JULY 2010 MICHIGAN BAR EXAMINATION MODEL ANSWERS

ANSWER TO QUESTION NO. 1

Plaintiff's motion for entry of a default should be denied. When served with a complaint, a defendant "must serve and file an answer or take other action permitted by law or these rules within 21 days after being served with the summons and a copy of the complaint." MCR 2.108(A)(1), emphasis added. Because defendant took other action, filing and serving his motion for summary disposition within 21 days, his action precluded a default being entered against him. A defendant may file an answer or take other action. Doing neither could expose him to default. A summary disposition motion under MCR 2.116(C) (10) can be filed at any time. Defendant was on solid ground by responding by filing his motion, so plaintiff's motion must be denied.

Defendant's motion for summary disposition should be granted. Defendant has properly supported his motion for summary disposition where plaintiff has not supported his response. In *Skinner v Square D Co,* 445 Mich 153, 160-161 (1994), the Supreme Court discussed the parties' obligations under MCR 2.116(C)(10):

"The Michigan Court Rules provide a precise description of the respective burdens that litigants must bear when a motion for summary judgment is filed pursuant to MCR 2.116(C) (10). Specifically, MCR 2.116(G) (4) mandates that the party seeking summary judgment must specify the issues for which it claims there is no genuine factual dispute. Provided the moving party's motion

is properly supported, MCR 2.116(G) (4) dictates that the opposing party must then respond with affidavits or other evidentiary materials that show the existence of a genuine issue for trial. If the opposing party does not so respond, the rule provides that 'judgment, if appropriate, shall be entered against him or her.' MCR 2.116(G) (4). In a similar fashion, this Court has explained the burden of the nonmovant as follows:

"Once a party is challenged as to the existence of the facts upon which he purports to build his case, the sum and substance of the summary judgment proceeding is that general allegations and notice pleading are not enough. Matters upon information and belief and alleged common knowledge are not enough. *That party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. If he fails, the motion for summary judgment is properly granted. [Durant v Stahlin,* 375 Mich 628, 640; 135 NW2d 392 (1965) (emphasis added).] (Footnotes omitted.)"

Defendant has specifically identified the issue about which he believes there is no genuine issue as to any material fact. Defendant has supported his motion with affidavits, admissions, depositions or other admissible evidence. Defendant supported his motion with affidavits involving eye witness observations. Once defendant did this, it was then incumbent on plaintiff to respond in a fashion to substantiate his belief that a material factual issue existed.

Plaintiff's burden was not carried by what he filed. His own restatement of what was in his complaint is insufficient because a responding party may not simply rest on mere allegations in the complaint. Moreover, the letters from the witness and the expert are not in any admissible format. Additionally, the content is of questionable admissibility. The evidence plaintiff has marshaled in support of his response to defendants motion is insufficient to create the factual dispute necessary to defeat defendant's motion.

Plaintiff's motion should be denied and defendant's motion granted.

ANSWER TO QUESTION NO. 2

The driver could possibly file suit alleging an assault and battery by Officer Stokes. The police department would be vicariously liable for the tort of its employee, Officer Stokes. However, a police officer, as a governmental employee, is immune from tort liability unless his conduct rises to the level of gross negligence. The facts presented probably do not support a case of excessive force. *As* such, Officer Stokes and the police department will be immune from any liability for the injuries sustained by the driver.

Assault & Battery: In order to establish claims of assault or battery, a plaintiff must demonstrate that the defendant had the intent to cause a harmful or offensive contact with another person, or knowing, with substantial certainty, that such contact would result. *Boumelhem v BIC Corp,* 211 Mich App 175, 184 (1995). Here, Officer Stokes slammed the driver's face on the hood of the vehicle, sprayed him in the face with pepper spray, and put his handcuffs on too tight. As such, all three actions by Officer Stokes would constitute assault and battery.

Vicarious Liability: The vicarious liability of a municipality for the torts of its employees is based on the doctrine of respondeat superior. Such liability generally can be imposed only where the individual tortfeasor acted during the course of his or her employment and within the scope of his or her authority. *Meadows v City of Detroit,* 164 Mich App 418, 431 (1987), citing *Ross v Consumers Power Co (on rehearing),* 420 Mich 567, 624 (1984). Accordingly, to the extent that Officer Stokes is liable for an assault and battery, his employer would be liable as well.

Governmental Immunity: However, under the governmental immunity act, a governmental employee is not liable in tort for personal injuries as long as the employee's "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c). "Gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). For example, an officer is grossly negligent if the force used is excessive. If Officer Stokes (the governmental employee) is immune, so then will be his employer.

Excessive Force: In subduing a suspect, a police officer may

use a substantial level of force that may even result in injury to the suspect if the use of that force was necessary. See *Sudul v Hamtramck,* 221 Mich App 485-486 (1997) citing *Burns v Malak,* 897 F Supp 985 (ED Mich 1995). To determine whether the amount of force used by a police officer was justified, the Court must determine whether the force was "objectively reasonable under the circumstances." *VanVorous v Burmeister,* 262 Mich App 467, 482 (2004) citing *Brewer v Perrin,* 132 Mich App 520, 528 (1984). "Police officers . . . must be given a wide degree of discretion in determining what type of action will best ensure the safety of the individuals involved . . . the general public . . . and the apprehension of wrongdoers." *Brown v Shavers,* 210 Mich App 272, 276 (1995) quoting *Ross v Consumers Power Co (on rehearing),* 420 Mich 567, 659 (1984). As such, if the force is determined to be excessive, then the governmental employee is liable in tort for the plaintiff's injuries.

Conclusion: A claim against the officer and therefore the police department will likely fail. Absent a showing of gross negligence, Officer Stokes and the police department are governmentally immune from the driver's lawsuit for assault and battery. The officer's actions--slamming the driver's face into the hood of the vehicle while attempting to subdue and frisk him, spraying him with pepper spray, and handcuffing him tightly--must be measured by "what was objectively reasonable under the circumstances." The driver here did not immediately stop, had to be forced off the road, and resisted more than one time Officer Stokes' efforts. While the handcuffing too tightly may constitute excessive force, the claimed injuries are nonexistent or minimal (no medical treatment required) and, therefore, not sufficient to support a claim of excessive force. *Oliver v Smith,* 269 Mich App 560 (2006). Because the driver cannot make out a claim of excessive force, he cannot establish the gross negligence exception to governmental immunity and his claim must fail.

ANSWER TO QUESTION NO. 3

This wills question tests the knowledge of several factual complications that may arise when probating a valid will. The correct disposition of Bradford's estate is:

1. Greg is entitled to a $200,000 payment from the estate as the fair market value of the Aston Martin.

This raises an issue of *ademption:* that is, there is specifically bequeathed property in the will that is *no longer a part of the estate at the testator's death.* In Michigan, there is a *presumption of non-ademption,* MCL 700.2606(1)(f), which is a change from the prior rule in Michigan where ademption would operate to cause the gift to fail entirely. *Hankey v French,* 281 Mich 454, 462-463 (1937). Where another statutory provision does not compensate the beneficiary for the value or replacement of specifically bequeathed property, the devisee is entitled to the value of the property unless the facts and circumstances show that the ademption was intended by the testator or within the testator's manifested plan of distribution. MCL 700.2606(1)(f). Notably, a beneficiary potentially has a right to: any insurance proceeds for injury to the specifically devised property unpaid at the death of the testator, MCL 700.2606(1)(c), or property procured by the testator as a replacement for the specifically devised property. MCL 700.2606(1)(e).

Here, Bradford bequeathed his Aston Martin to Greg, however the car was destroyed in an automobile accident prior to Bradford's death, and therefore cannot be given to Greg per the terms of the will. The presumption of non-ademption operates in favor of Greg: because the facts and evidence demonstrate that the ademption was *not* intended--the car was accidentally destroyed in the year prior to Bradford's death--Greg should be entitled to the cash equivalent of the Aston Martin. (Note that although Bradford received insurance proceeds from the destruction of the Aston Martin, Greg does *not* have an interest in these proceeds [$195,000] because the proceeds were fully paid *prior* to the testator's death. Note also that because Bradford never replaced the Aston Martin, Greg can have no interest in any replacement property.) Thus, the cash legacy should be equal to the value fo the vehicle at the time of the disposition, which would likely be an amount similar to its fair market value of $200,000.

2. State College receives nothing.

The primary goal in the construction of wills is to determine the testator's intent. *In re Edgar Estate,* 425 Mich 364, 378 (1986). Changes to the face of a will shall be enforced pursuant to the statutory dispensing power if there is clear and convincing evidence that the testator intended the change by the addition or alteration. MCL 700.2503(c).

Here, there is likely clear and convincing evidence that Bradford intended to change his will and thus remove the bequest to State College. On the face of the will, the bequest is crossed out, followed by specific words of disinheritance in the testator's handwriting that are signed and dated by the testator. This demonstrates an intent to remove entirely the original gift from the will by clear and convincing evidence, and the probate court should honor this intent by awarding nothing to the college.

3. One half of the remaining value of the state ($900,000) goes to Courtney, the sole remaining member of the Caravaggio Club. (Any heirs of prior deceased members of the club receive nothing.)

A testator may properly make a gift to a class of people, i.e., persons who are members of a common group where the intent of the testator is to create a class, however only members of the class who survive the testator take their share of the gift. MCL 700.2104, MCL 700.2604(1), Michigan Law & Practice 2d Wills, §2l3-214. The Rule of Convenience provides that the class closes when the testator dies; subject to exceptions not applicable here, any person who is not a member of the class at that time will not take.

Here, although the Caravaggio Club had three other members (in addition to Bradford) at the time Bradford made his will, only Courtney survived Bradford's death. Because the class closed upon Bradford's death, the two members who predeceased do not take their shares of the gift. (Note that because they were not related to Bradford, the Anti-Lapse Statute cannot prevent their gifts from lapsing.) Accordingly, their estates/descendants have no valid claim to their shares, which are distributed proportionately to the remaining class member(s). Thus, Courtney takes the entire interest (one half of the remaining value of the estate, $900,000).

4. Erin and Morgan, the twin daughters of David, receive one half of the remaining estate ($900,000), pursuant to Michigan's Anti-Lapse Statute, to be divided equally.

The general rule in Michigan provides that if a beneficiary predeceases the testator, then the gift lapses; a will cannot distribute property to a deceased person. See MCL 700.2104, MCL 700.2604(1). However, Michigan has modified this general rule through the enactment of an Anti-Lapse Statute. MCL 700.2603(1). The statute provides that if the predeceasing beneficiary is a grandparent or descendant of a grandparent or a stepchild of the testator, and the descendants are alive after 120 hours of the testator's death, then the gift will pass to the descendants of the beneficiary.

Here, because David predeceased the testator, his gift would normally lapse, but for Michigan's Anti-Lapse statute. Because David, as Bradford's son, is a descendant of Bradford's grandparents, the Anti-Lapse Statute operates to save the gift that would have been dispensed to David. This gift will instead pass to David's descendants, his daughters Erin and Morgan and will be divided equally between them. MCL 700.2718.

ANSWER TO QUESTION NO. 4

I. How should the court rule on the Prosecutor's motion?

The trial court should deny the prosecutor's motion to set aside the plea and assign the matter to a different judge.

As a general principle, judicial involvement in the bargaining of a sentence should be limited. *People v Killebrew,* 419 Mich 189 (1982). A limit on judicial intervention is necessary "to minimize the potential coercive effect on the defendant, to retain the function of the judge as a neutral arbiter, and to preserve the public perception of the judge as an impartial dispenser of justice." *Id.* at 202. However, judicial involvement in pre-conviction negotiation of a sentence is not precluded as a matter of law. This is because the Legislature has vested sentencing authority and discretion with the court and the court "may not abdicate this function by allowing sentence agreements to control the sentencing process." *People v Cobbs,* 443 Mich 276, 281 (1993).

In *Cobbs,* the Michigan Supreme Court discussed the propriety of a trial court disclosing the court's thoughts on sentencing prior to the acceptance of a plea. The Supreme Court stated, "At the request of a party, and not on the judge's own initiative, a judge may state *on the record* the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense." *Cobbs,* 443 Mich at 283 (emphasis in original, footnote omitted). The Supreme Court noted that the coercive position of the court is minimized where the court is not initiating the sentencing discussion but is merely responding to an inquiry regarding sentencing. Further, the court must take care to avoid express or implied alternative sentencing possibilities, such as sentencing variations that may arise from the exercise of the right to trial by jury. This is also necessary to avoid the potential of coercion. *Id.* The Supreme Court concluded that "[t]he judge's neutral and impartial role is enhanced when a judge provides a clear statement of information that is helpful to the parties." *Id.* at 284.

The Supreme Court also addressed the concerns that are at the root of the prosecutor's motion to set aside the plea. The Court stated, "Where a defendant pleads guilty or nolo contendere to the charged offense, there can be no infringement of the prosecutor's charging authority. Neither does this procedure limit the prosecutor's right to introduce additional facts at appropriate

points during the remaining pendency of the case, such as during allocution at sentencing." *Cobbs,* 443 Mich at 284 (footnote omitted). The prosecutor has wide latitude in the discretion to charge, but once a decision to charge is made, the prosecutor has no right to dictate the sentence. That right and duty vests exclusively with the court and the prosecutor's role in sentencing is limited to informing the court.

Here, the court did nothing improper. It is clear from the facts presented that the trial court did not initiate the discussion regarding sentencing. The court merely responded to defense counsel's inquiry. The judge further indicated that the sentence was based on the "limited knowledge of the case" then available to her. The court did not impose upon the prosecutor any obligation to reduce the charge or in any way impact or influence the discretion of the prosecutor. The prosecutor's motion to set aside the plea should be denied. After ruling on this motion, the trial court should refrain from sentencing defendant or taking any further action in this matter until after there has been a de novo review of the motion to reassign the case to a different judge. The motion is, in essence, a motion to disqualify the judge because of bias. Such motions are subject to de novo review by the chief judge of the circuit of a judge assigned by the State Court Administrator's Office. MCR 2.003(D)(3)(a).

II. Describe and discuss Debbie's remedies, if any, to the trial court's refusal to sentence her to six months in the county jail.

Although Debbie pled guilty with the expectation that she would be sentenced to six month's incarceration in the county jail, she has no right to force the trial court to impose such a sentence. *Cobbs,* 443 Mich at 283, make it very clear that "[t]he judge's preliminary evaluation of the case does not bind the judge's sentencing discretion." As the case proceeds it is likely that additional facts will become known to the court that impact sentencing determinations. *Id.* When the sentencing court expresses the inability to follow the preliminary sentence evaluation, a defendant who relied upon such evaluation to enter a plea of guilty has the "absolute right to withdraw the plea."

Additionally, to the extent the defendant wishes to withdraw a plea so offered and proceed to trial, the judge who has expressed opinions relating to sentencing remains subject to the disqualification rules under MCR 2.003. Debbie may conclude that the revised sentence offer shows an inability for the court to preside over her case as an impartial arbiter. However, a decision not to sentence a defendant consistent with a preliminary

sentencing evaluation is not a per se basis for recusal. "A judge's candid statement of how a case appears at an early stage of the proceedings does not prevent the judge from deciding the case in a fair and evenhanded manner later, when additional facts become known." *Id.*

Here, Debbie stated on the record that she was "pleased with the court's sentencing proposal and given the court's assessment, she would agree to plead guilty to the GBH charge." Thus it may fairly be said that Debbie relied upon the court's preliminary sentencing evaluation when she entered her plea. Accordingly, Debbie has two options, proceed with the sentence and accept the imposition of a 24 to 120 month sentence to be served in prison, or withdraw her plea. To the extent she wishes to withdraw her pleas, she may also seek disqualification of the judge, although unless Debbie waives her right to a jury such that the court is also the trier of fact, it is unlikely that disqualification would be granted. As a practical matter, Debbie would be well advised to remain with this judge and keep her plea of guilty. It is clear the prosecutor is seeking a penalty greater than that which the judge is now offering. Further, the facts indicate that the court's latest proposed sentence is at "the low end of the applicable sentencing guideline range." Thus, absent a finding she is not guilty, Debbie is not likely to achieve a better sentencing result.

ANSWER TO QUESTION NO. 5

Dan committed two acts that may expose him to criminal liability. First, he entered Sam's garage by prying open a locked door. Second, Dan attempted to give Patti a substance he believed to be a controlled substance. Each act is addressed separately.

I. Dan's Conduct at Sam's House.

Dan can be charged with common law burglary or first-degree home invasion in violation of MCL 750.110a(2). Dan can also be charged with misdemeanor larceny, for stealing the rock salt from Sam's garage.

The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. *People v Sands,* 261 Mich App 158, 162 (2004), MCL 750.110a(2). The elements of common law burglary are similar to first-degree home invasion except that common law burglary must be committed under cover of night and there is no requirement that a person legally be within the dwelling or that defendant be armed with a dangerous weapon. See *People v Saxton,* 118 Mich App 681, 690 (1982), citing LaFave and Scott, Handbook of Criminal Law, §96, p 708.

The term "dwelling" is statutorily defined as "a structure or shelter that is used permanently or temporarily as a place of abode, *including an appurtenant structure attached to that structure* or shelter." (Emphasis added.) MCL 750.110a(1)(a). At common law, the term dwelling included any structure within the curtilage of the home. Applied under either setting, there can be little doubt that when Dan pried open the locked door to a "garage attached to Sam's home" he broke into a dwelling.

At the time Dan broke into Sam's garage, Dan intended to commit a felony; the possession of crack cocaine, a controlled substance. Further, at the time Dan entered Sam's garage it was his intent to commit a larceny. In fact, Dan completed the larceny when he took the rock salt from Sam's garage. The crime of larceny is described by statute as "stealing [money, goods or chattels] of another person." MCL 750.356(1) (a). If the value of the goods

stolen is less than $200, the crime is a misdemeanor. MCL 750.356(5). Nonetheless, the act remains a larceny for purposes of home invasion in the first degree. Finally, because Sam and his girl friend were in his home at the time Dan entered Sam's garage, the final element of first-degree home invasion is satisfied.

The applicant need not discuss both common law burglary and home invasion to receive full credit in this portion of the question. A thoughtful analysis of either charge would suffice.

II. Dan's Conduct at The Bar.

Whether Dan is exposed to criminal liability for distributing rock salt to Patti while under the mistaken belief that he was providing her crack cocaine is a closer question. In *People Thousand,* 465 Mich 149, 158-159 (2001), the Michigan Supreme Court observed that "the concept of pure legal impossibility applies when an actor engages in conduct that he believes is criminal, but is not actually prohibited by law: 'There can be no conviction of criminal attempt based upon D's erroneous notion that he was committing a crime.' *Perkins & Boyce, supra, p 634."*

Notwithstanding the Court's discussion of the impossibility defense to criminal liability, the Court rejected the notion that the impossibility defense is rooted in the common law. *Thousand* at 163. The Supreme Court focused on the specific language of Michigan's attempt statute, MCL 750.92. The Court was "unable to discern from the words of the attempt statute any legislative intent that the concept of 'impossibility' provide any impediment to charging a defendant with, or convicting him of, an attempted crime." *Id.* at 165.

Here, it may be argued that Michigan's attempt statute has no application because the attempt is subsumed under the crime of delivery itself. *People v Alexander,* 188 Mich App 96 (1991). Thus, whether Dan is exposed to criminal liability for his attempt to deliver cocaine to Patti will turn on the language of Michigan's controlled substance statute. MCL 333.7401 provides, in pertinent part that "a person shall not . . . deliver or possess with intent to . . . deliver a controlled substance". The above-cited statutory language makes the intent to deliver equivalent to actual delivery. Thus, the attempt is equivalent to the principal charge of delivery.

Further, the delivery statute requires the possession of a controlled substance. This is also supported by Michigan's criminal standard jury instructions, which sets forth five elements for the unlawful possession of a controlled substance with the

intent to deliver. The first three of these elements are pertinent to this issue:

First, that the defendant knowingly possessed a controlled substance.
Second, that the defendant intended to deliver this substance to someone else.
Third, that the substance possessed was a controlled substance and defendant knew it.

Applied to the facts presented in this case, it may be argued that Dan cannot be convicted of possession with intent to deliver a controlled substance because he never possessed a controlled substance. The fact that he believed what he was doing was illegal does not transpose his otherwise legal activity into criminal conduct.

Conversely, it may be argued that, under Michigan's attempt statute, a defendant may be charged with an attempt to commit a crime where there is evidence of (1) an attempt to commit a crime; and (2) any act towards the commission of the intended offense. *Thousand,* at 164. Here, when Dan gave Patti rock salt believing it to be crack cocaine, he attempted to commit a crime--the delivery of a controlled substance. However, it is arguable whether Dan committed "any act" towards the commission of the intended offense of possession with the intent to deliver a controlled substance. The defendant will argue that no aspect of Dan's possession and delivery of rock salt, a legal substance, amounted to an act toward the commission of the offense. By contrast, the prosecution may argue that the home invasion perpetrated by Dan was committed with the intent to steal crack cocaine for the purpose of delivering it to Patti. This action constituted an act undertaken to perpetrate the crime of delivery of a controlled substance. Just as in *People v Thousand,* where the impossibility defense was found inapplicable to the charge of attempted distribution of obscene material to a minor where defendant was in fact distributing the material to an adult undercover police officer, defendant here may be charged with an attempt to distribute crack cocaine even though what he in fact distributed to Patti was a legal substance.

Dan may also be charged with possession with intent to deliver an imitation controlled substance in violation of MCL 333.7341(3), a felony punishable by imprisonment of not more than two years. MCL 333.7341(8). This statute defines "imitation controlled substance" as "a substance that is not a controlled substance . . . [which] by representation . . . would lead a reasonable person to believe that the substance is a controlled substance." Defense counsel may argue that no reasonable person looking at rock salt

would conclude that it is crack cocaine. The prosecution will respond that both Sam and Dan believed it to be crack cocaine and both represented the salt to be crack cocaine. This evidence is sufficient to present the question to the jury. In response, defense counsel may also argue that a person actually believing the substance to be a controlled substance may not be charged with this crime, as they lack the intent to distribute an imitation. The prosecutor may respond, however, nothing in the statute supports the conclusion that the distributor must in fact be aware of the imitation status of the substance.

ANSWER TO QUESTION NO. 6

The issue presented here relates to the extent, if any, the President may exercise power to modify, alter or otherwise impede the SIRA.

The President's authority to act "must stem either from an act of Congress or from the Constitution itself." *Youngstown Co v Sawyer,* 343 US 579, 585 (1952). Article II of the Constitution vests without reservation or qualification executive power in the office of the President. In comparison, Article I delegates to Congress the legislative powers "herein granted." These distinctions in grants of authority support the notion that the President has certain inherent powers beyond those expressly stated in the Constitution.

In *Medellin v Texas,* 552 US 491, 524-525 (2008), the Supreme Court of the United States recognized as the "accepted framework" Justice Jackson's tripartite scheme for judicial review of presidential authority. *Youngstown Co,* 343 US at 587 (Jackson, J. concurring). First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." 343 US at 635. Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which distribution is uncertain." *Id.,* at 637. In such a circumstance, presidential authority can derive support from "congressional inertia, indifference or quiescence." *Ibid.* Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and a court will sustain his actions "only by disabling the Congress from acting upon the subject." *Id.* at 637-638.

Here, the President's Executive Order directs the Agriculture Secretary to take two actions. First, it directs that the Agriculture Secretary "cease allocating subsidies available under the [SIRA]." Second, it directs the Agriculture aecretary to "use the funds made available under said act to subsidize businesses engaged in the harvesting and sale of organic vegetables."

I. The President's Authority to Order the Agriculture Secretary to Cease Allocating Subsidies Available Under the SIRA.

The Agriculture Secretary may argue that the President is granted authority under the SIRA to cease the distribution of subsidies. This power in the President is implied from the fact that the act calls upon the executive branch, through the Agriculture Secretary, to administer the subsidy program. Further, the act provides that subsidies are to be funded "only to the extent needed." Thus, the Agriculture Secretary will argue, the executive branch is in the superior position to determine what funds are needed to administer the program. Here, the President declared that the "shrimp industry in the Gulf of Mexico [had] fully recovered from the devastation of Hurricane Katrina." Thus, the Agriculture Secretary will argue, the President's order falls under the first prong of Justice Jackson's tripartite inquiry and, as such, a reviewing court should give great deference to the authority of the President.

The Shrimp Association will argue, however, that while subsidies to its members are not perpetual and, as stated by Congress, should only be funded to the extent needed, Congress reserved to itself the determination whether continuation of the subsidy was necessary. The act provides that "Congress shall annually appropriate the funds for such subsidy only to the extent needed." Here, Congress appropriated in 2010 funding for the subsidy, thereby indicating that the continuation of the subsidy was necessary. Nothing expressly stated in the act supports the conclusion that the President was granted the power to determine the continued necessity of the Congressional grant of the subsidy or that the President could cease funding of the subsidy once the funds were appropriated. Thus, the Shrimp Association will argue, the President's exercise of authority falls under the third prong of Justice Jackson's tripartite inquiry because the President's action is inconsistent with the action taken by Congress. Thus the President's authority is at its weakest and the President's action should be deemed unauthorized.

Moreover, the Shrimp Association may argue the President is under an affirmative constitutional duty to see that the will of Congress is done. US Const Art 2 §3 provides that the President "shall take Care that the Laws be faithfully executed." Here, Congress determined in its wisdom to authorize a subsidy to assist a sector of the economy that was "crippled" by a natural disaster. While the President may declare that the industry is recovered, it is for Congress and not the President to undue the subsidy once appropriated. In the absence of legislation repealing or otherwise ending the appropriation, the Association may argue the President is constitutionally required to implement the SIRA in the manner provided by Congress.

II. The President's Authority to Order that Funds Appropriated Under the SIR A be Used to Subsidize the Organic Vegetable Industry.

Review of the President's authority to order that the funds be used to subsidize the organic vegetable industry may arguably fall under the second prong of Justice Jackson's three-part inquiry, as Congress was silent in regard to subsidizing the organic vegetable industry. However, a stronger argument may also be advanced that this aspect of the President's order falls under the third prong of Justice Jackson's three-part test because funds used to implement the President's order are diverted away from a program specifically authorized by Congress.

This said, there is little doubt that the President is encroaching on the power constitutionally vested in the Congress when he orders the funds be used to subsidize the organic vegetable industry. The foundation of our federal constitution rests on the principle of separation of powers. Congress, in executing its policy-making authority under Article I of the Constitution, had the authority to assist through a government subsidy an industry that was adversely impacted by a natural disaster. US Const, Art I §1; Art I §8 cl. 18. By contrast, "[t]he Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Youngstown,* 343 US at 587

The President's Executive Order usurps from Congress the power to legislate. While the President can ask Congress to enact laws to promote the consumption of healthier foods and to subsidize the organic vegetable industry, he cannot direct that a presidential policy be executed in a manner prescribed by the President. *Youngstown,* 343 US at 587. This is particularly true where the Congress has authorized and appropriated funds to implement legislation enacted by Congress and the President is directing a member of his cabinet to refrain from doing that which is specifically directed by Congress and instead to use the appropriated funds to effectuate a different policy. *Id.*

The Agriculture Secretary may argue the President possesses residual emergency powers not expressly enumerated in the Constitution and that these powers permit him to order the Secretary to divert the funds earmarked for the gulf coast shrimp industry to the organic vegetable industry. *US v Bishop,* 555 F2d 771 (CA 10, 1977). Here, the claimed emergency would emanate from poor dietary habits of Americans. However, in the instances where emergency powers are recognized, the emergency is much more exigent than dietary concerns. See CJS, War Powers of the President, §54.

A reviewing court is likely to conclude the President exceeded his presidential authority and thus the Agriculture Secretary cannot use funds in the manner described in the Executive Order.

ANSWER TO QUESTION NO. 7

(a) Betty is the sole owner of the cottage because she and Abel acquired the cottage as a tenancy in the entirety, and, upon Abel's death, joint ownership interest transferred to Betty alone under the right of survivorship. Under the common law, a tenancy in the entirety was created when a validly married couple took property as joint tenants and shared the unities of time, title, interest, and possession. *Budwit v Herr,* 339 Mich 265, 272 (1954). With the enactment of MCL 565.49, Michigan eliminated the unities of time and title. Under Michigan law, the deed of conveyance to a married couple must explicitly state if the parties intend to create a separate type of estate rather than a tenancy in the entirety. *DeYoung v Mesler,* 373 Mich 499, 502-504 (1964). The deed to Abel and Betty indicated only that the property was conveyed to them "jointly as husband and wife." Therefore, Abel and Betty clearly acquired a tenancy in the entirety. Under a tenancy in the entirety, each party has an indivisible interest in the whole property. *Rogers v Rogers,* 136 Mich App 125, 134 (1984). A tenancy in the entirety may only be terminated by (1) the death of a spouse, (2) divorce, (3) mutual assent or (4) execution on a security lien by a joint creditor of both the husband and wife.

The judgment of divorce had not yet entered when Abel died. Therefore, the tenancy in the entirety was not dissolved by divorce. However, the tenancy in the entirety *did* terminate when Abel died. At that time, Betty took sole title to the property through the right of survivorship. This right provides that in the event that one spouse dies during the course of the marriage, the surviving spouse automatically takes fee simple ownership in the entire property.

The quit-claim deed to Lolita did not divest Betty of her ownership interest. As a tenant in the entirety, Abel did not have a separate or individual property interest that he could lawfully transfer to Lolita without Betty's assent. *Rogers, supra,* 136 Mich App at 134-135. A quit-claim deed only passes "the estate which the grantor could lawfully convey by a deed of bargain and sale." MCL 565.3. As Abel could not lawfully transfer his interest in the tenancy in the entirety, the quit-claim deed transferred no property interest to Lolita.

(b) As Betty has the sole ownership interest in the cottage, she may eject Lolita consistent with the provisions of their lease agreement. The lease agreement allows either party to terminate

the lease by giving 60 days notice. This is consistent with MCL 554.134(1), which allows a party to terminate a periodic lease with at least one month notice. In the event that Lolita refuses to leave after 60 days, Betty will have to look to the court for relief; she will have to file summary proceedings to evict Lolita as a holdover tenant. MCL 600.5714(1) (c)(I).

(c) Carl may not execute the mortgage against the cottage. Betty did not sign the mortgage agreement in relation to the cottage, which is property held as a tenancy in the entirety. A tenant by the entirety may not unilaterally dispose of, or otherwise encumber the property; both tenants must act together to jointly encumber a tenancy by the entirety. *Berman v State Land Office Bd.,* 308 Mich 143, 144 (1944). Thus, Abel could not lawfully unilaterally encumber the property. Further, "land held by husband and wife as tenants by entirety is not subject to levy under execution on judgment rendered against either husband or wife alone." *Sanford v Bertrau,* 204 Mich 244, 247 (1918). Therefore, Carl has no action against Betty.

ANSWER TO QUESTION 8

Under MCL 450.1487(2), "falnv shareholder of record, in person or by attorney or other agent, shall have the right" to inspect "for any proper purpose the corporation's stock ledger, a list of its shareholders, and its other books and records."

Under the statute, a shareholder is required to give the corporation a written demand, "describing with reasonable particularity" the shareholder's purpose, the records sought, and that "the records sought are directly connected with the purpose." A "proper purpose" under the statute is defined as a purpose reasonably related to the person's interest as a shareholder.

The statute also requires that the written demand be delivered to the corporation "at its registered office in this state or at its principal place of business." The statute also specifically contemplates that a demand is permissible through "an attorney or other agent" so long as the demand is accompanied by documentation which authorizes the "agent to act on behalf of the shareholder."

If the corporation does not permit an inspection within 5 business days after a proper demand has been received, of if the corporation imposes unreasonable conditions upon the inspection, the shareholder may apply to the county circuit court in which the principal place of business or registered office of the corporation is located to seek a court order to compel the inspection. MCL 450.1487(3).

The burden of proof depends upon the type of document sought. If the shareholder seeks to inspect the stock ledger or list of shareholders (and has otherwise complied with the written demand requirements), the burden of proof is on the corporation to show that the demand was made for an improper purpose or that the records sought are not directly connected with the shareholder's stated purpose.

If the shareholder seeks records other than the stock ledger or list of shareholders (and has otherwise complied with the written demand requirements, the burden is on the shareholder to establish that the inspection is for a proper purpose and that the documents are directly connected with the stated purpose.

The court has the discretion to permit the shareholder to inspect corporate books and records "on conditions and with

limitations as the court may prescribe and may award other or further relief as the court may consider just and proper." Additionally, if the court orders shareholder inspection of corporate records, then the court "shall also order the corporation to pay the shareholder's . . . costs, including reasonable attorney fees, incurred to obtain the order unless the corporation proves that it failed to permit the inspection in good faith because it had a reasonable basis to doubt the right of the shareholder . . . to inspect the records demanded."

Because WECS refused to comply with Dennis and Ed's written demands within 5 days after the demands were received, both Dennis and Ed can file actions in Bedbug County Circuit Court.

Because the statute allows "any shareholder of record" the right to inspect corporate records, the fact that Ed only owns one share of stock is irrelevant. The statute contains no minimum requirement. Additionally, the fact that he made his demand through an attorney is irrelevant, as the statute specifically contemplates making a demand through an attorney. Ed has demanded a list of shareholders, and has complied with the statute concerning the form and manner of the demand. The burden is on the corporation to show that the demand was made for an improper purpose. Seeking a shareholder list to get elected to the board of directors is a proper purpose pursuant to *George v International Breweries, Inc,* 1 Mich App 129 (1965).

Dennis has demanded a list of WECS's major accounts. Because the document sought is neither a stock ledger nor a list of shareholders, the burden is on Dennis to establish that the inspection is for a proper purpose and that the documents are directly connected with the stated purpose. Assuming that ensuring maximum profitability is a proper shareholder purpose, his claim should fail because a list of the major accounts is not "directly connected" with maximizing profitability. This is particularly true considering that Dennis is employed by WECS's competitor, and the information could be used by Acme to the detriment of WECS. If the demand is not sought in good faith for the protection of the interests of the corporation or the stockholders, a stockholder is not entitled to an order compelling the inspection of corporate documents. See *Slay v Polonia Pub Co,* 249 Mich 609, 616 (1930).

Assuming that Ed's claim prevails, he is entitled to "costs, including reasonable attorney fees." Even if Dennis prevails on his claim, he would not be entitled to attorney's fees if WECS can show that it had a good faith reasonable basis to doubt Dennis's right to inspect the list of major accounts. MCL 450.1487(5).

ANSWER TO QUESTION NO. 9

A bailment is created when the owner of personal property (the bailor) delivers his or her property to the possession of another (the bailee) in trust for a specific lawful purpose. *In re George L. Nadell & Co,* 294 Mich 150, 154 (1940). There were two separate bailment agreements here: between Carolyn and Tammy and between Jimbob and Tammy.

The obligations of a bailee depend on the nature of a particular bailment: whether the bailment is for the benefit of the bailee, for the benefit of the bailor, or for the mutual benefit of both parties. The nature of each bailment here was for the mutual benefit of both parties. The nature of each bailment here was for the mutual benefit of both parties, because Tammy agreed to return each muskrat to Carolyn and Jimbob at a future time, and Carolyn and Jimbob each agreed to pay Tammy for the taxidermy services. See *Godfrey v City of Flint,* 284 Mich 291 (1938). As the bailee in a bailment for the mutual benefit of both parties, Tammy is bound to exercise ordinary care of the subject matter of the bailment and is liable to Carolyn and Jimbob if she fails to do so. *Id.* at 297298.

(a) Based on the facts, Tammy is likely negligent for mistakenly giving Greggy to Jimbob and is liable to Carolyn for damages. Tammy owed Carolyn a duty to exercise ordinary care, and the ordinary care of bailees includes surrendering bailed property only to the proper bailor. See *General Exchange Ins Co v Service Parking Grounds,* 254 Mich 1, 7 (1931). Accordingly, she is likely liable for the damages attendant to giving Greggy to Jimbob instead of Carolyn. If Carolyn is successful in recovering Greggy from Jimbob, however, her recovery will offset some or all of the damages she is entitled to from Tammy.

(b) Based on the facts, Tammy is likely not liable for damages to Jimbob's muskrat, which was damaged as a result of the arson next door. As with Carolyn, Tammy owes Jimbob a duty to exercise ordinary care. A showing that personal property was damaged or destroyed while in the possession of the bailee creates s rebuttable presumption of negligence. *Columbus Jack Corp v Swedish Crucible Steel Corp,* 393 Mich 478, 510-511 (1975). Here, this would require Tammy to "produce evidence of the actual circumstances of the fire . . . including the precautions taken to prevent the loss." *Id.* at 511. Under the facts presented, it is

likely that Tammy can rebut the presumption of negligence because (1) her store is in a low-crime area, (2) the fire was not set as a result of her own negligence or the negligence of her employees, and (3) she has taken the precaution of a state-of-the art sprinkler system. See *Id.* at 511 n 3. Accordingly, she has likely exercised ordinary care in protecting Jimbob's personalty.

Tammy is, however, liable to Jimbob for monetary damages if Carolyn is successful in recovering Greggy from Jimbob (see part c, *infra).* As stated, Tammy owes Jimbob a duty to exercise ordinary care. Tammy's failure to exercise ordinary care in selling Carolyn's personal property to Jimbob is the only basis for Carolyn's recovery of Greggy from Jimbob. The amount of damages is Jimbob's actual loss, or "his bargain which he would have realized but for defendant's breach." *Demirjian v Kurtis,* 353 Mich 619, 622 (1958). Jimbob paid Tammy for Greggy, and, in the event of Carolyn's recovery of Greggy from Jimbob, he would have no stuffed muskrat to show for his payment to Tammy. Although Jimbob is not entitled to receive a muskrat from Tammy, because Tammy was not negligent as it relates to his personal property, neither was Tammy entitled to receive payment from Jimbob for a stuffed muskrat that did not belong to him. Therefore, Jimbob is entitled to recover his payment to Tammy in damages.

(c) Carolyn is likely able to recover Greggy from Jimbob. MCL 600.2920 codifies the common-law action for replevin and allows someone to recover specific personal property that has been "unlawfully taken or unlawfully detained," as long as the plaintiff has a right to possess the personalty taken or detained. MCL 600.2929(c). Carolyn remains the title owner of Greggy because a bailment does not change the title of personalty. See *Dunlap v Gleason,* 16 Mich 158 (1867). Under the common law, for the purposes of a replevin action, even a good faith recipient of property lacks title to that property as against the rightful owner. *Ward v Carey,* 200 Mich 217, 223 (1918).

Finally, the statutory exceptions to an action to recover property under MCL 600.2920 do not apply here. Carolyn is not trying to recover property "taken by virtue of a warrant for the collection of a tax, assessment, or fine," MCL 600.2920(1)(a), nor is she trying to recover property "seized by virtue of an execution or attachment." MCL 600.2920(1)(b).

Examinees discussing the application of the UCC to the facts will be awarded credit. Specifically, points will be awarded for addressing any of the following: (1) whether Tammy is a merchant; (2) whether as a taxidermist, Tammy deals in stuffed animals retail; (3) whether the taxidermy transaction can be characterized

as sales; and (4) whether the sale to Jimbob will transfer good title to him thus making the muskrat not subject to Carolyn's attempt to replevy it.

ANSWER TO QUESTION NO. 10

Craig would argue that his injury is one "arising out of and in the course of employment." MCL 418.301(1). The injury occurred on the employer's premises during regular work hours. And, the employer created the risk of such injury by providing a treadmill for employees. While Craig was not actually working at the time of his injury, workers' compensation coverage can extend to include "horseplay" activities incidental to the workplace. *E.g., Crilly v Ballou,* 353 Mich 303 (1958); *Petrie v General Motors Corp,* 187 Mich App 198 (1991). Craig would also emphasize that the overall purpose of the area was to maintain and promote employee health and morale. In that sense, ABC was encouraging employee use of the equipment. Since he was engaging in employee camaraderie and in a fitness activity, he was fulfilling an objective the employer at least subtly encouraged. *Thomason v Contour Fabricators Inc,* 255 Mich App 121, (modified in part and remanded) 469 Mich 960 (2003). Craig would also argue that, while he knew of the employer's lunch time policy, he had been leaving his work post to visit Jessica during her lunch time previously, and he had not been reprimanded by ABC for doing so. See *Backett v Focus Hope, Inc,* 482 Mich 269 (2008).

ABC would argue that, while the injury occurred on employer premises and while Craig was arguably engaged in a risk ABC created, the activity was elective, not required. Moreover, ABC would argue there should be no coverage under either one of two exclusionary provisions in the Worker's Disability Compensation Act. MCL 418.301(3) provides in pertinent part:

"An employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment. Notwithstanding this presumption, an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act."

The Michigan Supreme Court has explained that the social and recreational exclusion in the second sentence above has general application and is not limited to injuries sustained while going to and coming from work. *Eversman v Concrete Cutting & Breaking,* 463 Mich 86 (2000). Relying on this defense, ABC would argue the "major" purpose of Craig's activity at the time of Craig's injury was "social or recreational." That is, even if there is deemed to

be some work-related purpose to his activity, the "major" reason why he was running fast on the treadmill was for the social reason of impressing Jessica and/or the recreational use of the treadmill itself.

The employer would also urge the following exclusion in MCL 418.305, "If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act." ABC would emphasize its strict policy against using the area except during one's lunch time and that Craig was not on his lunch time when using the area. *Brackett, supra.* Craig's conduct should therefore constitute "misconduct." And, Craig's actions were "intentional and willful," not negligent. Finally, the employer would argue his injury was "by reason of" his misconduct, i.e., by reason of his breaking the rule. *Daniel v Department of Corrections,* 468 Mich 34 (2003). ABC might argue it was unaware of Craig's prior breaches of the rule and that is why it had not been previously reprimanded.

The examinee's projection of the outcome of the issue if litigated is less important than the examinee's ability to make cogent arguments for each side. In terms of the result, Craig would likely be able to rebuff the §305 wilful misconduct claim on the basis that the misconduct (breaking the rule) was not the immediate cause of injury, as opposed to his using the treadmill. That is, using the treadmill, *per se,* is not misconduct; it is simply when the treadmill is used that is arguably "misconduct." Craig will have a more difficult time with the §301(3) social and recreational exclusion, however. It is more likely than not that the injury would be deemed not covered because Craig was injured in pursuit of an activity whose "major purpose" was "social or recreational."

ANSWER TO OUESTION NO. 11

This is a change of domicile question that raises issues under MCL 722.31, often called the "100-mile rule." The statute applies in cases where the parents share joint legal custody and live within 100 miles of each other at the time the case is commenced. The statute provides that the child's residence is with each parent, and it prohibits the parents from moving more than 100 miles from the legal residence at the time the case was commenced. The statute applies to interstate changes of domicile. *Brown v Loveman,* 260 Mich App 576 (2004), lv den 470 Mich 881 (2004). In order for Betsy to take Sam to Columbus, she will need to either obtain Abe's consent, or obtain the court's permission by filing a motion to change Sam's legal residence. The court would look at the following five factors to make the decision (MCL 722.31):

1. Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent. **Here, it does appear that the change of legal residence would improve the quality of life for Betsy. In Columbus she would earn a stable income, with a good job, with health care benefits, and be near her parents. Betsy would likely argue that the change of residence would benefit Sam because of her increased income, better health care, and the stability of a more permanent home (after she found a place of her own). A single home would be better than moving Sam from apartment to apartment on an almost daily basis--an arrangement that is not sustainable in the long run. In Columbus, Betsy would also be close to her parents, who could aid in caring for Sam. The court might also want to know about the quality of the schools and neighborhoods in both Columbus and Ypsilanti.**

2. The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule. **Although the facts suggest that Betsy increasingly relied on Abe to take care of Sam, there is no indication that she did not exercise parenting time she was given by court order. This factor should not favor either party.**

3. The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order

a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification. **Betsy may need to offer generous parenting time to Abe because this factor works against her. She will assert that it is possible to provide sufficient parenting time for Abe such that he and Sam will continue to have a significant relationship with each other. Distance does not mean no contact--Sam would be able to maintain contact through e-mails, telephone, perhaps a webcam, and other electronic means of communication. Abe should argue that Columbus is too far away for him to maintain the type of contact with Sam that both he and Sam are accustomed to having, and electronic communication is no substitute for face-to-face interaction. He would likely be limited to long weekends, holidays and time in the summer (although Betsy may have summers off, in which case she will want to be with Sam too). At least one Court of Appeals decision has found the disruption of the father's time with his child to be important, holding that §722.31(4)(c) required the denial of the motion to relocate, in part because of the negative impact to the minor child of not having the father involved in his life on an almost daily basis. *Grew v Knox,* 265 Mich App 333 (2005).**

4-5. The extent to which the parent opposing legal residence change is motivated by a desire to secure a final advantage with respect to a support obligation, and domestic violence. **These are not factors here.**

Betsy would have the burden of proving the beneficial nature of the move by a preponderance of the evidence. *Brown, supra* at 600. Good arguments can be made on both sides of this issue, but it does not seem likely that the trial court would approve the move to Columbus if it included both Betsy and Sam, i.e., the trial court might say that Betsy can change her residence, but not Sam's residence.

It is important to recognize that a move such as the one contemplated by Betsy involves a two-step process. If the family court were to determine that Betsy had met her burden with respect to the five factors under MCL 722.31(4), it would next have to determine if the new arrangement amounted to a change in Sam's custodial environment. Abe's response to Betsy's motion should argue that Betsy does not meet the five-part 100-mile test, but that even if she does, the move would alter Sam's established custodial environment and Betsy cannot establish by clear and

convincing evidence that the change would be in Sam's best interest. A custodial environment is established if "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered." *Brown, supra* at 595, quoting MCL 722.27(1)(c). In this situation, a custodial environment is very likely established in Ypsilanti, with both parents. The argument *against* an established custodial environment is that when Betsy moved to a new apartment, the environment became "unestablished" and it has not settled into a new established environment because of the uncertainty surrounding the divorce. Here, Betsy would argue that Sam did not have a custodial environment with Abe, or if he did, Sam would be able to maintain that environment when he was with Abe during his parenting time. Abe would argue that he could not maintain the custodial environment in the event of Sam's move to Columbus.

If a custodial environment has been established, and the move would alter that established environment, changing custody would require a hearing wherein Betsy would have to establish, by clear and convincing evidence, that the proposed change was in Sam's best interest. MCL §722.27(1)(c); *Brown, supra; Rittershaus v Rittershaus,* 273 Mich App 462 (2007).

The list of factors a court must consider in determining the best interest of the child are set forth at MCL 722.23. Note that the test-taker should not be expected to provide the whole list, but should focus on a few of the factors that are relevant here.

Specifically, the following factors should be noted: (a) love and affection between parents and child--both parents have strong ties to Sam, and Abe's ties are likely to be disrupted by a long distance move; (b) capacity to provide love, affection and guidance--the question does not state which parent Sam primarily looks to for the provision of his physical and emotional needs, but if there was a clear winner here, it could be important in determining Sam's best interests; (c) capacity to provide food, clothing, medical care, and other physical needs--Betsy would be better able to provide for Sam's care because she will have more money, have better benefits, work a more normal schedule, and have her parents around to assist in childcare--Sam also has his parents close by, though his work at night would make finding care difficult during his work hours; (d) length of time in a stable environment--this factor would tend to favor Abe because Sam has lived in a more or less stable environment with both parents his entire life, although that life was arguably disrupted when Abe and

Betsy separated; (e) permanence of family unit--the permanence of the Ypsilanti environment is questionable because the parties live in apartments and it is clear that the divorce will cause a disruption in the custodial homes; (f) and (g) -- moral, mental and physical fitness are not issues here; (h) home and school records are not at issue; (i) child's preference--Sam is likely too young (4 years old) for the court to give his preference, if any, much weight. Note that there is no "tender years" doctrine in Michigan that would favor Betsy because she is the mother; and (j) (k) and (1)--there is no evidence that either party would be unwilling to encourage the parental relationship of the other, no evidence of domestic violence, and the question does not suggest other factors that are not accounted for in the prior list.

There is no clear answer to the question of what the judge would do. The key here is the test-taker's ability to recognize the issues, articulate the standards, and apply the standards to the facts.

ANSWER TO OUESTION NO. 12

The transaction is governed by Article 2 of the Uniform Commercial Code, which governs contracts, whether oral or written, that involve the sale of goods. See MCL 440.2102. Chip entered into an agreement with Minnow Boat Sales, MCL 440.2204(1), to purchase the boat, MCL 440.2106(1), an item movable at the time identified in the contract for sale. MCL 440.2105(1).

Chip can revoke his acceptance of the boat. To prove a revocation claim, a plaintiff must show: (1) the buyer accepted a lot or commercial unit whose nonconformity substantially impairs its value to him; (2) he accepted based on a reasonable assumption that the nonconformity would be cured or without discovering the nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or the seller's assurances; (3) he revoked acceptance within a reasonable time after discovering (or should have discovered) the grounds for the revocation; and (4) he revoked before any substantial change in the condition of the goods. MCL 440.2608(1), (2).

In regard to (1), Chip accepted the boat and must establish that the soot problem substantially impairs the boat's value to him. In interpreting this requirement the Michigan Supreme Court has held that "a buyer must show the nonconformity has a *special devaluing effect on him* and that the buyer's assessment of it is factually correct." *Colonial Dodge, Inc v Miller,* 420 Mich 452, 458 (1984) (emphasis added).

Chip can persuasively argue that buildup of soot on longer trips devalues the boat's value to him. Chip would maintain he specifically purchased the boat for longer trips. He can also claim that the buildup of soot on these trips is more than a nuisance, requiring him to clean the boat and damaging his clothes. A buyer in Chip's position could reasonably find that the soot devalues the boat. Although Minnow Boat Sales may contend that the soot is trivial and does not substantially reduce the value of the boat, the Michigan Supreme Court has upheld the revocation of acceptance for goods where the nonconformity does not substantially impair the good's monetary value. In *Colonial Dodge,* 420 Mich at 458-459, the Court upheld a finding of revocation of acceptance of a car because the dealer failed to include a spare tire. Dismissing arguments that "a missing spare tire is a trivial defect" that is "easy to replace," the Court focused on the value of the spare tire to the purchaser. *Colonial Dodge,* 420 Mich at

458-459. The purchaser had expressed the spare tire's value by purchasing special tires and indicating he had to travel extensively, often in the city. The Court found these concerns sufficient to establish that the car had a substantial impairment. Likewise, while the presence of soot may not affect the monetary value of the boat, the presence of soot substantially impairs the value of the boat to Chip.

In regard to (2), the question does not suggest that Chip could have discovered the soot problem before actually operating the boat. Further, after being aware of the defect, Chip only used the boat after receiving assurances from Grumby that the soot would eventually abate.

In regard to (3), Chip can persuasively argue that he revoked acceptance within a reasonable time after discovering the grounds for the revocation. Here, Chip initially informed Grumby of the soot and was assured that the problem would eventually go away. Chip waited and notified Grumby that the problem had not gone away. Grumby then attempted to repair the problem, but Chip could not have learned that the defect had not been corrected until the next boating season. Thus, for much of the time between Chip's acceptance of the boat and his attempt to revoke his acceptance, Grumby was attempting to fix the boat. "The seller's attempts to repair are likewise a factor in determining whether the buyer notified the seller of revocation within a 'reasonable time' after discovering the defect." *Head v Phillips Camper Sales,* 234 Mich App 94, 106 (1999) (buyer properly revoked acceptance of pop-up camper nearly one year after purchase and three attempted repairs). Here, considering the continuing efforts to correct the soot problem, and the inability to discover whether the first repair worked, Chip can persuasively argue that he revoked his acceptance within a reasonable time.

In regard to (4), there is no evidence of a substantial change to the boat. The facts only indicate the boat was subjected to normal wear and tear, which cannot amount to a "substantial" change in the goods.

Therefore, Chip should be advised that he has a credible claim to revoke his acceptance of the boat. Under the UCC remedy of revocation, the buyer is treated as if the goods were rejected at the outset and the buyer is entitled to a refund of the purchase price paid. MCL 440.2711(1).

Chip can also be advised that even without an express warranty, he may pursue implied warranty claims under the UCC, MCL 440.2314 and MCL 440.2315.

The stronger of the implied warranty claims is that the boat was not merchantable or fit for an ordinary purpose under MCL 440.2314. The warranty of merchantability requires that the goods sold be of average quality within the industry. *Computer Network, Inc v AM Gen Corp,* 265 Mich App 309, 316-317 (2005). Merchantable is not a synonym for perfect. *Id.* Chip will stress that the boat produces an "abnormal" amount of soot and cannot be wholly repaired. Grumby will maintain that the boat produces an acceptable amount of soot. The conflicting evidence will likely produce a question of fact in regard to whether the boat was of "average quality" or fit for an "ordinary purpose" of pleasure riding under MCL 440.2314. Notably, this resolution will focus on an objective "usage of trade," and not whether the soot problem substantially impairs the boat's value to Chip. Also, damages under a UCC warranty claim are generally limited to the difference between the value of the boat at the time of acceptance and the value of a boat that produces average soot. MCL 440.2714. Accordingly, even a successful claim for breach of a warranty of merchantability may not entitle Chip to a "full refund."

Chip is less likely to prevail in a claim under the implied warranty of fitness for a particular purpose under MCL 440.2315. A warranty of fitness for a particular purpose requires that the goods sold be fit for the purpose for which they are intended; in order to take advantage of this type of warranty, the seller must know, at the time of sale, the particular purpose for which the goods are required and also that the buyer is relying on the seller to select or furnish suitable goods. *Computer Network, Inc v AM Gen Corp,* 265 Mich App at 316-317. Here, Chip expressed to Grumby his purpose to tour the Great Lakes with a boat. While the boat he purchased may produce excessive soot, there is no evidence that the boat cannot nonetheless tour the Great Lakes. Accordingly, Chip would not likely prevail in action for breach of the implied warranty of fitness for a particular purpose under MCL 440.2315.

ANSWER TO QUESTION NO. 13

1. On these facts, Larry may not represent Camilla absent consent by Dennis after consultation with Larry. Also, even if Larry could represent Camilla, he would have a duty not to use confidences and secrets obtained from Dennis unless Dennis consented after consultation with Larry.

MRPC 1.9(a) provides that "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." Here, the divorce and the previous matter handled for the husband are not the same matter. However, they are substantially related.

"A subsequent representation is substantially related to a former representation if (a) the subject matter of the representation is the same, (b) the factual or legal issues overlap, or (c) there is a likelihood that confidential information obtained in the former representation will have relevance to the subsequent representation." Here, the assets held by Dennis will be relevant in the divorce matter. Dennis need not prove that Larry actually possesses confidential information.[2] Given the legal and factual issues in Larry's prior representation of Dennis, and the likelihood (indeed, virtual certainty in light of the facts set forth in the question) that Larry learned confidential information regarding Dennis's financial situation, the matter Larry handled for Dennis is substantially related to Camilla's matter.

'State Bar of Michigan Committee on Professional Ethics Opinion RI-282, citing RI-46, RI-95. See also *Alpha Capital Management, Inc v Rentenbach,* Mich App ; 2010 Mich App LEXIS 548 (March 23, 2010) (matter substantially related when former client might have disclosed confidences which could be relevant or detrimental to him or her in the current litigation; the lawyer "might have acquired" such information if the facts should have been discussed or if it would not have been unusual for them to have been discussed). *Trustees v Premier Plumbing & Heating Inc,* 2008 US Dist LEXIS 55867 (July 23, 2008).

[2] *Trustees, supra,* fn 1. Compare, Model Rule, cmt [3].

Even though the terms "materially adverse" may not be well-defined in the law, there can be no reasonable argument that the interests of divorcing parties are not materially adverse. This is so even if the parties are relatively cooperative; their interests are still adverse.

Because the interests of Camilla and Dennis are materially adverse, and their matters are substantially related, Larry is prohibited from representing Camilla under MRPC 1.9(a) unless Dennis consents to Larry's representation after consultation.

Additionally, Larry is prohibited from revealing to Camilla confidences or secrets gained in his professional relationship with Dennis, MRPC 1.6(b)(1). He is also prohibited from using confidences or secrets, or, indeed, "any information relating to the representation," to the disadvantage of Dennis (unless Dennis consents after consultation). MRPC 1.6(b)(2); MRPC 1.8(b); MRPC 1.9(c).

2. It is not clear whether Larry's proposed fee arrangement is permissible under the Rules of Professional Conduct.

A Michigan lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive (unreasonable) fee. When a lawyer has not regularly represented a client, the lawyer has a duty to communicate the basis or rate of the fee to the client, preferably in writing, before or within a reasonable time after commencing representation. MRPC 1.5(b). Although Larry's agreement recites several factors that are appropriate in determining reasonableness under MRPC 1.5(a), some courts and ethics committees have held or opined that using these factors to enhance a fee otherwise subject to straightforward computation may convert the arrangement into a contingent fee.

Contingent fees are generally allowed subject to certain exceptions. MRPC 1.5(a)(8); MRPC 1.5(c). One such exception is for "domestic relations" matters. MRPC 1.5(d) ("A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee in a domestic relations matter").

A clause similar to the one Larry proposed was recently found by the State Bar of Michigan's Committee on Professional Ethics to be a contingent fee and therefore impermissible in a divorce case. RI-346. But see, *Alexander v Inman,* 974 SW2d 689, 693 (Tenn, 1998) ("under the terms of the agreement between Inman and the attorneys, there is no question that they would be paid regardless of the outcome of the case. Payment itself is certain; only the exact amount of payment is uncertain.")

Contingent fees must be in writing and must "state the method by which the fee is to be determined." MRPC 1.5(c). Although it is always advisable to memorialize a fee arrangement in writing, the fee dependent upon results obtained and other factors recited in the question need not be reduced to writing unless it amounts to a contingent fee, and if it is such, it would be impermissible in a domestic relations matter.

3. Again, Larry's path is not clear with regard to Camilla's proposed limited scope of representation and ghostwriting project. Camilla is asking Larry to "unbundle" the legal services he would ordinarily deliver in a divorce representation.

A lawyer may limit the objectives of the representation if the client consents after consultation, so long as the representation is in accordance with the Rules of Professional Conduct and other law. MRPC 1.2(b) and comment. A lawyer may not make a false statement to a court or fail to disclose client fraud on a tribunal. MRPC 3.3(a)(1) and (2). Nor may a lawyer engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. MRPC 8.4(b).

There are two possible conclusions that can be drawn. The first is that unless a rule of professional conduct or of civil procedure requires client or lawyer to disclose drafting assistance to a court, there is no misrepresentation by either the client or the lawyer. Thus, the lawyer has not violated MRPC 3.3(a) (1) or MRPC 8.4(b) by making a false statement to the court. Nor has the lawyer assisted in client fraud in violation of MRPC 1.2(c), 3.3(a)(2), or 8.4(b). The State Bar Committee on Professional Ethics recently found that, assuming compliance with the Michigan Rules of Professional Conduct and other law, a lawyer may, without appearing or otherwise disclosing his or her assistance, assist a pro se litigant by giving advice on the content of documents to be filed in court, including pleadings, by drafting those documents and giving advice about what to do in court. RI-347. See ***ABA** Formal Opinion 07-446* (May 5, 2007) (no violation of rules similar to MRPC 1.2[c], 3.3[a][2], or 8.4[b] requiring disclosure of client fraud upon tribunal and proscribing dishonest lawyer conduct); *Arizona Ethics Opinion 05-06* (July 2005) (no violation of rules similar to MRPC 3.3[a][1] or 8.4[b]).

The second conclusion is that because a court assumes that a party who files a pleading under his or her own name is actually unrepresented, a lawyer who ghostwrites a pleading is helping a client mislead a court. Courts tend to hold the pleadings of unrepresented litigants to less stringent standards. *Kircher v Ypsilanti Twp,* 2007 US Dist LEXIS 93690 (Dec 21, 2007). Thus, a

benefit is being unjustly obtained when a lawyer assists a client by drafting a pleading without disclosing it to the court. See also *Grievance Administrator v Miller,* 06-125-Rd (HP, 2/7/2009) (suspending for 180 days an attorney who prepared bankruptcy petitions for filing by clients *in propria persona* in order to avoid the requirement that attorneys, but not parties representing themselves, file bankruptcy pleadings electronically).

ANSWER TO QUESTION 14

The question whether Donna can testify to what Wilma told her Harry was saying raises several connected hearsay issues. Hearsay "is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible unless it comes with an exception. MRE 802. MRE 803 enumerates a variety of circumstances in which statements or documents are not excluded by the hearsay rule, regardless of whether the declarant is available as a witness. MRE 804 states additional exceptions that may apply when the declarant is unavailable.

The purpose of Donna's proposed testimony is to place before the jury Harry's contemporaneous tentative identification of Dirk as Victor's attacker. Because Donna did not hear this directly from Harry but only heard Wilma's statement about what Harry was saying, this is an instance of "hearsay within hearsay." To be admissible, each level of hearsay must fall within an exception to the hearsay rule. MRE 805; *Merrow v Bofferding,* 458 Mich 617 (1998).

Wilma's statement to Donna is admissible under MRE 803(2) as an excited utterance: a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Having her husband shouting that their neighbor was being severely beaten is certainly a "startling event or condition," and Donna can testify that her mother, Wilma, was excited and under stress at the time she made her statement. Harry's statement within Wilma's statement must also be admissible for Wilma's statement to have any value, and it is. Harry's simultaneous description of what he saw happening next door is admissible both under MRE 803(2) as an excited utterance and under MRE 803(1) as a statement of present sense impression--a description of an event or condition made while the declarant, Harry, was perceiving the event.

Note: Some examinees may raise the issue of whether the statements of Harry and Wilma, who are not testifying at the trial, should be excluded under the Sixth Amendment confrontation clause analysis of *Crawford v Washington* because Dirk did not have a prior opportunity to cross-examine them. This question does not present such an issue because the statements of Harry and Wilma are not "testimonial statements," *e.g.* statements given at a prior trial or

hearing or during a police interrogation.

The purpose of introducing John Jones' testimony about a completely different incident is to show that Dirk attempted a similar assault on another "customer" of Lloyd's, and it is thus more probable that Dirk committed the assault on Victor. The obstacle to introducing John's testimony is MRE 404(b) (1); "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But such "other acts evidence" may be admissible for other purposes, such as "proof of motive [or] scheme, plan or system (surprising the victim from behind and disabling him with a flurry of blows).

If the proponent of "other acts" evidence articulates a reason for its introduction beyond just showing a party's propensity for certain conduct (which is not enough), the court conducts a further analysis to determine its admissibility. *People v Vandervliet*, 444 Mich 52 (1993). The evidence must be relevant and its probative value cannot be substantially outweighed by the danger of undue prejudice, in light of other means of proof for the proposition in question. (The court may also take into account whether a limiting instruction would be effective in cushioning the unfairly prejudicial impact of the evidence.) Here, the evidence tends to establish Dirk's identity as Victor's attacker, but one can argue about how strongly it does this. The court will probably find that the evidence fails the balancing test. The method used in the two assaults is similar, but it is not strikingly unique. Because John will give eyewitness testimony that Dirk recently committed an assault other than the one with which he is charged, there is a strong risk that the jury will in effect convict him of that offense rather than the charged offense. It is doubtful that a limiting instruction can sufficiently cure this risk. [This is the recommended analysis, but it is possible to argue the other side of any of the factors in this paragraph, and appropriate credit should be given for any logically framed position that balances relevance and unfair prejudice.]

ANSWER TO QUESTION 15

This question raises issues of (1) consideration, (2) statute of frauds, and (3) standing to sue as a third party beneficiary.

With respect to consideration, the applicant should point out that every valid contract requires some form of consideration. Detroit *Trust Co v Struggles,* 289 Mich 595, 599 (1939). Courts do not inquire into the sufficiency of consideration, *Gen Motors Corp v Dep't of Treasury,* 466 Mich 231, 239 (2002). Consideration requires a bargained for exchange, i.e. a benefit on one side, or a detriment suffered, or service done on the other. *Id.* As to Al's implied charge that there was no consideration for the contract ("I didn't give You anything you did not already have"), two issues arise. The first issue to be addressed is the impact Michigan's smoking law has on Al's promise to allow Joe to smoke in the dugout and on the field. The performance of a pre-existing legal duty is not sufficient consideration for a new promise, *46th Circuit Trial Court v Crawford County,* 476 Mich 131, 158 (2006), because "doing what one is legally bound to do is not consideration for a new promise." *Yerkovich v AAA,* 461 Mich 732, 741 (2000). Here, Al had a pre-existing legal duty to allow Joe to smoke in all open air spaces, which would include the dugout and field. Hence, the duty Al undertook in the managerial contract with Joe was the same as he was required to do under state law, so performance of the pre-existing duty did not provide legal consideration for the contract between Joe and Al. *Alar v Mercy Mem Hosp,* 208 Mich App 518, 525 (1995).

Second, it can still be argued that there is consideration supporting the managerial contract, as consideration for a contract can be in the form of a benefit extended to third parties, *Plastray Corp v Cole,* 324 Mich 433, 440 (1949). Thus, Joe's brother receiving a free hot dog franchise is consideration to support the contract, as it was a benefit conferred on a third party by Al at Joe's request. Additionally, if one of the forms of consideration fails, but another survives, that surviving consideration will normally support the contract. *Nichols v Seaks,* 296 Mich 154, 160 (1941). Consequently, there is consideration supporting the managerial contract.

The next issue is Al's assertion that the contract is invalid because it was written on a napkin and Joe did not sign it. The statute of frauds requires that any contract that is not to be performed within a year of making the agreement must be in writing

and signed by the person against whom performance is sought. MCL 566.132(1) (a). Joe's two-year employment contract cannot be performed within a year, so it must comply with the statute. *Marrero v McDonnell Douglas Capital Corp,* 200 Mich App 438, 441 (1993). To do so, the written document must contain the essential terms of the agreement. *Opdyke Investment Co v Norris Grain Co,* 413 Mich 354, 369 (1982). Here, the essential terms of the contract--the job, its length, and the consideration--were all contained on the napkin. Additionally, Joe would be seeking to enforce the agreement against Al, who signed the napkin. Hence, the statute of frauds is satisfied.

The final issue is Joe's brother's ability to sue Al to enforce the promise of a free hot dog franchise. In order to sue Al as a third party beneficiary, Joe must have been an intended third party beneficiary of the managerial contract. MCL 600.1405. "A person is a third-party beneficiary of a contract only when that contract establishes that a promissor has undertaken a promise *directly* to or for that person." *Schmalfeldt v North Pointe Ins Co,* 469 Mich 422, 428 (2003). This third party is not a signatory to the contract, but is the beneficiary of the contract between the promissor and promisee. *Jt Admin Comm v Washington Group Int'l, Inc,* 568 F3d 626, 631 (CA 6, 2009), citing Williston on Contracts, §37:23 (4th Ed, 1990). In deciding whether the parties intended to make someone a third party beneficiary, a court must determine from the form and meaning of the contract itself whether they objectively intended that person as a third party beneficiary. *Kammer v Asphalt Paving Co v East China Twp Schools,* 443 Mich 176, 189-190 (1993).

Joe's brother is a third party beneficiary of the managerial contract. The contract specifically identified him as the recipient of a free franchise, establishing the objective intent of the parties. Al knew that he was undertaking an obligation specifically to Joe's brother, undertook that obligation for at least a year, and the contract is otherwise enforceable.