd’s friends violated the Dram Shop Act by serving alcohol to Todd, someone who is under 21. Therefore, it is necessary to consider whether injury to a third party based on the served-minor’s violence or negligence is the type of harm that the Statute seeks to prevent. In this case, a jury would likely conclude that it was.

Therefore, Lisa may be able to sustain a negligence claim against Todd’s friends.

The friends, in their defense, will claim that they are not the proximate cause of the accident because Todd’s violence was an unforeseeable act that broke the chain of causation between serving Todd alcohol and Lisa’s injury. Lisa may respond, however, that, like her, Todd’s friends know or should know that Todd gets violent when he is drunk and therefore a barroom brawl is a foreseeable consequence of serving under-age Todd. They may also assert that Alan’s threatening gesture was an unforeseeable intervening act.

3. Lisa v. the local pub, in negligence.

Lisa may bring a suit against the local pub for allowing Todd to imbibe alcohol there in violation of the Dram Shop Act. The same analysis applies here as to Todd’s friends. At issue will be whether the shop knew that Todd’s friends were supplying him with alcohol or should have known, or negligently allowed it to happen. Also at issue will be the proximate cause - is the pub’s negligence in allowing Todd’s friends to give him the beer that the pub sold to legally - 22 year olds a proximate cause of Lisa’s injury? This is a more tenuous link. Lisa may want to consider joining Todd, Todd’s friends, and the bar as joint and severally labile defendants, allowing her to collect full damages for any party, and leaving it to the jury to apportion percentages of fault and leaving the defendants to collect through contribution claims from one another.


It is worth noting briefly that Lisa may have a cause of action against Alan for assault - intentionally causing her apprehension of imminent bodily harm or offensive touch, because he raised his hand at her. This is a different remedy, though, any recovery would not be related to the damages that she suffered to her leg.

5. Lisa v. Todd for battery.

Though transferred intent. Lisa may be able to collect for battery through transferred intent, where Todd intentionally caused an offensive tough against Alan that lead to an offensive touch against her. However, this action would fail because Todd didn’t actually have any contact with Lisa.

Lisa was in the zone of danger when Todd hit Alan and it caused her distress because she screamed. This would fall, though, because she does not manifest the necessary physical manifestations of distress for negligent infliction of emotional distress and her distress is probably not severe enough to qualify under intentional infliction of emotional distress.

Sample Answer #2 – Torts

To: Porter
From: Associate
Re: Lisa’s case
As per your request, this memorandum addresses possible claims and defenses in Lisa’s civil suit. As detailed above, Lisa has viable claims in tort against Todd’s friend, the Bartender and Bar Owner, Alan, and Todd.

A. Claims v. Todd’s friend: Negligence and Strict Liability.

The issue is whether Todd’s friend may be liable for Lisa’s damages simply by virtue of him having knowingly served beer to Todd, in violation of state law. The friend can likely be held liable for negligence, and perhaps for strict liability.

1. Negligence claim v. the Fraud

To bring an action in negligence, the plaintiff must show 4 elements 1. Duty; 2. Breach; 3. Causation (actual and legal causation) and 4. Damages. We owe duties to foreseeable victims of our negligence. The issue, therefore is whether it was foreseeable to the friend that serving alcohol to Todd could lead to harm to a third party. If so, serving the beer would be a breach of that duty with Todd’s resulting acts causing Lisa’s damages. The standard is that of the reasonably prudent person under the circumstances. Here, given that Todd’s other friend (Lisa) knew Todd’s tendency to get belligerent when drunk, this friend likely knew the same, and he therefore breached his duty to the victim (Lisa included) of the behavior his getting Todd drunk caused.

In the alternative, we can use “negligence per se” against the friend. To assert negligence per se, plaintiff asks the Court to import a statute, which as beer violated, as the relevant standard of care. Here, because state law makes serving alcohol to those under 21 illegal, we might be able to use that statute to stand in for the duty the friend owed, and the consequent breach. To use the statutory standard of care in a negligence per se case, the plaintiff must show that this was the class of person and class of risk the statute aimed to address. Here, clearly, protesting those too immature to drink from harming themselves and others falls within the scope of the statute’s aims.

2. Strict Liability Against Friend
The “no serving alcohol” statute is a strict liability statute. The issue is whether the friend may be strictly liable as well for serving the alcohol to Todd at less than 21 years. It is unclear whether the statute applies only to bar owners, but if not, we can use this against the friend as well - since his vision of the statute led to Lisa’s damages.

3. Friend’s Defense

The friend may raise several defenses. First, he may argue he was not the “cause in fact” of Lisa’s damages, i.e. Todd must have shoved Alan even if sober, due to his affection for Lisa and his anger at seeing her threatened.

He may also argue that Lisa was contributorily negligent in not stopping the fight, given that she knew Todd’s propensities. Note, however, contributory negligence is no defense to strict liability. Finally, friend may argue he was not the proximate cause of Lisa’s injuries either, or the grounds the chain of events was not foreseeable.

B. Lisa’s claims v. Bartender and Bar Owner

Lisa can likewise bring negligence and strict liability claims against the Bartender and Bar Owner. Under a Dram Shop Act, third parties can sue Bartenders for negligence in serving alcohol in such way that persons likely to cause harm to others as a result of their intoxication. Here the bartender saw a young man filling his glass all night, and perhaps knew of his belligerent propensities. It therefore was unreasonable to keep serving him, thereby establishing negligence under the Dram Shop Act. The Bartender also can be liable under the same negligence per se and strict liability analysis that applied to the friend.

Further, the Bar Owner can be held vicariously liable for the torts of his employee (the bartender) in the scope of employment. Thus, we can sue the Bar Owner for negligence and strict liability as well.

1. Bar’s Defenses

The Bartender and Bar Owner’s defenses will be that Todd’s actions were not reasonably foreseeable; that Todd would have acted this way even if sober (i.e., Todd was the actual cause in fact); and that Lisa was contributorily negligent. But these defenses, although applicable to negligence, would fail in the context of strict liability.

C. Claim v. Alan

Lisa can sue Alan for assault and perhaps, battery. Assault is the intentional action in another person of the threat and can immediate battery. Here, Alan’s conduct - yelling and raising his hand - clearly constitutes an assault.

Battery is the offensive touching of another person. Here, Lisa can try to sue Alan for battery, since he fell out and knocked her down.
Alan, however, may raise a defense to battery first, he may defend against battery on the ground that battery is an intentional tort and his touching of Lisa was the cause of Todd’s shoving, not Alan’s intent.

(Lisa may also have an intentional infliction of emotional distress claim against Alan, depending on what Alan was saying to her when he was yelling and this tort requires outrageous conduct and severe emotional distress).

D. Claims v. Todd

Lisa may sue Todd for battery and negligence. The issue is whether Todd can be liable for battery of Lisa even though Alan is the one who fell on her. Because Todd caused intentionally the act of offensive touching (by pushing Alan), he is likely liable for battery. The doctrine of transferred intent may also apply. Under this doctrine, Todd’s intent to commit battery of Alan can be transferred to Lisa’s harm as well.

Todd can also be sued for his own negligence given his history of violence when drunk, it was not reasonable of him to get so drunk, and damage to others from his conduct when drunk was reasonably foreseeable. (Note - Todd likely can’t be held “negligent per se” since he falls within the class of persons the “over 21" law seeks to protect.)

Todd’s Damages

Todd’s defenses will be, first, that his battery was privileged because he was acting in defense of others. A person can use force to protect others as long as the amount of force used is reasonable and the threat to the other person is imminent. Here, it appears Todd may have acted reasonably in trying to prevent Alan from harming Lisa.

Todd may also argue that Lisa was contributorily negligent or that she assumed the risk because she knew of Todd’s dangerous propensity when drunk, but did not try to stop him from defending her.

As always, please let me know if you need any further assistance on this matter.

Return to Top

Essay Question #2 - Criminal

Officer was investigating a series of prescription drug overdoses involving students at Ward College (“WC”). Bart, a prior confidential informant for Officer, was the bartender at the WC pub. Officer asked Bart to see what he could find out about the overdoses.

Lou, a WC graduate student, went to the pub. Bart poured drinks for Lou and himself. After a few rounds, Lou switched to water, but Bart continued drinking vodka. The conversation turned to the overdoses at WC. Bart commented, “Anyone who had access to opiate-based pain pills or signed prescriptions could make a fortune.” Lou responded, “I didn’t even think about that.”
Later, an intoxicated Bart called Officer and reported Lou admitted he “did it.” Officer secured a valid warrant for Lou.

Lou went to see his Aunt to borrow money. His Aunt lived across the street from Lou on Birch Lane. His Aunt, however, could not help him because she had hurt her back and was out of work. She asked Lou to get her pain pills from the kitchen. As he retrieved the opiate-based pain medication, Lou recalled Bart’s comment and jotted down the address of Doctor.

Later, Lou went to Doctor’s office, which was closed. He discovered an open window and crawled into the office. He broke into Doctor’s cabinets and found opiate-based pain pills, a prescription pad, and a letter bearing Doctor’s signature, all of which he pocketed. He exited the office and entered the elementary school next door. Lou tried tracing Doctor’s signature onto the prescription slips but gave up. He crumpled the illegibly-signed prescription slips and threw them along with the pain pills into the wastebasket.

Looking for Lou, Officer mistakenly went to Aunt’s house and knocked on the door. Aunt yelled from the couch, “Who is it?” Officer identified herself and asked if she could come in to get Lou. Aunt responded, “Uh, yeah, he’s not here.” Officer entered the house. While looking for Lou, Officer found a clear bag containing five ounces of marijuana under Aunt’s bed.

Meanwhile, Bart left the pub and started home. He heard someone yell, “He’s the rat who told police about the beer at our frat party. You pledges better get him.” As Bart frantically ran across the parking lot, he saw a woman closing her car door and grabbed her. Ignoring her screams, Bart pushed his way into the car and stepped on the accelerator, causing the car to lurch forward. At that moment, one of the pledges chasing Bart stumbled in front of the car. Although Bart swerved, the car hit the pledge and killed him.

You work for the Public Defender’s Office. You have been asked to prepare a memorandum identifying (a) the elements and factual basis for the potential charges against each defendant and (b) the elements and factual basis for the defenses or motions defendants can assert in response to the charges.

Prepare the memorandum

Sample Answer #1 - Criminal

Dear Public Defender’s Office Supervisor:

Please find below a memoranda identifying (a) the elements and factual basis for potential charges and (b) the elements and factual basis for the defenses or motions defendants can assert in response to the charges stemming from the Ward College prescription drug overdose investigation. The memo is organized by defendant and then charge/defense.

I. POTENTIAL CHARGES, DEFENSES, AND THE FACTUAL BASIS THEREWITH APPLICABLE TO LOU.
(1) Lou may be charged with possession with and intent to distribute or sale of a controlled substance based on his illegal procurement of opiate-based pain pills.

One may be guilty of possession of a controlled substance with an intent to sell if the defendant knowingly possesses controlled substances without a prescription and intends to sell the controlled substances. In this case, Lou broke into Doctor’s office and stole opiate pills and a prescription pad. Thus, Lou was in knowing possession of controlled substances (and an illicit means of procuring more). Next, based on his comments to Bart, one may infer an intent to sell. Additionally, dependent on the amount of the pills, Lou may face a statutory presumption of an intent to sell.

In his defense to possession with intent charge, Lou may argue that he abandoned the plans by dumping the pills and prescription pad in the wastebasket and that he never got close enough to be charged with an attempt to sell. These are not strong defenses.

(2) BECAUSE LOU BROKE INTO DOCTOR’S OFFICE WITH AN INTENT TO STEAL, HE MAY BE GUILTY OF BURGLARY.

At common law, burglary requires showing that the defendant broke and entered into a dwelling at night with the intent of committing a felony. By statute, the “dwelling” and night-time requirements are no longer required in most states. Hence Lou broke into an office (by breaking the cabinet) at night with the intent of committing the felony or larceny.

Lou might argue that his acts don’t meet the elements because he entered through an open window (hence no breaking) and it was an office (hence no dwelling). Given the statutory amendments and Lou’s breaking of the cabinet, these are not strong defenses.

(3) BECAUSE LOU TOOK PILLS AND A PRESCRIPTION PAD FROM DOCTOR’S OFFICE. HE MAY BE LIABLE FOR LARCENY.

The elements of larceny are an unlawful taking of another’s property with an intent to permanently deprive them of the property. Here Lou broke into Doctor’s office and stole pills and a prescription pad and took them away into the school next door. Thus, all the elements are met.

Lou might argue that he didn’t intend to permanently deprive the Doctor of his property as evidenced by his not keeping them or that he didn’t take the property away. However, these are not strong defenses.

[Lou may also be charged with attempted forgery as he knowingly signed another’s name without permission. However he didn’t publish the signature to anybody so it probably would only rise to the level of attempt]

II. AUNT MAY BE GUILTY OF CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE AS OFFICER FOUND 5 OUNCES OF MARIJUANA UNDER AUNT’S BED.
The elements of criminal possession of a controlled substance are that one knowingly possesses a controlled substance. Possession may be found when it is in one’s house. Knowledge may be inferred if the substance is found in a location under the exclusive control of the defendant. In this case, Officer found marijuana under Aunt’s bed. Thus, there is a good prima facia case against Aunt for criminal possession of a controlled substance. The amount of the substance may determine if it is a misdemeanor or a felony or if there is a statutory presumption regarding intent to distribute. The knowledge of the weight is presumed.

In her defense, Aunt may claim that the marijuana was discovered pursuant to an unlawful search and seizure. First, there was state action by Officer. Second, there is a strong presumption of privacy in the home. These two factors mean the Forth amendment applies. However, Officer may be able to assert that she acted in good faith on a warrant (even if it may have been defective due to the unreliability of the informant) and that Aunt gave Officer consent to enter and search the house which brought the drugs into Officer’s plain view from a lawful vantage.

III. CHARGES AGAINST BART.

Bart may be guilty of assault, battery, larceny, and vehicular manslaughter or driving under the influence.

The elements of assault are intentionally causing a person apprehension of imminent harm. The element of battery are intentionally causing an offensive touching. Here, Bart pushed a woman while stealing her car. He might argue necessity or self-defense as defenses because pledges were choosing him and they had threatened him. He might offer these defenses to the following charges too.

Also, Bart may be charged with larceny. The elements of larceny are an unlawful taking of another’s property with the intent to permanently deprive them of it. Here, Bart effectively carjacked this woman, using force to take her car. In fact, the additional use of force may even satisfy a robbery charge. In addition to his necessity/self-defense argument, Bart may offer as a defense his lack of intent to permanently deprive the woman of her car; instead, Bart was just trying to get away.

Next, Bart may be guilty of driving under the influence, vehicular homicide, or felony-murder. Bart stole the care and was driving under the influence. Next, while under the influence, he hit and killed someone. These facts may support any of the above charges.

Driving under the influence occurs when one operates a motor vehicle while intoxicated. Thee elements of vehicular manslaughter are when one recklessly kills another through operating a car. The elements of felony-murder is that one commits an environmental felony and that this causes the death of a third-party. Again, Bart could challenge the elements of the crimes based on facts (e.g., he might have been sober) or law/privilege (e.g. necessity or self-defense).

IV CHARGES AGAINST PLEDGES
The pledges may be charged with assault. They threatened and chased Bart. This may satisfy the elements of assault and intentionally causing apprehension of imminent harm. No defenses or mitigating facts appear in the report but it may be hard to identify the speaker who made the threat and/or find intent amongst the mob.

**Sample Answer #2 - Criminal**

Lou: Lou can be charged with burglary, larceny and attempted forgery.

1) Burglary is defined as the breaking and entering into a building with the intent to commit a felony or larceny therein. The common-law requirements of the building being a dwelling and the breaking and entering occurring at night are not applicable in this jurisdiction and in the majority of states. Lou can be charged with burglary because he broke into and entered the Doctor’s office through the window (this is sufficient breaking and entering) with the intent to commit a larceny therein. He went to the Doctor’s office to look for opiate-based pain pills.

Lou then committed larceny. Larceny is the taking and carrying away of the property of another with the intent to deprive them of it permanently. Lou committed larceny when he took the pills and doctor’s prescription pad carried it away from the cabinet.

Lou can claim that he did not commit larceny because he abandoned the pills and prescription pad at the elementary school. However, this is not a good defense because that is needed for larceny is the slightest carrying away of the items and the requisite intent.

Lou can also be charged with attempted forgery because he tried to tracing the Doctor’s signature onto the prescription slips. Forgery is the act of procuring a signature on an instrument with legal value. Lou may claim that he gave up and therefore did not come close enough to complete the crime. However, his act of forgery came close enough to completion regardless of the fact that he threw the prescriptions away.

Lou may also try to claim that he was entrapped. Entrapment is an affirmative defense which the defendant must prove by a preponderance of the evidence. The defendant must prove that he lacked the predisposition to commit the crime and was entrapped into doing it by the police. The defense will not save Lou here because he was not entrapped. Even if he got the idea from Bart’s comment that “Anyone that had access to opiate-based pain killer or signed prescriptions could make a fortune” this is not sufficient for entrapment, because he was not induced to commit a crime that he did not have the predisposition to commit.

Bart: Bart may be charged with murder, manslaughter, battery and robbery.

1) Murder: Murder is the unlawfully killing of another with malice aforethought. malice maybe inferred from the commission of a felony under the theory of felony murder. Bart swerved the car he stole from a woman (robbery) and during his escape killed the fraternity pledge. Robbery is a felony and is defined as the taking of the property of another from their person with the use of force or threat of imminent bodily harm. Bart committed robbery when he took the car from the woman by force and in his escape hit the pledge and killed him.
In the alternative to murder, Bart can be charged with manslaughter. Manslaughter is defined as the unlawful killing of another without malice aforethought.

Bart can claim that he was not committing a felony when he took the car from the woman but acted out of duress or self-defense. These would negate the malice requirement and reduce the crime to manslaughter from murder. They could also be used as a defense to manslaughter. Duress is being placed in a situation where must commit an unlawful act in order to prevent imminent harm to himself by threat from others. The fraternity brothers were chasing Bart, and he can claim he stole the car and lurched forward to prevent imminent bodily harm.

In terms of the manslaughter charge he can claim self-defense, which states that deadly force may be used by someone if it is feared that deadly force is about to be used against them. Bart can claim he used deadly force to prevent the use of deadly force against him by the pledges.

Bart can also be charged with battery, which is the intentional harmful or offensive touching of another because he pushed the woman. However, he can use the defense of duress as described above.

Lou’s Aunt. Lou’s Aunt can be charged with possession of drugs for the clear bag containing marijuana found under her bed.

Lou’s Aunt can make a motion to suppress the evidence as the fruit of an unlawful search and seizure. The officer who found the marijuana only had a warrant for Lou. He did not have a search warrant for Aunt’s house. Furthermore, when he came to Aunt’s house, although she consented (or at least didn’t stop him from coming into her house) she did not consent to the search of the house. Officer exceeded the scope of his warrant for Lou as well as the scope of the consent received by Aunt. Officer cannot claim any of the exceptions to a warrantless or consentless search because there was no emergency and the marijuana was found under Aunt’s bed, which is not a place where the Office could reasonably expect to find Lou, and is also not in plain view.

Even if Officer claims he was searching for Lou in what he thought was Lou’s house, in good faith reliance of a search warrant, his argument will fail. Even if lawfully searching Aunt’s house, a search warrant only allows an Officer to search places where the item or person may be found. Under the Aunt’s bed is not someplace where Lou could be found, therefore Officer’s argument would be without merit. It is also important to note that not all jurisdictions acknowledge good faith reliance of factually valid search warrant.

Essay Question #3 – Constitutional Law

Athletic Association (AA) is a division of the state’s athletic commission and regulates all public and private high school interscholastic sports. In an effort to rid interscholastic sports of performance-enhancing drugs, AA’s Board implements regulations requiring random steroid testing of students who participate in individual and team championship events. The board,
however, furnishes event officials with complete discretion in determining which athletes will have to undergo a drug test, and any disciplinary action undertaken is not subject to review.

Dali attends high school and is widely regarded as the fastest sprinter in the state. Before the state championship finals, track meet officials ask her to undergo a drug test. Dali, who is white, notices that none of the minority runners are asked to do so, and she refuses to take the test. She is then prohibited from running in the finals for her individual and team relay events.

The other members of Dali’s track team (both minority and non-minority) wear headbands with a statement criticizing the Board and meet officials: “Racism Lives Here: Whites Go Home!” At the Board’s urging, event officials immediately suspend the team for “conduct detrimental to the sport.” To prevent a riot, the officials postpone the track meet for one week.

The next day, Higgs, a disgruntled fan, sets up an internet email account, uses the pseudonym Markiaelli as his screen name and sends emails to local media outlets containing scandalous, yet true, commentary about individual Board and event officials’ private lives. The Board files an action for injunctive relief to compel Higgs’ internet service provider to divulge his identity. In a separate action, Dali and the team members also file a complaint for injunctive relief and damages against the Board and event officials.

Both actions are consolidated before your Judge in federal court. As the law clerk, you are asked to prepare a memorandum outlining the likelihood of success of the parties’ constitutional claims and defenses.

Prepare the memorandum

Sample Answer #1 – Constitutional Law

Dalia and the Team Member’s Claims for Injunctive Relief and Damages:

Dalia and the team will file a claim for injunctive relief both as to the drug testing itself as well as the refusal to allow the team to compete and wear their headbands.

(1) The Drug Testing – Violation of Equal Protection

In order to show that the drug testing policy violates the Equal Protection Clause of the 14th Amendment, Dalia will have to show that the policy/statute has both a discriminatory impact and intent. This is because the statute is race neutral on its face. Although Dalia may be able to show that the regulation has had a discriminatory effect (only white students are drug tested), Dalia will likely have difficulty showing the statute had a racially discriminatory intent, as the facts provide that the regulations were created for the purpose of ridding interscholastic sports of performance-enhancing drugs.

If, however, Dalia does manage to show a discriminatory impact and intent, then strict scrutiny must be applied, meaning the Athletic Association (which is a government actor for purposes of
state action) must show it has a compelling reason for the regulation which is narrowly tailored to meet a necessary objective.

The defense is that the regulation is race neutral and had no discriminatory intent and thus only rational basis review should be used. Rational basis requires the plaintiff to show that there is no legitimate state interest reasonably served by the regulation. This is a very difficult standard to overcome, as the legitimate state interest needn’t be the state’s actual interest, but only a conceivable interest. Thus, as the state may claim it is interested in keeping high school youths from using drugs, the state (Athletic Association/the Board) will prevail.

[It should be noted that the 11th Amendment prohibits plaintiffs from suing the state (including state agencies) in federal court for damage. However, Dalia can sue in federal ct for equitable relief, can sue a state official (like who enforces the policy) in federal ct for equitable or legal relief. Moreover, Congress can waive a state’s 11th Amendment protection when equal rights/civil rights are involved.]

(2) The Drug Testing – violation of Rt. To Privacy

Although there is no one particular constitutional provision providing for a rt. to privacy, it has been maintained through the penumbra of privacy. Perhaps Dalia and the team will argue there rights to privacy have been violated by the drug testing. This argument will not succeed as the Supreme Ct has already rule on the drug testing for high school athletes, and it is permissible.

(3) The Prohibition on wearing the headbands – A first amendment freedom of speech violation

Dalia and the team may assert a violation of their 1st Amendment right to free speech as a result of being denied the right to wear the sloganned headband (and their subsequent suspension from running as competitors). The 1st Amendment guarantees the right to freedom of speech and expression. There are limits, however, on this right. Government may prohibit or limit speech where it is likely to cause violent behavior. [Note that “fighting words” statutes must be narrowly and specifically drawn to avoid challenge on vagueness and overbreadth grounds]. Dalia and the team may assert that their headbands which state: “Racism Lives Here: Whites Go Home” is a form of political speech afforded the highest protection.

The Board will argue the headbands were likely to insight violence, and it was only for this reason that they were suspended. The Board will also argue that the Supreme Ct has ruled that in high schools and lower schools, the school may prohibit certain speech which detrimental to the learning, well being or safety of the students, consistent with the school’s role as a parent-like figure role (loco parentis). Continue on last pg.

The Board’s claim injunctive relief from Higgs’ ISP:

The Board officials will assert their constitutionally protected right to privacy has been violated by Higgs through his disclosure of their private facts. They will ask the Internet Service Provider (ISP) for Higgs’ identity so that they can sue him in tort for the privacy claim and disclosure.
The ISP will argue that one’s 1st amendment right to free speech includes the right to speak anonymously. Moreover, they will assert that Higgs is speaking truthfully about a matter of public concern and about public figures (thus the Board members tort claim would also likely fail). The ISP may also site to some freedom of association cases in which the Supreme Ct held that organizations (including the NAACP) did not have to disclose their membership lists. The rational was that disclosure of such lists would discourage membership which is a constitutionally protected right. The court held that there may be a right to associate anonymously.

However, the Board members will counter that there is no newspaper/report/informant privilege as to confidential sources, as we have seen through recent Supreme Ct decision. The board members will say that this is not a case about freedom of association, but rather about newspaper/informant confidentiality.

The ISP will say it is not a newspaper or reporter. It is an organization. The Board will probably then counter with citation to some 4th amendment cases in which the Sup Ct. ruled a phone company could be required to turn over the dialed phone numbers of a defendant, and there was no 4th amendment violation as to defendants’ privacy. This is a weak argument however as it would be a counterargument to a defense by Higgs if he were prosecuted for any crime.

The Board’s best argument is their 1st amendment one based on recent case law, they have a faire chance of success.

Continuation of part about the headbands and the First Amd. Claim:

The Board is unlikely to succeed on this theory though, as this speech did not occur in or at the school during the school day, but instead at an optional after school athletic competition, the speech was political, and the facts do not substantially indicate that a riot was likely to occur.

Sample Answer #2 – Constitutional Law

To: Honorable Judge
From: Law Clerk
Re: Consolidated Action

Per your request, following is an analysis of the consolidated claims by the Board v. Internet Service Provider (“ISP”) and Dali and the track team vs. the Board and meet officials. Applying constitutional principles, the Board’s motion should be denied, and Dali/Team’s motion should be granted in part/denied in part.

The Board’s motion to compel the ISP to divulge Higgs’ identity should be denied. At issue is the scope of the First Amendment’s protection of freedom of speech, as well as the protection of fundamental individual rights. Anonymous speech is protected by the First Amendment, as is indecent or profane speech. Freedom of speech is a fundamental right, and infringement on speech is subject to strict scrutiny review. Likewise, privacy rights are recognized as fundamental. Restrictions on fundamental rights will be upheld only if necessary and narrowly
tailored to serve a compelling state interest. Here, the only interest at stake is that of the Board and event officials (sic) privacy and desire to avoid dissemination of embarrassing information. Here, Higgs’ email untrue, then the individuals could bring tort claims for defamation or false light. If Higgs obtained the information re: privilege an action for disclosure could be had. Under the facts at hand, however, Higgs’ conduct was lawful, and the Board’s and officials’ embarrassment cannot be redressed by constitutional claims. (It should be noted that, even if true, if Higgs’ emails threatened national security or some other compelling interest, compelling disclosure would be proper.)

Dali and Team

The claim brought by Dali and her teammates (“Dali’s claim”) should be granted in part and denied in part. At issue is whether the meet officials’ action qualify as state action that must comport with the constitution.

First, it should be noted that Dali does not have any constitutional claims arising from the drug test demand or her selection for testing as compared to the non-selection of minority athletes. The Supreme Court has held that drug testing of public school students engaged in extracurricular activities is permissible, given the special needs of public school officials and students’ somewhat diminished privacy interests. Requiring Dali to take a drug test is ok, although the non-random method of testing is problematic. Discretionary drug testing raises Equal Protection concerns, as evidenced by Dali’s objection due to the lack of testing of minorities. However, to show that a regulation is racially discriminatory, as Dali alleged, not only disparate impact but discriminatory intent must be shown. Classifications based on race are subject to strict scrutiny analysis (see above) but no such classification can be shown here. To the extent that Dali sues for damages for the allegedly discriminatory drug testing, the motion should be denied.

The suspension of the team by the Board and event officials violates the due process clause and deprives the students of their rights of free expression. Because the meet officials act at the discretion of the Board, and the Board issues all applicable regulations, the conduct of the officials is likely to qualify as state action, meaning that the officials’ actions are held to the standard of the Constitution. By suspending the team without notice or an opportunity for a hearing, the officials (and thus the state) violated due process requirements.

Furthermore, the penalty for the team’s headbands was improper. Although states may regulate speech in limited public forums, such regulations must be content neutral time, place and manner restrictions. Here, the reaction suggests a non-neutral approach. Content-based restrictions must satisfy strict scrutiny, which this does not. Thus, the team’s motion should be granted insofar as the team seeks reinstatement and permission to wear the headbands. (It should be noted that students’ conduct did not create a threat of imminent harm, so as to justify the officials’ conduct. Indeed, the Board/officials are responsible for any perceived threat of a riot, since the risk came after the suspension.)
Essay Question #4 - Property

Dan owns three properties: Lot 1, Lot 2, Lot 3. Dan executes a deed conveying Lot 1 to Chris for life and then to Steve. Chris moves to Lot 1 and lives there for several years. Thereafter, Chris moves from Lot 1 to an assisted-living facility. After Chris moves out, Steve observes Lot 1 is in disrepair and needs a new roof.

Dan’s Last Will and Testament leaves Lots 2 and 3 to Steve. Dan’s Will directs that “all of my debts be paid upon my death.” After executing the Will, Dan sells Lot 3 and uses the proceeds to purchase Lot 4. Thereafter, Dan Dies.

Steve is unhappy when he discovers Lot 2 is encumbered by a mortgage, because he wants to take it free of any mortgage. Steve is upset when he learns Dan sold Lot 3.

Steve retains your law firm. Regarding Lot 1, he wants to know who is responsible to pay for necessary repairs and a new roof and whether he can sell the property. He also wants to know his rights with respect to Lots 2 and 4.

You are asked to prepare a memorandum outlining Steve’s rights and obligations regarding Lots 1, 2, and 4.

Sample Answer #1 - Property

Memo regarding Steve’s rights and obligations

Lot 1

Chris owns a life tenancy and Steve is the remainderman for Lot 1.

a) Regarding Steve’s questions about the roof repairs, he may enforce his rights and have Chris repair it. Life tenants may not commit waste. Waste can be divided into three types: voluntary, permissive and ameliorative. Permissive waste is due to the life tenants negligence. The life tenant must pay all taxes and maintain the property in reasonably good repair. As a life tenant, Chris has been charged with the foregoing duties. Steve may seek declaratory judgment to have Chris repair the roof or for damages arising from the disrepair to the home. However, if the desire for a new roof is more of an improvement than a necessary repair, Steve may not seek to have Chris pay for the construction.

b) Steve may not sell the property in fee simple absolute. One cannot sell more than he has. Steve currently has no interest in Lot 1. He owns the remainder interest. Steve’s choices are to purchase the life estate from Chris so that the interests merge and then he can sell the property; or Steve can sell his remainder interest in the property with the understanding that the Buyer will not have legal title until after Chris’ death.

Lot 2
Steve inherits Lot 2 encumbered by a mortgage. Whether he can take free of the mortgage depends on the law of the jurisdiction where he is located and will be determined.

Some jurisdictions and old common law apply the doctrine of exoneration of liens. Under such doctrine, any mortgage on a bequeathed property is paid off by the residuary of the estate so that the party takes the land free of the mortgage. Other jurisdictions, however, do not apply exoneration of liens. A party taking property under a will takes the property subject to the mortgage unless the will specifically says otherwise.

If Steve resides in a jurisdiction applying exoneration of liens, he can have the mortgage paid out of the estate. If he does not, Steve will have to look to the terms of the will to see if the testator specifically designated that the mortgage should be paid out of the estate. Dan’s will directs that all debts be paid upon my death. Whether this includes the mortgage will have to be determined by the probate court of the jurisdiction. However, because Dan did not specifically mention the mortgage or the property, the court will most likely find that Steve takes Lot 2 with the mortgage. Therefore, he will be obligated to pay the mortgage payments or his house could be subject to foreclosure.

Lot 4

Dan made the specific bequest of Lot 2 and Lot 3 to Steve and thereafter sold Lot 3 and purchased Lot 4.

Firstly, Steve has no rights to Lot 3, which was sold to a bona fide purchaser for value. Since Lot 3 was a specific bequest and no longer is owned by Dan at the time of death, the gift adeemed. In identity jurisdictions, where the gift no longer exists, the devisee gets nothing no matter whether it was a voluntary or involuntary removal from the estate. However, in other jurisdictions, where one piece of property is sold and the proceeds may be traced directly to another property, the devisee may be entitled to take that other property if that was the intent of the testator. In such jurisdictions, intent is the overriding determining factor in deciding whether the devisee takes nothing or takes the second property.

Here, Dan voluntarily sold Lot 3, there are no facts to indicate that he wanted Steve to have Lot 4 in its stead, and he chose not to reexecute a will or codicil to reflect such change. Therefore, the gift adeemed and most likely a court will find that Steve has no rights to Lot 4. Certainly in identity jurisdictions and most likely in intent jurisdictions because there are no facts to the contrary, Steve has no rights or obligations regarding Lot 4.

Sample Answer #2 - Property

Memorandum: Steve’s rights and obligations regarding Lots 1, 2, and 4

Lot 1:

According to the conveyance for Lot 1, Dan gave Chris a life estate in lot 1 and Steve a vested remainder. A life tenant has a duty to not commit waste on the property so that the property is
preserved for the remaindermen. There are several types of waste which a life tenant can engage in. One such type of waste is permissive waste. Permissive waste occurs when a life tenant does not maintain the property in reasonable repair. As applied to these facts, Chris, the life tenant, has engaged in permissive waste of Lot 1 by not maintaining the property. Instead, Chris has allowed the property to fall into disrepair, including needing a new roof. If Dan brings an action against Chris for waste, Dan will most likely win because Chris has not maintained the property in reasonable repair. Thus, Chris is responsible for to pay for the necessary repairs and for the new roof.

Regarding Steve’s interest in selling Lot 1, a person can only convey an interest in land equal to or less than the interest they possess. Thus, a remainderman can convey only his remainder interest; a remainderman cannot convey a fee simple absolute because he does not yet possess a fee simple estate. Thus, Steve may only sell his remainder interest in Lot 1; he cannot yet sell Lot 1 as a fee simple. Alternatively, Steve may buy Chris’ life estate interest. If Steve buys Chris’ life estate, then the life estate will merge with the remainder and create a fee simple absolute. If Steve takes this option, then he can sell Lot 1 as a fee simple estate because he will then own Lot 1 as a fee simple.

Lot 2:

At common law, when property was transferred by will, any outstanding encumbrances on the property, such as a mortgage, were paid with the assets in the decedent’s estate and the land was then transferred to the beneficiary free and clear of the encumbrance. Today, many modern statutes change this presumption and require that a testator explicitly state in his will that the encumbrances be paid off using the assets in his estate. If the testator does not make this express statement in his will, then the property is transferred to the beneficiary subject to that encumbrance. As applied to Steve, if the common law controls, then Steve receives Lot 2 free and clear of the mortgage because Dan’s estate would pay off the mortgage. However, if a modern statute applies to this transaction, then Dan will probably not receive Lot 2 free of the mortgage. Although Dan’s will states that all of his debts are to be paid upon his death, this clause is not specific enough under most modern statutes to qualify as indicating that Dan wants any mortgages on his property to be paid with the assets in his estate. Instead, Dan would have to specifically state that the mortgage was to be paid using funds from his estate. A general clause for paying all of his debts is not sufficient language to require the mortgage to be paid off using the assets from the estate.

Lot 4:

Property which is left by will and then sold by the testator prior to his death is referred to as adeemed property. At common law, when property was adeemed, the beneficiary of the original property had no rights to the new property. However, if any of the purchase price was still outstanding or if insurance proceeds on the property were still outstanding upon the testator’s death, then the beneficiary of the original property would be entitled to that amount. However, if the property named in the will was sold and the proceeds were received by the testator and used to purchase other property, the beneficiary’s property was thus adeemed and the beneficiary had no rights to the new property. As applied to Steve, Dan left Lot 3 to Steve in his will. Dan then
sold Lot 3 and used the proceeds to purchase Lot 4. The facts do not indicate that the buyer of Lot 3 owes any money on the purchase price. Instead, the facts seem to indicate the Dan received the entire purchase price for Lot 3 and used it to buy Lot 4. Thus, Steve’s right to Lot 3 was adeemed by this transaction. The property which was left to Steve in Dan’s will is no longer in Dan’s possession at the time of Dan’s death. Thus, according to the doctrine of ademption, Steve has no rights in Lot 4.

Essay Question #5 - Evidence

Anna Nicole, a movie star, is set to receive a colossal inheritance from the estate of her husband – Pierce. Anna could really use the money as she is the mother of a young daughter – Danny. However, before she could collect her inheritance, Anna dies. Danny is the only child of her mother, as her brother pre-deceased her. The executor of Pierce’s estate refuses to pay the inheritance to Danny, absent a court order.

Howard, Anna’s most recent boyfriend, files suit seeking to be appointed Danny’s Guardian Ad Litem. Larry, a former boyfriend of Anna, claims paternity and intervenes in the suit filed by Howard, asking the court to appoint him as Danny’s Guardian Ad Litem.

The parties, at a pre-trial conference with the judge, outline the evidence they will seek to introduce.

Howard wants to offer the testimony of Danny, who will say that her mother told her: “Howard is your daddy.” Howard also wants to offer in evidence a copy of a birth certificate form completed by him and Anna but never filed. Howard wants to introduce evidence that Larry pled nolo contendere to a charge of extortion two years ago.

Larry wants to testify that Anna called him six months before Danny was born, told him she was pregnant, and asked: “Are you ready to be a daddy?” Larry also wants to testify that Howard said to him “I will give you 25% of the inheritance, if you drop your paternity case.” Larry also wants to introduce testimony of Chauffeur that Anna said she was “totally exhausted by lying to Danny about Larry.”

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

Prepare the memorandum

Sample Answer #1 - Evidence

TO: Judge
FROM: Clerk
RE: Evidentiary issues
Below is an analysis of the evidentiary issues surrounding Howard and Larry and the claim for Danny, Anna Nicole’s daughter. Each party’s evidentiary claims will be discussed in turn.

Howard

Howard will likely be able to offer the testimony of Danny. As a threshold matter, the court must first be satisfied that Danny is a competent witness. A young child can be a competent witness so long as they have personal knowledge and understand that they are obligated to testify truthfully and honestly. Since the facts do not indicate the age of Danny, it is unclear whether a presumption of competency will be applied or not.

Assuming Danny is competent to testify, the statement by Anna Nicole regarding paternity will be admissible under the pedigree exception to the hearsay rule. As a general rule, under the Federal Rules of Evidence, all relevant evidence is admissible. However, an exception exists if the evidence is hearsay. Hearsay is an out-of-state statement by a declarant, offered for the truth of the matter asserted. Hearsay evidence is inadmissible, unless an exception applies.

Under the pedigree exception, there is a threshold requirement that the declarant be unavailable to testify. If the declarant is unavailable, a witness may testify as to the declarant’s statement if it goes to birth, blood relation, dates of marriage, and other familial facts.

In this case, the unavailability requirement is met because the declarant, Anna Nicole, is deceased. The statement relates to a blood relation, because Anna Nicole told Danny that “Howard is your daddy,” which is a statement of paternity. As such, this testimony will be admissible.

Howard will like not be able to offer into evidence the copy of the birth certificate form completed but never filed, because it is hearsay not within an exception. As mentioned above, hearsay is an out-of-state statement, offered for the truth of the matter asserted. Here, the birth certificate is being offered to prove that Howard’s name on the document is evidence that he was in fact the father of Danny. The public records exception to the hearsay rule allows for the admissibility of publicly recorded and filed documents, that are official in nature. Such documents, if filed and if they contain the proper seal of authenticity, are self-authenticating.

However, the facts indicate that this copy of the birth certificate was never filed. Therefore, there is nothing to suggest that the copy is an authentic replication of the original.

It should be noted that the Best Evidence Rule also comes into play here. The Best Evidence Rule states that the original document must be presented, instead of secondary evidence, absent an exception (for example, voluminous records or a reasonable excuse). As a general rule, copies are permitted to the same extent as originals. However, when there is a question as to the authenticity of the document (as is clearly the case here), the original must be presented into evidence. This is another reason why the copy of the birth certificate is inadmissible.

Lastly, Howard cannot introduce evidence that Larry pled nolo contendere to a charge of extortion two years ago. As discussed above, the general rule is that relevant evidence is
admissible. However, if relevant evidence would offend public policy if admitted, the evidence is kept out. An example of such evidence is a “no contest” plea. For public policy reasons, society wants to encourage defendants to enter truthful pleas, and not withhold from such pleas out of a fear of future admissibility of the evidence. As a result, the Federal Rules of Evidence do not allow the admission of “no contest” pleas is subsequent litigation.

Larry

Larry will not be able to testify about Anna’s phone call statements about his paternity because it constitutes hearsay and does not fall within one of the recognized hearsay exceptions. As discussed above, hearsay is an out-of-state statement by a declarant, offered for the truth of the matter asserted. Larry is offering Anna’s statement to prove that Larry, in fact, was the father of Danny. Since there is no applicable hearsay exception, the only argument Larry can make is that if falls under the “catch all” hearsay exception, allowing otherwise inadmissible hearsay evidence to come in if it is reliable and extremely probative. In this case, the reliability requirement is not met, because it is clearly in Larry’s interest to testify as to this statement, and there is no witness to impeach him (Anna Nicole, the other party to the conversation, is dead). Therefore, this testimony will be deemed inadmissible.

Larry will also not be able to testify that Howard offered to settle the case in exchange for 25% of the inheritance. As discussed above, the general rule is that relevant evidence is admissible. However, if relevant evidence would offend public policy if admitted, the evidence is kept out. An example of such evidence is offers of settlement. For public policy reasons, society wants to encourage parties to settle out of court, and not avoid settlements out of a fear that such discussions with be admitted against them. As a result, the Federal Rules of Evidence do not allow the admission of settlement offers in subsequent litigation.

Larry will likely be able to introduce testimony of Chauffeur. As discussed above, hearsay is an out-of-state statement by a declarant, offered for the truth of the matter asserted. In this case, Anna, the declarant, made a statement implying that Larry is the father of Danny, and Larry is offering the statement for its truth. The “then-existing condition” exception to the hearsay rule allows evidence pertaining to the declarant’s current mental or physical condition to be admitted into evidence. Here, at the time Anna made the statement, she is relaying to the Chauffeur that she is “totally exhausted” from the lying about Larry’s paternity. This is a statement going to Anna’s then-existing condition. Since the Chauffeur has personal knowledge of the statement because Anna communicated it to him, he is competent to testify.
Your Honor,

Some of the evidence sought to be introduced by Howard should be admissible, while some of it is not. Likewise, some of Larry’s proposed evidence is admissible – but not all of it. Likewise, some of Larry’s proposed evidence is admissible – but not all of it. The follow are my recommendations:

Howard

Danny’s testimony that Anna said “howard is your daddy” ought to be admissible. As a threshold requirement, any evidence must first be introduced. Under FRE 401, relevancy is defined as any evidence that will tend to make a fact of the case more or less probable.

Here, the evidence is certainly relevant. The issue becomes whether it is hearsay, and if so, whether it meets an exception to the prohibition against hearsay (FRE 801-803). Hearsay is any out-of-court statement offered for its truth at trial or other proceeding. While hearsay is generally inadmissible, there are a number of exceptions. One of these is “statements of family pedigree” or statements regarding paternity, etc.

Here, Danny’s proposed testimony is hearsay – it was spoken out-of-court by the now unavailable Anna Nicole. However, the content of the statement concerns pedigree, and as such, it should be admitted.

Note also that although Danny is very young, she is presumed competent to testify. Under the FRE, there is a strong presumption of competency provided the witness can (a) take an oath or affirmation, (b) understand the nature of the proceeding, and (c) appreciate the testimony about to be given. Danny meets there requirements.

2) The copy of the birth certificate should not be admitted, because i cannot be properly authenticated.

One method of introducing documents that are otherwise hearsay is via the public records exception. To qualify, the record must be filed with the appropriate clear and found in its natural place of custody.

Here, the certificate was filled out but never filed. Therefore, it fails to qualify as a public record, and is inadmissible.

3) Howard’s proposed introduction of Larry’s extortion charge will be admissible to the extent it may be used to impeach Larry’s credibility if he testifies.

There are several ways to impeach a testifying witness: (a) prior inconsistent statement; (b) prior acts of untruthfulness or involving credibility; and (c) prior convictions of crime punishable by more than 1 year in prison (and the conviction is less than 10 years old). Where the conviction is for a crime not involving dishonesty or truthfulness, the judge would have discretion in
permitting its introduction. However, when the crime is one of truthfulness or honesty, no discretion may bar its admissibility.

Here, Larry’s prior conviction is for extortion, and the charge is less than 2 years old. Because extortion is also likely to invoke dishonesty and untruthfulness, Your Honor, you will likely not be able to bar this evidence from coming in to impeach Larry. The evidence may not, however, be used to attempt to prove conformity with such prior occurrence in the present scenario – it would be an improper form of character evidence.

LARRY

1) Larry’s proposed statement of Anna, “Are you ready to be a daddy?”, should be held inadmissible as hearsay not within any exception.

The content of the statement is relevant. However, the statement is also hearsay, having been spoken out-of-court by Anna. Since no relevant exception applies to admit this type of interrogative statement, I recommend ruling against its admissibility.

2) Larry’s proposed evidence of Howard’s offer to compromise is likewise not admissible, specifically addressed by FRE 408. (Offers to Compromise)

Under FRE 408, offers by one party to settle a claim, or compromise in general, are inadmissible – there is a strong policy of favoring non-judicial settlement of disputes. The caveat, however, is that to be protected from admissibility, there must be actual pending litigation, or at least a contemplated dispute, between the parties. If so, the offer to compromise, and all other statements made in connection therewith, are inadmissible.

Here, Howard’s statement is clearly an offer to compromise. By the language itself, we know there is a paternity suit between the men. Therefore, this evidence should not be admitted at trial.

Lastly, Chauffer’s testimony of Anna’s statement about being exhausted is probably admissible.

The statement is relevant and it is hearsay. The issue is whether any exception applies, and if so, will it attach to the whole statement? One exception to hearsay is for “statements of present physical condition,” and generally a qualifying statement will not be severed but will come in in its entirety.

Here, Anna told Chauffer she was physically exhausted. Having expressed present physical condition, the statement comes in – including the more “damaging” piece regarding “lying to Danny.”

Finally, your Honor, FRE 403 will serve to bar otherwise relevant evidence if its probative value is substantially outweighed by its potential for prejudice, confusion, or misleading the jury. With respect to my six (6) foregoing recommendations, no otherwise admissible evidence should be excluded or the basis of FRE 403.
Essay Question #6 - Contracts

Seller, based in New Jersey, sells specialty bras exclusively over the internet at a discount. Over the course of ten years, Seller has purchased specialty bras from Manufacturer, a California company. Seller transmits an order to Manufacturer specifying the kinds of bras (style, color, and size) and quantity of each. Manufacturer then ships these bras within three months and sends Seller a bill. The contract states Manufacturer will provide Seller “all the specialty bras needed.”

Seller accumulates internet orders and prepayments from individual customers and transmits the orders to Manufacturer every two to four months. Seller holds the payments received in an account paying 5.25% per annum interest, which increases Seller’s profit margin and enables her to sell the specialty bras at a notable discount.

On December 26, 2006, Seller transmitted to Manufacturer an order for $75,000.00 worth of specialty bras, received them on March 17, 2007, but has not yet paid for them. On April 7, 2007, Seller ordered $90,000.00 worth of specialty bras. On June 5, 2007, Seller ordered $200,000.00 worth of specialty bras from Manufacturer, which Manufacturer thereafter started to produce for Seller.

Current trends recommend women be professionally “fit” with bras for both appearance and comfort. Manufacturer is attempting to enhance the image of its product and to sell its bras in high-end specialty boutiques equipped with trained “fitters.” Manufacturer has accordingly decided it will not sell its bras to anyone who does not have a fitting room and trained “fitters.”

Three weeks ago, Manufacturer sent Seller a letter advising Manufacturer would no longer sell to Seller unless Seller constructed a fitting room and hired a “fitter.” Seller is currently a one-person operation. It would cost Seller $50,000.00 to construct a fitting room. Training as a fitter would require Seller to read a short instruction manual.

Enraged, Seller immediately telephoned Manufacturer and advised she would no longer buy products from Manufacturer. During the same conversation, Seller, in a fit of pique, cancelled the order placed by Seller on June 5, 2007. That same afternoon, the April 7, 2007, order arrived at Seller’s business location, but Seller, still furious, rejected the shipment. Two days later, Seller attempted to rescind the cancellations, but Manufacturer refused to return the shipment or to reinstate the order.

Seller sues Manufacturer and Manufacturer counter-sues. You are the law clerk to the trial judge who has asked you to prepare a memorandum setting forth all causes of action and defenses of the parties.

Prepare the Memorandum

Sample Answer #1 - Contracts
To: Judge  
From: Law Clerk  
Re: Seller v. Manufacturer  

Seller and Manufacturer are involved in a sales contract. As such, their contracts are governed by Article 2 of the Uniform Commercial Code (UCC). The contract that exists between Seller and Manufacturer is known as a “Requirements Contract.” Requirements contracts are permissible under the UCC. Under requirements contracts a seller promises to provide a buyer with all the required goods he needs and the buyer promises to request such goods within a reasonable standard and promises to pay for them. In this case there are three contracts that need to be addressed: the December 26, 2006 contract for an order of $75,000 worth of specialty bras; the April 7, 2007 contract for $90,000 worth of specialty bras; and the June 5, 2007 contract worth $200,000 in specialty bras.

I. The December 26, 2007 contract.

Manufacturer has a valid cause of action to recover payment for the December 26, 2007 contract. This contract has been fully performed by Manufacturer. Under their contract Seller makes an order and Manufacturer delivers within three months. Here, seller ordered $75,000 worth of bras from Manufacturer in December 26, 2007. Manufacturer fully performed by delivering conforming goods on March 17, 2007. Seller accepted the goods and has no defense against the enforcement of this contract. Therefore, Seller will be required to pay Manufacturer the balance due, plus any incidental damages Manufacturer may have suffered because of the delay in payment.

II. The April 7, 2007 contract

In this case Seller ordered $90,000 worth of specialty bras from Manufacturer on April 7, 2007. Manufacturer completed the order with conforming goods, but seller refused to accept the shipment. The issue is whether seller had a right to reject the goods, and, whether seller’s repudiation was timely redacted.

Under the UCC, since Manufacturer complied with the contract and performed by delivering conforming goods, seller did not have the right to reject the goods. Actually, seller’s rejection operated as a breach of contract. Manufacturer, therefore, is entitled to damages. Under the UCC, a seller’s damages can be measured by the difference between the contract price and resale price if the seller resold the goods in good faith, or by the difference between the contract price and the market price if the seller did not resell the goods, as well as any loss in profits if the seller is a volume seller. In this case Manufacturer would be entitled to the difference between the contract price and the market value since the facts do not state whether or not he tried to resell. Additionally he may be entitled to any loss in volume he may have suffered.

Seller will argue that he is not responsible for damages and that Manufacturer should deliver the April 7, 2007 goods because he retracted his repudiation within a reasonable time and before Manufacturer relied on the repudiation.
Where a party repudiates a contract, and the other party has not relied on the repudiation, and the repudiating party retracts its repudiation the contract will be revived.

Seller may make a good argument because although he rejected the goods, he retracted his rejection within a reasonable time and Manufacturer had not relied on it. Also, since the contract does not have a specific date of performance seller will argue he can still accept.

Manufacturer, however, will argue that he has already performed. That seller’s actions were not in fact an anticipatory repudiation, but an actual breach and therefore will be entitled to damages under the April 7, 2007 contract.

III. June 5, 2007 contract.

The first issue, is whether there even existed a contract from the June 5, 2007 order. Under the UCC, requirements contracts must be commercially reasonable, and Seller’s increase in volume, from a $90,000 contract to a $200,000 contract is a very large increase. Manufacturer may argue that since seller’s demand in the June 5, 2007 contract were unreasonable compared to their past conduct, Manufacturer can argue there was no contract.

Nonetheless, Manufacturer began production on the $200,000 contract. During this time Manufacturer approached Seller and tried to modify the contract. Under the UCC modifications are permissible so long as they are done in good faith.

Manufacturer will argue that his attempt at modification was in good faith because current trends in fashion had changed and Manufacturer wanted to make its bras more high end.

Seller will argue, however, that Manufacture’s actions were not done in good faith because he threatened seller with repudiation unless he complied with is requests.

Nonetheless, Manufacturer’s requests were not unreasonable. A fitting room and a training a fitter would not require much effort from Seller. Therefore, it cannot be argued that manufacturer acted without good faith.

If it turns out that there was no contract for the June 5, 2007 contract, manufacturer may still be entitled to some damages under a theory of quasi contract. Since Manufacturer began performance on the June 5, 2007 contract when seller place the order manufacturer may be able to recover his costs.

**Sample Answer #2 - Contracts**

To: Judge  
From: Applicant  
Re: All cause of actions and defenses of the parties  

Is there a valid Contract?
The first issue is whether there is a valid contract between Seller and Manufacturer. In order for a valid contract, there must be offer, acceptance, and consideration. The offer will be valid if there is a manifest intention to enter into a binding contract. The acceptance will be valid if there is some bargained for benefit or detriment and then there must be some form of consideration by either sides. In addition, the contract for a sale of goods must also be in writing if it is for an amount greater than $500 to satisfy the state of frauds.

In this situation, there is clearly an offer made by the seller. The seller had went onto the internet to look at the prices that the manufacturer offered its goods for. The manufacturer was not making an offer by posting such prices since it is more for the customers to have an idea of what the price is. The seller however made an offer to the manufacturer when she transmitted an order to the Manufacturer specifying the kinds of bras and the quantity of each. Such an offer would not need to include the price since a valid contract for the sale of goods would not need a price because the court could substitute a reasonable price for the goods if necessary.

The manufacturer accepted the offer when she shipped the bras that the seller had requested even though it took the manufacturer 3 months to respond to the sellers offer. Under the UCC, a merchant to merchant offer will be held open for a period of 3 months. After such a time, the offer will be held open for a reasonable time. In addition, there is no need for consideration for offer to be held open. An open offer is also sometimes considered an option contract and consideration can be necessary to hold an option open, or in this case, an offer open. In this case, the court should only consider that the offer from the seller should be held open for a reasonable time. The manufacturer supplied the bras to the seller within 3 months of the offer thereby accepting the Sellers offer.

The contract calls for the Manufacturer to supply the seller “all specialty bras need.” Such a contract between merchants will be considered valid even though it does not specify a specific quantity to be shipped. That clause will not kill the contract. One important point to consider would be that the seller could not dramatically increase its needs to a point in which the manufacturer could not supply and then claim there was a breach of the contract. Any increase must be reasonable to the Manufacturer.

First Shipment

The Manufacturer has a claim against the seller for the order delivered to the Seller on December 3. On December 3, the Manufacturer delivered the order to Seller and the Seller accepted the goods. Generally, a person who receives property will be considered to have accepted the shipment if after a reasonable period of time, the person has neither rejected the goods or mailed them back or if the person receiving the goods has done an act which would expressly show that she has accepted the goods, such as selling the goods from the shipment. The seller has yet to pay for the goods but has kept them and did not reject or object to the order. Although it is not stated, if the Seller has sold any of the bras, she will have accepted the goods based upon such an action. The Seller would normally have a reasonable period of time in which it could have rejected the order but because Seller has not, Seller is considered to have impliedly accepted the shipment and therefore owes the value of the contract to the Manufacturer, which would be $75k.
Orders placed on April 7 and June 5

The seller placed an order on April 7 for $90k worth of specialty bras. In a situation where there is a custom made item, the maker has taken a substantial step in making the item, and the item could not be resold to another person, then the person order the specialty item would be liable for the amount of the contract. It is unclear in this case whether the items where specifically made for a certain person or persons, which is more like, and whether the bras could be resold to another department store or specialty store. However assuming that they could not be resold to another department store or specialty store, then Seller will not have the ability to reject once the Manufacturer has taken a substantial step in the making of the custom bras. In this case, the seller rejected the shipment from April 7 when it arrived at her store. Upon arrival, the Manufacturer had completed her part of the contract and the Seller was under a duty to pay the Manufacturer the contract price $90k.

In the case of the June 5, the Manufacturer has started to produce the bras in which the Seller ordered. The Seller has cancelled the order after the Manufacturer has started performance on a custom made good. The seller would normally then be liable to the Manufacturer for the contract assuming the bras are all made at the same time and the finished product occurs at once. However, based on the Manufacturers notice to the Seller that it is trying to sell goods in other boutiques, it would seem reasonable that the Manufacturer might be able to sell the bras it is currently making to another store. In this case, if the Manufacturer can sell the bras to another store, then the manufacturer will not be able to recover the entire contract price. The Manufacturer will be under a duty to mitigate the costs and the Seller may be liable for the amount which Manufacturer loses if the manufacturer is unable to sell the bras for the amount agreed upon with the Seller. The Seller would not be entitled to any money in which the Manufacturer might make based upon selling the bras to the boutiques at a higher price than the price agreed upon with the Seller.

Need for a Custom Fitter

When the Manufacturer stated to the Seller that she would no longer sell to the Seller unless the seller hired a fitter, this should be construed as an offer for a new contract and an anticipatory repudiation of the old contract. The Seller has the option to agree to the new contract in which she will hire a fitter. In addition the seller should also interpret this as an implied cancellation of the old contract. The Manufacturer is expressly stating that there will be new terms to the old contract. The Manufacturer is expressly stating that there will be new terms to the old contract or it will no longer exist. The Manufacturer will not be liable to the seller so long as the Seller has adequate notice and the result of the new contract is not going to put the Seller out of business. If it can be determined that the Manufacturer is making this statement because she knows that is the only suppler for which seller can use, then the seller may raise issue of economic duress. However, such a claim is unlikely to hold up and there are likely other custom bra fitters by which the Seller may order from.

Attempt to Rescind the Rejection
The Seller is likely going to claim that she should be entitled to rescind the cancellation of the contract and accept the shipment which she has rejected two days prior. When the contract was for custom goods, the court will often permit such rescission if done in a reasonable time, since it likely would lead to the avoidance of litigation for the value of the goods by the manufacturer. Here, the manufacturer is refusing to deliver the goods to the Seller. Because only two days have passed, it seems reasonable to permit the Seller to rescind the cancellation of the contract.

Return to Top

Essay Question #7 – Civil Procedure

It is civil motion day in the United States District Court for the District of Confusion. You are a law clerk assigned to prepare memoranda for Judge Guillame, who is assigned to hear the day’s motions.

1. Marcella, a resident of Confusion, has filed a lawsuit in federal court alleging violations of state law against her former employer, the New York Swamp dragons, A Delaware corporation with its principal place of business in New York. The other codefendant, the National Foosball Association (“NFA”), is an unincorporated association of professional foosball teams, each of which is a separate franchise. The NFA has a team that plays in Confusion, but the franchise is headquartered in and operates its principal place of business from New York. Fifty-percent of the Confusion Team’s revenues are generated in Confusion, while the remaining fifty-percent of revenues are produced throughout the remainder of the United States. Defendants have filed a motion to dismiss on procedural grounds.

2. Junior, a North Carolina resident, suffered serious injuries when he was struck by X Corporation’s delivery truck in North Carolina. Junior sued X in federal court. X is headquartered in Confusion and is a wholly owned subsidiary of A Corporation (also headquartered in Confusion), but Junior’s attorney did not name A as a party defendant to the lawsuit. A did, however, control and direct the defenses to Junior’s litigation was pending. Y went bankrupt, had its assets liquidated, and Junior recovered only $2,000.00 of his total damages from the bankruptcy court. Junior has now filed a lawsuit against A as a party defendant. A files a motion to dismiss on procedural grounds, and alternatively, a motion to transfer to North Carolina.

Prepare the Memoranda

Sample Answer #1 – Civil Procedure

To Judge Guillame
From: Clerk

Marcella v. NY Swamp Dragons and NFA
Federal courts must have both subject matter jurisdiction over the action and personal jurisdiction over the parties.

Subject matter jurisdiction in federal court can be either a federal question (a claim or claims based on rights arising out of a federal statute or the U.S. Constitution) or a diversity case (a claim between domiciliaries of two different states where the amount in controversy exceeds $75,000). For diversity jurisdiction to apply the parties must be completely diverse – no plaintiff can be a domicile of any state where any defendant is domiciled. Domicile of a person is determined their primary residence. A corporation is domiciled wherever it is incorporated, as well as wherever it has its primary place of business. An unincorporated association is domiciled in any state where any of its members are domiciled. Personal jurisdiction in a diversity action is determined in the same manner as it is determined in federal court.

Here, there is no federal question in play – Marcella has alleged only violations of state law. In order for diversity jurisdiction to be available, there must be complete diversity. Marcella is a resident and domiciliary of Confusion. The New York Swamp Dragons are domiciled in Delaware (where it is incorporated) and New York (where it has its principal place of business). Therefore, the court has subject matter jurisdiction over the Swamp Dragons.

The NFA is an unincorporated association. It is domiciled in any state where one of its members is domiciled. The NFA has a team that plays in Confusion. However, the court must examine where its principal place of business is. Using the “nerve center” test, the court looks at where the organization’s headquarters are. Here, the Confusion team is headquartered in New York. Using the “operations” test, the court looks at where the team’s primary operations take place. Here, the team plays in Confusion and derives 50 percent of its revenue from Confusion. If the court chose to look at the nerve center test, it would find that the Confusion team is a resident of New York, and thus the NFA does not have a member domiciled in Confusion and Marcella’s claims against the NFA can be heard in federal court on diversity jurisdiction. However, if the court follows the operations test, because the Confusion team plays in Confusion and derives half of its revenue from the state, it will likely hold that Confusion is a New York resident/domiciliary, and thus there will be no diversity jurisdiction for the claims against the NFA.

Junior v. A Corp.
Motion to dismiss on procedural grounds

A Corp’s motion to dismiss raises questions of the res judicata effects of Junior’s judgment against X Corp. Once Junior received a judgment against X Corp., the principles of res judicata preclude him from raising the same claim against the same party. Here, A Corp. owned X Corp. for parts of the litigation and controlled the defense of the action. A Corp. then transferred its interest in A Corp. (and the litigation) to Y Corp.

It is also significant that Junior has had a chance to litigate this action before. Res judicata can only be used against parties that had a full and fair chance to contest the litigation (or parties that
are in privity to such parties). Junior did have a full and fair chance to litigate his claims, so res judicata can be used to stop him from raising his claims against A Corp.

Motion to transfer to North Carolina

The motion to transfer raises questions of venue. Generally, venue in a federal court action is any district where a party resides, or where the cause of action arose. Generally, courts prefer not to disturb the plaintiff’s choice of venue, but will do as a matter of right when the plaintiff chooses a wrong venue and the defendant offers a proper venue. Courts also have discretion to transfer a case on the grounds of forum non conviens when the chosen forum is inconvenient for witnesses or parties.

Here, plaintiff chose a proper venue because it was the residence of one of the parties. There is no basis to transfer the case as a matter of right because the plaintiff chose a proper forum. However, because the accident occurred in North Carolina, it might be more convenient for witnesses to transfer the case to that state. Venue changes for forum non conveniens grounds are granted when it would be a hardship for witnesses to travel to the chosen venue, or other considerations (such as the availability of evidence) would make it more convenient for the litigation to be heard in another forum. If there are witnesses to the action and it is a substantial hardship for them to travel to Confusion, or if other evidence is only available in North Carolina, the court should grant the motion for change of venue.

Sample Answer #2 – Civil Procedure

Marcella v. NFA (National Foosball Association) should be dismissed for lack of subject matter jurisdiction.

Marcella’s case against NFA lacks subject matter jurisdiction. The issue is whether Marcella has met the requirements for diversity in a federal court.

For a federal court to have jurisdiction based on diversity of citizenship, there must be a complete diversity between the plaintiffs and the defendants. That is, all of the plaintiffs must be from a different state than each of the defendants. A corporation is considered to be a citizen of its state of incorporation and its principal place of business. An unincorporated association is considered to be a citizen in every state in which its member is a citizen.

In this case, Marcella is a resident of Confusion. If that is her domicile, that is her state of citizenship. While New York Swamp Dragons (NYSD) is diverse with Marcella (its citizenship is in Del. And NY), NFA is not, because it is an association whose membership includes a team that plays in Confusion, and hence a citizen there. NFA’s headquarters or place of business is irrelevant. So is personal jurisdiction where there is no subject matter jurisdiction. Hence, Marcella’s case should be dismissed for lack of subject matter jurisdiction.

A’s motion to dismiss should be denied, and motion to transfer should be granted.

A seeks dismissal on res judicata grounds. The issue is whether there is claim preclusion where A had litigated the case against a wholly owned subsidiary.
Res judicata prevents any claim against a party if the claim has already been litigated on the merits, by a court with appropriate jurisdiction. Res judicata also applies to any claim that had to be brought because of a compulsory counterclaim requirement in the original suit. In federal court, which is where Junior initially filed his claim, the only compulsory claim is a counterclaim by the defendant against the plaintiff that arises out of the same transaction or occurrence. Any other claim, such as a claim against a party not joined in the litigation, is not compulsory, and hence can be later pursued.

In this case, Junior’s claim against A is not precluded by res judicata, because A was not a party to the original litigation. X may have been a completely owned subsidiary, A may have controlled it, and even defended on behalf of X, but X and A are, in the eyes of the law, separate entities, and hence must be sued in separate capacities. Hence, because it was not a party to the original suit, and Junior had no obligation to join it in the suit, Junior can seek a claim against A. In alternative to a dismissal, A seeks a transfer to North Carolina (N.C.). Issue is whether change of venue is appropriate.

In federal court, a change of venue may be granted if the original venue is proper, and the venue to which transfer is sought is also proper venue. If original venue is improper, the court has discretion to dismiss the case. If proper, the court can grant it if it is more convenient for the parties, witnesses, is in the interest of justice.

In this case, venue N.C. is a proper venue because Junior is a N.C. resident, A is not a N.C. citizen (HQ is Confusion), and the tort occurred in N.C. (not required). Because venue in Confusion is also proper (diversity of citizenship between Junior and A), the court may grant a transfer to N.C. in lieu of a dismissal. Because Junior is a N.C. resident, N.C. is more convenient for Junior, while the hardship on A, as a corporation, is limited. Because the tort occurred in N.C., most of the witnesses are likely to be in N.C., the state of operative facts. The only connection Confusion has to this suit is that A Corp is headquartered in Confusion. Justice is better served by transfer to N.C. District Court. The court should deny the motion to dismiss, but grant the motion to transfer venue.