1)

Governing law in a breach of contract case.

In a Breach of Contract with Marta v. Don, the law governing this possible breach must be determined. With a sale of goods, the UCC governs and with contracts for services, common law governs. A sale of goods includes items such as tangible goods. The bait cooler is an item considered a tangible good and any contract breach will be governed by the UCC.

Merchants under the UCC.

Special provisions of the UCC govern contracts for merchants. A merchant is a person who may hold themself out to be one that deals with goods routinely or has specific knowledge in a particular field or subject matter pertaining to the goods being sold which would make the person knowledgable or a regular dealer with the goods. Marta is a shop owner operating a fishing shop, she deals with fishing goods and items needed for fisherman, including bait. Her shop is in need of a bait cooler to provide live or fresh bate for her customers. Marta will be considered a merchant. Don, on the other hand, is the person Marta contacted on Feb 1 for to buy for her a bait cooler. It is unclear if Don is a merchant who routinely deals with coolers such as a refrigeration distributor. Assuming he is, he would be considered a merchant as well. It could be unclear if Marta is dealing with a merchant but either way, the UCC would govern.

Contract formation between merchants.

Here the facts state that a valid written contract has been formed. To have a valid contract, offer, mutual assent and consideration must be established. Breiflye here, both parties have agreed in writing to certain and definite terms Marta will pay 5,500 for a cooler to Don. Don will provide the cooler no later than April 15. The problem here is with performance. Once a valid written contact is

established the parties must perform to the contact terms.

Performance

Once a contract has been formed that parties must perform the conditions to the contract. A condition precedent to payment from Marta is Don is to provide the cooler not later the April 15. Noncompliance of not delivering on time will excuse the subsequent condition of payment and Don will be in breach and liable for damages.

Problem with meeting the deadline

- Irrevocable ability to perform missed this

Anitcipatory repudiation - When a party to a contract states that he can't or won't meet the terms of the contract verbally, the party is repudiating the contract. The party may be in breach, the breachor may be liable for damages and conditions can be excused by the party that was breached. If Marta believe Don is repudiating the contract terms of delivery on April 15, she may be excused from payment. The contact states above cooler needed by April 15, Don calls on Feb. 15 stating he is having trouble procuring a Bait Mate Cooler. Don's tone sounded doubtful inferring that he might not meet the deadline. Marta believes Don may not meet the deadline so she immediately faxes Don to guarantee delivery by April 15. Don does not respond. The nonresponsive party maybe proves that Don is repudiating.

Additional terms - once a contract has been signed, modification must be in writing and must have additional consideration. However, if both are merchants additional terms do not need consideration. Don received a fax from Marta, she is demanding guarantee. Don doesn't respond to the guarantee but this does not alter the original contract in anyway. This would not really be considered a modification, the contract may still be completed. The problem is now, since Don has not responded, and as stated above Marta believes by his doubtful tone that

he has repudiated the delivery date which would be an immediate breach.

Belief of the immediate breach, under the UCC, Marta may go out and sue for damages immediately, mitigate or wait until the April 15 deadline to occur and then sue for breach. Marta does nothing until the 14th, but does purchase and requires a one-day delivery which incurs 2,000 premium shipping cost. Mitigation will be discussed below

Repudiation may be by verbal act or physical act, communication to Don of the repudiation must be made and Don must know of the repudiation. Marta takes action by contacting another seller and purchasing on April 14 to have delivery on April 15. Marta has bought another cooler the day before delivery on the original contract. Here, Don knows nothing because Marta has not communicated that she was buying another cooler and Don does not find out about the purchase. Since, she has not notified Don but in reality the parties still have a contract unless Marta wanted two coolers or Marta has RELIED on Don's repudiation by inference of the conversation on the 15th and nonresponse to her fax.

Promissory estoppel - when a party relies to their detriment and a contract is breached, the party may sue for damages. Marta relied on Don to provide the cooler by the April 15 deadline. Don does not deliver, therefore, Marta goes out on the 14th believing that Don will not meet the delivery that she had a time is of the essence clause and purchased from another party the cooler that she needed onthe 15th. The cost increased 2000 because of one day shipping.

April 15 - Marta does now have a cooler but the cooler from Don does not arrive. Don is now in breach. Under the UCC, a party who does not meet performance of a condition of the contract will be in breach and responsible for damages. Don did not deliver on the 15th, Don will be responsible for damage caused to Marta.

The standard measure of damages would be substituted goods. Marta buys the cooler from another supplier for 5,500, she has received the benefit of the bargain, but has incurred a huge shipping bill of 2,000 because she ordered one day shipping to meet her time is of the essense requirement to have the cooler on April 15. Since, Marta did not receive a response from Don and Don did not deliver by the deadline, her reliance on his repudiation made her incur additional shipping expense. Consequential damages included additional costs such as shipping to meet the needs. Marta will be able to sue Don for 2,000.

Additional note, the 5,500 payment from Marta to Don will be excused and Don will need to pay Marta 2,000

Damages to Don

Don was the breachor, he will not be entitled to any recovery. Here, however, Don may argue that if Marta would have ordered the Bate cooler earlier, the shipping charges would have been less but mitigation is something Marta did because she relied on Don and Don did not meet the deadline, did not communicate a guarantee and gave her doubt. The fact that she ordered it a day prior to the delivery date would cut her losses in order to make sure the cooler was installed and up and running prior to the May 1 open season requirement. Marta can state that this is why she waited until only the day before to give Don time to respond. Don may state that Marta did not rely on his repudiation because it was not a repudiation just a I may not meet the deadline doubt. However, since he didn't deliver on time he breached and will recover nothing as the breaching party. Don will be liable for the 2,000 shipping costs by Marta.

Prior to Delivery date Purchase - Argued

Question #1 Word Count = 1258

Damages

A Expectation

Place buyer in position would have been if contract performed

1) cost to cover - same as cooler cost - no money out

2) - shipping - Time of essence -

B Consequential Damage

But 4 breach - economic usually - none occurred
She has cooler

C) Incidental - arise from breach - inspection, storage, return of non-conforming goods

D) Duty to Mitigate

Prior Mitigation to Breach

- Reliance? due to no assurance?

2)

1 Blackacre Ownership

Amy and Bob Fee Simple and Jointly own with right of survivorship. A fee simple ownership gives both parties a right to sell, mortgage, manage the property. Amy has a right to give her property ownership away and she gifted her fee simple ownership in blackacre to Cathy by deed.

Deed transfer. At common law deed transfer required that a deed be in writing with a description of the property being granted, the names of the grantor, granting ownership interest of the described property to the grantee and proper delivery with intent to transfer title to the grantee. Amy gave Cathy a deed and at common law Cathy now has retained ownership of Amy's portion of Blackacre with Bob. In addition, Bob knew of the transfer of the deed to Cathy, ownership however was not recorded. At common law recordation was not a requirement. Modernly, recording is required in most jurisdictions but here, Cathy did not record the deed immediately.

Quit Claim to David

David and Amy, sold Blackacre to David. Under a quit claim deed, covenants of title require the marketable title being title free and clear of mortgages, or other purchasers or claims against the property may exist and a purchaser would be required to investigage to make sure the marketable title is free of encumbrances. A quit claim deed does not guarantee that a title is marketable and it would be that David would not be able to seek any recourse from the sellers. It is up to

David to search records to make sure that the property of blackacre is free and clear of any encumbrances. A bonifide purchaser of value that takes by quit claim deed should search and will be charged with constructive notice of any recording of ownership to the property. Title search of recordings would reveal only that Amy and Bob had ownership of Blackacre. David would not have any

notice of the deed to Cathy because Cathy did not record. However, first in time receipt of the deed conveyed to Cathy exists at common law and she is not required to record unless the jurisdiction has statutes that require recording.

actual / constructive notice inquiry

Not a recording jurisdiction

Amy can only gift what she owns away to Cathy. Amy only owned half of Blackacre, therefore she can only gift away here half of blackacre. If no recording statute exists in the jurisdiction of Blackacre, then David would not own Amy's portion of Blackacre. Therefore, Amy would own half and David would own half and he would not have any recourse against Amy or Bob since the quit claim deed would not entitle him to Amy's half. wrong

Recording the deed.

Modernly most jurisdicitions do have recording requirements such as race or race notice. If the jurisdiction has such a requirement then first in time to record would be the owner of Blackacre. Race Notice jurisdiction, required inquiry to see if any encumbrances are recorded - this would give David notice. However, Cathy recorded after David. David had no notice of Cathy's claim because she did not record first. David would be the owner of Blackacre in a Race/notice and a race jurisdiciton.

Bonifide purchaser for value. If a party pays money for property, without notice of any existence of a gift to another person will prevail as the owner of the property because of the purchase rather that the party that receives the property as a gift. Here, it is clear, that Cathy was receiving a gift and paid no money where David did pay for Blackacre. David would be a bonifide purchaser of value unless (as stated above) the jurisdiction does not require recording.

Amy and David would own as co-owners in a non-recording jusrisdiction OR David would own Blackacre in recording jurisdictions - either a race/notice or a race jurisdiction.

2. David's lawsuit against Ellen and Fred

Missed

Contracts such as lease agreements for land are governed by common law but land contracts of over a year must be in writing as required by the statute of frauds

Landlord / Tenant

Tenancy for years, when a landlord and tenant sign a lease agreement for a term of years the parties will be responsible for honoring the lease agreement for the term. Ellen (tenant) and David signed a 15 year lease with a condition that the tenant be responsible for procuring hazard insurance. Ellen is charged with being responsible for the maintenance of this insurance for the entire 15 year period and any damage due to property will become her responsibility. Here, Ellen did not procure insurance and therefore will be responsible for liability during her time as tenant.

Assignment - An assignment to another party to take over an existing contract can be made if the party taking over but the statute of frauds requires that any lease agreement over a year be in writing in order for it to be enforceable. Ellen recorded her tenancy for the 15 year period but Ellen was only the tenant for 5 years of the 15 year lease. She can sublease or assign to someone else since the lease agreement did not make any restrictions, however without a writing and recording she will still be responsible for the entire 15 year period of the lease.

Fred - took possession of the lease, it is for property, taking substantial performance of a contract may create a quasi contract relationship. Under promissory estoppel a party which relies on another to their detriment that a contract does exist, can overcome the statute of frauds writing requirement. Taking into consideration that since Fred assumed the lease, took possession of blackacre and started paying the lease payments, if David relied on Ellen's

assignment of the lease to Fred assignment, David may state in court that Fred's noncompliance in procuring the insurance, which David required under the lease agreement would entitle David to recover for damages to the property while Fred was in possession because Fred also did not obtain insurance.

David can recover damages both from Fred and Ellen for the destruction to the building destroyed by fire. If Amy is co-owner with David, she is not entitled to any damages. David as owner of blackacre would be entitled to any damages he can recover to repair the building destroyed.

Question #2 Word Count = 1050

3)

1 Governing law in Federal Court

A matter filed in federal court must follow the procedures under the Federal Rules of Civil Procedure. The federal court must have Subject matter jurisdiction and personal jurisdiction. Here, the diversity jurisdiction is stated to be proper and therefore, Phil's injuries must be over 75,000 and proper diversity must exist, meaning that Phil must be a resident of a different state than Diana. Under Erie Doctrine, in Federal court substantive questions will be governed by state law and the FRCP will govern questions of procedural subject matter. Discovery is a procedural question and the FRCP procedural law will govern.

half right - didn't mention forum shop outcome determ

Physical Examination

Discovery is allowed under the FRCP as this is a procedural matter to find relevant facts or to lead to the discover of relevant facts in the case. Diana filed an answer denying that her accident caused injuries to Phil. She is allowed to file motions requesting discovery of facts to prove she was not negligent and that any injuries Phil has were not because she hit him with her car.

Relevance - a motion of discovery must be to discover relevant facts regarding the matter. Relevant is a fact which is offered to prove or disprove a fact of consequence. The matter before the court is Phil is seeking damages because he was physically injured. Diana disputes the negligence claim. In negligence, in order to prove an action, damages must be established. The claimed injury is relevant to the damages that Phil is requesting and a physical examination would be able to either estable injury or disprove injury. In addition to the injury, damages need to be proven to complete the negligence that was allegedly caused by Diana hitting Phil resulted in damages. Damages cannot be established if no injury occurred as a result and because Diana is denying the negligent action, the physical examination requested by motion of order in

discovery is necessary to disprove a fact of consequence - that Phil was injured. The court did not err in requesting that Phil submit to a physical examination.

Since Diana is trying to prove she is not neglignet of the injuries Phil is claiming the court must request Phil submit to a physical to determine his actual injuries.

Mental Examination

Discovery of mental examinations can only be allowed if the party claims emotional distress as a result or if pain and suffering is part of the damages requested. Relevant (see above). If Phil is claiming emotional distress due to the injuries suffered from the alleged negligent action, than the court would request a mental evaluation. In addition, if Phil is requesting damages for pain and suffering the court MAY require a mental examination. Here, we do not have any facts to suggest that Phil's injuries were more the physical injuries from the facts. If Phil is not seeking emotional distress (such as loss of sleep) or pain and suffering than the court did err.

2. Deposition of Laura.

Still must do the FRCP – sub pro Bad test

FRCP – will prevail if State doesn't have some law

Privilege

4 Dr Pat Priv

Attorney client privilege qualifies for immunity from discovery if it is part of the thoughts, impressions of an attorney while preparing for litigation. Marital privilege also is considered confidential. Qualified privilege are communications used to also prepare for litigation and Phil is objecting to his Dr. Laura from being disposed. Discoveralbe information is allowed if it does not violate privilege. A Doctor Patient relation seeking to have immunity from discovering may qualify under the qualified privilege if the examination was made for the litigation and personal information that Phil revealed to the doctor is something confidential. The physical report though is something that can be requested and any verbal or

FRCP – can depose non party

FRCP allows 10 depo's each 1 to 7 days

party depo – reas notice

non party subpoena + reas notice

Exception FRCP Controversy injury – makes this relevant

recorded verbal comments between the doctor and Phil may be kept out.

Under the qualified privilege there is an exception that will prompt a court to allow discovery. If the subject matter is destroyed or the other side is not able to discover the information without substantial cost this undue burden with establish a need to force discovery. Here, Phil may have healed, somewhat since the April accident and therefore the information would be impossible to obtain by a physical examination. Phil's doctor's deposition should be allowed.

3. Jury trial

FRCP - Rules demand must be w/in 14 days of filing answer to complaint

Under the constitution a party has a right to a jury trial for all criminal matters that have a threat of imprisonment. Civil procedure requires a jury trail if the matter is one of law and not one of equity. The matter before the court is for negligence, no injunctive relief is sought. The court did not err in granting Diana's motion to deny a jury trial.

Question #3 Word Count = 765

END OF EXAM

4)

1. To establish Belle's equitable relief a liability theory must be proven.

Contracts for the sale of real property are governed by common law. Here, the parties went to enter an agreement for the sale of land, so common law principles will govern.

In order for Belle to sue Steve for equitable relief to obtain Parcel 1 from Steve, a liability theory from a breach of contract must be established. Belle and Steve executed a contract on Feb 1 because Steve owned Parcel 1 and Belle wanted to buy Parcel 1, the existence of terms of contract between the parties must be met. A contract requires, intent to sell with mutual acceptance by the parties to definite and certain terms of the contract and consideration.

Intent and Mutual acceptance

The intent must be expressed or implied by actions by the party selling. Mutual assent of the parties is an agreement meeting certain and definite terms. Here, Steve executed a contract with Belle. The intention of Steve to sell to Belle will be an expressed intention to sell Parcel 1 for the price of 400,000, so the intent to sell is met and Belle wants to buy Parcel 1. Since both parties mutually assent to the buy/sell transaction in writing, on the day the contract was executed by both parties the mutual assent occurred.

Definite and certain terms

In order for a contract to exist it must contain definite and certain terms that a reasonable person would understand to be part of the deal. Ordinarily a contract will state parties, item being transferred, price, quantiy, date transfer to establish a closing and exchange of title for monies. Here, the terms of the contract state 1. Parties - Steve (seller), Belle (buyer) which establishes the parties, 2. the item to be sold - a property description: Parcel 1 which borders the lake and 3.

conveyances with the propoerty states that an easement will be conveyed across Steve's adjoining parcel 2, because no access to the road is accessible from Parcel 1. The contract states the name of the road (incorrectly - mistake to be discussed below), 4. an additional conveyance for vegitation: five 100 year old oak trees on Parcel 1 will become Belle's property and 5. closing date is set to convey the land to Belle on April 1 for the purchase price of 400,000. In conlusion, the terms are definite and certain and the parties mutual assent shows an intention to be bound to these terms.

Consideration - is met by buyer and seller giving away something (detriment) in exchange for something (benefit), this is the exchange of the property for cash. Therefore consideration is met.

In conclusion we have a contract and breach will occur if either party does not perform to the duties of each party under the contract.

Breach by Steve. Sometime in late Feb. Steve is approached by Tim who wants to buy the Parcel 1 for 550,000. Steve agrees with Tim to convey the parcel to Tim and to breach his contract with Belle.

Anticipatory repudiation

When a party to the contract states unequivicably to the other party of the contract that they are not going to perform under the terms of contract the party is to be said to repudiate the contract. Here, Steve has a conversation with Belle and tells her the contract between Belle and him is "no-good" because the wrong road is named. Belle has received verbal communication that Steve is no longer going to perform and sell the property to her. Steve has repudiated the contract. The question of the reason will be addressed under mistake below.

When a party repudiates a contract, the party is said to be the breachor. The party that did not breach has options, sue at the time of repudiation or what until

the performance by the breachor is not performed under the terms of the contract and then sue. Here, Belle has reason to want to sue immediately. Steve is considering signing another contract with Tim for the same parcel that Belle wishes to purchase. In order to stop the sale to another purchaser, Belle may sue immediately to stop the sale and to try and force the original contract between her and Steve to be performed.

Damages - When a breach occurs in a land sale contract, the standard measure of damages for the buyer is Market Price minus Contract price. But Belle doesn't want money damages, she wants the land. Belle wants equitable relief of specific performance under the contract. In order to meet the equitable relief she will have to establish that damages are inadequate, there is a property right, the court will have to have feasibility to issue specific performance, balance/mutuality of the parties and beat any defenses that Steve could offer (mistake in the contract).

Damages are inadequate

To prove damages are inadequate a party breached must uniqueness, with services it is pretty easy, a famous painter, with land sale it is also one that is considered unique - each parcel is unique. Here, Parcel 1 borders a lake, has beautiful oak trees 100 year old trees so the question of damages are unique by Parcel 1's description will show that this is unique parcel of land and therefore damages in funds would be inadequate since Belle wants the land.

Property right is established if a property is involved. This is a traditional rule and although it can be met because the Parcel 1 is property in question, modernly the courts no longer require this rule.

Feasibility

The court will need to establish that they have jurisdiction both subject matter

and personal over the defendant to award the plaintiff in a case. A court in the jurisdiction where the property is located or where the defendant is domiciled will meet the personal jurisdiction and the subject matter can be established if case or controversy exists between the parties. Here, domicile and property can establish that a court has personal jurisdiciton over Steve if the court is in the same jurisdiction as the property or where Steve is domiciled. The PMJ is met because the parties are in dispute over the existence of a valid contract which the breachor intends to violate so remedies can be said to exist. Feasibility of the court to hear this case is established.

Balance/mutuality of the parties. If either party can sue for relief this mutuality is met, the court may also look at balancing the hardships placed on the parties when injunctive relief is sought (which will be discussed with the trees below). Belle is suing for the land and Steve could also sue if Belle would not have performed under the contract so mutuality exists in this dispute.

Bond notice

Perm Rest order to stop sale to T, M

— Injunctive Relief if proven? here - on next page

Defenses -

If it can be proved that the contract was void, voidable, impossible, frustrated, illegal or that the party suing has unclean hands, specific performance will not be awarded. Here, Belle must beat any defenses that Steve could offer. Steve will state the contract is void because the description of the road regarding the easement to that road from Parcel one across Parcel two was incorrectly stated and invalidates the contract between the parties.

Mutual/unilateral mistake in the contract.

A mutual mistake in a contract can be corrected by the courts to look at any extrinsic evidence to correct the mistake as to the meaning of the intent of the parties. A unilateral mistake by one party will not be corrected unless the other party to the contract knew or should have known about the mistake. Here, the road "Top Road" was the wrong name of the road that the easment across Parcel 2 was conveyed to the Parcel 1. The covenant of easement does not fail

because the road name was a mistake invalidating the contract because the name can easily be corrected. The defense that the contract is void will fail since the court can plug in the true name of the road.

No other defenses are avaiable to Steve. Therefore, since all elements are met to establish that specific performance on the contract can be awarded to Belle and stop the proposed sale of Parcel 1 by Steve to Tim, Belle will succeed in forcing the sale of the land under the contract.

Injunctive relief to stop the removal of the Oak Trees in March.

Belle will need to file with the courts for a Preliminary Restraining Order in order to stop Steve from removing the trees from Parcel 1.

PRO

To establish a PRO a party must establish similar to what was required above under specific performance. Inadequate damages, property right, feasibility, balancing and beat defenses. The party must also give notice and issue a bond with the courts.

Inadequate damages (defined supra). The oak trees are 100 years old, they are unique so inadequate damages are proven. Property, feasibility and defenses are all the same as above. The Balancing - is would there be an undue hardship on Steve that would outweigh Belle's claim to the oak trees and the answer is no!

The court should issue a temporary restraining order to resolve the matter so the oak trees are not removed.

2. Damages - as mentioned above under standard measure of damages. Buyer proves breach and will receive the market price minus the contract price. If the true value of the land is 550,000, Belle can receive 150,000 in damages.

Question #1 Word Count = 1573

5)

Sam v. Andy, Ruth and Molly (referred to as the THREE)

A partnership - formation can be express and does not require a writing to agree to go into a business together for profit. Here, the THREE, verbally agreed to launch a business together and to call it TBA, each have tasks and each will receive net profits equally, a partnership has been formed.

Liability of partners

All parties that form a partnership will be jointly and serverally liable for all liabilities of the partnership activities. Joint and serveral liability for Tort actions under the scope of partnership duties will also be assessed to each partner in a partnership. However, personal tort claims that are not within the scope of the partnership will not be assessed to each partner but only to the party that committed the tort. Sam is suing the THREE for libel because Andy published a false story about him taking illegal drugs. Libel is a tort in which a the defendant makes a false statement about plaintiff to a third person and the plaintiff suffers damages as a result of the story. Here, Andy published a false story in the TBA newsletter about Sam. The actual story about Sam using illegal drugs published meets the false statement definition because people will read the newsletter.

Public person/famous person - NYT Malice

When a story is published about a person who is considered a public figure than the plaintiff must establish that the publication was made with so-called malice, a wilful and wanton disregard for the truth and also the person must establish damages, economic and damage to reputation. Here, Andy KNEW what he published was false so Sam can establish that malice is met. It may also be proven that Sam will be sanctioned by the Major Baseball Association and fans may be angered over the publication as well. Sam may lose his job as a result since the MBA has rules that illegal drug use is in violation of the policies of the players, therefore could fine him or suspend him from playing.

harm to reputation

Gertz - Private individuals who are defamed in catagories such as drunkeness, women accused of immoral chastising, theft or branded as a criminal do not have to prove damages, they are presumed and this is a strict liability tort claim. Here, if Sam is not a well known player he still could have a valid suit against the THREE as a private individual too because the publication speaks to drug usage and would fall under the drunkeness or the criminal activity.

With Libel proven Andy will be liable for writing and publishing the story, the THREE may be liable for Andy's action under joint and serveral liability.

Ruth and Molly - deny liability. Partners can deny liability if the actions of the defendant (Andy) are not within the scope of the partnership duties. Andy is a journalist, but here, the question will be raised by Ruth and Molly that Andy conducts all his business activities through his close corporation "Baseball Stories". With the fact that the journalist writed under his close corporation, the two gals will state that Andy was not writing for the partnership but for Baseball Stories. However the newsletter was published for TBA and this argument will fail.

Andy may wish to assume the same argument because under the close corporation a party is not liable the corporation is liable for activities performed under the corporation. As stated above, denying liability will most likely fail because Andy was writing and article for TBA's newsletter which would make all the partnerships liable for the libel publication.

Ruth and Molly - may seek indemnity, since they did not write the story. Indemnity looks to the responsible party for payment of any damages suffered. Since the story was intentional and a lie, Ruth and Molly will most likely want to avoid any liability because Andy's actions were a violation of the duty to the partnership. Partners have a fiduciary duty to conduct all transactions in good

faith and not to harm the partnership. Here, Andy's action caused a libel suit and his intention was with Malice since he knowing published a false story. Ruth and Molly can seek indemnity to not be held responsible for Andy's actions.

The Computer Store v the THREE

Partnership (defined supra), a partnership is responsible for all debts of the partnership. Any equipment, leases, wages, etc. will be part of the partnership. Third parties who rely to their detriment on a purchase by a partner can look to the partnership for payment. Here, Puchase of all equipment by any partner would be a debt to the partnership. Andy was not authorized to purchase equipment for the partnership but the bill was sent to TBA. TBA will have to prove that TBA is not responsible. If the Store knew that TBA was in business and the Andy was a partner who purchased on behalf of the partnership, TBA would be able to make the partnership liable for the compute purchase. Here, the THREE agreed that Molly was responsible for purchases and again Andy is in breach by not abiding by the agreement between the partners but a third party creditor who relies to their detriment on a partner being authorized will be able to look to the partnership for payment. Since Andy told the Store to send the bill to TBA, he was portraying to acting under his partnership duties. Therefore, the Partnership will be liable for the debt of the computer purchase from the Computer Store.

Ruth and Molly - may seek indemnity, since they did not give Andy the duty of purchasing equipment, Andy was not authorized to do so. Indemnity as stated above looks to the responsible party for payment of any damages suffered. Since, Andy purchase an item he was not authorized to, Ruth and Molly will most likely want to make Andy solely responsible by indemnifying their obligation to pay out of the profits of the Partnership.

Partners have a fiduciary duty to conduct all transactions in good faith and not to

harm the partnership. Here, Andy's action caused the partnership to incur a debt for which he was not authorized to do so. Ruth and Molly can seek indemnity to recover any loss to partnership profits due to his unauthorized purchase.

The partnership will be ultimately liable for both any damages awarded to both Sam and the Computer store as a result of Andy's actions on behalf of the partnership.

Question #2 Word Count = 1087

6)

1 Zoo - charitable trust

A charitable trust is for set up when property is to be given to a organization for a charitable purpose. The purpose must not be for profit but for the benefit of education, science, arts or the community. Here, Tess wanted the remainder after her grandchildren died to go to the Zoo for care of the elephants and at the time of establishing this trust the Zoo had elephants. Formation of a trust for a charitable purpose at the time of formation is established.

Cy Pres

If the valid will establishes that the Zoo has a remainderman to the property in Tess's Trust, under Cy Pres the court may find that since the charitable activity is no longer in existence the court can determine another charitable of like activity. Since the last elephant died, the court can establisht that the charity can potentiall go to the care of another animal so that Tess's purpose for the funds can still be accomplished. If the court and the Zoo come to some agreement for another animal to be cared for than Tess' trust to the Zoo will continue. However, if the care can not be established the property intended for a charitable activity will revert back to the estate. Therefore if the Zoo fails to have the court agree to another animal to substitute for the elephants, the property after the grand children die will revert back to the estate and be given to the heirs to Tess.

2. Which WILL is the REAL WILL

In order to establish who will take under the Will, when there are multiple will's which have been revoked, it will be up to the courts to establish which will is valid. Usually the last will written and validly executed will be the one that the courts will honor. Below we will start with the first Will written to determine validity of each and in successor will's that may revoke the prior will. If a successor will is found invalid, a prior will may be revived.

A valid will is established if the party has capacity (Capable means sound mind, over 18, with a knowing element of giving away property and a knowing the property to be given) and executes (signs) a will that is witnessed under the statutory provision in which the person resides. The will must have stated the property that the party intends to give and name beneficiaries to recieve.
Tess' first will- in 2011 - Tess executes a valid will INTENDS on leaving in trust for her grandchildren, Greg and Susie (bene's 1), ALL her PROPERTY of which the income will be given to them each year from that property. Upon the death of the last living granchild the remainder of the property is to go into a charitable trust for the benefit of the elephants at the zoo (Bene's 2). Tess has a valid will

A will can be revoked by execution of a new will or by personal act. Here, in 2013, the court authorized Greg to make a new will for Tess. Tess was determined to be of failing mental capabilities the year prior. If Tess is incapable, she will not meet the capacity requirement. Here, however Greg makes a new will as he was appointed conservator over Tess by the courts. Greg does not consult Tess and signes the will and has it witnessed. The new will purports to give Greg and Susie all property.

If Valid

Interested beneficiary - under the terms of a will, if a party is a witness to the will while the party is also a beneficiary, the party's gift will fail and revert back to the estate. Here, Greg signed the will on behalf of Tess, he did not witness is so he does not meet the witness / beneficiary definition. But Greg is an interested beneficiary and therefore this will is void, since this deviation from the prior will is not the original intent of Tess.

New Will - is it valid?

Tess executes a new will in 2014 leaving out Greg. Following the formalities of capacity, intent, beneficiaries, execution and witnesses. The same problem

exists as mentioned above regarding capacity. It seems though that finding the new will by Greg, Tess exhibits, knowing and because she becomes furious, she calls a lawyer. These are actions of a competent person who feels they've been cheated in some way. The lawyer will have stated if Tess executed in front of the Lawyer that she be of sound mind. The lawyer and the witnesses can also testify to whether Tess was of capacity. If the court finds that Tess is competent then this new will can revoke all previous wills.

If this new will for any reason is found invalid due to Tess' capacity issue at the time executed in 2014. The most recent prior VALID will can be revived. The will excuted by Greg, can be established by extrinsic evidence not to be the intent of Tess. That would mean that the court would look to a prior will to revive. Here, however, the issue of the court authorizing Greg to make a will means that either the first will is invalid or that another issue exists. If this is the case, than Tess may die intestate! This is unlikely though, since the facts do not state why Greg was authorized.

Distribution

Therefore, it is determined the court will find that the 2014 will is VALID. Greg will receive nothing upon Tess's death. Susie will inherit the trust income from the property for her life and upon her death if the courts determine that the Zoo can take the remainder, the Zoo will receive the property in trust to care for some newly named animal. If the court determines that the Zoo can't receive, then at the death of Susie, the property will go to remaining heirs, which may include Greg, if living.

Question #3 Word Count = 995

END OF EXAM

1)

Memoruandum

To: Dario Machado, Managing Partner
From: Applicant
Subject: R. Burnsen & B-G Investors dispute (referred to as the B-G/Virta Sale)
Date: February 24, 2015

With regards to your request to establish the best solution to the B-G/Virta Sale of the pending stock transaction, Conner should not release the stock to anyone at this point. In doing so, the firm will be open to a tort liability of conversion and punitive damages unless we can get the two parties to the transaction to agree otherwise. Below, are the answers to your questions and a discussion as to the best possible solution to this problem.

Part I Ethical / Fiduciary duties

Did Conner become an escrow holder for all the parties upon taking and holding the signed documents and the signed stock certificates?

Yes, under the State of Columbia laws, Conner became an escrow holder according to Section 17003 an escrow is any transaction in which one person is a middleman, the middleman takes possection of property of another and holds it to be delivered to another. According to the definition summarized here, Conner is an escrow holder when he obtained the stock certificates and put them in the file. The possession of the stock will be deemed to be an escrow because Conner is to hold for the transaction to be completed, the transfer of monies for the contracts to be given to the buyer and the certificates to his client B-G at closing. In Wasman v. Seiden the Appellate Court of State of Columbia found the attorney Sieden received a grant deed from the adverse party. Seiden was to hold it until his client, Barbara signed a promissory note for 70,000. However,

Sieden recorded the deed and upon failure to safeguard the property entrusted to him during settlement, he was acting in the same capacity as an escrow agent and owed a duty of care to not transfer the property until the proper documents were signed and in possession of the adverse party. Here, Conner would be doing practically the same thing. He owes not only his client a duty but he also owes a duty of care to Dr. Virta, the adverse party must be satisfied before the release of his stock certificates. Since B-G held off in closing the deal because of lack of fund and depositing and signing the agreements, Dr. Virta has revoked the deal, although there was not a closing date stating time is of the essence, the deal was to close on February 18th. Dr. Virta still does not have the signed agreements and his tax liability has increased due to the fact that 4 payments will be made if the deal goes thru as it is stated.

Releasing the certificates to Conner's clients would be a breach of his duty to Dr. Virta since he has received a letter not do to so, it would be proper to hold off delivery of the certificates to B-G. In Diaz, the bank closed escrow after being informed that the deal was not for the right amount of money. The incorrect amount was 7,000 but the promisorry note which was provided to the bank had the correct amount of 19,000. The bank ignored the letter from Diaz's attorney and the agreement showing the 19,000 was the correct amount and closed the escrow. Diaz was damaged as a result. If we want to keep B-G as a client, we should tell them, point blank, the certificates are in dispute and as escrow agent Conner cannot release them until the dispute is resolved. Plus, they will be held liable because even though the funds are now with Dr. Virta, the partial funds do not pay for the 2 million stock but only approximately a quarter of the funds for the total stock certificates. In addition, the Dr.'s attorney said the funds will be returned. Since Conner owes a duty to both our client and Dr. Virta certificates being sent to either parties at this juncture will result in litigation (interpleader, discussed below will address this in further detail). Conner is an escrow holder and therefore has a duty to both his client and the opposing party to resolve the issues prior to release the certificates.

Conner is an escrow holder for the deal, was it proper for him to be an attorney for one party while being the escrow holder for all the parties?

An escrow agent may be an attorney who has a bonafide client relationship with a prindipal in a real estate or personal property transaction who is not actively engaged in the business of an escrow agent. Conner is an attorney, Conner is representing the client with a bonafide relationship with the client. Conner is not actively engaged in the business of an escrow agent and therefore he does meet the Columbia Professional Code to be an escrow agent in this transaction without holding a license as required by Section 17002. Furthermore, in Sieden the court stated they by no means want to discourage attorneys from facilitating transactions, although the warning is there too - the court cautions attorney NOT to convert escrow property.

Even though you asked me only is it proper and I do believe this transaction was proper. In the future we should consider signed waivers if we are going to hold property in a transaction such as this one. Under the ABA code and rules on professional responsibility if their is a potential we may be representing multiple parties in a transaction their may be a requirment that an attorney not have a conflict of interest. In order to provide competent and diligent representation to his client, it would have been cost effective to employ an escrow agent in transactions such as the one in dispute. It may be that we should rethink holding stock certificates in a large transaction so we will not have liability, the help of a title company or bank in the future. Plus, then the monies would never have been released to one party unless the other party had all documents. If we do decide to keep with the practice of being an escrow agent, a waiver of conflicts should be signed by both parties request they seek counsel with signing the waiver so that they know when a dispute arises with regards to disputes such as this one what the outcome can be. Arbitration could have been set and therefore the two sides could have mediated rather than addressing this with the courts

which today is very costly. It is common for deals to go longer in length than anticipated, frustrations arise and I do not see that this deal has completely gone south, but we must not only address the cost now to our client but also to our firm if we do not avoid any further liability, we could end up paying not only to litigate our mal practice but breach of fiduciary duties could make the press. As stated in Seiden, delivery of property of another constitutes a conversion even if he acted innocently and by mistake. We cannot deliver the certifcates to B-G, the property belongs to Dr. Virta. The fact that Dr. Virta has the 500,000 is another issue. The contract is for 2 million shares, the argument that B-G has at least 500,000 dollars worth of the 2 million shares will not stand up in court if the court considers that we gave Dr. Virta's property to our client B-G and will open the door to a tort liability. This will also be addressed further under the interpleader discussion below.

If acting in a dual capacity such as this, did it restrict his ability to both advise the clients and follow their instructions?

Advise to both clients, Under Wasman v. Sieden, the law of professional negligence does not supply a legal duty to safeguard the a deed until a stated condition for recordation was met, and constituted a breach of duty that was malpractice. However, even thought this duty of care to adverse parties does not exist, Sieden did retain the deed and upon acceptance of it a duty of care of an escrow holder as established by being that middleman should make sure all conditions are met before releasing property in escrow upon satisfaction all duties are met. Any violation of escrow instructions can give rise to an action for brach of contract and this will create a liability in tort for breach of duty. In Siedman, taking possession of the deed constituted a duty as a bailee to keep property and not release until conditions satisfied are met. The court concluded Sieden committed a conversion of property when recording the deed even if the attorney acted by mistake. Sieden 1998

As an escrow officer, what is Conner's duties to the opposing party?

In Diaz v. United Columbia Bank, the bank became an escrow holder who received the wrong amount on the original escrow agreement that the note for a sale of a restaraunt business was to be 7,000. When notified of the mistake by an the attorney for Diaz that the amount should be 19,000 and providing the written contract, the bank ignored it and closed the escrow. The court concluded that the bank failed to exercise reasonable skill and ordinary diligence in conducting the escrow process. Conner's duties are the same, he must be diligent and not return the property to the opposing party, but to inform them that holding the property and let the court decided by filing an interpleader to resolve any dispute herein.

Part II - Options

1. Completion of the purchase and forward of the stock certificates for transfer.

We have a dispute so completion of the purchase and forwarding the stock certificates for transfer may result in litigation by the opposing party for violation of conversion. In Seiden, the court stated that Seiden who recorded the deed in his possession on behalf of his client committed conversion. Conversion here is when someone receives property and wrongfully transfers to another the original holder of the property is violated because the owner can no longer retrieve that property back, therefore the converter will be liable for damages. The appellate court concluded conversion of property for the attorney's client use must use caution. We have received Dr. Virta's stock certificates, they are physically in our possession in a file, which could be said to be the same as holding in escrow as in Seiden. If the courts find that we deliver these certificates to B-G by a wrongful act, we may be considered to have damaged Dr. Virta and therefore could face liability in tort for the conversion of the certificates.

If the firm releases the certificates to Conner's client and the sellers sue for breach we could face punitive damages as well. Section 8403(a) - Liability - if interpleader action filed - the seller is compelled to make a demand in writing to not register or transfer shares if it is improper or an unauthorized transfer. In Diaz, the Bank transfer was wilful and of wanton disregard and punitive damages were awarded. This also speaks to not releasing the certificates because our liability for punitive damages could result in the same outcome.

Although, the transaction went sour since it was not completed on time, I still believe this is a salvagable transaction, it might be to our best interest, to call up Dr. Virta's attorney and have him come in to see if we can resolve with further negotiations.

2. File an interpleader action against our clients and the seller.

This option is not only sound but if negotiations do not go anywhere within the next few days, we should contact litigation and have them prepare interpleader documents to present to the court. In Diaz, an escrow holder who fails to implead acts at his or her own peril. Not that Conner was acting out of his duty to give his client the best transaction, but since the deal seems to be leading toward litigation, the firm should protect the interests of both parties to the escrow as well. Diaz is sound law and interpleading as stated in Section 386 permits a firm whom double or multiple claims are made by two or more parties giving rise to multiple liability filing, an action of interpleader in the state of Columbia compels claimants to interplead and litigate and we as the defendant can file a cross-complaint in interpleader. In the Diaz case, the appellate court permits a plaintiff to interplead the funds in escrow, it preserves the certificates and will assist the firm in avoiding further liability.

8403(b) as issuer - registration may be withheld for 30 days - which provides

opportunity of legal process for the person who initiated demand. If we cannot contact and settle this matter with Dr. Virta's attorney, we file the interpleader and the courts can decide. Therefore, Dr. Virta as a seller under 8403(c), who is the registered owner can seek injunction, order or any process the court enjoining against improper issuance or unauthorized transfer of shares. I do believe this will be the outcome but we can bring this up with his attorney and let him know that Dr. Virta will have no deal and will have to return the funds he has received.

3 Retaining the stock certificates, until seller sues or parties work out a settlement.

Personally this method would be the least costly, however after reading the last letter from Taylor, Dr. Virta's attorney, it is a slim chance that the outcome will be one we can negotiate. I think it might be in our interest to call Taylor as soon as possible and see if he wouldn't mind setting up a meeting to see if we can salvage this before filing the interpleader. If no deal, then the interpleader is the best solution for us to not be in a position of breach of a duty as an escrow agent, and we will also escape liability of conversion as well as punitive damages by this route.

If you would like to discuss further, please do not hesitate to contact me, I hope this memo has answered your questions as stated.

Sincerely,
Applicant

Question #1 Word Count = 2380

END OF EXAM

1)

State of Columbia

Warren County Superior Court

State of Columbia

Criminal Division

v.

Case No. 2014-2341

Christopher Daniel

Memorandum of Points and Authorities

This memorandum is submitted in support of granting the motion seeking to suppress evidence because the Defendant has a guaranteed right to confront all witness at trial by cross-examination. As the prosecution plans to admit inadmissible evidence that is considered hearsay under NO exceptions or any nonhearsay definitions under the codes of Columbia Rules of Evidence there court should deny admission of all hearsay evidence that would be in violation of the confrontation clause Sixth Amendment of the U.S. Constitution of the Defendant's rights.

This Memorandum refers to the case against Christopher Daniel (Daniel). Daniel is charged with the murder of Gloria Daniel and Peter Daniel *(note: per your memo outlining this task, I am addressing this memo as if the attempted murder of Gloria is now amended. If not, I can quickly change the document to attempted murder of Gloria and murder of Peter universally as needed).*

Statement of Facts

(as you stated in the task memo, you will complete the statement of facts).

Analysis

Relevant evidence may be submitted to prove or disprove a fact of consequence during a trial in order for the plaintiff to establish the elements necessary to prove a statutory violation in a case.

Relevant evidence includes testimonial, documents, recordings and other various items, such as items used to commit and act to be offered into evidence necessary to prove a fact. Circumstancial evidence may also come in to make inference to prove a fact. However, with testimonial evidence and documents, or for example 911 recordings, the Constitution demands a criminal defendant an absolute right to confront those witnesses on cross-examination at trial or formal proceeding. Bringing evidence in that is not subject to this procedure not only will violate their rights but is akin to producing a statement from a witness stating I saw the suspect wearing a blue coat and the person who committed the robbery yesterday was wearing a blue coat. No accurracy can be acheived from such an inference. As here in this case, allowing the nonverbal statements from Gloria, the 911 recording of Peter without Daniel being able to cross-examine would be a grave injustice and the Framers were adamant about protecting people from statements without confrontation at trial.

Imagine if relevant evidence were allowed but no testimony at court would be needed. How would a jury be able to perceive if the person who made the statement was truthful? How would a jury be able to determine whether that person could have been mistaken? Relevant evidence can come in only if it meets strict guidelines after determining if it is relevant, it is subject to rules on

hearsay, formational requirements and be almost impossible to prove that what is being asserted really proves a fact.

Hearsay

Under Rule 801 - out-of-court statements offered at trial for the truth of the matter asserted is hearsay and will be not allowed to be entered as evidence unless the statement is nonhearsay or falls under one of the exceptions. Exceptions that maybe would apply in this instance to allow evidence to come in include: excited utterance and public records. In civil trials, when a person is unavailable to testify, these exclusions apply. The definition for the excited utterance - that a person makes a statement while under the stress of the event could be said to apply when one sees an accident and states: "Did you see how fast the crazy guy was going?" and if this comment was made immediately after the event to someone who was in the accident, it may be brought in as hearsay with an excited utterance exception. In People v. Jackson, the Supreme Court held that even when a witness loses consciousness and regaining consciousness at a later time will still demonstrate the utterance under the stress of the event. (Jackson, 2009). But this case differs from the case at hand because the witness in this case is available to testify even though the witness can't remember the event.

Daniel's case differs, however, the 6th amendment of the constitution does not allow hearsay of this nature if the witness is unavailable and in Jackson the court admitted the excited utterance BECAUSE the defendant would have the opportunity to cross-examine the declarant to test the reliability of the officers recordation of the witnesses testimony at the time it was uttered. So Peter's statement, "he killed his mother." may not come in because the confrontation clause requires that a criminal defendant be afforded the right to cross-examine Peter, the person making the excited utterance statement. Therefore, no hearsay will be allowed to be brought in under an excited utterance exception in a

criminal trial in this state.

Confrontational Clause of the Sixth Amendment

Daniel is entited to a fair trial, one that does not violate his rights. He has constitutional rights one being the Sixth Amendment right to confront his accusers. Testimony that is admitted must afford Daniel a right to cross examination. This right is fundamental and required in all criminal proceedings in all of the states. The Supreme Court has held testimonial statements are not allowed to be admitted from a witness that is unavailable. Daniel's rights would be violated if testimonial evidence is allowed to be presented when the witness are unavailable to testify.

In Crawford v. Washington the Supreme Court held that a 6th amendment violation occurs when a witness statement made out-of-court prior to the formal trial, if that statement is brought in as testimonial statement during the trial that statement shall be inadmissible when a witness is unavailable and the defendant did not have the opportunity to cross-examination of witness about the statement at a prior proceeding. (Crawford, 2004) The court held "making a statement reliable is akin to dispensing with jury trial because a defendant is obviously guilty." This dicta inference indicates that no hearsay statement in a criminal proceeding will be allowed if the defendant is NOT afforded a right to cross-examine the person who made the statement.

Testimonial statements

Peter's 911 recording by police

Peter called 911 after an attack on him and his wife Gloria. In the call recorded by the police, Peter states he has been beaten, his wife has been killed and indicates that his son did it. Then Peter states both sons names: Jonathan and

Christopher. The 911 operator asked who did this - and the response is unintelligible.

The statements made by Peter were testimonial in nature and occurrance in 911 call on August 13, 2014 at 12:43 a.m. shortly before Peter died. Statements held to be testimonial in nature fall into a category that if used in court against a defendant to require the witness to testify about those statements. The 6th amendment violation will occur if a testimonial statement is admitted unless the defendant has had a chance to cross-examnine the witness at a prior formal proceeding. Here, Peter is unavaliable and no prior formal proceeding where Daniel's attorney could cross-edxamine Peter has occurred.

In Davis v. Washington, the Supreme Court stated a statement that causes a person to become a "witness" has made a testimonial statement and the testimonial statement is subject to the confrontation clause. (Davis, 2006). A testimonial statement is made to the police during an investigation but are after-the-fact during an on-going investigation, where nontestimonial statements usually assist the police while ongoing emergency is occuring. The Davis court distinguishes the difference between the beginning of the 911 conversation here which was currently an emergency occuring at the time that the responses MCcottry was making were nontestimonial, she was not acting as a witness nor was she testifying. The 911 statements after Davis drove away were testimonial and would like the Crawford interrogation as describing an event in the past.

911 recording and the observations made by Officer James should not be admitted into evidence. Under 803(8)(B) hearsay exceptions regarding public records exclude: in criminal cases the observations by police officers and other law enforcement personnel. The 911recording and the observations made by Officer James are hearsay and the exception regarding criminal cases should excluded. In the Crawford case the supreme court barred admission of testimonial statements of witnesses that are unavailable. (Crawford, 2004). In

addition, in Davis, the supreme court held that 911 operators are agents interrogating 911 callers, the callers that are calling and relaying information after the events occurred is testimonial in nature and subject to cross examination at trial in any criminal proceeding.

The statement's made by Peter should not be admitted. In criminal cases and the findings of the Supreme Court, a defendant's right under the constitution are violated if witnesses are not available to testify at trail and be cross-examnined. In this instance if the court were to allow the testimonial statements to be admitted, the Daniel's 6th Amendment right under the confrontational clause will be violated because Daniel's will not be able to cross-examine Peter about the events on the night of August 13. This evidence should be excluded from the trial.

Gloria's non verbal responses to Officer James

The non verbal nods to the police officer James of Gloria would also be testimonial. Officer James questioning of Gloria prior to being taken to the hospital produced no conclusive findings that the defendant committed this crime. After Gloria was questioned by her doctor regarding the attack on February 11, 2015, Gloria stated that she was aware she was attacked, she was aware she couldn't speak when Officer James questioned her due to pain and suffering that night and doesn't recall the questioning by Officer James. Gloria also stated she at no time identified who the attacker was because she didn't know who attacked her and her husband.

Since statements held to be testimonial in nature fall into a category that if used in court against a defendant to require the witness to testify about those statements. The 6th amendment violation will occur if a testimonial statement is admitted unless the defendant has had a chance to cross-examnine the witness at a prior formal proceeding. Therefore, the court should not admit Gloria's non-

verbal noddings as an admission identifying Daniel as the assailant because the testimonial statement from August 13 to Officer James is subject to the confrontational clause of the sixth amendment. In admitting Gloria's non-verbal responses as to identify the defendant the defendant is not afforded his right to cross-examine at trial therefore the this tesimony should be excluded from the trial.

Conclusion

Motion to suppress the evidence of the testimonial statements of both Peter on the 911 recording and of Gloria's nonverbal statements to Officer James should be granted because the Sixth Amendment confrontation clause guarantees Mr. Daniel the right to confront all witnesses at his criminal proceedings by cross-examination. These two unavailable witnesses cannot be cross-examined at these proceedings and the Supreme Court has held that statements held by witnesses who are not available at trial will not be admitted. The court should grant the motion to suppress the evidence on the testimonial statements made by Peter and Gloria Daniel.

Question #1 Word Count = 1864

END OF EXAM