## ANSWER TO QUESTION NO. 5

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

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

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

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

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

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

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

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

**II. Dan's Conduct at The Bar.**

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

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

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

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

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

First, that the defendant knowingly possessed a controlled substance.

Second, that the defendant intended to deliver this substance to someone else.

Third, that the substance possessed was a controlled substance and defendant knew it.

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

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

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

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