Bar Examination Sample Q&A - February 2006

Questions and Sample Answers

February 2006

Civil Procedure
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Question #1

TORTS

Twice in the past five years, Tony has been convicted of driving while intoxicated. He realizes a third conviction means mandatory jail, a stiff fine, and a prolonged loss of driving privileges.

Tony reads the newspaper advertisement for a new product known as the Tipsy-Meter, manufactured by Barry. The device is attached to the steering wheel of a car, and upon entering the vehicle, the driver is to blow into the mechanism. If the Tipsy-Meter determines the driver is legally intoxicated, it locks the steering wheel, thereby rendering the vehicle inoperable.

On the evening in question, Tony attends a party at the home of his friend, Phil. Guests are served an assortment of food and non-alcoholic beverages. In addition, several kegs of beer are available on Phil’s back porch, where guests are expected to help themselves.

Tony consumes several beers before leaving the party. He stumbles as he walks down the outside steps, causing another guest, Joe, to remark out loud: "Looks like Tony’s feeling no pain right now!"

Upon entering his car, Tony blows into the Tipsy-Meter, which shows his blood alcohol level is well below that of legal intoxication. Tony then begins to drive home.

Within minutes, Tony drives his vehicle into the back of a car operated by Cynthia, who is waiting at a red light. Cynthia recently had back surgery and, as a result, suffers a much more severe injury than would otherwise have occurred.

Cynthia consults you regarding her legal rights. Before filing suit, you conduct an investigation,
which reveals the following points:

(1) Tony was arrested at the accident scene, and his blood alcohol level, tested by the police at that time, was well above the point of legal intoxication;

(2) The Tipsy-Meter in Tony’s car malfunctioned because the air passage was blocked. As a result, the Tipsy-Meter could not properly read breath samples. The problem is traced to a defect in the device itself, and is believed to have existed at the time of installation;

(3) Cynthia’s driver’s license had expired a month before the accident. She had misplaced the renewal application and did not realize she had missed the deadline.

Prepare a memorandum, advising Cynthia of the likely defendants in a lawsuit, the grounds asserted against each defendant and the likelihood of cross-claims and/or defenses raised by each defendant.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 1

To: Cynthia

From:

Re: Your claims

It is my opinion that you have viable claims against Tony, Phil and Barry, as well as anyone else in the "chain of commerce" of the Tipsy Meter, as discussed below.

As to Tony, you have claims in negligence, including negligence per se. A negligence claim arises when there exists a duty of care, there is a breach of that duty, legal causation and damages. In this case, Tony had a duty of care to operate his vehicle safely under the circumstances and avoid striking your vehicle. He breached that duty by driving while intoxicated and rear-ending your vehicle. Notably, when a rear-end collision occurs there is generally a "presumption of negligence." That means that the burden of proof will be on Tony to demonstrate that he was not negligent. Also, the fact that Tony was driving while his BAL was well over the legal limit will probably be "negligence per se." When, as in this case, a statute is created to protect against a certain harm, and a violation of the statute in fact causes that harm, a presumption of negligence arises. Since Tony violated the statute by driving with a BAL over the limit, and since a "drunk driving" accident occurred, Tony was negligent per se.

Causation and damages against Tony are clear. His negligence caused the collision, which was the cause of your injuries. That being said, Tony will most likely cross claim against all co-defendants, arguing that their liability (negligence or otherwise) was the sole or primary cause of your damages. Tony is unlikely to escape liability in this way, and will almost certainly be found liable, or jointly and severally liable with the co-defendants.
Tony may raise other defenses to the suit, and I will mention two significant defenses. First, he may argue that he reasonably believed he was not intoxicated, because he reasonably relied on the Tipsy Meter. I expect this defense to fail for two reasons. First, Tony "stumbled" out of the party, and someone remarked that he was "feeling no pain." This is evidence that Tony's intoxication should have been known to him. (Also, in cases such as this, voluntary intoxication does not give rise to a defense of no knowledge of ones actions.) Second, assuming that the drunk driving statute is strict liability, Tony would still be negligent per se.

A second defense Tony may raise is the fact that your injuries (or at least their severity) were caused by your pre-existing back problems. This defense will also fail. It is axiom of law that the defendant "takes the plaintiff as he finds her." As long as your injuries were the reasonably foreseeable result of the negligence, your predisposition to a severe back injury will be no defense.

You probably also have a "Dram Shop action" against Phil, who threw the party at which Tony became intoxicated. Dram Shop Acts permit recovery against those who serve intoxicants to someone who is visibly intoxicated and who then causes harm to occur. Originally, such actions could be brought only against commercial establishments, but have now been extended to social hosts. Since it appears that Tony was drinking at the party while visibly intoxicated (see below), and Tony then caused this accident, Phil should be liable in the Dram Shop action against him.

Phil will probably cross claim against the co-defendants as described above. He may also raise the "glass spine" defense discussed above. Also, he may argue that he is not liable since Tony was serving himself and Phil did not know that Tony was visibly intoxicated. This defense should fail, since Phil provided the beer (even though Tony "poured his own") and since another party goer saw Tony stumble and remarked that Tony was "feeling no pain." This should have been significant to put Phil on reasonable notice of the problem. (The partygoer probably had no affirmative duty to act to prevent Tony from driving, but I will also research any reliable Good Samaritan Laws to confirm this.)

Lastly, Phil may also argue that Tony crashing into you was a "legally intervening cause" of your harm, thereby relieving you of liability. This defense will also fail, since the harm was foreseeable, and would not have occurred but for Phil's negligence. Also, this is the very type of harm that Dram Shop Acts are intended to prevent, so Phil is probably negligent per se as well, giving rise to a presumption of negligence as discussed above.

Finally, you have a viable claim against Barry. Since there is no evidence of negligence on the part of Barry, the action should be brought under "strict liability." In this type of action, a product manufacturer is liable for harm caused by a defective product, even absent a showing of negligence, recklessness, intent or even knowledge of the defect. A defect can be in the design or manufacturer of the product. In this case, a defect in the manufacturer caused the Tipsy Meter to malfunction, which was a legal cause of the accident and your harm. As stated above, it is irrelevant that Barry was not negligent, since he is strictly liable for the defect.

Barry will probably cross claim as described above, and raise the "glass spine" and "intervening
cause" arguments discussed above. These defenses should fail for the same reasons. Barry may also argue that you were neither a purchaser or user of the Tipsy Meter, so you should not be able to recover for a product defect. This defense should also fail, since "bystanders" are able to recover for product defects as long as the harm was foreseeable. In this case, since the Tipsy Meter was intended to prevent an intoxicated person from driving and causing harm, the accident and your damages were foreseeable, and you may recover under the defective product/strict liability thereby.

Finally, I would also sue any defendant in the chain of commerce between Barry and Tony, such as a wholesaler and retailer. Such entities are also strictly liable to you for the defect, though they may (legitimately) demand indemnification from Barry since the defect was present when it left Barry, and the wholesaler, retailer, etc. probably had no way to discover the defect.

Please contact me to discuss this matter further. Thank you.

SAMPLE ANSWER 2

To: Cynthia

From:

Re: Your legal claims

This memorandum summarizes the likely defendants available to you, Cynthia, in a lawsuit, the grounds you may assert against each defendant, and the likelihood of cross-claims and/or defenses that we expect each defendant may raise.

Tony: battery

The most promising defendant for you is Tony, the driver who ran into the back of your car. You might, first, assert a claim for battery against Tony. To recover, you will have to prove that Tony intentionally committed an act substantially certain to result in a harmful or offensive - but it may be difficult to prove the third element, that Tony intentionally committed the act in question; driving his car forward into yours. He need not have intended you harm, but he must have intentionally caused his car to bump into yours.

Tony will likely defend such a claim by asserting that he did not act intentionally; because of his intoxicated stated, he did not intend to strike your car, but was merely careless in doing so. Because it will be difficult to prove intent, this defense to this particular claim may well succeed.

Tony: negligence

Nevertheless, you also have a claim against Tony for negligence. To recover, you will have to prove that Tony owed you a duty of care, that he breached that duty, that his breach proximately
caused you injury, and the extent of your damages. This claim is much more straightforward to you. All drivers owe all other drivers the duty to drive with reasonable care, and it is likely that you will be able to prove that Tony breached this duty by driving while legally intoxicated. First, you may be able to take advantage of the doctrine of negligence per se, in which Tony's breach of a statute or ordinance designed to protect individuals like you is itself proof of his negligence. The DWI statute is designed to protect, in part, other drivers on the road, and so if you assemble proof that Tony violated the DWI statute, you may be able to assert negligence per se to show a breach of his duty. In most jurisdictions, as long as you can show that Tony's conduct violated the statute, you need not actually show that Tony has been convicted; the statute sets one threshold of a legal duty, and you may use that standard to show Tony's negligence. Therefore, even if Tony's arrest did not lead to a conviction, you may still be able to show negligence per se.

Even without negligence per se, you will likely still be able to show that Tony behaved in a negligent fashion. There are several pieces of evidence to support this claim. First, Tony had notice of his problem of driving while intoxicated; he had two prior convictions. Although you will most likely not be able to introduce evidence of his prior convictions in order to prove that Tony drove while intoxicated on this occasion, you will be able to introduce evidence of these convictions to show that Tony was put on notice of his own propensity to drive while drunk. Second, there is no evidence that Tony was forced to drink at Phil's house; Tony's voluntary intoxication, without providing for an alternate means of transportation, may well constitute reckless and will at least constitute negligent conduct even if you cannot show that his driving itself was careless. Third, you will likely be able to introduce testimony by Joe, who will be able to testify about his observations of Tony's condition that evening. You should also be able to introduce evidence of Joe's statement, "Looks like Tony's feeling no pain right now!" - although the statements of declarants out of Court are usually considered inadmissible hearsay, this statement records Joe's present sense impression of Tony's condition, and as such, it is an exception to the hearsay rule and will be considered admissible testimony. Finally, you will likely be able to introduce the results of the blood alcohol test given to Tony at the scene; although you will have to call a police witness to authenticate the test, the test will be admissible evidence not within any exception, and it will establish that Tony's blood alcohol level was well above the limit for legal intoxication while he was driving.

All of the above evidence may be used to show that Tony was intoxicated while driving, and therefore breached his duty to you to drive with reasonable care. Tony's intoxication was likely a proximate cause of the accident, and therefore of the injuries you sustained, and so you will likely be able to recover for his negligence.

Tony: defenses and cross-claims

We would expect that Tony would assert at least three defenses to this claim, and that he would also assert a cross-claim, discussed below. First, Tony would likely contend that he was not negligent, because he exercised reasonable care in installing the Tipsy-Meter to prevent him from driving while intoxicated. The relevant question here is whether a reasonable person under all the circumstances would rely solely on the Tipsy-Meter to prevent any harm from driving while intoxicated. If so, Tony may well be able to show that he was not negligent. However, in this case, I think that we have a strong claim that a reasonable person would not rely solely on a
Tipsy-Meter; it is one step toward responsible conduct, but cannot be the only step taken, especially for an individual with a history of driving while intoxicated. If a reasonable person would not have relied solely on a Tipsy-Meter, Tony's defense will fail.

Second, Tony will probably claim that he was not responsible for your injuries, or at least for most of your injuries, because you recently had back surgery. This, too, should fail: by New Jersey's "eggshell-skull" rule, a negligent defendant is deemed to take the plaintiff as she may be found, and if his negligence is the proximate cause of injury, the fact that other factors may aggravate that injury will not preclude recovery. Even though your back was more sensitive due to your recent surgery, New Jersey law provides that due to Tony's negligence, as the proximate cause of your injuries, Tony will be held liable for the full extent of any damage.

Finally, Tony will probably assert that you were negligent in driving without a valid license. New Jersey uses a full comparative negligence rule, apportioning liability to each negligent actor (in other states with a contributory negligence rule, the plaintiff's negligence could bar recovery from a negligent defendant). If you are found negligent in driving without a license, it could limit your recovery from Tony. However, it is unlikely that your expired license will be deemed negligence here. Although there was a legal responsibility for you to drive only with a valid license, you owed no duty to Tony to do so; this is a requirement that the state requires to ensure that each driver drives safely overall. As there is no indication that you were not driving safely, the lack of a valid license alone will probably not be deemed negligent conduct as to Tony, and will probably not limit your recovery.

We would also expect Tony to assert a cross-claim against Barry, the maker of the Tipsy-Meter, for either contribution (payment of the responsible portion of damages) or indemnity (payment in full due to complete legal responsibility), for negligence, strict liability, or the breach of a warranty. I will discuss negligence and strict liability claims below, as these are also claims that you will have against Barry, but here I will briefly discuss the breach of warranty theories; you will not be able to assert such a theory, as there was no privity of contract between you and Barry (you did not purchase the device, and you are not a family member, household member, or guest of one who did). If the Tipsy-Meter contained any warranty guaranteeing its proper functioning, in the newspaper advertisement or otherwise in product packaging, and the product failed to function as warrantied, Tony would likely have a breach of express warranty claim against Barry. Even if no such warranty were found, Tony could have a claim for the breach of the implied warranty of merchantability, because the Tipsy-Meter did not function as a reasonable person would have expected, for the use for which it was intended. If Tony is able to recover on either cross-claim, these claims will likely reduce the amount that he must pay to you - though you will be able to recover the full extent of your damages in any case, as Tony and the other actors are all jointly and severally liable, meaning that you may recover the full amount and all of them to apportion liability among themselves.

Phil: dramshop act

You may also have a claim against Phil, for his responsibility as a server of alcohol. He was not selling beer, and so he is not a commercial provider of alcohol, and may not be covered under New Jersey's dramshop act. If the dramshop act applies to noncommercial providers of alcohol,
however, then Phil may be strictly liable for damages arising out of the acts of an intoxicated individual, due to that individual's intoxication. The dramshop act may not provide strict liability, however, if it does not do so, but rather uses a negligence standard, Phil will likely assert your lack of a valid license as a defense, but this defense will fail for the reasons above. Finally, Phil will almost certainly cross-claim against Tony for Tony's own negligent acts, analyzed above.

Barry: warranties

As mentioned above, you will not have a claim against Barry for breach of warranty, due to the lack of privity.

Barry: negligence

You also may have an action directly against Barry for negligence, if it can be shown that he breached a duty of reasonable care in designing or manufacturing the Tipsy-Meter. The facts that we have discovered thus far do not indicate any negligence on his part, but as time goes on, such facts may be established.

Barry: strict liability

However, you have a valid claim against Barry in strict liability for a product defect. First, it is possible that the Tipsy-Meter malfunctioned due to a design defect: perhaps it is the design of the product that caused the air passage to become blocked. If so, and if Barry could reasonably have substituted a safer design, Barry will likely be liable to you for any reasonably foreseeable damages arising out of the design defect, including foreseeable misuse of the device itself, and certainly including Tony's ability to drive while intoxicated.

Even if the Tipsy-Meter was not defectively designed, however, it may have been defectively manufactured. We know that the problem is believed to have existed when it was installed; if the blockage problem existed when it left Barry's manufacturing facility, and if it was a dangerous defect, then again, Barry will be strictly liable for damages resulting from the defect, no matter whom was injured. Here, the defect was certainly dangerous: it caused a device intended to prevent drunk driving to malfunction, allowing a drunk driver to operate a motor vehicle. If the defect existed in this Tipsy-Meter when it left Barry's facility, as is likely, then you will probably have a valid claim against Barry in strict liability for a manufacturing defect. Even if you are found to be negligent, your negligence would not defeat such a claim in a contributory negligence state, and would only reduce your award in a comparative negligence state like New Jersey to a limited extent.

As above, we would expect Barry to cross-claim against Tony for negligence as well. These claims are analyzed above.

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Question #2
CONSTITUTIONAL LAW

The State of Impairment enacted legislation prohibiting employers, educational institutions, and private organizations receiving government funding from engaging in discrimination based on race, gender, sexual orientation or political affiliation. The legislation also contains a provision barring state funding to and revoking the tax-exempt status of any entity that refuses to comply with the anti-discrimination statute or if the entity prohibits state agencies’ on-campus recruiting.

The Girls Club ("Club") is a group of non-profit, tax-exempt colleges and non-educational social organizations chartered to promote leadership values in its all-female membership. In recent years, the Club has developed an in-house recruiting program for its members, which provides access to a variety of entry level and management trainee positions with private and government employers.

During the height of the in-house recruiting season, the Club expelled Sara when its President discovered she intended to undergo a sex change operation. In a press release, the Club stated: "Ms. Sara’s decision to undergo a sex change operation conflicts with the fundamental values of the Club’s charter, which is to develop and foster a nurturing environment for female leaders of tomorrow." The Club also banned Impairment recruiters from its in-house recruiting program because it wanted to preserve its "core values." Impairment immediately stopped all funding to and revoked the tax-exempt status of the Club because of its noncompliance with the anti-discrimination and recruiting legislation.

Sara has filed a lawsuit against the Club alleging that her expulsion violated Impairment’s anti-discrimination legislation. The Club, on behalf of its members, has also filed suit against Impairment and its policymaking officials seeking injunctive relief and monetary damages arising out of the loss of its state funding and tax-exempt status.

Sara and the Club’s actions have been consolidated in Impairment’s trial court. As the law clerk to the Judge assigned to this litigation, you are asked to prepare a memorandum assessing all relevant constitutional claims and defenses of the Club and Impairment.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 1

To: Judge
From: Applicant
Re: Sara v. Club/Club v. State of Impairment

Introduction

You have asked me to prepare a memorandum that assesses the constitutional claims and defenses of Club and the State of Impairment. In general, it appears that Sara’s claim is based
upon the Equal Protection Clause of the 14th Amendment of Constitution. The issue for Sara concerns whether Club is a private or private institution for purposes of the 14th Amendment, which requires government action in order for the 14th Amendment to be applicable. In regard to Club’s claims against Impairment, the issue also hinges upon the 14th Amendment on grounds of procedural due process. However, there is also a First Amendment issue involving freedom of association.

Sara v. Club

The most significant issue here concerns whether the Club can constitutionally discriminate against Sara on the basis of her gender. Sara has decided to undergo a sex change operation, which is offensive to the Club, an all-female group. Before determining whether such discrimination is constitutional, it is appropriate to determine whether Club is private or private for purposes of application of the 14th Amendment.

Club receives funding from the state of Impairment and also has tax-exempt status (prior to the state’s action of revoking these privileges). Therefore, based upon the fact that the state funds the Club, it is highly likely that the Club would be deemed as an extension of the state rather than a completely private organization. If Club were just a private organization, it would be able to discriminate freely on the basis of gender, and Sara would have no equal protection claim.

In regard to gender, one must determine the proper level of scrutiny under the 14th Amendment Equal protection Clause. The Equal Protection clause applies when class of people receives discriminatory treatment, and the discrimination is fostered by the state. Here, gender was within a quasi-suspect class, and quasi-suspect classes receive intermediate scrutiny. The proper standard concerns whether Clubs gender discrimination is substantially related to an important government interest. Sara will likely be able show that the Club’s discrimination against her based upon her new male gender is not substantially related to an important government interest.

In defense, the Club will argue that it is a private organization so that the 14th Amendment will not apply to Sara’s discrimination claim. Because the Club is now no longer funded by the state since the state has revoked Club’s funding as a penalty for the Club’s gender discrimination, the Club will likely argue that it is solely a private organization, which can freely discriminate on the basis of gender. However, the Club cannot deny the fact that it received state funding at the time Club expelled Sara.

Furthermore, Club will argue that, while it received state funding, was not acting as a state function. Thus, the strength of Sara’s Equal Protection claim rests upon the determination of whether the Club will be deemed a public or private organization. In my opinion, it appears that the Club is a public organization since it received state funding and served an important role for the state by advancing careers of female Impairment citizens.

Club v. Impairment

A significant question that arises here concerns whether Club is entitled to state funding and tax-exempt status. The procedural due process clause of the 14th Amendment requires that an
aggrieved plaintiff be afforded procedural due process in the form of notice or a hearing before being deprived of a property right. The strongest argument that the Club has in regard to a property right is tax-exempt status, since Club is a non-profit organization. Club likely formed itself as a non-profit organization in order to obtain tax-exempt status. Therefore, the Club arguably has an entitlement in its tax-exempt status.

Thus, a review of procedural due process under the 14th Amendment is in order. The Procedural Due Process clause (PDP) requires a balancing of the interests between the petitioner, the risk of error without additional procedures, and the interest of the state in expediting a decision. Here, a balancing of the aforementioned interests will likely weigh in favor of Club, since it arguably had a property interest in its tax-exempt status, being a non-profit organization. In defense, the state will argue that its interests in expediting the situation and its own interests in the enacted legislation outweigh the Club’s interests.

The more significant claim by the Club concerns the First Amendment right of Association. The Club can argue that the state forces the Club to associate with both men and women. The Club had all female membership. Thus, by taking away the Club’s funding and tax-exempt status, the state is insisting that the Club associate with men as well as women in violation of its First Amendment right.

The First Amendment issue also turns, once again, the Equal Protection issue. The Club will also argue that it is a private organization, so that it is freely allowed to discriminate on the basis of gender and associate with only females. However, the state will likely argue that the Club, by receiving state funds, is a state actor which cannot freely discriminate.

Lastly, the Club might attempt to argue that the state’s legislation is unconstitutional as a bill of attainder because it punishes the Club by taking away funding and tax-exempt status through legislation. The state will counter by arguing that the legislation was not intended to function retroactively to the Club.

SAMPLE ANSWER 2

Sara may file a lawsuit against the club because the club violated her 14th Amendment right to Equal Protection under the Constitution.

The issues are whether the State of Impairment statute against discrimination is constitutional as applied against a private organization, and whether Sara’s Equal Protection rights have been violated under the statute.

The Congress of State Impairment may draft legislation that will protect individuals from discrimination based on sex or gender. The court will uphold such legislation if the government can show that the law is substantially related to an important government interest. This is an intermediary scrutiny standard that the court will apply to any case involving a case based on gender. Moreover, the government may regulate private conduct if such conduct has an adverse affect on interstate commerce. Moreover, government may regulate private conduct when such
private organization are (sic) receiving government grants or funding.

Under these facts, the government can show that its employer anti-discrimination statute is substantially related to an important government interest in protecting individuals from discrimination based on gender or sexual orientation. It may also show that since the Club has derived beneficial funding and tax exempt status from the state, and the fact that employment has an effect on commerce, Club’s discriminatory behavior, although private, may be regulated by the State of Impairment. Such regulation is in the spirit of the U.S. Constitution.

Therefore, the Club may not raise any such defense, and their conduct at expelling Sara based on gender violates Equal Protection under the 14th Amendment.

In order for a plaintiff to sue a defendant for a constitutional violation, their case must be justiciable. The plaintiff must show that they have standing, and that the defendant caused the plaintiff’s injury and that the court may redress such injury. In order for a plaintiff to have standing, they must show state action and an ongoing injury. Sarah may sue because as discussed earlier, private conduct is actionable against Club under these facts and Sarah has and is suffering an ongoing injury (i.e. she has been expelled from the Club in the height of the in-house recruiting season.) The court may redress this injury with an injunction. Therefore, Sarah has standing to sue based on a violation of Equal Protection rights.

The Club may have a defense on two separate grounds. The issue is whether Club’s First Amendment right of freedom of association has been violated and whether their Fifth Amendment due process rights have been violated.

A state may pass no law abridging a persons freedom of association under the 1st Amendment. This right is applied to the states through the 14th Amendment.

Here, Club may argue that their freedom of association has been violated. The mission of their charter is to foster an environment for female leaders of tomorrow. Their ability and right to foster women’s success is one that may not be infringed upon. However, when such association is conducted in such a manner that discriminates, the court may find no right. Here, Club’s association with women is held out to the public, and therefore, the Club may not discriminate based on gender.

Due process under the 5th Amendment as applied to the states under the 14th Amendment guarantees that no person shall be deprived of life, liberty or property without due process of law.

Here, Club may argue that the immediate injunction stopping all funding and tax-exempt status is deprivation of property and a violation of due process. The club, under such a (sic) anti-discrimination statute, is entitled to a trial type hearing to present facts before such a deprivation of property is summarily decided by the state. To act otherwise would be a violation of due process.

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Will is an avid racecar fan. When he heard the Formula One World Championship was coming to New Jersey, he immediately purchased tickets for the event for himself and his family.

On race day, Will decided to drive his Lasa-Speed Coupe to the event. After the race, Will felt he could duplicate the on-track actions of his favorite stars. Traveling down the highway at over 100 miles per hour, the Lasa-Speed Coupe went out of control and crashed into a concrete barrier. Will and his wife, Sara, were not seriously hurt. However, his genius stepdaughter, Jane, was horribly maimed.

After the accident, Will and Sara divorced. Weeks after the divorce, Sara sued Will for Jane’s injuries. Will filed a third-party complaint against Lasa-Speed, claiming a product defect caused the accident.

At trial, attempting to show that Lasa-Speed was aware of its defects, Will’s attorney sought to introduce evidence that before either Sara or Will’s lawsuits were filed, Lasa-Speed offered to give Will $750,000.00 and a Lasa-Speed Super Coupe if Will agreed not to sue. The court sustained Lasa-Speed’s objection.

Will’s attorney also moved in limine to exclude Will’s nine-year old conviction for gambling and two three-year-old convictions for speeding, which occurred in the same area of town as the accident. The court denied the motion as to the gambling conviction but granted the motion regarding the speeding convictions.

Will’s attorney called Jane to testify that she heard a loud "bang" right before the car went out of control. Before the oath was administered, Lasa-Speed’s attorney objected: "Judge, this witness is only nine years old, clearly too young to give any testimony." The court sustained Lasa-Speed’s objection.

During her cross-examination, Lasa-Speed’s attorney asked Sara whether, when they were married and alone, Will ever said to her "I love to drive fast." Will’s attorney objected. The court sustained the objection.

Will’s attorney called Designer’s Assistant to testify that Designer, now in Europe, said, "I know the Lasa-Speed Coupe isn’t structurally sound when driven at very high speeds. But no one can drive that fast in America anyway." Lasa-Speed’s attorney objected. The court overruled the objection.

The jury returned a verdict against both Will and Lasa-Speed. Will hired your firm to handle the appeal. The senior partner has asked you to research and analyze all evidence rulings and write a memorandum.
SAMPLE ANSWER 1

(1) Lasa-Speed offered to give Will $750,000.

Evidence is relevant if it tends to made a fact of consequence more probable or less probable then it would without the evidence, i.e., does it help to prove or disprove a fact in issue.

Under the Federal Rules of Evidence (FRE), settlement offers are not admissible to prove liability or validity of a claim.

Here the Lasa-Speed offer to pay Will $750,000 and a Lasa-Speed Super Coupe is relevant to show liability or negligence because this seems like a large settlement. However relevant evidence is inadmissible if its probative value is outweighed by unfair prejudice.

Lasa-Speed can argue that the wanted to settle to they would not have to go through with a long and tedious litigation.

The evidence of Lasa-Speed’s offer is not admissible. The Court acted properly in sustaining the objection.

(2) Will’s Convictions

9-year old convictions
Under the FRE, convictions and misdemeanors are admissible if they concern truthfulness or honesty and are less than 10 years old.

The 9-year old conviction for gambling is irrelevant. It does not help prove or disprove a fact in issue and was therefore correctly denied.

Speeding Conviction
The conviction for speeding is relevant because it tends to prove there was another cause for the accident other than the Lasa-Speed Coupe, that is, Will’s negligence.

Will can argue that the speeding conviction is character evidence. Character evidence is inadmissible to show that the defendant acted in conformity with that character on a given occasion.

The Plaintiff will argue that Will put his character in issue when he felt he could duplicate on-track actions, therefore, the conviction is admissible. Will was traveling at 100 miles/hour when the Laser-Speed Coupe went out of control.
The Court properly decided to admit the speeding conviction.

(3) Jane’s Testimony

Any witness can testify. The FRE does not have an age restriction. Any witness can testify to their personal (first-hand) knowledge, observation and perceptions.

As long as Jane can appreciate what it means to tell the truth and that she is under oath to tell the truth, she can testify.

The evidence of the "bang" is relevant because it tends to prove that the Laser-Speed Coupe had a defect and made a banging noise. This helps the trier of fact decide the cause of the accident.

The Court incorrectly sustained Lasa-Speed’s objection.

Lasa-Speed can argue that Jane might be bias but Jane was probably not too young at nine years old to testify to what she heard.

(4) Sara testimony

The evidence is relevant because it tends to prove that Will was the cause of the accident because he was driving fast.

Will attorney can argue two areas' confidential marital communication and hearsay

Confidential marital communication is a privilege and applies when a husband and wife make statements that are confidential while they are married. Each spouse holds the privilege. The communication made while alone during the intimacy of their marriage also survives divorce. These communications cannot be disclosed. The judge acted correctly in sustaining the objection.

Hearsay

Will’s attorney can also argue that such a communication is hearsay. Hearsay is an out of court statement offered in court for the truth of the matter asserted. Hearsay in admissible if it falls with an exception which offers some indicia of trustworthiness. Here there is no hearsay exception.

(5) Designer’s Assistant

The evidence is relevant to help prove that Lasa-Speed is defective and probably cause the accident.

Lasa Coupe will object and state that the testimony is hearsay (defined about under #4).
Will’s attorney will argue an exception to the hearsay rule "admission" (vicarious admission) by a party opponent or declaration against interest.

An admission is not hearsay, Declaration against interest is an exception as long as declarant is unavailable. Here the designer is unavailable.

The admission or declaration is clearly against his interest if he designed the car and is subject to liability.

The court was correct in overruling the objection.

**SAMPLE ANSWER 2**

To: Senior Partner
From: Jr. Partner
RE: Will’s Appeal - Evidentiary concerns
DATE: 2/24/06

After analyzing the evidence rulings from the trial, I have found that there were some rulings in error and some that were correct.

Wills Attorney offering evidence of a prior attempt to settle

Will’s attorney in the trial attempted to introduce evidence of a settlement offer by Lasa-Speed prior to either of the lawsuits. First thing to analyze is the relevance. Something is relevant if it has a tendency to prove or disprove a fact in the case. Here, the fact that Lasa-Speed offered a settlement to Will is likely relevant because it deals with the issue at trial and it is likely to prove or disprove someone admitting guilt.

However, there is strong public policy against admitting evidence regarding settlement offers because it may chill settlements if they could be used against parties in court to show things ranging from liability to insurance. Lasa-Speed correctly objected and the court sustained. The trial court was correct to sustain the objection because admitting the settlement offer would be against public policy.

Will’s attorney trying to exclude his convictions

Will’s attorney sought to exclude Will’s nine-year old convictions for gambling, and two three year old convictions for speeding which occurred in the same area of town as the accident. The court denied the motion as to the gambling convictions but granted the motion regarding speeding convictions.

In order to admit prior convictions into a court proceeding, the prior conviction must either be a felony or must be a misdemeanor that deals with truthfulness such as fraud, tax evasion, etc. Additionally if that conviction is ten years old or more, the discretion is of the court to decide if it is probative.
In the present situation, if the gambling conviction was a felony it would likely be allowed to be introduced. Gambling would not be considered a misdemeanor that involves lying. If the jurisdiction views gambling as a misdemeanor, then it would likely not be allowed to be admitted and as such the trial court ruled wrong in denying the motion as to gambling.

The two three year old convictions for speeding would likely also be excluded if they were misdemeanors. However, there is a possibility that the convictions because they deal with a pertinent issue in the case, would be allowed into evidence because it tends to prove Will’s history of speeding in this exact area. If it is offered as evidence of Will’s prior consistent action in this area then it might be admitted and in that case, the court would have ruled incorrectly on this issue of evidence as well. The convictions of the speeding would be relevant because they tend to prove or disprove Will’s usual way of driving. The gambling conviction may not be relevant to this case because it doesn’t tend to prove or disprove any fact in this case.

Lasa-Speeds Objection to Jane’s testimony

Jane’s testimony would be considered relevant in the present situation because she was an eyewitness to the accident and her testimony would tend to prove or disprove the Lasa-Speed had a defect in the car.

Jane’s testimony is hearsay in that it was an out of court statement that is admitted to prove that there was a design defect that caused the accident. However, under the Present sense impression exception to hearsay, a witness may testify as to what they perceived if they were present at the scene and saw the event occur blurted out a heard exactly that they sensed.

Lasa-Speed objected on account of the competency of the witness. They attempt to claim that she was witness and as such at 9 years old is too young to give testimony.

Jane would not be deemed incompetent to testify if she was able to understand the situation and understood the quality and could perceive that of their actions. If Jane could perceive the car going "bang" right before it went out of control, then she is competent. Here it is likely that the court erred in sustaining the objection because it is likely Jane understood and perceived the situation.

Will’s objection to Sara’s Statement

This is a relevant statement because it tends to prove or disprove Will’s propensity to drive fast. In this situation it would be hearsay because it is an out of court statement that is offered to prove Will was negligent in his driving. Will’s objection could be based on either the fact that this testimony is inadmissible because the door wasn’t opened or the character if that Will is a reasonable driver. In order to attack character, it must first be established by the case in chief.

Second, this could be excluded because of the marital communication privilege. The witness spouse has the right to not admit to any confidential communications with their spouse during marriage. Even though Will and Sara are divorced the question asks about communication during
Lasa-Speed Objection to Designer Assistant

The statement here was relevant because it tends to prove or disprove that the car was defective. It is hearsay because it is an out of court statement offered to prove Lasa-Speed’s negligence. This statement likely falls within the Admission of a party opponent exception to hearsay.

The Designer is not present so he can’t be called to testify as to the statement. The Statement is an opinion that speaks to the liability of the party to the matter. Due to Designers unavailability, this could be offered as an exception to the hearsay rule. The court was correct to overrule the objection if Designer was unavailable.

CIVIL LAW

Joe, a police officer for a New Jersey municipality, entered a cell to restrain an intoxicated prisoner who was thrashing about, banging on the bars, etc. When Joe left the cell, the prisoner had facial abrasions and required stitches, and accused Joe of smashing his face against the cell bars. Steve, a trainee assigned to Joe, was present but did not actually see the prisoner until the altercation was over. However, he wrote a report in accordance with what Joe told him occurred, which was that the prisoner’s injury occurred before Joe entered the cell. In response to an internal investigation, Joe urged Steve to "stick with the story" rather than explain that he had not actually seen the incident. These facts came to light during the investigation.

Following the investigation, the State charged Joe with crimes of official misconduct, aggravated assault, and witness tampering. The police department charged him with disciplinary violations, which proceedings were held in abeyance pending the criminal proceeding. The grand jury reduced the first two criminal charges and no-billed the witness-tampering charge. The downgraded charges were dismissed after the State’s case was presented.

Joe sought unsuccessfully to have the disciplinary charges dismissed, arguing they were precluded by the outcome of the criminal charges. The disciplinary hearings resulted in dismissal of the assault charge. However, Joe was found guilty of knowingly and willfully causing a false police report to be made; issuing an unlawful order to a subordinate; and failing to give a truthful statement when being questioned in regard to an internal investigation. Joe appealed.

The prisoner has filed a civil action against Joe and the municipality for the injuries he incurred, continuing to claim Joe assaulted him in the cell. Joe has filed a motion to dismiss the case on the basis of the prior proceedings.
Joe has filed a claim for attorney fee reimbursement for defending against the criminal and administrative/disciplinary charges, pursuant to a statute allowing fees to a "defendant in any action or legal proceeding arising out of and directly related to the lawful exercise of police powers in the furtherance of his official duties." The statute further requires that for an officer to be reimbursed for defense expenses, the proceeding must "be dismissed or finally determined in favor of . . . the officer." The municipality opposes the fee claim.

You are the law clerk assigned to the judge who is hearing all the cases in which Joe is involved. She has directed you to analyze all the cases and to discuss the effects, if any, of the various decisions already rendered on the claims still pending.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 1

TO: Judge  
FROM: Law Clerk  
RE: Cases Involving Joe  
Joe’s Appeal of Disciplinary Hearings - The issue here is whether the disposition in Joe’s favor of all of the criminal charges (no-bill on witness tampering, downgrade of official misconduct and aggravated assault, and dismissal of the downgraded charges after the state’s case was prosecuted) bars further disciplinary hearings by the police department based on the underlying events at issue. Joe could try to argue based on double jeopardy or res judicata or collateral estoppel (claim or issue preclusion), but likely will not prevail on either argument.

Double jeopardy - Double jeopardy bars retrial of a criminal defendant for subsequent criminal charges, by the same sovereign, if those charges and the original charges do not each include at least one element not included in the other charges. The threshold issue is whether the grand jury proceedings and trial on the reduced charges were sufficient to cause jeopardy to attach. The grand jury was not because jeopardy does not attach until the first witness is sworn in a criminal trial before a judge or the juror is sworn in a jury trial. Jeopardy attached for the downgraded charges, but we don’t have sufficient information to analyze what those charges were.

In any event, regardless of whether jeopardy attached, the requirements for double jeopardy are not satisfied here because police department disciplinary proceedings are administrative in nature, and not criminal. Therefore, Joe has no ground for dismissing those charges based on double jeopardy.

Issue/Claim Preclusion - The issue here is whether the criminal proceedings resolved issues arising out of the same transaction or occurrence, whether the party Joe seeks to preclude (the state or municipality) was a party to that proceeding, whether the prior proceeding was a final judgment, and whether the issues being raised in the second proceeding were material to the outcome of the first proceeding and if not raised in the first, could have been raised in that
proceeding. Here, Joe cannot meet that burden at the very least because the grounds on which he prevailed in the first proceeding - failure of the state to prove lack of probable cause (in the case of the grand jury) or guilt beyond a reasonable doubt (in the case of the criminal trial) were not necessarily dispositive of the police department proceedings.

Prisoner Civil Action Against Joe - The issue here is whether the disposition of prior criminal proceedings against Joe would act to bar prisoner’s claim against Joe arising out of the same transaction or occurrence. In order for Joe to prevail, he would have to establish grounds for claim preclusion (res judicata), including the requirement that the party against whom res judicata is being asserted, had an opportunity to participate in the prior proceeding. This threshold requirement clearly cannot be satisfied. Thus Joe will not be successful in dismissing the prisoner’s lawsuit.

Joe’s Claim for Attorney’s Fees - In order to prevail on this claim, Joe will need to establish, (1) that the fees related to defending an action or proceeding "relating to the lawful exercise of police powers" in furtherance of official duties, and (2) that the proceeding was "dismissed or finally determined" in Joe’s favor. The issue here is whether the prior criminal proceeding against Joe provides a basis for Joe to demonstrate compliance with these two tests.

"Lawful Exercise" - Did the outcome of the grand jury and criminal proceedings establish that Joe’s conduct constituted a "lawful exercise" of police powers? Joe would argue that the combination of the no bill on witness tampering and downgrading and ultimate dismissal of other charges amounts to a resolution in Joe’s favor that Joe’s conduct was not "unlawful" and therefore was "lawful exercise". However, the municipality should be able to argue that the dismissal of charges in the criminal case only resolved the "beyond a reasonable doubt" standard, and the standard under the attorney fee statute would be a preponderance of the evidence standard. Thus, no issue preclusion. The state will also point to the determination in the police disciplinary hearings as in fact resolving the issue against Joe.

Dismissed or Determined - This is not satisfied for disciplinary. Even if satisfied for criminal, Joe will not prevail because of failure to prevail on "lawful exercise".

**SAMPLE ANSWER 2**

To: Judge  
From: law clerk  
Re: claims pending related to Joe  

CIVIL CLAIMS

Joe has filed a motion to dismiss the assault claim filed by the prisoner against himself and the municipality, alleging that the decision in the criminal matter has finally determined this matter. This motion to dismiss should not be granted, as the standard of proof in criminal cases is guilt beyond a reasonable doubt and the standard of proof in civil matters is a preponderance of the evidence standard. The witness tampering charge, which was no-billed in the criminal matter, is
not included in the civil case. The official misconduct charge and the aggravated assault charge were downgraded, with the aggravated assault charge becoming either simply assault or some lesser offense like harassment. The downgraded charges were dismissed following the states case, as they had not demonstrated proof beyond a reasonable doubt.

For Joe to defend the civil case for assault on res judicata grounds, he must show that both the claim and the parties are the same, and that the matter has been finally and finally concluded on the merits. Although it appears that the assault is the subject matter of the civil case was included in the first trial, the prisoner was not a party to the action. If Joe is attempting to defensively use collateral estoppel, he must that claim is precluded because it was conclusively established that he was not liability for the assault in the first proceeding and that prisoner cannot now challenge that conclusion. This argument must fail, as prisoner did not have the ability to cross examine Joe in the first proceeding, and because the standard of proof in the criminal case was different. Just because Joe was not found to have committed the assault beyond a reasonable doubt does not mean that he conclusively will be found not to have committed the assault under the preponderance of evidence standard. Thus, Joe's lack of a criminal conviction for assault will not be sufficient for a judge to grant the motion to dismiss in the civil case.

ADMINISTRATIVE CLAIMS

As above, Joe will have a difficult time defending his actions in the administrative charges based upon the findings in the criminal case. In the administrative proceedings, the new charges of false reporting, unlawful orders and failing to give truthful statements were not issues involved in the criminal case and therefore are unaffected by the outcome of the criminal matter. The police department was not a party and did not have the opportunity to fully investigate, question witnesses and develop evidence in any of these new charges, so the outcome of the criminal matter which did not involve them will have no effect on the administrative claims on the charges other than the assault. Even the assault charge cannot be defended based upon res judicata or collateral estoppel as the police department was not a party to the criminal charge and did not have the opportunity to fully question and investigate the charges. Moreover, whatever the standard of proof that is required in administrative proceedings, it is unlikely that it will be a proof beyond a reasonable doubt standard that is used in criminal cases. Thus, as above, the fact that there was not proof beyond a reasonable doubt for a criminal conviction, there may be sufficient evidence for a lower standard in police administrative proceedings. This finding has not been appealed by the police department, so no further analysis is necessary.

LEGAL FEES

Criminal case - Joe is entitled to legal fees in his criminal case pursuant to the statute because the legal proceeding arose out of the exercise of his police powers, which have now been determined by the court to have been lawful, as shown by the dismissal in favor of the officer. The fact that administrative charges are still pending against the officer are not relevant for this determination, as the criminal proceeding has been finally determined in favor of the officer.

Civil case - Joe is not eligible for reimbursement for attorney fees in a civil action under this
Administrative case - Under the statute, Joe may be entitled to fees if administrative proceedings within the police department qualify as a "action or legal proceeding." If they do not, Joe is entitled to no reimbursement. If internal police department proceedings do qualify as a "legal proceeding" under the statute, Joe is entitled to fees related to his defense on the administrative assault charge which has been finally determined in his favor, assuming those fees can be apportioned from the remaining charges that have not yet been finally determined. Joe may at some time in the future be entitled to additional fees if his appeal to the other charges is sustained, but since there is no final determination at this point, he is not entitled to reimbursement on these charges yet.

Question #5

PROPERTY

Some time ago, Richard signed a document that provided, "I give my sister Liz my house on Main Street for her life or until she marries." Liz has been living in the house. The house is in a state of great disrepair because Liz has failed to maintain it. Liz recently became engaged to Charlie, and he has moved into the house with Liz.

Richard owns a large tract of undeveloped land that he wants to subdivide into several lots. Five years ago, Richard and Dawn agreed for Dawn to have an option to purchase one of the lots in the proposed subdivision for $50,000.00. He told Dawn the option would have to be exercised within sixty days after the township planning board granted final approval for the subdivision. The township planning board has not yet given approval. Dawn paid an architect to prepare plans for a house she wants to build on the lot.

Richard signed a contract to sell another of his properties to Ellen. Last month, before the sale closed, fire destroyed the building on the property. After the fire, Ellen told Richard she still wanted to buy the property, but she wanted a reduction in the purchase price because the building was destroyed.

Last week Richard died. Richard’s heirs want Liz and Charlie to leave the house. They do not want Dawn to purchase the lot. They do not want to close on the sale to Ellen.

Richard’s heirs have retained your law firm. You are asked to write a memorandum outlining the heirs’ rights and obligations with respect to Liz, Charlie, Dawn, and Ellen.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 1
Memorandum

To: Partner
From: Associates
Re: Rights & Obligations of Richard's heirs with respect to Liz, Charlie, Dawn & Ellen.

Upon careful consideration of all facts in this case, Richard's heirs will have to permit Liz and Charlie to remain in the house on Main Street until they get married, may have a cause of action against Liz for waste, may get out of contract with Dawn, but will have to sell the lot to Ellen.

1. Richard's heirs v. Liz

When Richard gave document to Liz that provided "I give my sister Liz my house on Main Street for her life or until she marries" he created a life estate in Liz measured by length of her natural life. Additionally, he created an estate subject to condition determinable as evidenced by his words "or until she marries." In other words, Liz can remain the rightful owner of the house on Main Street her entire life as long as she does not marry. Such a condition creates a possibility of reverter in Richard or his heirs. This reverter will happen automatically and Richard's heirs will be rightful owners of house on Main Street as soon as Liz marries. Here, however, Liz is not married to Charlie. Therefore, until they become officially married they have a right to remain on Main Street. The fact that Liz and Charlie are engaged is not enough for Richard's heirs to resume ownership.

However, Richard's heirs have future interest in this property, because it will become theirs in case of Liz's marriage or death. Thus, they have standing to bring an action v. Liz under Doctrine of Waste. As a present holder of life estate, Liz has a duty to future interests not to decrease the value of the estate unreasonably by her own actions. By failing to maintain property, Liz allowed it to fall in a state of great disrepair, thus caused it to be decreased in its value.

2. Richard signed a valid contract with Ellen. Upon signing of a contract, risk of loss passed to Ellen. Absent the fire insurance on the house, Ellen will bear the loss to the building. She still is obligated under the contract to purchase the property for the full price without any reductions. Richard's heirs inherited the same rights and obligations under the contract as Richard had at the moment of his death. Therefore, if Ellen wants to proceed with closing, Richard's heirs have to sell her the lot for the full price.

3. Richard and Dawn agreed on a sale of Richard's property for $50,000. It is not clear from the facts, if Richard and Dawn prepared any written document for sale of property as is required for sale of real estate to satisfy Statute of Frauds. If no such written agreement exists, it should not be hard for Richard's heirs to keep this portion of land in their possession. Moreover, Dawn's option to purchase was conditional on township's final approval of subdivision. This approval has not been given, so the condition for the option has not been satisfied. Moreover, the option was given to Dawn by Richard five years ago. Richard's heirs may successfully argue that this is beyond any reasonable time to keep the option to purchase, especially in the absence of written contract. Therefore, I believe that it will be easy for Richard's heirs to keep lot intended for Dawn to themselves. Dawn paid an architect to prepare for a house she wanted to build on this
lot. In other words, she detrimentally relied on Richard's promise. But his promise to sell was only conditional and the condition hasn't been satisfied yet.

4. Richard's heirs have no claim against Charlie, because he is on the premises with Liz's permission, and she currently is the rightful owner of the house on Main Street. Therefore, Charlie is not a trespasser.

**SAMPLE ANSWER 2**

Memorandum  
To: Richard's heirs  
From: Attorney  
Re: Richard's property  
Date: February 23, 2006  

I. Introduction  

You have retained this firm in regards to the status of property belonging to Richard, now deceased. This memorandum addresses your rights and obligations with respect to Liz, Charlie, Dawn, and Ellen respectively.

II. Rights & Obligations with respect to Liz  

There is an issue as to what rights you may have to the house on Main Street. Richard purported to grant to Liz a life estate in this home, conditional on her marriage in the future.

A life estate is a grant of lawful possession measured by a life. Once that measuring life dies, the estate reverts back to the grantor, or his/her estate/heirs if he/she is no longer living.

Here, Liz was granted a life estate, albeit a conditional life estate. Richard or his heirs/estate retained a reversion, an absolute right to retake the property upon termination of Liz's life or upon the condition of her marrying occurred. Since Liz is still living, she is entitled to possess the house on Main Street for the remainder of her life or until she marries. While Liz is presently engaged, she has yet to marry, thus the condition has not occurred. Liz, therefore, has a life estate because she is still alive and has yet to marry.

A life tenant has a duty not to commit waste to the property. Permissive waste occurs when the life tenant fails to maintain the premises. Failure to maintain includes not making necessary repairs, failing to pay taxes, and failing to pay mortgage interest payments.

Here, it appears that Liz has committed waste by failing to make necessary repairs. This waste is evidenced by the house's "state of great disrepair." The facts specifically mention that Liz has failed to maintain the house. Therefore, Liz has committed waste, which life tenants have a duty not to commit. Liz is therefore liable to you, as Richard's heirs for such waste.

As mentioned, when the life estate was granted, Richard retained a reversion. Richard's death
III. Rights and Obligations with respect to Charlie

As mentioned above, Liz has a life estate. Liz may allow Charlie to live with her as she has this possessory right in the house. Richard never granted any interest to Charlie. Thus, Charlie has no interest in the house, but may stay as Liz may allow during her life or upon her marriage.

IV. Rights and Obligations with respect to Dawn

The issue is whether Dawn has an interest in a lot in the proposed subdivision.

The first problem concerns the purported agreement. Generally, the statute of frauds requires all interests in land be written. Here, the facts do not clearly state if such a writing exists. Richard and Dawn "agreed" and Richard "told" Dawn about the option's limits. This evidences an oral agreement. Oral agreements for the sale of land are unenforceable. An exception exists if the purported buyer takes possession and makes improvements or spends money in reliance on the oral argument. Here, Dawn did suffer a detriment by paying an architect to design a house. However, Dawn never took possession of a lot. Therefore, the exception is inapplicable.

Second, the contract was not specific in identifying a lot. A real property contract must properly identify the property sufficiently enough. The land was to be subdivided into "several" lots and Dawn was to receive "one" lot. There is no mention of which lot, therefore the property is not adequately identified.

Finally, the option allows Dawn sixty days following the grant of final approval for subdivision by the planning board. The planning board has not yet made such approval. Dawn may argue that her interest has yet to vest.

Based upon the apparent lack of a written contract and adequate identification of the property, Dawn has no interest in a lot on the tract of land. Therefore, it is unlikely you own Dawn any obligation. Nor, does Dawn owe you, as Richard's heirs, any money.

V. Rights & Obligation with respect to Ellen

The issue here is whether Ellen has any interest in the property she contracted to buy from Richard, and if she is entitled to a reduction in price for the fire damage.

Richard and Ellen appeared to have entered into a valid real estate contract. The issue is who bears the risk of loss from the fire. Generally, once a valid contract for real property is entered into, the risk of loss shifts from the seller to the buyer during the escrow period. Here, the risk of loss shifted to Ellen upon signing the contract with Richard. Ellen, at that time, had an insurable interest in the property and could have insured the property. Under the theory of equitable conversion, Ellen bore the risk of loss and thus is not entitled to any reduction in the price.
Furthermore, as the bearer of the risk, Ellen must pay the price of the contract.

As Ellen bore the risk of loss, she must pay the full agreed to price to Richard. As Richard's heirs, you are entitled to this payment as of right. Your obligation is to deliver the premises as Ellen and Richard agreed.

V. Conclusion

Your rights and obligations are set forth above with respect to Liz, Charlie, Dawn, and Ellen.

**Question #6**

**CRIMINAL LAW**

Don is angry because his girlfriend, Sally, told him she loves Guy and is breaking up with him. Don asks Tom to help him kill Guy. Tom says he does not want to get involved.

Don learns Guy and Sally are going to Happy Hour Bar on River Road. Don and Tom arrive first and wait inside for Guy and Sally. When Don sees them, he asks Guy to step outside. They go outside; Sally and Tom follow. Don says: "How come you took Sally?" Guy says: "I didn’t." Don throws a punch at Guy, and a bouncer sees them fight and asks all four to leave the property.

Due to recent floods, many area bridges are closed. Don and Tom get to a bridge Guy and Sally must cross, and they remove the "Danger! Closed Bridge/Detour" sign.

When Guy and Sally leave the restaurant, Guy puts his arm around Sally and kisses her. Sally decides to drive them both home in Guy’s car. As they drive off, Guy begins to touch and kiss Sally and to unbutton her blouse. Sally yells at Guy to leave her alone. He ignores her and pulls out a gun, saying: "You’ll do as you’re told. Pull over." Fearing a sexual assault, Sally steps on the gas and screams loudly.

Don now sees Guy’s car approaching the bridge and hears Sally scream: "Stop touching me!" He realizes she is in danger. He tries to warn her by running towards the car, yelling "Stop!" Sally hits the brakes but cannot prevent the car from falling off the bridge. Right before Sally hits the brakes, Guy sees Don and tries to shoot him but misses and instead hits Sally. An autopsy reveals Sally drowned and that the bullet wound to her chest, although not the cause of death, was non-survivable.

Don uses his cell phone to call the police. When the police arrive, they pull Guy out of the water, pat him down, and find bullets in his pocket. They then ask him: "What happened?" Guy says: "I didn’t mean it."

After Guy is arrested, his car is impounded. Although the police go to the impound lot to look for
the gun, it is never found. When the police open the trunk of the car, they find a metal box containing money linking Guy to a local robbery.

You are a law student taking a final exam and your professor has asked you to prepare a memorandum outlining what crimes Don, Tom, and Guy have committed and what defenses they may raise.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 1

Don -- Solicitation Don may be found guilty of solicitation for trying to get Tom to agree to murder Guy. Solicitation is a crime where one tries to implore another party to commit a crime. Here Don asked Tom to help him kill Guy and is guilty of solicitation. Solicitation however merges into conspiracy if there is a meeting of minds.

Conspiracy--If Tom is found to be part of a conspiracy the solicitation crime disappears. Conspiracy is a meeting of minds with the intent to commit a crime. Here Don asked Tom to kill Guy w/ him. Although the facts indicate Tom declined there may be enough evidence to prove that there was a meeting of minds as the two went to the bar where Guy was and removed the warning sign from the bridge. At common law all that was necessary for a conspiracy conviction was a meeting of the minds. Under the MPC and most States there must be some more overt act. That could be found here by Tom. Don's acts at the bridge. Further Don could not argue that he tried to abandon the conspiracy when he screamed at Sally to warn her about the bridge. To abandon a conspiracy one has to do more than renounce it-he must affirmatively renounce it and do some act such as calling the police to prevent the crime or trying to stop it. Here Don did call the police but after the death occurred & would probably still be found guilty of conspiracy if Tom is as well. (see Tom)

Criminal Battery--Don is guilty of criminal battery against Guy. Battery is the intent to cause an offensive or harmful touching with another person actively causing such harmful touching. Here Don took Guy outside & threw a punch at Guy. This is a battery assuming the punch actively made contact with Guy. If the punch didn't make contact with Guy, Don would be guilty of an assault which is an intent to cause a harmful touching or apprehension of such which causes apprehension.

Murder--Don would be guilty of intentional murder or at least depraved heart murder of Sally. Murder is the killing of another person with malice aforethought and (sometimes) premeditation. Here Don manifested his intent to kill Guy earlier in the day. He took substantial steps at the bar. He premeditated his removed the warning sign from the bridge. Malice for murder can be found from "knowing" or "reckless" mental states. Here Don will be found guilty of at least being reckless. He knew or should have known that by removing the warning sign there was a substantial likelihood that Guy could go over the bridge and die. Although Don intended to kill Guy, murder has a doctrine called transferred intent whereby if you intended to kill one person & you killed another, the intent was transferred to that 2nd person. Thus the intent to kill Sally is unnecessary as he intended to kill Guy & actually did kill Sally. Further depraved heart murder is
a general intent crime and only requires a showing of a substantial likelihood.

Manslaughter--If for any reason Don cannot be found guilty of murder he can be charged with manslaughter on the theory of heat of passion killing. Manslaughter is murder but reduced in severity b/c the defendant committed the crime soon after leaning of a relationship which would make a reasonable person in the mind angry and without a reasonable opportunity to cool off. Here Don is angry and a reasonable person would be angry at Guy however it appears that their should be some period of time for Don to cool off as the intentional killing of Guy seems to be taking place after sometime. If the Ct. finds however that a reasonable person would be in the heat of passion & not cool off Don could be guilty of manslaughter of Sally under the doctrine of transferred intent & not murder. However manslaughter is a lesser included offense of murder & can't be charged concurrently.

Atempted Murder of Guy--Don should certainly be guilty of the attempted murder of Guy. He manifested intent to kill Guy when talking to Tom, he took steps toward doing so & he knew he was doing so. Attempt is a specific intent crime but Don's actions rise to the level of attempted murder.

Tom - Conspiracy--Tom might be found guilty of conspiracy. As discussed a conspiracy required a meeting of minds to commit a crime. If Tom is not guilty of conspiracy (no meeting of minds) neither can Don. But Tom will argue that he didn't want to get involved. However Tom's actions indicate that he was complicit and part of a conspiracy despite his initial indication of declining-he helped Don go to the bar. Helped him remove the sign. Conspiracy does not merge into the underlying crime so he would also be guilty for every crime Don committed as part of the conspiracy-e.g., battery.

Murder of Sally--attempted murder of Guy. Since Tom has no mitigating factors he shouldn't be guilty of manslaughter of Sally-rather murder and since Tom took no action to renounce or withdraw from the conspiracy he is guilty for all actions up to and including Sally's murder. Further if for any reason Tom & Don's acts don't rise to the level of murder or manslaughter they at the very least are negligent homicide which involves gross negligence in removing the warning sign.

Guy--False Imprisonment--Guy is guilty of false imprisonment of Sally. False imprisonment is when one confines another in an enclosed space without the freedom to leave and the other party is aware of that confinement. Here Guy held Sally at gunpoint w/in a car and she couldn't leave. The fact that she made the car go faster was not relevant b/c she feared leaving the car.

Battery of Sally--At the very least Guy's advances are battery of Sally. Battery is an offensive or harmful contact. That certainly is what happened to Sally. Further when Guy removed his gun and held Sally at gun point he committed assault by creating the apprehension of a harmful or offensive contact.

Attempted Sexual Assault--Guy may also be guilty of attempted sexual assault or attempted rape because his statements "you'll do as you told, pull over" indicate along w/ the presence of his gun that he had the intent to rape Sally.
Attempted Murder of Don--Guy will also be guilty of attempted murder of Don. He pulled a gun and tried to kill Don intentionally. Murder as described below is intentionally killing w/ malice (knowing or reckless). Guy will argue he was doing so in self defense but not warranted here b/c deadly force for self defense only if you know to avoid deadly force. Here no evidence Guy knew that Don could have the sign to be removed.

Murder of Sally--If the attempted killing of Don was not justified under self defense doctrine Guys shot at Sally won't be justified. If it is justified it will be. Although it did not actually kill Sally under the substantial factor test the shot which otherwise would have killed Sally will be enough to prove murder under doctrine of transferred intent.

Bullets--The police may have reasonable suspicion to search Guy through a pat down Don called the police & probably mentioned the accident. If the police knew a gun was fired they'd have reasonable suspicion which is a distinct standard to do a pat down of Guy. Otherwise the bullets are inadmissionable.

Guy's Admission--Guys admission is probably admissible. Here the police asked the question right after an accident. Perhaps they would/should have arrested him because they found bullets in his pockets. However there is no evidence that there was the level of police custody/interrogation that warranted a Miranda warning which is necessary when there is custody interrogation. It seems to be a spontaneous statement & therefore admissible.

Impound Lot/Metal Box--The metal box is inadmissible. The police need a search warrant to search for things under the 4th Amendment if they have probable cause. Although the police may have had probable cause to arrest Guy & impound his car the S. Ct. has never held that a car being in custody affords more than in inventory search. This means that though the police could do inventory of the car, to open the locked box even with probable cause they should have secured a warrant-especially since there was no danger of evanescent evidence as the car was in the impound lot. The money should be excluded.

SAMPLE ANSWER 2

To: Professor

From: Student

Re: Memorandum Outlining What Crimes Don, Tom, Guy have committed and What Defenses they Can Raise

Don

Don comitted solicitation by asking Tom to help him kill Guy. Solicitation is asking for another's aid in committing an offense. It is a specific intent crime and Don possessed the requisite mental
state and action accordingly. There doesn't seem to be an assertable defense here.

Don also committed a battery, which is the unlawful application of force to another individual by hitting Guy. Battery is a general intent crime, and it seems here as well that Don possessed the sufficient mental state and acted accordingly when he attacked Guy. Arguing consent is unlikely to succeed.

When Don and Tom get to a bridge that Guy and Sally must cross and remove the sign, there can be an element of conspiracy here. Although not entirely discernible from the facts, a conspiracy is a specific intent crime that consists of a specific agreement between two parties to engage in an unlawful act. At the very least, it seems that removing the sign would constitute vandalism of public property that would most likely be the subject of a strict liability offense where no intent is required. There could have arguably been a conspiracy between the parties to remove the sign accordingly.

When Don runs to the car and sees that Sally is in danger, he tries to warn her but cannot prevent the car from falling off the bridge. Don could be liable for a depraved heart killing based on reckless and wanton conduct in removing a sign that said bridge out. This liability arises based on general intent and is shared with Tom as accomplice. There doesn't seem to be a good defense to this.

Tom

Even though Tom may have effectively withdrawn from being solicited into killing Guy earlier on which is an effective defense to solicitation, Tom may also be liable as an accomplice to a crime. First off, he can be liable as being an accomplice in vandalism. Accomplice Liability means that an individual can be liable for the primary actor's crime and all foreseeable crimes originating from it. Even if a conspiracy isn't possible as above, Don can be liable on that basis.

More explicitly, Tom could be liable for the murder of Sally here based on the principle of accomplice liability to Don's act of removing the sign if it is fact true that Sally drowned as a result of removing the sign and it was also a foreseeable outcome based on removing a sign that said "Danger! Closed Bridge/ Detour".

Tom most likely cannot raise a defense here based on the fact that the killing was in fact foreseeable. While the shooting was not necessarily foreseeable, the drowning would be, and given that's the ultimate cause of Sally's death in this case, it seems that Tom would be liable for Sally's death on that theory, in spite of making such a defense.

Guy

Guy may have committed a battery, or unlawful touching, by putting his arm around Sally and proceeding to kiss her if that was beyond the scope of her consent. Assuming that Sally consented, Guy would not be liable for battery. However, Guy continues to touch and kiss Sail
and to unbutton her blouse, and Sally yells at Guy to leave her alone. This has now arguably become a battery, or unlawful touching of another, that she has not consented to. Thus, that's not an assertable defense by Guy.

Guy also committed an Assault by pulling out the Gun. An assault is committed by a person when they place an individual in apprehension of an unlawful touching. By pulling out the gun, a deadly weapon when loaded, he has committed an assault against Sally because she was placed in a reasonably apprehension of an immediate harm, perhaps being shot for non-compliance. In fact, the facts state that Sally feared an sexual assault by Guy.

Guy sees Don and tries to shoot him but misses an instead hits Sally. In doing so, Guy arguably committed murder through transferred intent. Guy saw an opportunity to kill Don and took it. If this can be shown to be an unlawful killing with malice aforethought, then it is in fact an unlawful killing. The fact that the drowning ultimately killed her is harmless. The fact is that the transferred intent is sustainable due to at the very least Guy's wanton and reckless discharge of a firearm in such proximity from a rapidly moving vehicle that this could perhaps be argued to be a depraved heart killing, which would only require a general intent as opposed to a specific intent. Guy would have a hard time defending this.

When the police arrive, they pull guy out of the water. Guy is asked, "what happened" and he responds. This is not a custodial interrogation and so since Miranda hasn't yet attached Guy's answer "I didn't mean it" is arguably not subject to the exclusionary rule at trial. If for some reason this was taken in violation of Miranda, though that's unlikely to be the case here, the statement could be used to impeach Guy. A pat down is reasonable in this circumstance as being a stop and frisk based on reasonable suspicion. There was no effective violation of Guy's reasonable expectation of privacy even though this did in fact constitute a 4th Amendment search. The fact that bullets represent distinct and discernible artifacts that are detectable by a stop and frisk means that they are arguably admissible as evidence even if they haven't been discovered due to a search incident to arrest. Harmless error or perhaps even inevitable discovery would operate here if Guy was to argue that the seizure was improper as a warrantless search. Exigency is maybe another defense that could be raised against any 4tb Amendment argument made by Guy in this circumstance.

When Guy is arrested, his car is impounded. So making the assumption that there is a proper arrest procedure, the validity of the inventory search depends on the police having a regular method in place or established policy. Assuming that's the case here, then the impounding is properly done and can't be asserted as a defense by Guy to an improper seizure as part of a fruit of the poisonous free argument.

When the police open the trunk, this is permissable. When a car is impounded incident to a valid arrest, they are entitled to tear the car apart and this includes the trunk. In finding the metal box that contains money linking guy to a local robbery, this is permissibly seized as a result of a valid impounding procedure and search. Assuming that this evidence is admissible as being properly seized over any possible defense through objection as to unreasonable search/seizure by the police, Guy may in fact be also charged with the robbery as well assuming that this evidence is not the fruit of the poisonous tree.
John learns Mary wants to purchase a used car at an auction. Although under state law only licensed car dealers can bid at auctions, and John is not a licensed car dealer, his friend, Peter, is, and Peter has agreed to let John use Peter’s dealer card that would allow John entry in the auction. John meets with Mary who says, "I want a 2002 to 2004 Mercedes SUV and I am willing to pay $15,000.00." John says, "My fee for these services is 10% of the purchase price." John also says that, under the auction’s rules, payment is due immediately, and Mary will not be able to enter the auction because she will not have a dealer’s card. John memorializes his and Mary’s statements on a paper towel that both he and Mary sign.

John takes Mary to the Auction House. Peter has signed the standard agreement with the Auction House with the following terms: (1) all sales are "as is"; (2) payment for the car is due immediately; (3) if a dealer owes the Auction House money for a car, then that dealer cannot participate in any Auction House auction until the dealer’s account is current. Peter and John have a standing agreement: John will split the fee with Peter in exchange for Peter’s lending John the dealer card.

At the Auction House, John, on Mary’s behalf, bids on a 2002 Mercedes SUV and wins. He meets Mary outside the Auction House to tell her the good news. When Mary learns the car has 150,000 miles, she refuses to pay for or accept the car. Because John was unable to pay for the car, he resubmitted it to auction. He waited for seven weeks before he finally accepted a bid of $12,000.00, the highest amount offered during the seven weeks. John paid the $3,000.00 difference. Peter, in turn, was unable to participate in the auction for seven weeks. Over the past year, Peter had earned at the auction, on average, $1,800.00 per week. John sues Mary, and Peter sues John.

You are the law clerk to the judge assigned to preside over the case, who has asked you to prepare a memorandum setting forth all contractual rights, duties, obligations, and defenses.

PREPARE THE MEMORANDUM

SAMPLE ANSWER 1

To: Judge
From: ______
C: Contract claims J v. M; P v. J.
It is likely that the contract entered between John and Mary is an enforceable contract that is a legally enforceable agreement between two parties. A contract requires an offer or acceptance, and the law requires some sort of consideration - that is bargain for exchange or legal documents, to demonstrate the sincerity of the agreement. Here the two parties needed what is considered a bilateral contract - both parties made promises and the promises serve as due consideration. Mary wants someone to get her a 2002-04 Mercedes SUV for 15,000; John agrees to it. John asks for $10% fee, Mary agrees to pay it.

There's a question of whether the sale is governed by the U.C.C. - is this a sale of goods? or a service contract? If it is a service contract than it is governed by the common-law rather than the U.C.C.

The contract appears to be for the services of acquiring the SUV at auction, and therefore this is a service contract governed by common law.

The statute of frauds requires that this contract be in writing, which it is. It is irrelevant that it is not a formal writing. The agreement on the napkin, executed (signed) by both parties, satisfies the statute of frauds.

The issue remains, however, what to do about the fact that the writing was silent about the mileage on the car. This is obviously the crux of the dispute. John claims that it is not an element, that Mary is breaching the contract, and that he is therefore entitled to appropriate damages. Mary is defending that either the mileage on the car either voids the contract or excuses her breach or performance. There is no evidence that the parties discussed mileage at all prior to the contract formation. Based on the facts it appears that the napkin contract was fully integrated (i.e. contained all of the terms of the contract.) Were it discussed prior or contemporaneously to the formation of the contract, the parol evidence rule would exclude the testimony since it was not offered to explain an ambiguity in the contract.

Were this a sale of goods, the courts would look to whether or not the 150,000 mile figure was reasonable, or whether John violated some good faith duty to honor the contract.

The common law, however, is much more formalistic as the term of the contract seems to indicate that Mary has breached by not previously indicating a mileage requirement.

It might be possible for Mary to claim unconscionability or unjust enrichment on the part of John, if she can prove that a 2002 Mercedes SUV with $150,000 miles has a value that readily differs from $15,000. However, John was able to ultimately sell it for $12,000 so it is unlikely she'll be able to so prove.

For all these reasons, John will likely prevail. He will be entitled to the $3,000 he had to pay out of pocket from his mitigation efforts. (Difference between bargained for price paid, and actual sale value.) He will also be entitled to any costs that he accrued in having to resell the car - auction fees, advertising, etc. He will also be able to recover his expected profit. That's what he
would have recovered had Mary not breached - $1,500 (10% of the entitled price.) If Peter recovers against John (see below) John may also be able to claim indemnification from Mary based on her breach.

Peter v. John

Peter wants to recover the 1,800 x 7 weeks of business that he lost. Peter will claim that John is liable under the terms of the Auction House rules, and that John assumed the loss.

However John can defend based on the fact that his agreement with Peter was illegal. The law will not enforce any illegal contracts. Peter held the license as a car dealer, not John. Peter allowed John to use his ID, but that is contrary to the law. Therefore, while it may feel like inequitable loss by Peter, he has no legal cause of action.

Even if the court were to bar the nature of the agreement - given that there was no unity between John or Peter there is no contract to enforce or duty to indicate that John assumed Peter's liability under the terms of the agreement with Auction House.

SAMPLE ANSWER 2

Memorandum
To: Judge
From: Clerk

John v. Mary

John can sue Mary for Breach of K. A valid K requires: (1) offer; (2) Acceptance; (3) consideration and (4) No Valid Defenses.

A K for the Sale of Goods of $500 or more is required to be in writing under the Statute of Frauds. The paper towel, though unconventional, will suffice to satisfy the SOF as it sets forth All Material Terms and is Signed by the Party & be charged.

Mary can try to Defend that there was No Valid K b/c John committed Fraud or Misrepresentation when he omitted to tell her he was NOT a licensed car dealer. However, the Fraud or Misrepresentation does NOT go to the Essence of the K, and, in Any Event, was not in Any way related to the cause of her Breach.

In Addition, Mary can try to Alleged John was Actually the one who committed breach when he purchased a car with 150,000 miles on it. However, the facts do not indicate that this was in Any way part of the Bargained-For Exchange. Moreover, Assuming this was a Completely Integrated K, the Parol Evident Rule would bar Contemporaneous Statements Made At the time of K-ing to Contradict or Supplement the terms of the written K. Moreover, if Mary tried to Alleged the 150,000 via provision As A Modification, while The UCC would NOT require it to be Supported by Consideration. this Argument would fail for Mary b/c it is NOT in Writing.
In Assessing the Damages John is entitled to from Mary, because the c/A is based in K, John should be entitled to his Expectation Damages. This included the Cost of Cover plus any Incidents. In other words, John would be able to get the $3,000 cost of covering, plus the 10% of $15,000 he was Expecting to Receive, plus Any incidental costs from Resubmitting the Car to the Auction, Advertising or Filing Fees.

[In Addition, depending on whether or NOT John is held liable to Peter, he may seek Indemnity from Mary for that].

Peter v. John

As discussed Above, a Valid K requires: (1) offer; (2) Acceptance; (3) Consideration; (4) No Valid Defenses. It is clear John had a fee splitting Agreement with Peter. As such, Peter can Argue he was an intended third party Beneficiary of the John-Mary K and should be entitled to 1/2 of 10% of $150,000.

In Addition, Peter will undoubtedly try to sue John for $12,600 ($1800 x 7 weeks) of his lost earnings. This is known as Compensatory Damages, and, Assuming breach of K is found, may be ordered as a remedy by a Court if proven using Corroborating evidence that is Actual and not just Speculative.

However, the issue still remains whether John will be held Accountable to Peter for the $12,600.

John can try to Argue Unclean Hands. Because Peter was aware of the Auction House's policy and asserted to John using his dealer card in violation of that policy, he committed wrongdoing. In Addition, John can defend that Peter Assumed the Risk in knowing the Auction House's strict policy, that John would break that policy, in which case Peter would be held responsible for John's Actions.

Because of the Fee Splitting Arrangement John & Peter had, John can try to Argue there was a Joint Venture or Agency Relationship b/n the two, in which case, Peter would be liable for John's Ks. Regardless of whether the court finds these defenses to K for motion applicable, Peter may still be able to recover at least the $12,600 based in Equity. Unlike K Remedies, which place the Non-Breaching Party in the position they would have been in had the deal gone through, Equitable Remedies try to place the Non-Breaching Party in the place they were in before the Breach was committed.