JULY 2012 MICHIGAN BAR EXAMINATION MODEL ANSWERS

ANSWER TO QUESTION NO. 1

(1) A "trust" is defined as the right to the beneficial enjoyment of property to which another holds legal title. The property is held by the trustee at the request of the settlor for the benefit of a third party (the beneficiary). Black's Law Dictionary, 8th Ed.

In order to establish a valid trust, the trust must comply with the requirements contained in the Michigan Trust Code, MCL 700.7101, et *seq.* Michigan recognizes four methods of creating a trust: (1) the transfer of property to another person as trustee during the settlor's lifetime or by disposition taking effect upon the settlor's death; (2) a declaration by the owner of the property that the owner holds identifiable property as trustee; (3) the exercise of a power of appointment in favor of a trustee; and (4) a promise by 1 person to another person whose rights under the promise are to be held in trust for a third person. See MCL 700.7401(1)(a)-(d).

No matter which method is chosen, a trust is created <u>only</u> if five statutory requirements are met: (1) the settlor has the capacity to create a trust; (2) the settlor indicates an intention to create the trust; (3) the trust either has a definite beneficiary, is a charitable trust, is a trust for a non-charitable purpose, or is a pet care trust; (4) the trustee has duties to perform; and (5) the same person is not the sole trustee and sole beneficiary. See MCL 700.7402(1) (a)-(e).

Lastly, the Michigan Trust Code specifically permits the creation of oral trusts. MCL 700.7407 states that "[e]xcept as required by a statute other than this article, a trust need not be evidenced by a trust instrument, but the creation of an oral trust

and its terms may be established only by clear and convincing evidence." Thus, while a trust in real property cannot be established verbally, see MCL 566.106, a trust in personal property may be established by oral declaration. *Osius v Dingell,* 375 Mich 605 (1965); *Harmon v Harmon,* 303 Mich 513 (1942).

In this case, it appears that a valid oral trust was created in April 2010. Regarding the method of creation, the facts indicate that Dennison, the owner of the property, declared that he held the identifiable property (500 shares of Acme Anvil Company stock) as trustee. Thus, MCL 700.7401(1)(c) is satisfied.

The requirements for the creation of a trust also appear to be satisfied. Nothing in the facts calls into question Dennison's capacity to create a trust, and he clearly indicated his intent to create a trust. Moreover, the trust has definite beneficiaries---Dennison, Scott, Ed and Paul. Additionally, the trustee (Dennison) had duties to perform: he had a duty to manage the trust assets in good faith and to pay for the vacation expenses. Lastly, the same person was not the sole trustee and sole beneficiary. While Dennison was the sole trustee, he was not the sole beneficiary. Therefore, MCL 700.7402(1)(a)-(e) appears to be satisfied, and a valid oral trust was created in April 2010.

(2) As indicated above, a trust need not be in writing, "but the creation of an oral trust and its terms may be established *only* by clear and convincing evidence." Dennison's statement, announced to all of the patrons and employees at the local diner, would appear to satisfy a "clear and convincing" evidentiary standard.

(3) Generally speaking, the terms of a trust are to be carried out as nearly as possible in order to give effect to the intent of the settlor. *In re Maloney Trust,* 423 Mich 632, 639 (1985).

While the terms of the trust normally prevail over the provisions of the Michigan Trust Code, MCL 700.7105(2) sets forth a list of requirements that may not be dispensed with in favor of the trust terms. MCL 700.7105(2)(c) provides that the requirement contained in MCL 700.7404 prevails over any term in the trust. MCL 700.7404, in turn, provides that a trust may be created "only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve."

Most of the enumerated expenses appear to satisfy the requirements of MCL 700.7404. Lodging, food and beverages, and fishing and hunting gear are neither unlawful nor contrary to public policy. Therefore, those terms of the trust are valid. However, because gaming for "any money" is unlawful, see MCL

750.301, the expenses related to $5 poker would not be considered a valid term of the trust.

ANSWER TO QUESTION NO. 2

Daniel's Right to the Convertible: Daniel does not have a valid property interest in the convertible. Ordinarily, a valid *inter vivos* gift transfers title to the donee if three elements are satisfied: (1) the donor has the present intent to transfer title gratuitously to the donee; (2) there is actual or constructive delivery of the subject matter to the donee, unless it is already in the donee's possession; and (3) the donee accepts the gift. *Detroit Bank v Bradfield*, 324 Mich 124, 130-131 (1949).

However, "transfer of title of an automobile cannot be effected without compliance with the statute" regulating automobile transfers. *Drettman v Marchand*, 337 Mich 1, 6 (1953). This requirement applies equally to gifts. *Taylor v Burdick*, 320 Mich 25, 32 (1948). For the title transfer to occur, MCL 257.233(8) requires an owner to "indorse on the certificate of title as required by the secretary of state an assignment of the title."

Because the facts indicate that Walter did not indorse the certificate of title, no transfer of title occurred and, therefore, no *inter vivos* gift occurred. Under MCL 257.233(8), Daniel is not entitled to ownership of the convertible without Walter's endorsement on the certificate of title. While handing over the keys to Daniel on his birthday and saying, "[t]he car is yours," provides evidence of his intent to transfer the car, "actual or constructive" delivery of the gift requires the donor to "part with his dominion over the property so *that no further act is required of him to vest the* title *in the donee.*" *State Bank of Croswell v Johnston*, 151 Mich 538, 542 (1908) (emphasis added). Constructive delivery did *not* occur in this instance because simply handing Daniel the keys is insufficient to vest the title in Daniel; Michigan law requires an endorsement of the certificate of title for a title transfer to occur. *Taylor v Burdick, supra.*

Gregory's Right to the $10,000. Gregory does have a valid property interest in the $10,000. Michigan has adopted the Uniform Transfers to Minors Act, MCL 554.521 et *seq.*, which provides that "[c]ustodial property is created and a transfer is made," when money is "paid or delivered to a broker or financial institution for credit to an account in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: 'as custodian for ______ (name of minor) under the Michigan uniform transfers to minors act'." MCL

554.533(1) and (3). Walter did, in fact, deliver the $10,000 to the bank account in the name of Gregory. Further, because the question indicates that Walter complied with Michigan law in opening the account, the transfer is not defective as to form.

A transfer under the UTMA "is irrevocable, and the custodial property is indefeasibly vested in the minor." MCL 554.536(2); *People v Couzens,* 480 Mich 240, 248 (2008). By depositing money into this account as Gregory's birthday gift, Walter effected a transfer of property to Gregory, which is "indefeasibly vested in him." Accordingly, Gregory has a property interest in the $10,000.

As an aside, although Gregory has an indefeasible property interest in the $10,000 that Walter deposited, Gregory might not be able to assert control over the $10,000 until he is 18 years old. See MCL 554.546. Nevertheless, because he is more than 14 years old, he can petition the court for delivery of the custodial property to him. See MCL 55.539(2).

ANSWER TO QUESTION NO. 3

1. MRS properly foreclosed on Kerry's mortgage.

Michigan law allows a mortgagee to foreclose by advertisement (also known as foreclosure by exercise of power of sale), which allows a mortgagee to forego judicial proceedings where there has been a default in the mortgage, such as failure to pay. MCL 600.3201; MCL 600.3204. However, in order to do so, certain conditions must be met. First, there must be a power of sale clause in the mortgage and the mortgage must not otherwise be in foreclosure at the time the mortgagee seeks to foreclose. MCL 600.3201; MCL 600.3204(1) (b). Second, the mortgagee must publish notice that the mortgage will be foreclosed by sale "by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold . . . are situated." MCL 600.3208; see also MCL 600.3212. Third, within 15 days after the first publication of the notice, the mortgagee must post a copy of the notice in a conspicuous place upon a part of the premises, and if it is the principal property of the borrower, must *serve written notice* on the borrower. MCL 600.3208; MCL 600.3205a (repeal set to become effective December 31, 2012). A public foreclosure sale must be held on the set date, and the purchaser must record the deed within 20 days of the sale. MCL 600.3216; MCL 600.3232.

In this case, Kerry's property was properly foreclosed by advertisement. The language quoted from the mortgage instrument includes a power of sale clause. MRS properly published notice of the sale for four consecutive weeks in the local newspaper, properly posted notice of the sale on the property, and properly served notice on Kerry personally. Finally, MRS purchased the property on the set date of the sheriff's sale. A mortgagee may, in good faith, purchase the property at the sale. MCL 600.3228. Because MRS followed all appropriate protocol to foreclose by advertisement and purchased the property for the outstanding balance of the mortgage, there is no indication from the facts that it did not act in good faith.

2. MRS is a proper party to foreclose on the mortgage, and may foreclose by advertisement.

Generally, a legal holder of a mortgage is entitled to enforce it because he has an interest in the property. *Lee v Clary,* 38 Mich 223 (1878). The right to foreclose a mortgage belongs to the

mortgagee. *Daniels v Eisenlord,* 10 Mich 454 (1862). When exercising a power of sale clause, only the person having legal title to the mortgage at the date of foreclosure is entitled to exercise the power of sale contained in it. *Canvasser v Bankers Trust Co,* 284 Mich 634 (1938). However, "the choice of a mortgagee is a matter of convenience" and the security interest and beneficial interest of the mortgage need not be held by the same entity. *Adams v Niemann,* 46 Mich 135, 137 (1881).

In order to foreclose by advertisement, the foreclosing party must be "either the owners of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage." MCL 600.3204(1)(d). It would appear that MRS is a designated mortgagee, separate from the lender of record, which thereby allows financial institutions to efficiently buy and sell loans backed by mortgages after their initial issuance without changing the mortgagee. In a case analogous to the one presented here, the Michigan Supreme Court held that a mortgagee such as MRS is the owner of an interest in the indebtedness secured by the mortgage. *Residential Funding v Saurman,* 490 Mich 909 (2011); see also *Residential Funding v Saurman,* 292 Mich App 321 (2011) (Wilder, J., dissenting), adopted in relevant part by the Supreme Court. As the named mortgagee in this case, MRS owned a contractual interest in the indebtedness, an interest dependent on whether the mortgagor met the obligation to pay the indebtedness that the mortgage secured. This qualifies MRS as a proper party to foreclose, and satisfies the requirement that the mortgagee have an interest permitting it to foreclose by advertisement.

3. Even though the property has been properly foreclosed, Kerry successfully redeemed the property.

Michigan provides a statutory right of redemption to homeowners of foreclosed properties. This right allows a foreclosed homeowner to recover the property from the purchaser by paying the amount that the purchaser paid for the property, plus all taxes, insurance, fees, and interest that has accumulated. MCL 600.3240(1)-(2); *Gerasimos v Continental Bank,* 237 Mich 513, 518-519 (1927). Redemption has the legal effect of voiding the purchaser's deed. MCL 600.3240(1). In order to exercise the right of redemption, however, a homeowner must act within the time period set by statute. See MCL 600.3240(7)-(13). For a non-abandoned residential home subject to a mortgage executed after January 1, 1965, the redemption period is either 6 months (where the outstanding balance is less than 66-2/3% of the original indebtedness) or 1 month (where the outstanding balance is more than 66-2/3%). MCL 600.3240(8), (10).

Even though the property has been validly foreclosed, Kerry successfully redeemed the property by paying National Bank the purchase price, as well as an amount sufficient to cover the taxes, fees, and interest accumulated within the statutory period. Here, the redemption period will be either 1 month or 6 months, depending on the outstanding balance of the indebtedness. While the facts do not indicate what the level of indebtedness is, in either situation Kerry met the deadline by tendering the redemption amount to National Bank (the assignee of the purchaser, MRS) within two weeks of the foreclosure sale. Thus, Kerry successfully redeemed the property, and thus may recover the property.

ANSWER TO QUESTION NO. 4

This question raises the following issues:

(1) Does the agreement between UP and DAW meet the requirements for an enforceable contract?

(2) If so, are DAW's contractual obligations to UP subject to a condition precedent (or subsequent) that Dean would find financial backing for making the film in Michigan?

(3) Can DAW argue there was no breach on the basis of frustration of purpose, impossibility of performance, or mutual mistake?

(4) Is Dean personally liable to UP on his oral guarantee?

1. The contract is enforceable. Under Michigan law the elements of an enforceable contract are (1) parties competent to contract, (2) proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) if the contract is bilateral, mutuality of obligation. *Hess v Cannon* Trap, 265 Mich App 582, 592 (2005). Elements (1), (2), and (4) are plainly satisfied. In addition, both parties have given adequate consideration. Consideration is a legal detriment that has been bargained for in exchange for a promise. *Higgins v Monroe Evening News,* 404 Mich 1 (1978). A promise may be valid consideration for another's promise, as can a performance. *General Motors Corp v Department of Treasury,* 466 Mich 231, 239 (2002). Here the parties exchanged promises: UP promised to provide services and DAW promised to pay for them including a guaranteed minimum payment for at least two calendar quarters. There is also mutuality of obligation because the agreement on its face requires both parties to do certain things. *Reed v Citizens Ins Co,* 198 Mich App 443, 448 (1993).

2. Dean appears to believe that Phil should have understood that the written document was not binding until DAW was certain it had financial backing for making the film in Michigan. When an agreement provides that a party's contractual obligations do not arise unless a certain event occurs, that event is called a "condition precedent." A related concept is that of a "condition subsequent" -- a later event that operates to release a party from the obligations initially imposed by a contract. Here the written document between UP and DAW contains no reference to any

conditions, financing or otherwise; the obligations of both parties are stated without qualification. On the other hand, the writing does not include an "integration" or "merger" clause stating that the writing is the complete and exclusive statement of the parties' agreement. It is therefore permissible for DAW to argue'that the parties agreed on other, unwritten terms but did not include them in the writing. *Cf. UAW-GM Human Resource Center v KSL Recreation Corp,* 228 Mich App 486 (1998).

A court asked to interpret the agreement would attempt to give effect to the parties' intentions at the time they entered into the contract, including ascertaining whether there were additional unwritten terms consistent with the written terms. In the process, it could consider evidence of the parties' conduct and statements contemporaneous with making the agreement (this is called parol evidence or extrinsic evidence) to determine what each party should have understood the contract meant. *Goodwin, Inc v Coe,* 392 Mich 195 (1974).

DAW's argument that the contract contained an unwritten condition related to the availability of financing for filming in Michigan is likely to fail. Both parties believed the services described by the contract would be necessary at the time they signed it. The contract specifically called for UP to begin work even though the financing had not been finalized, and DAW made an oral request as well. Furthermore, DAW, which in the stated facts is the offeror, was in the best position to know when it proposed the contract how much uncertainty existed about lining up the necessary financial backers, and thus whether the contract should make allowances for those contingencies. But Dean did not write any such contingencies into the contract, and even his statements to Phil that he had not finalized the financing did not communicate that the Michigan pre-production services covered by the contract should not go ahead in the meantime. (An examinee may also invoke against DAW the doctrine of *contra proferentem,* i.e., that a document should be construed against its drafter. That is an acceptable observation, but more credit should be given to an examinee who recognizes that under Michigan law this interpretive rule is resorted to only as a "tie breaker" when all other interpretive devices fail. *Klapp v United Ins Group Agency Inc,* 468 Mich 459, 472 [2003]).

3. DAW could also attempt to argue that its obligations to UP -- or at least the $30,000 minimum -- were no longer enforceable on the basis of mutual mistake, frustration of purpose, or impracticability of performance.

Mutual mistake would not be a viable defense. A mistake must

relate to a part or present, not a future, fact. Restatement 2d, Contracts, §151, comment *a.* A mutual mistake regarding the existence of a fact that is critical to the purpose of a contract at the time a contract is made can be a basis for obtaining equitable relief from a contract. But here both parties knew when they signed the document in late September that it was not yet settled whether money would be available to make the film in Michigan. That, and whether Ms. Lovely is available to star, are future facts, not present facts.

A stronger argument for DAW, which stands some chance of succeeding, is that DAW's obligation to pay UP the guaranteed minimum of $30,000 should be excused under the doctrine of frustration of purpose. The purpose of the contract was unquestionably to ensure that DAW had a provider of pre-production services for a movie that would be filmed in Michigan. Once it was necessary that the movie be filmed elsewhere, UP's contracted-for services had no further purpose. Under Michigan law, the frustration of purpose doctrine applies if (1) the contract has not yet been fully performed on both sides; (2) the purpose of the contract was known to both parties at the time of formation; and (3) the purpose was frustrated by an event not reasonably foreseeable at the time of formation, so long as that event was not the fault of the party invoking the doctrine. *Molner v Molner,* 110 Mich App 622 (1981). Points (1) and (2) are satisfied. The stated facts would allow an examinee to argue either way on whether element (3), foreseeability, is satisfied. Apparently DAW had good reason to believe that Ms. Lovely would bring in investors, and her sudden unavailability was not DAW's fault. On the other hand, while Dean was justifiably confident that he could make financing fall into place after he signed her, one could argue it was reasonably foreseeable in September that Ms. Lovely's personal problems would interfere with her being able to appear, which would cause DAW's plan to quickly fall apart. Even with that possibility, DAW made an unconditional promise to pay UP at least $30,000. Of course, if frustration of purpose now excuses DAW from further performance, DAW is still obligated to pay UP for services already rendered at the agreed hourly rate of $150 plus expenses.

The doctrine of impracticability, on the other hand, does not fit these facts. It would not be impracticable or impossible for UP to continue scouting locations in Michigan; it would simply be pointless. (This situation resembles the classic illustration of the difference between frustration of purpose and impracticability: a contract to build a boat dock which was entered into just before boats were unexpectedly banned from the lake. Building the dock would not be impossible or impracticable, but the purpose of doing so would be frustrated.)

4. Irrespective of the other issues, Dean has no personal liability. The Michigan Statute of Frauds, MCL 566.132(1) (b), requires a "special promise to answer for the debt, default, or misdoings of another person" to be in writing. Dean's oral guarantee of whatever DAW might owe UP is void under that statute. In addition, no additional consideration was given for this separate oral promise made by Dean after the agreement between the companies was signed.

ANSWER TO QUESTION NO. 5

The answers to these questions primarily involve MRPC 4.2, which provides that:

"In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

The three individuals that plaintiff's counsel wishes to interview are not parties to the action and are not represented by counsel in the matter. The defendant company's attorney is not the attorney for these witnesses. For this reason, it would appear that, even though the subject matter of the proposed interview is the subject matter of the litigation, the rule is inapplicable. However, in the case of an organizational party, the analysis is more complex. The Comment to Rule 4.2 states:

"In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

The Comment requires an analysis of whether the witnesses are persons with managerial responsibility or are persons whose acts or omissions might be imputed to the organization for purposes of liability or whose statements constitute an organizational admission.

1. The currently employed janitor is not a manager. Therefore, unless there is reason to believe that an act or omission by the janitor could be imputed to the corporation or that the janitor's statement may constitute an admission on the part of the corporation, there is no ethical prohibition against the investigator attempting to interview the janitor.

Neither Michigan case law nor any decision by the Michigan Attorney Discipline Board considers the application of the rule in the circumstances presented. One formal Michigan ethics opinion,

R-2 (1989), concluded that once a lawsuit has been filed, plaintiff's counsel may not seek to interview current employees but may attempt to interview former employees so long as counsel complies with Rule 4.3. That opinion involved nurses who had cared for the plaintiff in an alleged malpractice case where their acts or omissions could be imputed to the organization, or whose statements could constitute an admission against the organization. As a result, the Commissioners concluded that plaintiff's counsel could not ethically communicate with those nurses without the consent of the hospital's counsel. The facts presented in this question involving a currently employed janitor indicate that he or she might have knowledge about a fact issue, that is, whether certain plastic parts had been thrown out in the normal course of business. In the absence of any facts indicating that the janitor is anything other than a mere fact witness, the facts of this case differ qualitatively from those present in R-2 and do not implicate the no-contact provision of Rule 4.2.

Moreover, because the janitor is not represented by the corporation's attorney, an interview with the janitor would not undermine the primary policy considerations underlying Rule 4.2 -- protecting a represented person against overreaching by adverse counsel and safeguarding the lawyer-client relationship from interference.

On the other hand, once litigation has been initiated, any attempt to interview a corporate defendant's employee is governed by the rules regulating discovery in civil cases. Plaintiff's response to this argument is that (1) the rules regarding discovery are meant to supplement, not supplant, other permissible investigative tools, (2) requiring plaintiff's counsel to go through defense counsel before attempting to interview a janitor and other similarly situated witnesses would unreasonably increase the cost of litigation, (3) increasing the cost of litigation exacerbates what is already an uneven playing field, given the imbalance of resources between most plaintiffs and most corporate defendants and (4) if the rules of civil discovery were intended to supplant other investigative tools, there would be no need for Rule 3.4(f) to permit a corporation's attorney to ask company employees not to agree to be interviewed by plaintiff's counsel, since such a request by plaintiff's counsel would violate the rules of the tribunal and, therefore, be unethical pursuant to Rule 3.4(c).

Further, because Rule 3.4(f) permits a company's lawyer to ask a company employee not to agree to be interviewed by opposing counsel, plaintiff's counsel must, at least, give notice to defense counsel that she intends to seek an interview with the employee in order to provide defense counsel with an opportunity to give the

advice permitted by Rule 3.4(f). Plaintiff's response to this argument is that (1) the rule merely permits defense counsel to make such a request but does not also require plaintiff's counsel to give notice to defense counsel before attempting to interview an employee, (2) if the rule were designed to advance require notice to defense counsel, it would have so stated and (3) defense counsel remains free to ask company employees not to speak with plaintiff's counsel at any time, including when first learning that suit has been filed or might be filed.

This is a fact-sensitive issue without much case law guidance. Applicants can score points with either a "yes" or "no" answer with proper analysis.

2. With respect to the formerly employed janitor, the answer is "yes". Once the janitor is no longer employed by the defendant company, the janitor is no longer the company's agent, so there is even less reason for prohibiting the proposed contact. *Valassi v Samelson,* 143 FRD 118 (ED Mi 1992), and *Smith v Kalamazoo Ophthalmology,* 322 F Supp 2d 883 (WD Mi 1992).

In conducting such an interview, however, counsel must remain careful not to seek disclosure of any attorney work-product or any communications between the janitor and company counsel that occurred while the janitor was employed by the company, as those communications remain privileged regardless of the fact that the janitor is no longer employed by the defendant company. Counsel must also be mindful of Rule 4.3, which requires her to avoid stating or implying that she is disinterested in the matter.

3. With respect to a current division manager, a request for an interview would be improper. As a key decision-maker, there is a substantial likelihood that the division manager's statements may be treated as admissions by an agent or otherwise binding on the company. Moreover, the division manager is much more likely to have participated in or otherwise be privy to confidential communications between defense counsel and other key company decision-makers; for this reason, there is also a significantly greater danger that an interview of the division manager would intrude on either or both the attorney-client privilege or the work product privilege.

ANSWER TO QUESTION NO. 6

The complaints and reviews are out-of-court statements. However, Jack's (and Linda) is not offering the evidence for proof of the matter asserted in those out-of-court statements, but rather to allow the jury to understand what information Linda relied upon in deciding to discharge Bob.

The evidence is not to show the truth or falsity of the factual information contained in the complaints and reviews. It is offered to show the content met the requirements Linda had been given for making the discharge decision. Bob has placed in issue Linda's alleged age bias. The information Linda acted on is critical to establishing her non-age based reasons for acting as she did toward Bob. Thus the customer complaints and performance reviews admitted through Linda are not hearsay and Bob's objection that the complaints and reviews are inadmissible hearsay should be overruled.

Hearsay is defined as "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). It is settled that an out-of-court statement that is not offered to prove the matter asserted, but rather to prove intent of the declarant or the effect of the out-of-court statement on the declarant is not offered for the proof of the matter asserted, and is therefore not hearsay:

"An utterance or a writing may be admitted to show the effect on the hearer or reader when this effect is relevant. The policies underlying the hearsay rule do not apply because the utterance is not being offered to prove the truth or falsity of the matter asserted."

People v Fisher, 449 Mich 441, 449-450 (1995) (quoting 4 Weinstein, Evidence 1801(c) [01], pp 801-94 to 801-96). See also Rosen, Wilder, Young & Cranmer, *Michigan Practice Guide: Civil Trial and Evidence* (2006 Thomson West), §9G:54 Non hearsay distinguished -- Statements offered to show effect on someone else (knowledge, notice, motive, etc.):

"An out-of-court statement is not hearsay if offered to show the effect on the hearer, reader or viewer rather than to prove the truth of the content of the statement; *e.g.,* to show that a party had prior notice or knowledge; that a party was given a warning; or

to prove a party's motive, good faith, fear, etc, where such matters are relevant to an issue in the case."

In *Haddad v Lockheed California Corp,* 720 F2d 1454 (CA 9, 1983), the plaintiff claimed his managers had discriminated against him because of his age. At trial, the plaintiff's management testified, over the plaintiff's hearsay objection, about complaints management had received from others about working with the plaintiff. The Ninth Circuit agreed with the trial court that the manager's testimony was not hearsay at all:

"This testimony was not hearsay: It was not offered to prove the truth of the complaints. See, Fed.R.Evid. 803(c). Instead, this testimony was offered to show that Lockheed management had received complaints regarding Haddad. Such testimony was relevant in demonstrating Lockheed's non-discriminatory intent in its employment practices." *Haddad,* 740 F2d at 1456.

Some test-takers may analyze both the complaints and reviews under MRE 803(6), the hearsay exception for records of regularly conducted activity:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification, unless the course of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

There is not enough information to determine whether the exception would apply. For example, there is no information given as to whether there was testimony or other trustworthy certification as to whether the records were created or maintained in the course of a regularly conducted business activity or whether the complaints were simply submitted ad hoc. And, since the documents are not hearsay in any event, discussion of the exception is not necessary. Still, recognizing and analyzing the possible application of the exception, either as an alternative theory or recognizing there is not enough information to reach a conclusion,

may be worth some minor credit.

It is also possible that some test-takers will treat the complaints and/or reviews as hearsay, but as falling within the present-sense impression exception. MRE 803(1). The evidence would be insufficient to reach that conclusion because there is no evidence that the statements were made "substantially contemporaneous" with the conduct described or with Linda's review of the statements. *People v Hendrickson,* 459 Mich 229, 236 (1998). See MRE 803(1) (a present sense impression is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter").

As to whether Bob can introduce Jack's discovery that some customer complaints had been fabricated according to Jack's subsequently implemented follow-up process, the court has discretion to admit this evidence. The subsequent remedial measure of following up on customer complaints is not admissible "to prove negligence or culpable conduct" by Linda. MRE 407. It may be admitted under MRE 407 for the purpose of demonstrating the "feasibility of precautionary measures" that would have prevented an injury or for impeachment. Here, where Linda testified it had not been feasible to follow up and thereby possibly determine that one or more complaints concerning Bob had been fabricated, the court could decide to admit the evidence to demonstrate there may have been a feasible precautionary measure or to impeach Linda on that issue. See Robinson & Longhofer, Michigan Court Rules Practice: Evidence (3d ed., West 2009), §267, p 203 (1992) (subsequent remedial measure may be admitted to impeach witness's claim that she did everything she could to prevent the injury).

However, the determination of admissibility under MRE 407 is entrusted to the trial court's decision. *Hadley v Trio Tool Co.,* 143 Mich App 319, 328 (1985). Jack's therefore could argue under MRE 403 that the prejudicial effect of the evidence substantially outweighs its probative value or that the evidence would confuse the jury. Only a small portion of complaints had been fabricated and none of those complaints were about Bob. Coupled with Linda's own observations of Bob, which were not inconsistent with the complaints, it should not be an abuse of discretion to exclude the evidence due to its substantially prejudicial effect. *People v Layher,* 464 Mich 756, 761 (2001) (discretionary call on "close evidentiary questions cannot by definition be an abuse of discretion"). On the other hand, because it is a close question on a discretionary call, it also would not be an abuse of discretion to admit the evidence for impeachment purposes or to demonstrate that a feasible precautionary measure existed.

ANSWER TO QUESTION NO. 7

The intoxication defense is not likely to succeed. MCL 768.37(1) removes intoxication as a defense to any crime if the consumption of the alcohol causing the intoxication was voluntarily consumed. Because the facts indicate Tony and Chucky voluntarily consumed the whisky and beer, the intoxication defense it not available to them. Additionally, because Tony and Chucky would know the consumption of alcohol would cause their intoxication, MCL 768.37(2) would not assist them.

Tony claiming Chucky alone murdered Vance will not exonerate Tony. Criminal responsibility may be assigned to a principal or an accomplice, sometimes also called an aider and abettor. MCL 767.39 abolished the distinction between accessory and principal:

"Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

The elements of aiding and abetting are (1) the alleged crime was actually committed by the defendant or someone else; (2) before or during the crime, defendant did something to assist in the commission of the crime; and (3) the defendant must have intended the commission of the alleged crime or must have known that the other person intended its commission at the time of giving the assistance. CJI 2d 8.1.

Applying these elements to the facts at hand requires rejection of Tony's defense that he is not guilty of murder because Chucky did the actual killing. Tony encouraged Chucky to kill Vance by (1) providing Chucky the keys to his car; (2) pulling Vance into the road; (3) telling him to (indeed threatening to kill him if he didn't) run over Vance, all to finish him off or kill him. Tony has accomplice liability as an aider and abettor.

Chucky's defense that Tony forced him to kill Vance will be unsuccessful. One accused of a crime may claim duress as a defense but not where the crime is murder. Because the charged crime is the murder of Vance, Chucky cannot employ a duress defense, even if Chucky was afraid of Tony. *People v Dittis,* 157 Mich App 38, 41 (1987); *People v Etheridge,* 196 Mich App 43, 56 (1992); *People v Moseler,* 202 Mich App 296, 299 (1993). Michigan cases are

therefore consistent with the common law, and Michigan statutes provide no exception to the common law.

Mary cannot be charged with murder either as a principal or an accomplice because she did not take part in the murder as a principal nor an alder or abettor. She did not know about the murder beforehand, only learning of it after being told by Tony and Chucky. However, Mary can be charged as an accessory after the fact. The elements of this charge are (1) someone else, other than Mary, committed the crime of murder; (2) Mary helped the other person in an effort to avoid discovery, arrest, trial or punishment; (3) when Mary gave help, she knew one or both men had committed a felony; and (4) Mary intended to help one or both men avoid discovery, arrest, trial or punishment.

Applying these elements to the facts presented would cause Mary to be charged with Accessary After the Fact because (a) the men committed the murder by their own statements; (b) Mary helped them avoid discovery or arrest because she saw the blood in their boots, saw the police arrive, mopped the floor, and directed the men to hide evidence in the dumpster and themselves in the cooler; (c) Mary knew the men had committed a felony by their own words; and (d) she intended to help the men with whom she had an employer/employee relationship. CJI 2d 8.6. MCL 767.67.

ANSWER TO QUESTION 8

While it will probably prove unsuccessful, Dr. Glitter's best argument is to challenge the constitutionality of the rule as a violation of the free speech guarantee of the First Amendment to the United States Constitution, applicable to the state through the Fourteenth Amendment. *Gitlow v New York,* 268 US 652 (1925). The First Amendment provides that government shall make no law abridging the freedom of speech.

Here, the Michigan Board of Medicine has implemented a rule that prohibits physicians from soliciting hospitalized clients. Generally, speech that "propose[s] a commercial transaction" is deemed commercial speech, *Board of Trustees of the State Univ of New York v Fox,* 492 US 469, 473 (1989), and is protected by the First Amendment from "unwarranted governmental regulation." *Central Hudson v Public Service Comm of New York,* 447 US 557, 561 (1980).

While commercial speech is not entitled to the same scope of protection as political speech or expressive speech, *Rochester Hills v Schultz,* 459 Mich 486, 489 (1999), it does enjoy constitutional protection under an "intermediate scrutiny" analysis. *Florida Bar v Went For It,* 515 US 618, 623 (1995). The test used to ascertain the constitutionality of regulations imposed on commercial speech "turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson,* 447 US at 563. Commercial speech may be regulated if the government satisfies a four-prong test: (1) the speech must be protected by the First Amendment. For commercial speech, it must concern lawful activity and not be misleading; (2) the government must assert a substantial interest in support of its regulation; (3) the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and (4) the regulation must be "narrowly drawn" to serve the substantial interest. *Florida Bar v Went For It,* 515 US at 624. The state has the burden of establishing the validity of its commercial speech regulation under the *Central Hudson* test. *Cincinnati v Discovery Network, Inc.,* 507 US 410, 416 (1993).

(1) In this case, the speech subject to restriction concerns the promotion and sale of cosmetic surgery procedures, a lawful activity. The facts do not indicate, and no reasonable argument may be advanced, that providing truthful information regarding available cosmetic surgery procedures is misleading. Therefore,

the speech is protected by the First Amendment.

(2) The government interests that caused the State Medical Board to enact the rule are substantial. In fact, "[s]tates have a compelling interest in the practice of professions within their boundaries, and . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb .v Virginia State Bar,* 421 US 773, 792 (1975). Moreover, protecting the privacy of potential clients is also a substantial state interest, as commercial speech may not be used to "intimidate, vex, or harass the recipient." *Endenfield v Fane,* 507 US 761 (1993). Lastly, the United States Supreme Court has noted that "[u]nlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Ohralik v Ohio State Bar Ass'n,* 436 US 447, 457 (1978). Thus, the asserted governmental interests in support of the regulation are substantial.

(3) The third prong of the *Central Hudson* test is a closer question and requires the government to demonstrate that the restriction on commercial speech directly and materially advances that interest. To satisfy this prong, the state "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree," and may not rely upon "mere speculation or conjecture." *Edenfield* at 770-771. While a state is not required to submit empirical data "accompanied by a surfeit of background information" in order to satisfy the third prong, *Florida Bar,* 515 US at 628, the commercial speech restriction must "target[] a concrete, nonspeculative harm." *Id.* The asserted dangers are "significantly greater" where an "unsophisticated, injured, or distressed lay person" is personally solicited. The lay person may place trust in the professional "simply in response to persuasion under circumstances conducive to uninformed acquiescence." *Ohralik* at 465-466. In contrast, where the clients are "sophisticated" and "far less susceptible to manipulation," in-person solicitation "poses none of the same dangers." *Edenfield* at 774-775. Because the rule at issue here involves a doctor who is soliciting potential patients in their hospital rooms--a situation involving people who are especially vulnerable to persuasion by a professional whom the patient is inclined to trust--a court is likely to consider the Michigan Board of Medicine rule closer to the *Ohralik* circumstances than the *Edenfield* circumstances.

(4) Under the fourth prong of *Central Hudson,* a court

considers "whether the speech restriction is not more extensive than necessary to serve the interests that support it." *Greater New Orleans Broadcasting v US*, 527 US 173, 188 (1999). A state is not required to select the *least* restrictive means; rather, what is required is a reasonable fit between the state's goal and the means chosen to accomplish that goal. The means chosen must be "in proportion to the interest served," and "narrowly tailored to achieve the desired objective." *Florida Bar v Went For It*, 515 US at 632. Here, one could easily argue that the rule prohibiting the solicitation of hospitalized clients is narrowly tailored to serve the state's substantial interest. The solicitation ban is limited to a relatively brief period of time--the duration of the potential client's hospitalization. Moreover, there are numerous other ways for hospitalized patients seeking plastic surgery to learn about the availability of plastic surgeons while they are hospitalized, including television, radio, newspapers, the internet, telephone directories, and physician referral services. Because the prohibition is narrowly tailored to the period of hospitalization, and ample alternatives exist for receiving information about the availability of plastic surgery, the constitutionality of the rule should be upheld.

ANSWER TO QUESTION NO. 9

Defense Argument for Exclusion: Defense counsel would base his request on the Sixth Amendment to the United States Constitution. The Confrontation Clause of the Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him." The Fourteenth Amendment renders the Clause binding on the states. *Pointer v Texas,* 380 US 400, 403 (1965). Because Bobby is charged with a criminal offense, murder, the Sixth Amendment right to confrontation applies to him.

The United States Supreme Court held in *Crawford v Washington,* 541 US 36 (2004) that, if a witness is unavailable for trial and the accused had no opportunity to confront the witness through cross examination, the witness's statements cannot be relayed to the trier of fact through another witness. *Crawford* explained that, in these circumstances, the only thing that satisfies the Confrontation Clause is confrontation, not the flexibility for admission of out-of-court statements provided by the rules of evidence.

However, *Crawford's* application of the Sixth Amendment, and indeed the Confrontation Clause itself, is limited to "testimonial statements." Included in the definition of testimonial statements are statements to police officers "under circumstances that objectively indicate the primary purpose of police interrogation is to establish or prove past events potentially relevant to later criminal prosecution." See *Davis v Washington,* 547 US 813 (2006).

Defense counsel should argue that the circumstances of the interrogation, i.e. police officers quizzing a dying man prone in a gas station parking lot, the nature of the questions asked, i.e., a desire to identify the man's assailant, his location, and other details, and the interrogating officers' mild interest in the man's well-being, clearly indicate the primary purpose of the police officers' interrogation of the man was to establish or prove past events potentially relevant to later criminal prosecution.

In sum, defense counsel would conclude his argument for exclusion by indicating (1) the statements sought to be admitted are testimonial; (2) the man is unavailable for trial, and (3) no prior opportunity for cross examination was presented.

Prosecution Argument for Admission: The prosecutor would

respond that, while the defense argument for exclusion is generally accurate as far as it goes, the argument misses a central point in determining whether the statements in question are testimonial. The prosecutor should argue that the statements are not testimonial if "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."

The prosecutor would then argue that the circumstances indicate the police interrogation had as its primary purpose addressing the man's gunshot wounds; that an emergency was ongoing because the shooting was recent and nearby; that Bobby was not yet in custody and, generally, when police arrived, they had little information at hand and that their acquisition of information was in a fluid, informal setting where next occurrences were not anticipatable.

In sum, the prosecutor should argue the statements were not testimonial and therefore not within the ambit of the Confrontation Clause.

Judge's Analysis: The issue for the court to decide is whether the man's statements are categorized as testimonial. No real dispute exists as to the application of the Confrontation Clause once this determination is made: if they are testimonial, they are barred by the Clause; if they are not, no such bar exists.

Determining whether the statements are testimonial in turn is calculated by whether the primary purpose of the interrogation is to address an ongoing emergency or to gather evidence for later criminal prosecution. This is a multi-factor; context-dependent analysis not given to unduly weighing a single factor. See *Michigan v Bryant,* 131 S Ct 1143 (2011).

In reaching the determination of the purpose for the interrogation, a court may consider (1) whether an ongoing emergency actually exists, (2) the formality or informality of the victim/police encounter, (3) the statements and actions of both the declarant and interrogators, and (4) other factors germane to a particular scenario.

Pursuant to *Michigan v Bryant,* the court should rule that the statements are non-testimonial because they were made under circumstances objectively indicating that the primary purpose of the interrogation by officers at the scene was to meet an ongoing emergency. That police were present with the victim and Bobby was not, does not undermine the conclusion that an emergency situation

was present, nor compel the conclusion that the officer's interrogation was for gathering evidence for later criminal prosecution. A proper, more expansive view of whether an ongoing emergency exists is called for under *Bryant.* Defendant's motion should therefore be denied.

Additional points may be awarded for:

(1) Greater in-depth discussion of the meaning of the word "witnesses" as used in the Confrontation Clause as that meaning has significance to the determination whether a witness's statement is testimonial.

(2) Any salient discussion about the differing contests between *Crawford, Davis* and *Bryant,* as those contexts enlighten the decision as to the primary purpose of the interrogation.

(3) That the statements were "dying declarations" and as such were admissible at the time of the Sixth Amendment's creation and were therefore not precluded by it. This point should <u>not</u> simply be addressed under MRE 804(a)(4) and (b)(2) to obtain credit.

(4) Greater discussion of the case specific factors suggesting a broader measuring rod for the term "ongoing emergency" as discussed in *Michigan v Bryant.*

ANSWER TO QUESTION NO. 10

Recourse against Candy Coffman: As an officer and director of FPC, Candy Coffman is required to discharge her fiduciary duties to the corporation (1) in good faith; (2) with the care that an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner she reasonably believes to be in the best interests of the corporation. MCL 450.1541a(1)(a)-(c). Certainly, Candy would argue that she acted in good faith by entering into the contract because she believed that the price of salt would skyrocket, and that a long-term contract fixing the price would be advantageous to the company.

In exercising her business judgment and discharging her duty to the corporation, Candy is entitled to rely upon "information, opinions, reports, or statements," if prepared or presented by, among others, "[1]egal counsel, public accounts, engineers, or other persons as to matters the director or officer reasonably believes are within the person's professional or expert competence." MCL 450.1541a(2)(b). However, a director may *not* rely on such information if the director has knowledge of the matter that makes otherwise permissible reliance "unwarranted." MCL 450.1541a(3). In this case, Candy relied upon several investment reports and trade articles predicting a steep rise in the price of salt. In all likelihood, her reliance on these sources will be deemed reasonable. Moreover, the facts do not indicate that Candy has any actual knowledge regarding salt speculation or future salt shortages. Therefore, it is unlikely that legal recourse may be sought against Candy Coffman.

Shareholder's Meeting: Even if the corporate bylaws do not provide for special meetings of the shareholders, MCL 450.1403 grants the circuit court of the county in which the principal place of business or registered office is located the authority to order a special meeting of shareholders. The court may order the special meeting "for good cause shown," upon application of "not less than 10% of all the shares entitled to vote at a meeting."

Under Michigan law, unless otherwise provided for in the articles of incorporation, "each outstanding share is entitled to 1 vote on each matter submitted to a vote." MCL 450.1441.

Greta Goulet, who possesses 11% of FPC's stock, may not independently "compel" a special shareholder's meeting. However, because she owns "not less than 10% of the shares entitled to vote,

she may petition the court for a special shareholder's meeting, and the court may exercise its discretion in granting the meeting "for good cause shown."

Whether it is possible to remove Amanda and Candy as directors: The facts indicate that the five minority stockholders collectively control 55% of the FPC stock. Pursuant to MCL 450.1511, shareholders may remove directors "with or without cause," and removing a director requires a majority of the shares entitled to vote, not merely a majority of the votes cast. Therefore, assuming a special meeting of the shareholders is called, and assuming that Amanda or Candy would not vote to oust the other, each of the five minority shareholders *must* vote in favor of removing Amanda and Candy in order for the ouster to occur.

Greta or another of the minority shareholders may argue that a voting agreement representing 55% of the voting FPC stock was created on the conference call among the minority shareholders, and thus this is enforceable at a meeting to oust Amanda and Candy. Under Michigan law, voting agreements between two or more shareholders are "specifically enforceable" if the voting agreement is "in writing and signed by the parties." MCL 450.1461. The facts indicate that the agreement was reached over a telephone conference call, and does not indicate that the agreement was reduced to a signed writing. Therefore, the verbal voting agreement is not enforceable, and Nancy Nome is free to vote as she sees fit. Unless Nancy changes her mind, Amanda and Candy will not be removed as directors.

ANSWER TO QUESTION NO. 11

In order to make out a prima facie case of negligence, a plaintiff must prove four elements: (1) duty, (2) breach of that duty, (3) causation, and (4) damages. *Brown v Brown,* 478 Mich 545, 552 (2007). The existence of a legal duty is a question of law. *Valeaniant v Detroit Edison Co,* 470 Mich 82, 86 (2004). "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." *Brown,* 478 Mich at 552. Duty requires the defendant to conform to a specific standard of conduct in order to protect others against unreasonable risks of harm. *Maiden v Rozwood,* 461 Mich 109, 131 (1999); *Rakowski v Serb,* 269 Mich App 619, 629 (2006). Policy factors to consider in determining whether a duty should be imposed include the relationship of the parties, the foreseeability of the harm, the burden that would be imposed on the defendant, and the nature of the risk presented. *In re Certified Question from Fourteenth Dist Court of Appeals of Texas,* 479 Mich 498, 508 (2007).

Johnson's claim against Smith: With respect to injuries occurring between participants in a recreational activity, the Supreme Court has held that proof of negligence is not enough to maintain a suit for personal injuries. Specifically, in *Ritchie-Gamester v Berkely,* 461 Mich 73 (1999), the Court adopted "reckless misconduct as the minimum standard of care for co-participants in recreational activities." In *Behar v Fox,* 249 Mich App 314, 319 (2001), the Court of Appeals held that:

"Our Supreme Court has previously defined reckless misconduct as follows:

"'One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence. His conduct must be such as to put him in the class with the willful doer of wrong. The only respect in which his attitude is less blameworthy than that of the intentional wrongdoer is that, instead of affirmatively wishing to injure another, he is merely willing to do so. The difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another, being indifferent whether it does so or not.' *Gibbard v Cursan,* 225 Mich 311, 321; 196 NW 398 (1923), quoting *Atchison T & SFR Co v Baker,* 79 Kan 183, 189-190; 98 P 804 (1908)."

In light of *Ritchie-Gamester,* the applicant should indicate that the duty placed on participants in the soccer game was to not act recklessly. *Ritchie-Gamester,* 461 Mich at 95 ("co-participants in a recreational activity owe each other a duty not to act recklessly"). Using that definition from above, the applicant should discuss whether the evidence shows Smith violated that duty. In doing so, the applicant should recognize that some of the witnesses heard Smith use a profanity towards Johnson just before he turned and intentionally elbowed Johnson. That evidence of intentional conduct would create a factual dispute with the evidence that it was merely an accidental elbowing. The jury would decide who to believe, and so Johnson might be able to establish the breach of duty element of a claim against Smith.

The remaining elements of causation and damages are easily shown under these facts. Proximate cause is defined as "that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which injuries would not have occurred." *Helmus v Dept of Transportation,* 238 Mich App 250, 256 (1999). The applicant should recognize and briefly discuss that fact that the elbowing caused the injuries and the injuries appear to be significant.

Jones's Claim Against WASI: In addressing any possible negligence claim against the property owner, an applicant should first determine what duty was owed to the plaintiff. The first step is to determine the status of the plaintiff, and from the facts we know that plaintiff was an invitee as she paid for a ticket. *Benton v Dart Properties, Inc,* 270 Mich App 437, 440 (2006).

Second, the applicant must determine what duty is owed an invitee by a premises owner. In general, a landowner owes a duty to an invitee to take reasonable steps to ensure that the premises are reasonably safe, and must warn an invitee of unreasonably dangerous conditions or dangers known to the landowners but unknown to the invitee. *Lugo v Ameritech Corp Inc,* 464 Mich 512, 516 (2001). Here, however, we are addressing a more specific duty, that is, what duty is owed to an invitee to protect them from criminal acts occurring on the premises. That issue was addressed in *MacDonald v PKT Inc,* 464 Mich 322, 335-336 (2001), where the Court held that a premises owner has a duty to invitees to respond reasonably to specific occurrences on the premises:

"A premises owner's duty is limited to responding reasonably to situations occurring on the premises because, as a matter of public policy, we should not expect invitors to assume that others will disobey the law. A merchant can assume that patrons will obey

the criminal law. See *People v Stone,* 463 Mich 558, 565; 621 NW2d 702 (2001), citing Prosser & Keeton, Torts (5th ed.) §33, p 201; *Robinson v Detroit,* 462 Mich 439, 457; 613 NW2d 307 (2000); *Buczkowski v McKay,* 441 Mich 96, 108, n 16; 490 NW2d 330 (1992); *Placek v Sterling Hts,* 405 Mich 638, 673, n 18; 275 NW2d 511 (1979). This assumption should continue until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee. It is only a present situation on the premises, not any past incidents, that creates a duty to respond.

* * *

"Having established that merchant's duty is to respond reasonably to criminal acts occurring on the premises, the next question is what is a reasonable response? Ordinarily, this would be a question for the factfinder. However, in cases in which overriding public policy concerns arise, this Court may determine what constitutes reasonable care. See *Williams, supra* at 501, citing *Moning v Alfono,* 400 Mich 425, 438; 254 NW2d 759 (1977). Because such overriding public policy concerns exist in the instant cases, the question of reasonable care is one that we will determine as a matter of law. *Williams, supra* at 501. We now make clear that, as a matter of law, fulfilling the duty to respond requires only that a merchant make reasonable efforts to contact the police. We believe this limitation is consistent with the public policy concerns discussed in *Williams."*

Thus, the applicant should recognize that WASI's duty is to respond reasonably to criminal situations that occur on the premises. In particular, the applicant should indicate that, given the circumstances of an unruly crowd and an incident on the field, WASI should have been aware that the fans could be in danger. Indeed, WASI's manager did contact the police because of the increasingly tense situation, and that is all that is required. WASI had no further duty to protect Jones from the criminal assault and battery committed upon her. That the injury occurred before police arrived does not mean that the duty was not fulfilled. No breach of duty exists, and Jones cannot establish the elements of a negligence claim.

Finally, if the applicant comes to this conclusion, the rest of the negligence elements are not necessary to discuss. However, if an applicant concludes that a duty was breached, the applicant should engage in a discussion about the final two elements, i.e., whether the breach was the proximate cause of the injury, and whether Jones suffered damages. The first issue--proximate cause--should entail a discussion of what constitutes proximate cause and whether the failure to protect Jones proximately caused her injuries. As noted in the first answer, proximate cause is defined

as "that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred." *Helmus v Dept of Transportation,* 238 Mich App at 256. In order to render a negligent act a proximate cause of an injury, it is not necessary that the particular consequences or injury or the particular manner in which it occurred might have been foreseen, if, by the exercise of reasonable care, it might have been anticipated that some injury might occur. *Oestrike v Neifert,* 267 Mich 462, 464 (1934); *La Pointe v Chevrette,* 264 Mich 482, 491 (1933); *Baker v Michigan Cent R Co,* 169 Mich 609, 618-619 (1912). In other words, where the exact consequence of the negligence may not be foreseen, if some injury was reasonably foreseeable as a probable consequence of the conduct or omission involved, it is actionable. *Oestrike,* 267 Mich at 464-465. An argument could be made that the punch was unforeseeable, though a counter argument can be made that some injury was foreseeable because of the unruly nature of the crowd. The better argument is that it was unforeseeable. Finally, the applicant should readily conclude that Jones suffered damages.

ANSWER TO QUESTION NO. 12

1. Jurisdiction of civil claims lies with the circuit court. MCL 600.604. MCL 600.1629 provides for where venue lies in a tort action. Specifically, pursuant to MCL 600.1629(1)(a), venue lies in the county in which the original injury occurred if the defendant resides, has a place of business, conducts business, or has a corporate registered office in that county.

A proper analysis includes identification of the actual place of occurrence of the damage or injury that gives rise to the plaintiffs' cause of action. Here, the proper answer, with the limited facts given, is that the injury occurred with the exposure to lead in Happy Heights County.

Smelly Smelter conducts business in Happy Heights County satisfying MCL 600.1629(1)(a)(i). The attorney should advise his clients that he is filing the complaint in Happy Heights County circuit court.

2. In Michigan, the prerequisites for certifying a class are listed in MCR 3.501(A)(1)(a)-(e). The prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority. *Henry v Dow Chemical Company,* 484 Mich 483 (2009). Once in state court, the plaintiffs are required to provide the certifying court with "information sufficient to establish that each prerequisite for class certification is, in fact, satisfied. The pleadings alone may set forth sufficient information. If not, the certifying court must look to additional information." Id. at 502.

The following prerequisites must be analyzed:

(1) Numerosity. Analysis of whether the class is sufficiently well-defined and a reasonable estimate of the members can be determined *Hill v City of Warren,* 276 Mich App 299 (2007). Also to consider is whether joinder of the proposed class would be impracticable. *Zine v Chrysler Corp,* 236 Mich App 261, 288 (1999). Here, the geographical area of Sara Sibling's hometown is well-defined and allowed the attorney to estimate 2,000 members which is a sufficiently large class of which joinder would be impractical.

(2) Commonality. Analysis includes whether "all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class

member." *Hill v City of Warren,* 276 Mich App 299 (2007) (citations omitted). Here, the different years and lengths of exposure to residents at different ages, coupled with the variety in the health issues would require evidence unique to each class member so commonality is not present. An acceptable analysis could conclude that the property damage claims of loss of property value may be considered common enough to satisfy this prong of class certification but because of differing valuations, age of homes, repairs undertaken over the years, etc., it is likely this factor is not satisfied.

( ) Typicality. Analysis of whether the class members' claims share a legal theory and a "core of allegation." *Hill v City of Warren,* 276 Mich App 299 (2007) (citations omitted). Here, the members share legal theories of negligence, nuisance, and trespass because of the release of lead into the neighborhood surrounding the smelter.

(4) Adequacy. Analysis of whether the named plaintiff's counsel is qualified to sufficiently pursue the putative class action and whether the members of the class may not have antagonistic or conflicting interests. *Neal v James,* 252 Mich App 12, 22 (2002) (citations omitted). A fair analysis here is that because the attorney had previously and successfully handled an asbestos class action and immediately undertook the appropriate investigation, the attorney is qualified. There is no suggestion in the hypothetical that the proposed members have antagonistic or conflicting interests.

(5) Superiority. Analysis of whether a class action, rather than individual suits, would be the most convenient way to decide the legal questions presented. It is a practicality test and a question of "convenient administration of justice." *Hill v City of Warren,* 276 Mich App 299 (2007) (citations omitted). Because the claims are so fact specific, requiring different medical testimony for each injury or ailment, a class action may not be a superior way to promote the convenient administration of justice.

Here, the attorney should advise his clients that even though the prerequisites of numerosity, typicality, and adequacy likely would be satisfied, it is unlikely that the plaintiffs could have a class certified because of the lack of commonality in both the personal injury and property damage claims, and arguably because of the lack of superiority.

3. The attorney should explain to his clients that, if the class is certified, the next step would be to satisfy the requirements for notifying the class as provided in MCR 3.501(C):

(1) Notice shall be given to persons who are included in the class. Here, all residents of the neighborhood from 1970 to present;

(2) Plaintiff is responsible for making the proposal regarding notification in the motion for certification or state reasons why the determination cannot be made and offer a proposal of when it should be made;

(3) The court shall determine how, when and by whom, and to whom the notice shall be given; the content of the notice; and to whom the response to the notice is to be sent; and,

(4) The plaintiff bears the cost of notification.

4. The defendant could file a counterclaim against Sara Sibling even if the class was certified. MCR 3.501(H) provides that counterclaims may be filed as in any other action against the class or an individual class member. There is no limitation on the type of counterclaim or the type of recovery sought. *Adair v City of Detroit,* 198 Mich App 506 (1993). Thus, the proper answer would be that a counterclaim can be filed against Sara as she is the only plaintiff, the class not being certified.

ANSWER TO QUESTION NO. 13

Spousal support would most likely be denied on the basis of the factors outlined below. The familiarity with the factors pertinent to making the determination is being tested.

The divorce court has the discretion to award alimony as it considers just and reasonable. MCL 552.23; *Ianitelli v Ianitelli,* 199 Mich App 641, 642-643 (1993). Relevant factors for the court to consider include 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. *Ianitelli, supra* at 643; *Demman v Demman,* 195 Mich App 109, 110-111 (1992). The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Hanaway v Hanaway,* 208 Mich App 278, 295 (1995).

A full analysis of the pertinent factors would include the following:

(a) Length of the marriage. This is a two-year marriage. This weighs against spousal support.

(b) Parties' ability to pay. Molly has an ability to pay. Disparity in income and lifestyle is relevant, but there is no legal right for the parties to live in the same lifestyle. This factor weighs against spousal support.

(c) Past relations and conduct. Both parties worked hard and contributed about equally--although differently--at least at the end. (And, contribution within the home is no less valuable than one outside the home. *Hanwaway.)* This is a neutral factor in this matter.

(d) Their ages. The inference is Desmond and Molly are young, less than 30. Desmond has his career all before him. This factor weighs against support.

(e) Needs. Desmond does not need more support as his pay during the marriage was enough for subsistence and to pay for his student loans. This weighs against support.

(f) Ability to work. Desmond can obviously work. Molly can work, but her success may prove to be ephemeral in the fashion

business. This is a neutral factor.

(g) Health. There is no reason to think that either party has health issues. This is a neutral factor.

(h) Fault. Molly is not at fault for the breakdown of the marriage. This fact is detrimental to Desmond's claim for spousal support. And, Molly would emphasize that awarding spousal support would, in effect, punish her and reward Desmond without sound reason.

ANSWER TO QUESTION No. 14

The Uniform Commercial Code (UCC)'s Article 2 governs this transaction because it involves a transaction in goods under MCL 440.2102. The goods are movable at the time identified for sale. MCL 440.2105(1). Furthermore, both ABC and LCS would be considered "merchants" under MCL 440.2104(1).

A. Assignment or Delegation. The UCC's relevant commentary says: "Generally, [the UCC] recognizes both delegation of performance and assignability as normal and permissible incidents of a contract for the sale of goods." Comment to 2-210 of the UCC. The Code itself provides that obligations under a contract can be delegated "unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract." MCL 440.2210. Delegation does not require the consent of the other party in the absence of it possessing a "substantial interest" in having the original party perform. See, *First of America Bank v Thompson,* 217 Mich App 581, 586 (1996). Here, there is no indication that ABC and LCS agreed that the obligations were non-delegable. And, there is nothing to suggest ABC has "a substantial interest in having " LCS "perform or control the acts required by the contract." Although ABC preferred dealing with the people at LCS, that would not amount to a "substantial interest" in having only LCS perform under the contract. There is nothing unique about ABC's performance under the contract that would prohibit delegation.

Therefore, LCS's assignment or delegation of its contractual obligations would not permit ABC to permit ABC to avoid the contract. The crucial point is that the examinee recognize the ability to assign or delegate (except as noted above) and recognize it is not dependent on consent.

B. Non-Conformity. The UCC permits a buyer to revoke the contract if a "non-conforming" installment "substantially impairs its value" to the buyer. MCL 440.2612(3). Here, the facts do not suggest that the non-conformity "substantially impairs the value" to ABC. The facts do not specify how much Maximum Supply's fertilizer mix differed from LCS's mix, but the implication is not much. Only one private customer--not ABC's primary customers, the municipalities--mildly complained. And, there is no indication the private customer sought any remedy for the problem from ABC. The non-conformity ought not be considered to "substantially impair its value" to ABC. *See generally, Davis v Lafontaine Motors,* 271 Mich

App 68, 83 (2006). The crucial point is recognition and discussion of the substantial impairment requirement for revocation. The examinee should also note Maximum Supply has the right to cure an initial non-conforming installment. MCL 440.2612(2).

An examinee may also analyze the question under the "substantial impairment" provision, MCL 440.2608(1) and discuss the possible "difficulty of discovery" of any non-conformity under MCL 440.2608(1)(b).

An examinee might, despite the above, argue that there is a substantial impairment, suggesting, for example, that other customers may soon complain too. If that is the case, then the examinee would definitely need to address the right to "cure."

Finally, an examinee might delve into performance under the contractual relationship previously and/or whether there are other remedies such as a breach of an express warranty or an implied warranty under MCL 440.2314 and MCL 440.2315, respectively. There should be no penalty for such, but it is not called for in the question.

ANSWER TO QUESTION No. 15

Intentional Tort: While Jason might file an intentional tort action against MCA, it would not be successful under Michigan law. MCL 418.131(1) provides that workers' compensation is an employee's "exclusive remedy against the employer for a personal injury or occupational disease." There is a statutory exception for intentional torts that must be considered, however. Intentional torts for this purpose are specifically defined as follows:

"An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Id.*

Here, MCA might be negligent in exposing its employees to the deleterious material, given its past experiences with the material and knowledge that injuries have previously occurred from the exposure. But, the courts have held that a mere showing that an injury or accident is likely to occur is not sufficient to establish an intentional tort under MCL 418.131(1). *Bazinau v Mackinac Island Carriage Tours,* 233 Mich App 743 (1999). An employer must be shown to have the purpose of inflicting an injury upon the employee. *Travis v Dreis & Krump Manufacturing Co,* 453 Mich 149 (1996). There must be a specific intent that there be an injury. *Herman v City of Detroit,* 261 Mich App 141 (2004). There is no indication under the facts that MCA "specifically intended an injury" to Jason. Nor is there a suggestion MCA had "actual knowledge that an injury was *certain* to occur and wilfully disregarded that knowledge."

Therefore, Jason has no intentional tort remedy. His remedies would lie exclusively within the workers' compensation statute.

Michigan Jurisdiction: Jason can seek a workers' compensation remedy under Michigan workers' compensation statute for an injury occurring in Ohio. MCL 418.845 is the provision defining Michigan's jurisdiction over injuries occurring outside of the state. The provision says Michigan can exercise jurisdiction "over all controversies arising out of injuries suffered outside the state if the injured employee is employed by an employer subject to this act and if either the employee is a resident of this state at the time of injury or the contract of hire was made in this state."

The Act covers all private employers regularly employing three or more employees. MCL 418.115(a). Jason is a resident of Michigan. He was only temporarily dispatched to Ohio. And, Jason's contract of hire was made in Michigan. If either one of these latter two criterion is satisfied, Michigan has jurisdiction. Both are satisfied and, consequently, Michigan clearly has jurisdiction.

[An examinee might note that Jason could likely also pursue workers' compensation benefits under Ohio's workers' compensation statute. If he receives benefits from Ohio, then the amount recovered under the law of Ohio would be credited against the benefits payable under Michigan's statute. MCL 418.846.]

Job Search: Jason's refusal to search for work outside of MCA could be fatal to his claim for weekly disability benefits. "Disability" in Michigan is defined as a limitation of wage earning capacity. MCL 418.301(4)(a). And, "[f]or the purposes of establishing a limitation of wage earning capacity, an employee has an affirmative duty to seek work reasonably available to that employee, taking into consideration the limitations from the work-related personal injury or disease." MCL 418.301(4)(b). This job search requirement became a statutory requirement as of December 19, 2011 upon enactment of 2011 PA 266. And, before enactment of 2011 PA 266, a job search requirement was reflected in case law: *e.g., Stokes v Chrysler EEC,* 481 Mich 266, 279, 283 (2008). Also, even if there were no equal paying jobs available elsewhere, Jason's refusal to look for lesser paying work would adversely affect his potential rate of weekly benefits under MCL 418.301(8).

Jason's lack of job search would have no adverse effect on his claim for medical benefits or for any request by him for vocational rehabilitation. MCL 418.315 and MCL 418.319, respectively.