JULY 2009 MICHIGAN BAR EXAMINATION MODEL ANSWERS

ANSWER TO QUESTION NO. 1

1. Dechini's Statement: Normally, Dechini's statement would be substantively admissible against him under MRE 801(d) (2) (A) as the admission of a party-opponent. To be admissible under that rule, the statement must be (1) the party's own statement, and it must be (2) offered against the party. However, because Dechini's inculpatory statements occurred during the course of plea negotiations with the prosecutor, MRE 410(4) precludes the admission of the statement against Dechini. MRE 410(4) states that any statement made during plea discussions with the prosecutor which do not result in a guilty plea or result in a withdrawn guilty plea, are not admissible against the defendant. Note that Dechini's statement *can* be used in a perjury trial if the statement was made by the defendant under oath, on the record and in the presence of counsel. However, in the context of the murder trial, Dechini's statement is not admissible against him.

2. Testimony of Miguel Morales: Although Miguel is young and a special education student, MRE 601 provides that every person is presumed competent to be a witness unless the court determines, after questioning the witness, that the witness does not have sufficient physical or mental capacity or sense of obligation to testify truthfully. Thus, Miguel's testimony against Dechini, placing his car at the scene of the crime, is presumptively admissible, but he may be subject to challenge before he is allowed to testify. The defense must challenge Miguel's competency in

order to trigger the court's obligation to assess the child's competency.

Moreover, under MRE 604, Miguel's interpreter is subject to the expert qualification rules, and must make an oath or affirmation to make a true translation. The prosecutor is not prohibited from selecting its own expert. MRE 706(d). The court must determine that Carolina's specialized knowledge will assist the jury to understand the evidence and that she is qualified by knowledge, skill, experience, training, or education to interpret for Miguel. MRE 702. Because Miguel does not speak any English, an interpreter is required. Thus, Carolina will be permitted to interpret if the court is satisfied that she is qualified to do so accurately.

3. **Testimony of Judge York:** Whether Judge York's testimony is admissible depends upon whether the judge is presiding over Dechini's trial. Under MRE 605, a judge presiding over a trial may not testify in that trial as a witness, and the defendant need not make an objection in order to preserve the issue on appeal. However, if Judge York is not presiding over Dechini's trial, then there should be no impediment to the admissibility of the testimony, which is relevant to rebut Dechini's alibi defense.

ANSWER TO QUESTION NO. 2

Donald will not succeed in a motion for summary disposition under MCR 2.116(D)(1). A civil defendant must make a claim that the court lacks personal jurisdiction over him in his first motion for summary disposition or in his first responsive pleading, whichever is first. MCR 2.116(D)(1). Although Donald did not do so in his July 22, 2009 responsive pleading, Donald may amend his pleading once as a matter of course, as long as it is done within 14 days of serving the pleading. MCR 2.118(A) (1). An amended pleading may introduce a defense that otherwise would be waived. *Harris v Lapeer Public School System*, 114 Mich App 107 (1982) . Accordingly, he may amend his responsive pleading to question the trial court's personal jurisdiction over him. He has one week remaining to do so as a matter of course, beyond which he must seek either Potine's consent or leave from the court before he can amend his complaint. MCR 2.118(A)(2).

Nevertheless, Donald's personal jurisdiction claim still must fail. It is true that Donald neither lives in Michigan, nor was served with process in Michigan. Accordingly, the courts of Michigan do not have *general* jurisdiction over Donald. MCR 600.701. However, because the alleged tort occurred in Michigan, Michigan courts have *limited* personal jurisdiction over Donald to render a personal judgment against Donald arising out of his alleged negligence. MCL 600.705(2). Therefore, this cause of action is appropriately brought in a Michigan court.

Donald's claim that the Ingham circuit court does not have subject-matter jurisdiction is meritorious. A party may raise the issue of a court's lack of subject-matter jurisdiction at any time during the proceedings, MCR 2.116(D) (4), so Donald does not need to amend his responsive pleading to include this ground for relief. The Ingham circuit court does not have subject-matter jurisdiction over Potine's lawsuit. Rather, the district courts have *exclusive* jurisdiction in civil actions when the amount in controversy does not exceed $25,000. MCL 600.8301(1). Accordingly, this civil action can only be pursued in district court.

Finally, Donald's claim that the statute of limitations has passed is also likely to be meritorious. Donald must raise his statute of limitations defense in his first responsive pleading. He must, therefore, amend his July 22, 2009 pleading to raise this issue. Donald may amend his responsive pleading once as a matter of course, as long as it is done within 14 days of serving the

pleading. MCR 2.118(A)(1). He has one week remaining to do so as a matter of course, beyond which he must seek either Potine's consent or leave from the court to amend his complaint. MCR 2.118(A)(2).

In Michigan, the statute of limitations for tort actions involving injury to property is 3 years. MCL 600.5805(10). Because the alleged negligence occurred on May 4, 2005, the statute of limitations bars any action commenced on or after May 5, 2008. Potine's action is untimely, and therefore Donald is entitled to summary disposition on this basis.

ANSWER TO QUESTION NO. 3

The Dramshop Act provides a cause of action for plaintiffs injured by a visibly intoxicated person against a retail establishment that unlawfully sells alcohol to the visibly intoxicated person, if the unlawful sale is a proximate cause of the injury. MCL 436.1801(3); *Reed v Breton,* 475 Mich 531, 537-538 (2006). Proof of "visible intoxication" requires objective manifestations of intoxication. *Reed, supra* at 542; *Miller v Ochampaugh,* 191 Mich App 48, 59-60 (1991). Circumstantial evidence such as Tipsy TaMmy's blood alcohol content taken after the accident cannot alone demonstrate that Tipsy Tammy was visibly intoxicated. *Reed, supra* at 542-543. Polly cannot demonstrate that Tipsy Tammy was visibly intoxicated because Tipsy Tammy did not show any objective manifestations of intoxication--she did not slur her speech, show a lack of balance or change her mood. Accordingly, Carolyn's Cavern is entitled to summary disposition under the Dramshop Act.

The No-Fault Act generally bars actions for non-economic damages, unless the injured person suffered an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life. MCL 500.3135(1), (7). Whether a plaintiff meets that standard involves a multi-step process in which the court determines: (1) whether there is a material factual dispute concerning the nature and extent of the person's injury; (2) whether an important body function has been impaired; and (3) whether the impairment affects the person's general ability to lead her normal life by comparing her life before and after the accident and the significance of impact on the course of her life. *Kreiner v Fischer,* 471 Mich 109, 131-133 (2004). There is no dispute that Polly broke her arm and it took three months to heal. A broken arm is a serious impairment of an important body function. Polly's injury, however, did not affect her general ability to lead her life or alter the course of her life. Polly's injury was not extensive or pervasive and her recovery was relatively short. Polly's life before and after the accident is indistinguishable. Thus, her general ability to lead her life and the course of her life were unaffected and Tammy is entitled to summary disposition. See *Kreiner, supra* at 135-136.

ANSWER TO QUESTION NO. 4

A. **Discuss the Charge Asserted Against Debbie Defendant:** The prosecutor has charged Debbie Defendant with first-degree premeditated murder. The elements of this offense are:

1. Defendant caused the death of the deceased;
2. Defendant intended to kill the deceased;
3. The intent to kill was premeditated;
4. The killing was deliberate; and
5. The killing was not justified or excused under the law. CJI2d 16.1; MCL 750.316(1) (a).

Here, Debbie's confession provides evidence as to every element of the crime of first-degree premeditated murder. Simply stated, Debbie confessed to the intentional, deliberate and premeditated murder of her father. Murder perpetrated by means of poison is premeditated murder. MCL 750.316(1)(a). Nothing in the fact pattern supports the conclusion that this murder was justified or excused under the law. Thus, Debbie Defendant's confession provides evidence of every element of the charge of first-degree premeditated murder. This said, the prosecution will likely fail in this prosecution.

B. **Will the Prosecutor be Successful in the Prosecution of Debbie Defendant?** In Michigan, a prosecutor may not introduce in evidence the inculpatory statements of an accused without proof of the corpus delicti. *People v McMahan,* 451 Mich 543, 548 (1996) The corpus delicti rule guards against erroneous convictions for criminal homicides that never occurred. The rule also minimizes the weight accorded to confessions by requiring collateral evidence to support a conviction. *Id.* at 548-549 (internal quotations and citations omitted); see also *People v Konrad,* 449 Mich 263, 269 (1995).

The corpus delicti rule "provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury (for example, death in cases of homicide) and (2) some criminal agency as the source of the injury." *Konrad, supra,* at 269-270, citing *People v Cotton,* 191 Mich App 377, 394 (1991); see also *McMahan, supra,* at 548-549. It is not necessary to prove all elements of the charged crime before the confession is admissible. *People v Ish,* 252 Mich App 115, 117 (2001). Further, evidence of the above elements need not

be proved beyond a reasonable doubt. It is sufficient if the trial court determines that these elements are established by a preponderance of the evidence. *People v King,* 271 Mich App 235, 241-242 (2006). In so doing, courts may draw reasonable inferences and weigh the probabilities. *People v Mumford,* 171 Mich App 514, 517 (1988).

Here, the death of Debbie Defendant's father is not disputed. The only issue is whether a preponderance of the evidence showed that the death of the deceased was caused by a criminal agency. Nothing presented in the facts of this case, other than Debbie Defendant's confession, establishes that the death of the deceased was caused by a criminal agency. The death certificate of the deceased indicates he died of natural causes. There was no evidence preserved from the crime scene that can be reviewed and reassessed in light of Debbie's confession. No photos were taken and no autopsy was performed. There is no body to exhume to search for evidence of a poison. The home of Debbie Defendant was searched and no evidence turned up establishing that Debbie possessed a lethal poison. The records of Debbie's former employer, the place where she claimed to have taken the poison, no longer exist and her former employer cannot attest to any drugs missing during Debbie's tenure.

The prosecution will not be able to satisfy the corpus delicti rule. Without independent proof that the death of Debbie Defendant's father was caused by some criminal agency, Debbie's confession cannot be admitted against her and the prosecutor will not be able to convict Debbie as charged.

ANSWER TO QUESTION NO. 5

A. **Sobriety Checkpoints Under the Michigan Constitution:** The discussion whether sobriety checkpoints are constitutionally permissible under the Michigan Constitution does not end with the determination that such conduct does not violate the Fourth Amendment to the United States Constitution. The Michigan Constitution of 1963, contains a provision prohibiting unreasonable searches and seizures. Specifically, Const 1963, art 1, §11, provides in pertinent part:

"The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation."

While the above-quoted provision is similar to the Fourth Amendment of the United States Constitution, it is not identical to it. Michigan courts are obligated to interpret the Michigan Constitution independent of the rights and protections afforded under the United States Constitution. "When there is a clash of competing rights under the state and federal constitutions, the Supremacy Clause, art VI, cl 2, [of the United States Constitution] dictates that the federal right prevails." *Sitz v Dep't of State Police,* 443 Mich 744, 760 (1993) *(Sitz II).* However, where a right is given under the United States Constitution, it does not necessarily follow that a state constitution must be interpreted as providing the identical right. *Id.* "[B]ecause these texts were written at different times by different people, the protections afforded [under each document] may be greater, lesser, or the same." *Id.* at 762 (citations omitted). Michigan "courts are not obligated to accept what [is] deemed to be a major contradiction of citizen protections under [the Michigan Constitution simply because the United States Supreme Court has chosen to do so [in its interpretation of the United States Constitution]. *Id.* at 763.

In *People* v *Collins,* 438 Mich 8, 25 (1991), the Michigan Supreme Court held that the prohibition against unreasonable searches and seizures found in Const 1963, art 1, §11, should "be construed to provide the same protection as that secured by the Fourth Amendment, absent 'compelling reason' to impose a different interpretation." A compelling reason exists where there is a "principled basis in this history of [Michigan] jurisprudence for the creation of new rights." *Sitz II, supra* at 763.

In *Sitz II, supra*, the Michigan Supreme Court specifically considered the constitutionality of sobriety checkpoints and concluded there existed compelling reason to interpret Const 1963, art 1, §11, to provide greater protection than the protection afforded under the Fourth Amendment to the United States Constitution. Specifically, the Michigan Supreme Court observed that the Michigan Constitution has historically been interpreted to provide the people traveling on public roadways the fullest protection available under the law. *Id.*, at 775, citing *Pinkerton v Verberg*, 78 Mich 573, 584 (1889). Further, the Michigan Constitution has historically been interpreted to distinguish between searches and seizures made for administrative or regulatory purposes from searches and seizures involving criminal investigations. The Michigan Supreme Court noted that "seizures with the primary goal of enforcing criminal law have generally required some level of suspicion." *Id.*, at 778 (Citation omitted) . The Michigan Supreme Court also cited several cases in which it discussed and reaffirmed the notion that reasonable cause is required to stop or search cars operated on Michigan's public roadways. *E.g., People ex rel Attorney General v Lansing Municipal Judge*, 327 Mich 410 (1950) (striking down as unconstitutional a statute that permitted certain searches, including some involving automobiles, without a warrant); *People v Stein,* 265 Mich 610 (1933) (observing that "[i]f conditions demand a special rule of search on highways, the remedy is by amendment of the [Michigan] Constitution"); *People v Roache,* 237 Mich 215, 222 (1927) (stating "[n]o one will contend that an officer may promiscuously stop automobiles upon the public highway and demand the driver's license merely as a subterfuge to invade the constitutional right of the traveler to be secure against unreasonable search and seizure_ "); *People v Kamhout,* 227 Mich 172, 187-188 (1924) (stating that police officers "have no right to stop and search an automobile * * * for the purpose of ascertaining whether it is being used [to further illegal activity] unless they have * * * reasonable grounds of suspicion * * * as would induce in any prudent man, an honest belief that the law is being violated").

The Michigan Supreme Court concluded that the jurisprudence and constitutional history of Michigan provided a compelling reason to interpret the prohibition against unreasonable searches and seizures found in the Michigan Constitution more expansively than the protection afforded under the Fourth Amendment to the United States Constitution. Thus, the Michigan Supreme Court held that sobriety checkpoints violate Const 1963, art 1, §11. *Spitz II, supra* at 778. For these reasons, the ACLU likely will prevail in its claim that the Michigan Constitution bars the implementation of sobriety checkpoints on Michigan roadways.

B. **Sobriety Checkpoints Under the United States Constitution:** The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures absent a warrant issued upon a showing of probable cause. An exception to the warrant requirement allows searches or seizures of automobiles when there is probable cause to believe that evidence of a crime will be found in a lawfully stopped vehicle or that the vehicle contains or is contraband. *Florida v White,* 526 US 559, 563-565 (1999). The Fourteenth Amendment to the United States Constitution imposes upon the various states the protections provided under the Fourth Amendment. Here, the Michigan State Police plan to stop every vehicle at a designated time and place in order to investigate whether the driver is intoxicated and operating the vehicle in violation of Michigan law. These stops, regardless of duration, constitute seizures within the meaning of the Fourth Amendment. *United States v Martinez-Fuerte,* 428 US 543, 556 (1976) (holding a Fourth Amendment "seizure" occurs when a vehicle is stopped at an illegal alien checkpoint). No warrant was issued authorizing these seizures and no probable cause existed to justify the police action. Thus the dispositive issue regarding the constitutionality of the proposed sobriety checkpoint under the Fourth Amendment is whether the warrantless activity proposed by police is reasonable. *Michigan State Police v Sitz,* 496 US 444, 450 (1990).

When determining the reasonableness under the Fourth Amendment of a warrantless seizure, courts employ a three-part balancing test derived from *Brown v Texas,* 443 US 47 (1979). Applying the Brown factors in the context of the facts presented here, a reviewing court should consider the following three factors: (1) the interest of the state in preventing accidents caused by drunk drivers; (2) the level of intrusion and delay imposed upon motorists passing through the checkpoint; and (3) the effectiveness of sobriety checkpoints in achieving the state's goal. In *Sitz, supra,* the Supreme Court of the United States applied these three factors to determine that roadside sobriety testing does not offend the Fourth Amendment to the United States Constitution.

The Supreme Court observed that states have a "grave and legitimate" interest in curbing drunk driving. Statistical evidence supports the conclusion that thousands of highway deaths are caused by intoxicated drivers. *Sitz, supra* at 451.

The Supreme Court also concluded that the level of intrusion and delay imposed upon motorists passing through the checkpoint was reasonable--less than one minute. The Supreme Court emphasized, "the circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their

approach may frighten motorists. At traffic checkpoints, the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Sitz, supra* at 453, quoting *People v Ortiz*, 422 US 891, 894-895 (1975).

The Supreme Court also concluded that sobriety checkpoints are an effective method of advancing the interests of the state to diminish drunk driving. The question whether sobriety checkpoints are effective is distinct from the issue whether they are the best method of deterring drunk driving. The Supreme Court noted that deference must be given to local "governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Sitz, supra* at 454.

For these reasons, the ACLU will not likely prevail in its attempt to prevent sobriety checkpoints as being violative of the United States Constitution.

ANSWER TO QUESTION NO. 6

Peter's counsel may file a motion to suppress Wendy Witness' identification of Peter and request the trial court conduct a pretrial evidentiary hearing to determine whether the lineup procedures employed in Wendy's identification of Peter violated Peter's due process rights. *United States v Wade,* 388 US 218 (1967). It is unlikely that Wendy Witness' identification of Peter will be suppressed.

A lineup may be found to be so suggestive and susceptible to misidentification that it denies a criminal defendant due process of law. *Stovall v Denno*, 388 US 293, 301-302 (1967); *People v Hickman,* 470 Mich 602, 607 (2004); *People v Lee,* 391 Mich 618 (1974). To challenge an identification on the basis of lack of due process, "a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." People v *Kurylczyk,* 443 Mich 289, 302 (1993) ; *People v Williams,* 244 Mich App 533, 540 (2001). Where a defendant raises a credible argument that the lineup procedure is constitutionally suspect, a trial court should conduct an evidentiary hearing to decide the matter.

Here, there are many facts Peter's counsel can cite to support his argument that the lineup was unduly suggestive. First, the persons used to participate in the lineup featured many physical characteristics that varied greatly from the physical characteristics initially cited by Wendy to describe the assailant to the police. Wendy described the assailant as having short black hair, wearing a white sweatshirt, 5'8" tall, 150 pounds and between 20 and 22 years of age. No person in the lineup wore a white sweatshirt and no person, other than Peter, was less than 5' 11" tall. The persons participating in the lineup other that Peter, who weighed 160 pounds, weighed between 170 and 180 pounds--substantially more than the 150-pound description Wendy initially offered to police. Three of the lineup participants had brown hair rather than black hair, as described by Wendy. And all but one of the lineup participants fell outside the age range cited by Wendy to describe the assailant.

Further, the participants in the lineup featured many physical characteristics that varied from the physical characteristics of Peter. Peter was the shortest person in the lineup at 5'10" tall. Peter was also the lightest person in the lineup, weighing 160

pounds. These facts are arguably significant because Wendy described the assailant as being only 5'8" tall and 150 pounds. Thus, counsel may argue, the witness may have concluded that the shortest and lightest person in the lineup (Peter) must be the assailant. Counsel should also point out that Peter was the only person in the lineup wearing a white tee shirt--clothing very similar to a white sweatshirt Wendy indicated the assailant was wearing during the commission of the crime. Finally, only one of the lineup participants was older than Peter, and two of the lineup participants were substantially younger than Peter (5 and 6 years younger).

The fairness of an identification procedure is evaluated in light of the total circumstances. *Kurylczyk, supra* at 311-312, 318; *People v Murphy* (On Remand), 282 Mich App 571, 584 (2009) . Discrepancies between the physical characteristics of an accused, the description of the assailant provided police by the witness, and the persons who participated in the lineup do not necessarily render the lineup procedure defective. *Id.* at 289, 312, 318; *People v Hornsby,* 251 Mich App 462, 466 (2002). There is no requirement that the lineup participants approximate the description of the assailant that the witness provided to police. All that is required is that the lineup participants approximate the culprit's description. *Id.* at 312; *People v Holmes,* 132 Mich App 730, 746 (1984). Differences in the appearances of lineup participants generally pertain to the weight of an identification and not to its admissibility. *Hornsby, supra,* at 466. Differences are significant only to the extent that they are apparent to the identifying witness and substantially distinguish the defendant from the other lineup participants. *Kurylczyk, supra* at 312; *Hornsby, supra* at 466.

Here, nothing in the differences cited by defense counsel would make it apparent to Wendy Witness that Peter Perpetrator was the assailant. While not all the lineup participants had black hair, all of them had short dark hair. Thus, this subtle distinction in hair color will not render the lineup invalid. Also, Michigan courts have held that minor variations in height will not render a lineup unduly suggestive. *People v Rivera,* 61 Mich App 427 (1975) (concluding difference in height of up to 4 inches is legally insignificant). Here, there was only a 2-inch difference in height between Peter Perpetrator and the other lineup participants. Similarly, differences in the clothing worn by lineup participants generally will not render the lineup procedure defective. Here, Peter was presented in the lineup wearing the same clothing he was wearing at the time of his arrest. This was permissible. *People v Gunter,* 76 Mich App 483 (1977).

A court reviewing the fairness of a lineup will also consider the opportunity of the witness to view the culprit at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the culprit, the level of certainty demonstrated by the witness at the identification, and the length of time between the crime and the identification. *Neil v Biggers,* 409 US 188, 199 (1972); *People v Solomon,* 391 Mich 767 (197 4). Applying these factors to the facts presented in this case, there is little doubt that the court would conclude the lineup did not violate Peter's constitutional rights. Wendy observed the crime without obstruction from 30 feet away, at noon on a sunny day. While there are some variations between the description of the assailant that Wendy provided to police and the physical appearance of Peter Perpetrator, these variations are minor. Peter has short black hair, as described by Wendy. In addition, Wendy described an assailant that featured the approximate age and weight of Peter. While Peter is 5'10" tall and Wendy described the assailant as being 5'8" tall, given all the other similarities between Peter and Wendy's description of the assailant, this minor difference in weight will not taint the identification. Further, the length of time that passed between the crime and the lineup was very short--the lineup was held only one day after the crime. Significantly, Wendy proclaimed certainty in her identification. These factors weigh strongly in favor of concluding the lineup procedures withstand constitutional challenge.

Peter's counsel may argue that the lineup is unduly suggestive because police informed Wendy that "a suspect was in custody and would be in the lineup." However, the fact that the complainant was told that the culprit would be in the lineup is not unduly suggestive as a matter of law. *People v McElhaney,* 215 Mich App 269, 287 (1996).

Additionally, counsel may argue that the absence of defnse counsel during the lineup process creates an inference that the process was unduly suggestive. However, an accused is not entitled to be represented by counsel at identification procedures conducted before the initiation of adversarial judicial criminal proceedings. *Hickman, supra* at 609. Given the analysis provided above, the prosecutor will have little problem meeting its burden.

ANSWER TO QUESTION NO. 7

The likely result is that a court will find an enforceable oral contract between Dribble and Premier.

The general rule under the Uniform Commercial Code in Michigan is that an oral contract for the sale of goods of $1,000 or more is not enforceable unless there is a writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought. In this case there is no writing signed by Dribble. MCL 440.2201(1).

An exception to the general rule requiring a writing signed by the party to be charged applies to oral contracts between merchants (Dribble and Waffle are merchants), commonly referred to as the merchant confirmation.

A merchant confirmation sent by one party to the other party within a reasonable time is sufficient for enforcement of an oral contract, if the party receiving the writing has reason to know its contents and does not object within a reasonable time. See MCL 440.2201(2).

The confirming letter from Waffle's President to Dribble's President is a merchant confirmation delivered within a reasonable time. Even though Dribble's President did not review the contents of the letter, Waffle could argue that Dribble's President had reason to know its contents, because the confirming letter was sent only one day after the oral agreement. Dribble's President did not object to the writing.

In addition, it could be argued that the oral contract is enforceable because the red and white striped basketballs have been specially manufactured for Dribble. MCL 440.2201(3) (a).

Waffle can delegate its performance under the oral contract to Premier, since there is no agreement precluding a delegation and the facts do not indicate that Dribble had a substantial interest in having Waffle perform the contract, *i.e.,* the manufacture of basketballs. MCL 440.2210(1).

The likely result is that Premier and Waffle breached the contract.

Although the merchant confirmation did not expressly state the

ANSWER TO QUESTION 8

Jack should be advised to file a claim for weekly workers' compensation benefits because he has an excellent chance of receiving weekly benefits. Michigan's workers' compensation statute offers generous protections to employees disabled by work injuries who return to work post injury at what is characterized under the statute as "reasonable employment." MCL 418.301(5)-(9); *McJunkin v Cellasto Plastic Corp,* 461 Mich 590 (2000). "Reasonable employment," formerly called "favored work," is post-injury work that can be performed by an employee deemed "disabled" under ma, 418.301(4) and *Stokes v Chrysler, LLC,* 481 Mich 266 (2008). The exam question is structured such that Jack is to be considered "disabled," given his severe restrictions and the employer's tacit concession Jack is unable to work elsewhere. The "make work" nature of Jack's work virtually confirms that Jack is laboring at the heavily favored work clearly fitting within the rubric of "reasonable employment."

A person, such as Jack, who labors at post-injury "reasonable employment . . . for less than 100 weeks" and who "loses his or her job for *whatever* reason . . . shall receive compensation based upon his or her wage at the original date of injury." MCL 418.301(5) (e) (emphasis added); *Russell v Whirlpool Financial Corporation,* 461 Mich 579 (2000). Therefore, even though Jack's cessation of work will be due to the plant closing, §301(5)(e) protects his right to weekly compensation because he will have lost his job after having performed less than 100 weeks of "reasonable employment."

Jack's receipt of unemployment compensation benefits does not preclude receipt of weekly workers' compensation benefits. Jack can receive both. MCL 418.358; *Paschke v Retool Industries,* 445 Mich 502 (1994). If Jack receives both benefits, his weekly workers' compensation benefits will be reduced dollar-for-dollar by the unemployment compensation benefits. MCL 418.358. Unemployment compensation benefits are usually much less than weekly workers' compensation benefits. And, in any event, unemployment compensation benefits are limited in duration, whereas weekly workers' compensation benefits can continue for Jack's lifetime.

In discussing whether Jack can receive weekly workers' compensation payments, examinees might address the question of whether Jack is "disabled" under *§301(4)/Stokes* and/or whether his wage loss relates to his disability under the second sentence of §301(4). The question is structured to avoid delving into those

issues. If an examinee delved into those issues nevertheless and discussed §301(5)-(9) and the unemployment compensation provision of §358, they are entitled to additional (not less) consideration for awareness of deeper latent issues. Finally, an examinee might discuss the time lag between Jack's injury and his claim for weekly benefits. As long as the "reasonable employment" and unemployment issues are correctly addressed, discussion of the timeliness of Jack's claim should also not be held against an examinee. Jack's claim is clearly timely. MCL 418.381.

ANSWER TO QUESTION NO. 9

1. Land: The first question here is whether the property is separate or marital. A court would almost certainly find it was separate because: (1) it was given as a gift to Gary **before** the parties' marriage, and Michigan law does not recognize the acquisition of "marital" rights with respect to a couple living together but not married, *Korth v Korth,* 256 Mich App 286 (2003); *Reeves v Reeves,* 226 Mich App 490 (1997); and (2) the property was given as a **gift** to Gary, and gifts are generally considered to be separate property. *Dart v Dart,* 460 Mich 573 (1999). Note that putting a spouse's name on property does not render it marital property as opposed to separate property, although it can weigh in favor of such a finding. *Reeves, supra; Korth, supra.* Gertrude might have had an argument that she ought to receive a share of any appreciation in the value of the land, but there was no increase in the land value. Even if the property is deemed to be separate, it can be divided if (1) the claimant spouse contributed to the acquisition, improvement or accumulation of the property, MCL 552.401; or (2) the award to the claimant spouse out of the parties' marital assets is insufficient for the suitable support and maintenance of the claimant, MCL 552.23. See *Reeves, sup_ra.* It is very unlikely that the court would invade separate property in this short-term childless marriage where the spouses' incomes are similar.

2. Spousal Support: This was a short-term childless marriage and the parties have the same income. The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished, and the factors that the trial court would consider would be: (1) the past relations and conduct of the parties, (2) the length of the marriage (note that the parties' 10-year cohabitation does not count towards this factor--Korth, *supra),* (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. *Olson v Olson,* 256 Mich App 619, 631 (2003). *Note, however, that this is a comprehensive list that applicants*

should not be expected to replicate, and many cases contain other, shorter lists of factors. See, for instance, *Magee v Magee,* 218 Mich App 158, 162 (1996), stating that the trial court should consider, "the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case."

In this case, Gertrude's attorney might argue that Gary's affair, i.e., his fault in causing the divorce, his ability to move in with his dad, and Gertrude's injury and potential inability to work in the future, justifies some sort of spousal support. However, because of the parties' income parity, the short-term nature of the marriage, and the fact that Gertrude will receive the settlement money and a share of the joint account, a spousal support award of any significance would be unlikely.

3. Settlement Check: The award for pain and suffering is separate property and the check can be cashed before the divorce is final without consequence. Although causes of action are generally marital property, *Heilman v Heilman,* 95 Mich App 728 (1980), and assets acquired right up until the divorce judgment is entered are considered to be acquired "during the marriage", *Byington v Byington,* 224 Mich App 103 (1997), awards for pain and suffering are personal to the injured party. *Bywater v Bywater,* 128 Mich App 396 (1983). Note that the check should not be deposited into the joint account because Gary could argue that it was a contribution to the marital estate. In addition, it would be all right for Gertrude to take the money for the attorney fees from the joint account, although it would be counted against her in the final property settlement.

ANSWER TO QUESTION NO. 10

This is a straight-forward conflict question addressing imputed conflicts.

If Tim were still a member of Carpet & Wall, P.C., MRPC 1.9 (a) would apply. Under that rule, the firm would not be able to represent interests materially adverse to Manuel, where the former matter is substantially related to the prospective matter. Since Tim was at Carpet & Wall when he assisted Manuel in setting up the business whose operations would now be challenged, no one at Carpet & Wall would be able to represent the non-managing investors against Manuel without Manuel's consent. Tim's representation would impute to the rest of the firm under MRPC 1.10(a).

There is a special rule, however, when lawyers change firms. MRPC 1.10(c) says Carpet & Wall is disqualified only if both the following criteria exist: (1) the prospective representation is substantially related to the former representation, and (2) lawyers remaining in the firm have information protected by MRPC 1.6 (privilege or confidences and secrets) that is material to the matter. The facts indicate that only Tim worked on matters for Manuel while Tim was at Carpet & Wall, and that the Manuel files were transferred when Tim left the firm. As long as Carpet & Wall has no protected information about Manuel (including paper or electronic archive) that is material to the prospective matter, the ethics rules do not prohibit representation of the non-managing investors. It does not matter whether Tim represents Manuel on the prospective dispute.

ANSWER TO QUESTION NO. 11

For the following reasons, I would advise Best Brakes that it has a cause of action for breach of contract because the original contract was modified, despite the absence of a written modification.

1. Despite the written modification and anti-waiver clauses of the contract, Best Brakes and Allied retain the power to mutually modify the contract or waive certain of its ter-ins. Because the parties retain their freedom to contract, notwithstanding such clauses, it is settled that a written contract may be varied by a subsequent parol agreement even where the original contract provided that it could not be changed except by written agreement. *Reid v Bradstreet Co,* 256 Mich 282, 286 (1931).

2. The freedom to contract does not permit a party to unilaterally modify an existing bilateral contract, but it does allow Best Brakes to establish a waiver and/or modification by clear and convincing evidence that the parties mutually intended to modify or waive provisions of the original contract. Processes was an Allied Vice President who was vested with authority under the contract to modify it. Processes evidenced his assent to the modification by promising Best Brakes that commissions on all filter sales would commence immediately despite the absence of a written modification. Best Brakes evidenced its mutual assent by then pursuing and obtaining sales of filter products. This evidence, if proven, is sufficient to establish a mutual agreement necessary to give effect to the modification. [NOTE: This can be characterized as either a mutual agreement to modify the existing contract or a mutual agreement to enter into a new contract covering the same subject matter as the original contract.] *Quality Products v Nagel Precision,* 469 Mich 362, 369-372 (2003); *Kla.s v Pearce Hardware & Furniture Co,* 202 Mich 334, 339-340 (1918).

3. Because Processes made an affirmative statement, albeit oral, assenting to the modification, there was also a waiver, i. e., a voluntary and intentional abandonment of a known right. Vice President Processes' affirmative direction to proceed forthwith with filter sales in exchange for commissions demonstrated a voluntary and intentional abandonment of Allied's rights at issue under the contract.

4. As to any rights upon renewal, Best Brakes' efforts to attempt to enforce the oral modification upon any renewal 18 months

hence would be subject to challenge under the statute of frauds. Without a writing to support a promise to include a term some 18 months hence, the statute of frauds would probably prohibit any attempt to enforce such alleged rights. *Kelly-Stehney v McDonald's (on remand),* 265 Mich App 105, 110-116 (2005).

5. This is not a case where alternative relief can be sought under *quantum meruit.* Under *quantum meruit,* the law will imply a contract in order to prevent unjust enrichment when one party unfairly receives and keeps a benefit from another. The facts here seem to fit in this framework, except for the well-established rule that an implied contract cannot exist if there is an express contract between the same parties covering the same subject matter. *Morris Pumps v Centerline Piping,* 273 Mich App 187, 194 (2006)

ANSWER TO QUESTION NO. 12

This question raises the ability of Smith to successfully maintain a suit against the individual directors and BLAU. The successful applicant should first acknowledge that Smith may bring this in both an individual and derivative basis, and then proceed to discuss (1) whether the statutory requirements for bringing a derivative suit have been met, and (2) whether there are grounds for Smith to maintain these claims on an individual basis. The proper conclusions are that plaintiff does not meet all the statutory requirements for bringing a derivative claim and that he is alleging an injury that is also an injury to the corporation, and so he cannot maintain this case in his individual capacity. His case should be dismissed.

General Principles: Initially, the applicant should receive points for noting that the motion challenges Smith's standing to sue and who is the real party in interest. *Michigan National Bank v Mudgett,* 178 Mich App 677, 679 (1989). See also *Leite v Dow Chemical Co,* 439 Mich 920 (1992). Credit should also be given if the applicant recognizes that the shareholder and corporation are separate entities, *Belle Isle Grill Corp v Detroit,* 256 Mich App 463, 473-474 (2003).

Derivative Claims: In general, "a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer or employee." *Belle Isle, supra* at 473-474. The normal practice is for a derivative suit to be brought by one or more shareholders suing in a representative capacity. In particular, a shareholder can maintain a suit for injuries to a corporation by meeting the statutory requirements set forth in MCL 450.1492a, which states:

"A shareholder may not commence or maintain a derivative proceeding unless the shareholder meets all of the following criteria:

"(a) The shareholder was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one who was a shareholder at the time.

"(b) The shareholder fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.

"(c) The shareholder continues to be a shareholder until the

time of judgment, unless the failure to continue to be a shareholder is the result of corporate action in which the former shareholder did not acquiesce and the derivative proceeding was commenced prior to the termination of the former shareholder's status as a shareholder."

A shareholder also may not commence a derivative suit unless he has made a written demand upon the corporation to take suitable action and either 90 days have elapsed since the demand, a rejection is received from the corporation, or irreparable injury would result to the corporation by waiting the 90 days. NICL 450.1493a. A plaintiff who does not satisfy all of these criteria cannot maintain a derivative claim on behalf of the company.

Additionally, because the suit is brought for the benefit of the corporation, "[a]ny recovery runs in favor of the corporation", *Futernick v Statler Builders, Inc.,* 365 Mich 378, 386 (1961), quoting *Dean v Kellogg,* 294 Mich 200, 207-208 (1940), and the corporation is usually brought into the case as a defendant. Also, generally a shareholder who acquiesces or participates in a decision cannot later challenge it in court.

Here, Smith made a written demand on the corporation, and waited 90 days to file suit, satisfying MCL 450.1493a. He also was a shareholder at the time he filed suit, and there is nothing to suggest that he could not fairly and adequately represent the interest of the corporation in the lawsuit. In fact, given his business experience and training, an argument could be made that he does. Smith also properly sued BLAU as a defendant to make it a party. There is also no suggestion that Smith or any other shareholders had any input in this decision. However, Smith fails to satisfy the requirement that he remains a shareholder through the time of judgment, as he sold his 500 shares of stock during the pendency of the litigation. His divesting of the shares also did not result from corporate activity, but from his own voluntary sale of the publicly traded stock. Thus, he cannot maintain this derivative suit.

Individual Claims: A claim can be brought in the name of the individual if the shareholder "can show a violation of a duty owed directly to the individual that is independent of the corporation." *Belle Isle Grill, supra* at 474. Thus, Smith may be able to pursue these claims in his own right if he can show "a violation of a duty owed directly to him" *Michigan National Bank, supra.* However, this "exception does not arise merely because the alleged violation resulted in injury to both the corporation and the individual; rather, it is limited to cases in which there is a breach of duty that is owed to the individual personally." *Belle Isle Grill,*

ANSWER TO QUESTION NO. 13

This question tests the effect of an "in terrorem" (no-contest) provision in a will, the elements of a valid will, and the ability of adult children of the decedent to elect against a will.

Effect of the "In Terrorem" (no-contest) Clause: The letter intended as a will states: "it is my wish that any person who challenges this will take nothing from my estate." Carl and Joe will have to overcome this restriction on contesting the will or they risk taking nothing from William's estate.

Under the common law "in terrorem" (no-contest) clauses were strictly construed and enforceable. *Saier v Saier,* 366 Mich 515 (1962). Carl and Joe would argue that EPIC partially abrogated the common law in regards to "in terrorem" clauses by stating in NICL 700.2518: "A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." So, the issue becomes whether or not probable cause exists to contest the will. The Restatement 3rd of Property states: "Probable cause exists when, at the time of instituting the proceeding there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful." 2 Restatement Property, 3d, Wills and Other Donative transfers, §8.5, Comment c, p 195. Carl and Joe do not have probable cause under this test to challenge the will because there is not probable cause to object to this will in the given facts of this case. For example, the facts state Carl and Joe believe that the will is in their father's own handwriting even if they do not remember the letter. Further, even though it is not properly witnessed, the will is valid as a holographic will as is discussed below. Finally, even though one could speculate that leaving the bulk of the estate to the church may not have been William Long's intent, there are no facts presented indicating a reason to overturn the express provisions of the will making specific gifts of $5,000.00 apiece to Carl and Joe and the rest to Good Church.

Therefore, the "in terrorem" clause is valid and no probable cause exists to challenge the will. So, any person who challenges the will risks taking nothing from the estate of William Long. If Carl and Joe object, the entire estate is likely to be distributed to Good Church.

Elements of a Valid Will: Carl and Joe will argue that no formal will has been found and the letter dated May 26, 1950, is not a valid will. Thus, their father should be deemed to have died intestate and the assets passed via the laws of intestacy. Upon careful examination, their claim is without merit.

MCL 700.2501 states: "An individual 18 years of age or older who is of sound mind may make a will." In this case William was about 30 years old when he drafted the will and no facts are presented that he was not of sound mind.

MCL 700.2502(1) states in pertinent part that a will must be witnessed by at least 2 individuals. Under this statute, the will is clearly deficient because it was witnessed by only one person. However, MCL 700.2502(2) states: "A will that does not comply with subsection (1) is valid as a holographic will, whether or not witnessed, if it is dated, and if the testator's signature and the document's material portions are in the testator's own handwriting." In these facts the entire letter appears to b in William's own handwriting, it is signed, dated, and was clearly intended to be a will. As such, it is a valid holographic will whether or not it was properly witnessed. William will be derned to have died testate, the will should be admitted to probate, and the assets distributed in accordance with the terms of the wiLl.

Ability of Carl and Joe to Elect Acainst the Will: If a valid right to elect against the will were available to Carl or Joe, they could take advantage of it regardless of the enforceability of the "in terrorem" clause. However, unlike a surviving spouse, adult children have no right to elect against a valid will and take ti-leir partial intestate share. They must challenge the validity of the will and be successful in that challenge as discussed above.

It is plausible that an answer might discuss the "omitted children" statute or the stand exemptions and allowances that minor dependent children could receive against the terms of a valid will under EPIC. This analysis is fine, if included, as long as the answer correctly determines that Carl and Joe are not entitled to any exemptions or allowances under EPIC because they are adult children and they were not omitted from the will under the "omitted child" statute, MCL 700.2302.

ANSWER TO QUESTION 14

In Michigan, all wild animals (ferae naturae) "are the property of the people of the state." MCL 324.40105. Thus, "an individual may acquire only such limited or qualified property interest therein as the state chooses to permit." *People v Zimberg,* 321 Mich 655, 658 (1948). Here, the facts indicate that Chris did not have a hunting license; therefore, he did not have the state's permission to take the deer, and the deer remains the property of the state. It does not matter that Chris Cook hunted the deer on his own property. While the land might belong to Cook, the deer does not, and the sate may restrict the taking and use of the deer as it sees fit. *People v Van Pelt,* 130 Mich 621, 624 (1902). In addition to facing misdemeanor criminal charges, MCL 324.40118(3), Chris Cook may also be required to reimburse the state $1,000 for the value of the deer. MCL 324.40119(1) (b).

Chris Cook may well be able to keep the $125,000. Under the Lost and Unclaimed Property Act, MCL 434.21 et *seq.,* Cook must either report the finding of the money or deliver the money to local law enforcement. If Cook wishes to receive the money in the event it goes unclaimed, Cook must provide his name and address to the law enforcement agency. If the owner of the money can be established, then the money is returned to the owner. The initials on the safe deposit box inventory, "A.S.T.," is the only potential clue regarding the owner of the money. If the legal owner of the money is not located within six months, MCL 434.24(7), then the $125,000 is to be returned to Chris Cook. MCL 434.26(1)(a). The statute, construed as a "finder's statute," applies whether the property was lost (accidentally misplaced) or mislaid (intentionally placed and subsequently forgotten). *Willsmore v Oceola Tp,* 106 Mich App 671 (1981), *superseded by statute* as stated in *People v $27,490,* unpublished opinion per curiam of the Court of Appeals, issued 11/26/1996 (Docket No. 173507).

As Cook only found the key to the safe deposit box, he could not claim any ownership interest in the *contents* of the safe deposit box under the Lost and Unclaimed Property Act. At most, he would be entitled to the property he found--the key. Under the Uniform Unclaimed Property Act, MCL 567.221 et *seq.,* all property held in a safe deposit box that goes unclaimed by the owner for more than 5 years after the lease period has expired is presumed abandoned. MCL 567.237. Abandoned property is turned over to the State and, if the owner does not claim the property within three years, the property is sold, MCL 567.243(1), and the proceeds revert to the general fund of the State. MCL 567.244.

ANSWER TO QUESTION 15

"Michigan is a race-notice state, and owners of interests in land can protect their interests by properly recording those interests." *Richards v Tibaldi,* 272 Mich App 522 (2006), quoting *Lakeside Ass'n v Toski Sands,* 131 Mich App 292 (1983). A recorded instrument, such as a deed or mortgage, is considered "notice to all persons except the recorded landowner . . . of the liens, rights, and interests acquired by or involved in the proceedings. All subsequent owners or encumbrances shall take subject to the perfected liens, rights, or interests." MCL 565.25(4). Pursuant to Michigan's recording statute, MCL 565.29, "the holder of a real estate interest who first records his interest generally has priority over subsequent purchasers." *Richards, supra* at 539.

It is clear from the facts above that although Bank Zero's mortgage was made first, MyBank's mortgage was recorded first. Therefore, MyBank's mortgage takes priority if MyBank is a good-faith purchaser who paid valuable consideration. There is no dispute that MyBank is a purchaser who paid valuable consideration, so the only question is whether MyBank is a purchaser in good faith.

A bona fide purchaser is a party who acquires an interest in real estate for valuable consideration and in good faith, without notice of a third party's claimed interest. *Richards, supra* at 539. Notice can be actual or constructive. *Richards, supra.* Constructive notice exists ([w]hen a person has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate, and fails to make" such inquiries. *Kastle v Clemons,* 330 Mich 28, 31 (1951). The relevant issues are whether the facts were sufficient to give rise to the need to make further inquiry and, if so, whether due diligence was exercised in making the inquiry. *American Fed S & L Ass'n v Orenstein,* 81 Mich App 249, 252 (1978).

As the facts indicate, Mike clearly disclosed the name of the primary lender on his application. This could be considered actual notice to MyBank. In the very least, it should have lead MyBank to make further inquiries concerning the possibility of a superior lien. Therefore, before MyBank executed its mortgage, it had constructive, if not actual, notice that its mortgage was intended to be subordinate to the one issued by Bank Zero. As such, MyBank is not a good faith purchaser and Bank Zero's interests would be entitled to priority despite the fact that it did not record its mortgage first.