

**PENNSYLVANIA BAR EXAMINATION
ESSAY QUESTIONS AND ANALYSES**

FEBRUARY 1995

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QUESTION NO. 1

Rules of Professional Conduct:	Advertising a specialty and guaranteeing a result.
Federal Income Tax:	Deductibility of personal interest, home equity loan interest and mortgage interest on personal residence.
Wills:	Partial Revocation, unexecuted interlineation and dependent relative revocation.

FACTS AND INTERROGATORIES

Frank, while preparing his federal income tax return, was overwhelmed with the complexity of the interest deductibility rules. He decided to check the Yellow Pages for an attorney specializing in federal income tax. He found Attorney Able's advertisement which included the following:

Income Tax Specialist.
I guarantee you a refund.

Frank went to Able and retained him to prepare his return. Frank had "credit card" interest expense paid on his personal credit cards, "home equity" interest expense paid on a second mortgage loan to purchase a boat and "mortgage" interest on the original purchase money mortgage on his home. Frank's home was worth its recent \$130,000 purchase price, his original mortgage balance was \$50,000 and his home equity loan balance was \$90,000.

Able prepared Frank's return, and Frank did qualify for a lawful refund. Frank was very pleased, because his personal calculations of his taxes did not result in a refund.

Frank then asked Able if he also handled estate matters. Able indicated he did. Soon thereafter, Frank, without telling Able, took his will (which was properly prepared by another attorney Art) crossed out the clause therein which named Art executor and wrote in the margin next to it, "I appoint Able as my executor".

Frank later died survived by his wife, Mary, who is the sole beneficiary under his will. Able, Art and Mary each seek to serve as the personal representative of Frank's estate.

1. Does Able's Yellow Page advertisement violate the Rules of Professional Conduct?
2. Assuming that Frank itemizes deductions on his federal income tax return,

what interest expenses, if any, of those set forth in the above facts, are deductible for federal income tax purposes?

3. Who is entitled to serve as executor or administrator of Frank's estate?

EXAMINER'S ANALYSIS - QUESTION NO. 1

1. **Able's Yellow Page advertisement violates the Rules of Professional Conduct in two respects.**

The first is that he claims to be a "tax specialist" which, under Model Rules of Professional Conduct (MRPC) 7.4(c) and Pennsylvania Rules of Professional Conduct (Pa.R.P.C.) 7.4(a) is proscribed unless there is a certifying agency set up in Able's jurisdiction under which Able, in fact, qualifies. The facts do not indicate whether or not Able's jurisdiction has such a certifying agency and, if so, whether Able is properly enrolled in it. If not, Able is in violation of the rule.

The second is that Able's statement where he guarantees a refund also violates MRPC and Pa.R.P.C. 7.1(b) which disallows any statement in advertising which "...is likely to create an unjustified expectation about results the lawyer can achieve...". It is obvious that Able cannot guarantee everyone a refund since not everyone is entitled to a refund. Guaranteeing refunds creates an unjustified expectation to lay persons.

Otherwise, the fact that Able is advertising is specifically allowed in MRPC 7.2 and Pa.R.P.C. 7.2. In fact, advertising in the telephone directory (Yellow Pages) is specifically allowed so long as the contents of the advertisement are otherwise within the limitations of the advertising rules.

2. **All of Frank's original purchase money mortgage interest is deductible, a portion of his home equity interest (second mortgage) is deductible and none of his credit card interest is deductible.**

Internal Revenue Code (IRC) Section 163 provides for the deductibility (subject to limitations and exclusions) of interest. For those who itemize on their personal federal income tax returns, home mortgage interest is deductible (IRC §163 (h)(3)(B)) provided the mortgage does not exceed \$1,000,000 nor the acquisition or fair market value of the home (IRC §163 (h)(3)(B) and IRC Regs. §1.163-10T(c)). Accordingly, Frank's mortgage interest should qualify for deductibility assuming the mortgage is on his personal residence which the facts substantiate and because the mortgage exceeds neither the \$130,000 purchase price, the value of the home nor the \$1,000,000 limitations.

However, the Internal Revenue Code more severely limits the deductibility of

other types of interest. Personal credit card interest is not deductible (IRC §163 (h)(1)). Unless Frank was using his personal credit card for a business purpose whereupon the interest on the credit card might be deductible as a business expense (which facts are not suggested in the question), Frank will have no deduction for his personal credit card interest on his federal income tax return (IRC §163 (h)(1) & (2)).

Interest on home equity loans can be deductible (IRC §163 (h)(3)(B)). Interest on such loans, even if the proceeds of the loans are not used on a personal residence, are deductible if the loans are secured by a mortgage on the borrower's equity in his personal residence (IRC §163 (h)(3)(C)). Thus, interest on Frank's home equity loan can be deductible even though Frank used the home equity loan proceeds to buy a boat.

There are, however, further limitations on the amount of a home equity loan which will qualify for interest deductions. The home equity loan cannot exceed 1) the value of the home less the primary mortgage (IRC §163 (h)(3)(C)(i)) or 2) \$100,000 (IRC §163 (h)(3)(C)(ii)). In Frank's case, although there is no problem with the second \$100,000 limitation, the primary mortgage and equity loan do exceed in total the value of Frank's home by \$10,000 (the \$50,000 primary mortgage and the \$90,000 equity mortgage total \$140,000 which, in turn, exceeds the stated value of Frank's home of \$130,000 by \$10,000). Accordingly, the interest attributable to \$10,000 out of Frank's \$90,000 home equity loan would not be deductible on his individual income tax return.

3. Either Art will serve as executor or Mary as administrator of Frank's estate depending on whether Frank intended to delete Art as executor in all events. Able will not serve as executor in any event.

Although Frank's writing on the margin made it clear that he wanted Able to serve as his executor, such interlineations do not accomplish the intended change unless executed in the manner required for the execution of the will itself. Wright Estate, 380 Pa. 106, 110 A.2d 198 (1955); 20 Pa.C.S.A. §2502; Uniform Probate Code (UPC) §2-502. In Pennsylvania, the interlineation would at least have to be signed or the will reexecuted. Witnesses would not be necessary in Pennsylvania. 20 Pa.C.S.A. §2502 and §2504.1. However, the facts do not indicate that Frank even signed the notation or otherwise reexecuted his will. Therefore, the naming of Able as executor will fail unless such an execution of the modification or a republication of the will is assumed to exist.

Art possibly will not serve as executor either. Although he is named in the properly prepared and executed will as the executor, Frank has partially revoked the will by crossing out the executorship clause which named Art. Assuming Frank wanted to delete Art regardless of whether he properly appointed a substitute, the partial revocation would be effective without Frank's signature and attestation. Wright Estate, (Supra.); 20 Pa.C.S.A. §2505(3); UPC §2-507(2). Consequently, Frank may have

succeeded in deleting Art as executor but failed in naming Able as his replacement (again assuming that Frank did not sign the change or republish his will).

If Art is deleted as executor and with Frank's failure to properly name Able, Frank's will then would have no effective clause appointing an executor. For such event, both the Uniform Probate Code and the Pennsylvania Estates and Fiduciary Code address who should be designated administrator. UPC §3-203 and 20 Pa.C.S.A. §3155(b)(1)(2). Both provide that the residual beneficiary (Mary) be the administrator (if she is willing to serve) of an estate in which the will does not effectively name an executor. Thus, Mary would serve as administrator of Frank's estate.

However, if Frank only intended to delete Art under the condition that he was properly substituting Able then Frank would not necessarily have had the intent necessary to revoke Art. Specifically, the intent necessary to revoke is deemed not to exist where the circumstances are connected with the intended replacement of the revoked clause under the doctrine of dependent relative revocation. Braun Estate, 358 Pa. 271, 56 A.2d 201 (1948). Since both 20 Pa.C.S.A. 2505(3) and UPC 2-507(2) specifically require intent for partial revocation and since the facts in Frank's case imply that he really only meant to revoke Art because he was naming Able, Art should prevail under said doctrine and be named executor in Frank's estate. Additionally, Art can point out that it appears Frank wanted an attorney to serve as his executor and on at least two occasions did not name his spouse, Mary. On balance, Art will most likely serve under the facts of this case.

QUESTION NO. 2

Drawer of check bears loss and relieves depository bank of loss resulting from fraud perpetrated by drawer's employee in forging payee's indorsement - - Majority shareholders of closely held corporation cannot oppress minority shareholders in their capacity as employees - - A custodian may be appointed to remedy the situation - - A director owes his corporation a duty of loyalty which includes not appropriating for herself a business opportunity in which the corporation would have an interest - - Violations of this duty may be remedied by shareholder actions against the director - - An attorney must avoid conflicts of interest among clients whom he is representing - - When conflicts arise, an attorney must call them to the attention of both parties and discontinue representing both sides - - An attorney should not aid a client to violate her duty nor assist a client to commit fraud.

FACTS AND INTERROGATORIES

In late 1991 Fred, Lew and Nell formed FLN, Inc. as a Pennsylvania corporation, into which they merged their separately viable businesses, Fred's Flowers, Lew's Landscaping and Nell's Nursery. Pursuant to the merger agreement, FLN's stock was issued 25 shares to Fred, 40 shares to Lew and 35 shares to Nell, and these three became FLN's board of directors. The legal work was handled by Nell's attorney, Al, who was also made corporate legal counsel.

At FLN's first board meeting, Lew was elected President and assigned responsibility for contract sales and Nell was elected Vice President in charge of the nursery, inventory and supply. Fred was elected Treasurer in charge of accounting. To help Fred, the board hired Ed to keep track of FLN's accounts payable and to prepare checks for payment. Fred was the only authorized signatory on FLN's account which was at Bank.

In 1993, Al told Nell that as solicitor for the County Sewer Authority he was advertising for bids to haul away and dispose of sludge from the sewage treatment plant. Knowing from its public budget that the Authority currently paid \$35 per ton for sludge removal, Nell requested, and the Authority permitted, Al to assist her in submitting, for her own personal account, what became the winning bid of \$30 per ton to be paid to her for sludge removed. Out of this \$30, Nell's only expense was \$10 per ton which she paid to an independent trucker to haul the sludge the short distance to the nursery where FLN composted and used it. Nell made handsome profits and FLN saved substantial costs of fertilizer by using the composted sludge.

At its last meeting, FLN's board learned the following from its CPA audit:
(a) Ed, intending to embezzle, had prepared a check payable to a regular FLN supplier to whom currently nothing was owed, obtained Fred's signature, forged the payee's indorsement and deposited the check into Ed's own account at S&L, and then spent the money; and (b) FLN had composted 10,000 tons of sludge at the nursery at a net savings of \$25,000 in fertilizer costs.

Prior to that board meeting, Fred and Nell, who had become romantically involved and wanted to own all of FLN themselves, had approached Lew to purchase his interest. Lew had refused to sell, and to put pressure on him, at that same board meeting Fred and Nell voted to remove Lew as an officer and to terminate his employment with FLN.

In each of the following, how would you advise and why:

1. Assuming Ed has no assets, who among FLN, Bank or S&L must bear the loss on the check proceeds Ed spent?
2. Needing employment and no longer having a separate landscaping business, Lew inquires as to whether he can get back a job at FLN despite Fred's and Nell's opposition?
3. Lew gives you the facts concerning the Authority sludge removal contract. What action may he take against Nell?
4. Did Al violate any rules of professional conduct?

EXAMINER'S ANALYSIS - QUESTION NO. 2

1. Because Ed, who was entrusted with responsibility for preparing checks for FLN, made the fraudulent indorsement, the indorsement was effective as the indorsement of the payee, and FLN, must bear the loss.

Ed was responsible for providing the names and amounts for payees of FLN's checks. Ed fraudulently had a check prepared to a payee to whom nothing was owed, and once the check was signed, Ed forged the payee's indorsement and placed the check into Ed's own account at Bank. In this situation, the new UCC §3-405(b)[adopted in Pennsylvania as 13 Pa.C.S. §3405(b)] provides that when an employer has entrusted an employee with responsibility with respect to the instrument and the employee makes a fraudulent indorsement, the indorsement is effective as the indorsement of the person to whom the instrument is payable. Subsections (a)(3) & (4) make it clear that because Ed had

authority to prepare checks to be issued in FLN's name and/or to supply the names and addresses of payee's on the checks, Ed was an employee entrusted with responsibility with respect to the instrument and therefore his indorsement of the payee's name was effective as the indorsement of the payee. As a consequence, FLN must bear the loss.

The same result would have been obtained under Article 3 prior to the recent amendments. UCC §3-405(1)(c)[13 P.S. §3405(a)(3)] states that the indorsement by any person in the name of the payee is effective if the employee of the drawer of the check supplied the drawer with the name of the payee intending the payee to have no interest in the check. Therefore, the revisions to Article 3 of the Uniform Commercial Code did not change the result and FLN bears the responsibility and cannot recoup from either Bank or S & L.

(Without this special provision in §3-405, S&L would have the loss because of the warranties under §3-417(a)(1) [13 Pa. C.S. §3417(a)(1)] and §4-208(a)(1) [13 Pa. C.S. §4208(a)(1)] that S&L was entitled to enforce the draft, when, in fact, S&L had no title because of the forged payee's indorsement. This warranty is given by S&L automatically simply by presenting the check to Bank and accepting Bank's payment of it. Under subsection (b) of each of these sections, the damages payable by S&L to Bank for breach of the transfer warranty, is the amount Bank paid to S&L for the check less the amount, if any, that Bank can charge to FLN's account. Because the analysis shows that Bank can charge the entire check to FLN's account, S&L will have no liability for its breach of the transfer warranty.)

2. Lew could probably obtain reinstatement to his employment at FLN by petitioning the court to appoint a custodian for FLN by alleging that Fred and Nell are in control and have acted oppressively and/or fraudulently toward him, an owner in excess of five percent, by removing him from his employment.

When FLN was formed, Lew had a viable landscaping business. When he merged his business into FLN, the natural understanding would be that Lew would continue to have gainful employment with the new entity, otherwise there would be no reason for his joining the merger. Thus, even though not stated explicitly in a merger agreement, this would be the general understanding of all merger participants. Fred and Nell have now removed him, not for any "just cause", but to pressure Lew into selling his FLN shares to them, by freezing him out of the benefits of employment at FLN.

§1767 was added to the Pennsylvania Business Corporation Law (BCL) to provide a remedy for this type situation. The official comment to this section states that "[T]his new provision is intended to establish a statutory foundation

for the development on a case-by-case basis of safeguards for incorporated partners in dealing with each other,. . . in the case of a closely held corporation, oppressive conduct often takes the form of freezing-out a minority shareholder by removing him from his various offices or by substantially diminishing his power or compensation;. . ." (Amended Committee Comment - 1990.)

BCL §1767(a) [15 Pa. C.S. §1767(a)] provides that upon application of a shareholder, the court may appoint one or more custodians for the corporation if, in the case of a closely held corporation, the directors or those in control have acted oppressively or fraudulently toward a five percent or greater shareholder in his capacity as shareholder, director, officer or employee. Lew owns forty percent of the outstanding shares and therefore meets the five percent requirement. FLN has only three shareholders and, therefore, it meets the closely held test. Lew has been removed from his employment; therefore, Lew falls into one of the protected classes. The removal seems to be oppressive in that there was no "just cause" given. On the contrary, Fred and Nell are engaging in a classic "freeze out" of Lew to "encourage" him to sell his shares to them. Therefore, the remedy in Pennsylvania would be for Lew to petition the court to appoint a custodian for the purpose of reinstating Lew to his employment at FLN, which petition should be successful.

The use of a custodian for the purpose of protecting a shareholder in his capacity as an employee is the current way Pennsylvania addresses the situation where majority shareholders act oppressively and even fraudulently toward minority shareholders by taking away their employment. Prior to the availability of this remedy, the Federal District Court reached a similar conclusion in Orchard v. Covelli, 590 F.Supp. 1548 (W.D.Pa 1984), aff'd, 802 F.2d 920 (3d Cir. 1986) based on breach of fiduciary duty pursuant to a freeze-out plan. The question could be raised as to whether the appointment of a custodian to run the corporation is the best remedy a court could fashion. However, short of "de-merging" FLN and returning the landscaping business to Lew, the only other remedies would be paying damages or forcing FLN to buy Lew's stock, both of which could drain FLN's cash more severely than simply requiring FLN to rehire Lew. The use of a custodian allows the court to see that "justice" is done to all of the corporate "partners" and may be enough to convince Fred and Nell to act in a less oppressive or fraudulent manner.

3. a. Nell usurped FLN's opportunity to bid for the county sludge removal contract and should turn over the remaining portion of the contract to FLN and pay FLN the \$200,000 she has already received.

FLN, not being a natural person, can only function through natural persons who are its directors, officers and other agents. Unless these persons are

supplying proper information to FLN and giving it every opportunity available, FLN will never be able to function properly. Therefore, directors and officers are bound by a fiduciary duty towards their corporation which requires them to give it undivided loyalty. Fletcher, Encyclopedia of Corporations, §861.1. This rule prohibits a director or officer from appropriating for herself an opportunity in which she knows the corporation would have an interest if brought to the corporation's attention. Only if the corporation freely rejects the opportunity, is the director or officer permitted to take the opportunity for herself. Fletcher, Encyclopedia of Corporations, §862,862.1. This rule is part of the director's/officer's fiduciary duty as codified in Pennsylvania in §1712 of its Business Corporation Law [15 Pa.C.S. §1712]. In BCL §1713 (a)(2)[15Pa.C.S. §1713(a)(2)], the statute specifically states that even if the shareholders have relieved the directors of personal liability such exception does not apply if the breach of the director's duty constitutes self-dealing, and Nell is guilty of self-dealing.

Nell was aware that the nursery could accept the Authority's sludge, compost it and use it to save significantly on fertilizer expenses. Nell also knew that if the nursery could use the sludge, there was a short haul from the sewage treatment plant to the nursery and combining this knowledge, Nell realized that a \$30 per ton bid could be doubly profitable by making a profit on the bid itself and obtaining free sludge which would significantly reduce fertilizer expenses. If it were not for the nursery's ability to use the sludge, Nell would not have been interested in the contract with the Authority. Thus, Nell realized that there was an opportunity for FLN but she deliberately chose to take part of that opportunity for herself and thus has violated her fiduciary duty towards FLN and should be required to pay to FLN the \$200,000 profit she has already made (i.e. 10,000 tons at \$20 per ton) plus turning over to FLN the remaining portion of the contract with the Authority as well as the contract with the hauler. This puts FLN in the position it would have been in had Nell originally honored her duty and made the deal for FLN.

- b. As a major FLN shareholder both now and at the time the wrong occurred, Lew can make demand upon FLN to enforce its rights against Nell and, if the corporation refuses, Lew can bring a derivative action on behalf of the corporation.

Lew has continuously been more than a 5 percent shareholder in FLN and thus under most corporation statutes, including BCL §1782 [15 Pa.C.S. §1782], qualifies, without posting security for expenses, to bring a

derivative action against Nell and/or against the majority directors who refuse to obtain for FLN the ongoing sewage sludge contract and the profits already derived from it. (Fletcher, Encyclopedia of Corporations §5972, 5980, 5908, 5945). Usually a demand upon the Board is necessary before an action is filed. (Fletcher, Encyclopedia of Corporations §5963, 5969). Therefore, if FLN's Board refuses to take action against Nell, Lew may do so in a derivative action. Because of the romantic relationship between Fred and Nell and their hostility towards Lew, one can assume that it will be a futile effort for demand that the board take action against Nell.

4. Al, as FLN's legal counsel, violated his duty to his client by assisting Nell in personally bidding for the sewage sludge removal contract and in not informing FLN of this potentially profitable contract.

Al told Nell about the sludge removal contract being up for bid. While initially he may not have seen this as an opportunity for FLN, by the time Al began assisting Nell to bid, he should have realized that (1) the sludge removal contract was something in which FLN would have a business interest, and (2) Nell was violating her fiduciary duty by bidding personally on the sludge removal contract without first making this opportunity known to FLN. (See 3(a) above.)

Al was legal counsel to FLN and thus owed it a duty not to represent another client if such representation would be directly adverse to FLN. When Al realized the sludge removal contract's potential for FLN, as FLN's legal counsel, Al owed a duty, similar to Nell's fiduciary duty, to inform FLN of the Authority's sludge removal contract being up for bid and the potential for FLN. Having informed Nell of this fact, and knowing that Nell would not inform FLN, (perhaps because Al did not advise her to inform FLN) Al should have called FLN's attention to the bidding process instead of aiding Nell to violate her fiduciary duty. Although under Rule 1.13(e) of the Pennsylvania Rules of Professional Conduct regarding an organization as a client, Al may represent both FLN and Nell, this is always subject to Rule 1.7 on conflicts of interest. By assisting Nell in personally bidding for the Authority's sludge contract, Al allowed himself to represent a party adverse to the interests of FLN, also Al's client. By the time Al was assisting Nell in preparing a bid, if not earlier, he would have realized that FLN also had an interest in bidding on the contract. Therefore, Al probably has violated the conflict of interest rule in Rule 1.7(a).

Also, under Rule 1.2(e) on scope of representation, once Al realizes the conflict of interest problem and that his continued assistance to Nell is prohibited under the Rules (for example, prohibited under Rule 1.7 discussed above), Al must so advise Nell. Al has failed to do this.

Al probably knew that by bidding personally, Nell was violating her fiduciary duty to FLN. (See 3(a)). If Nell's violation of her duty in her usurpation of the corporate opportunity amounted to fraudulent conduct on her part, Al may have violated Rule 1.2(d) on the scope of representation, if Al realized the fraudulent nature of Nell's conduct and yet continued to assist her. The facts state that Al did not warn Nell that her conduct was in violation of her duty to FLN but continued to assist her in violating that duty. It is possible, that Nell may have modified her conduct to conform to her fiduciary duty had Al properly advised her of her fiduciary obligation to FLN.

If Nell's conduct rises to the level of fraud upon FLN, under Rule 4.1(b) on truthfulness in statements to others, Al may have a duty to inform FLN unless prohibited under Rule 1.6(c)(2) on a lawyer's duty of confidentiality. This latter rule states that a lawyer may reveal information to the extent necessary to prevent or to rectify the consequences of a client's fraudulent act in the commission of which the lawyer's services are being or had been used. Whether or not Nell's conduct amounts to fraud, there is no problem on confidentiality since there is public notice of the bidding process on a public contract like this one. Thus, even if Al did not disclose Nell's involvement, he could have called FLN's attention to the bidding process and its potential for FLN's business, and thus not leave his client FLN without an opportunity to have a chance at the contract. However, Al never disclosed to FLN the opportunity in spite of his awareness of it, his knowledge that Nell was proceeding to take advantage of it, and his knowledge that in doing so Nell was violating her fiduciary duty to FLN.

QUESTION NO. 3

Torts:	Battery, False Imprisonment, Trespass to Chattel
Civil Procedure:	Adding a Third-Party Defendant
Evidence:	Relevancy, Party Admissions, Offer to Pay Medical Expenses

FACTS AND INTERROGATORIES

Peter was on crutches because of a broken ankle. So long as Peter had his crutches he had sufficient mobility . Without them his mobility was extremely limited. Nonetheless, Peter decided to go shopping at Davidson Department Store ("Davidson"). While shopping in the jewelry department Peter handled and inspected several men's wrist watches. Peter returned each watch to the counter rack. Sam, a uniformed security guard employed by Davidson to prevent theft losses, was using binoculars to observe customers in the jewelry department from a concealed catwalk. Sam observed Peter handling the watches and believed that Peter had dropped one of the watches in a small shopping bag held in his other hand.

As Peter was leaving the store he was approached by Sam, who identified himself as a security guard for Davidson out of the hearing of others. Sam strongly suggested that Peter follow him to the security office a short distance away. Peter asked why he should follow Sam to any office when he had done nothing wrong. However, after Sam assured him this matter could be straightened out in a few minutes Peter followed him to the security office. As soon as Peter entered, Sam took him to an interview room used to question suspected shoplifters. Peter still protesting his innocence was sternly told by Sam to "shut up" and "sit down". Peter, intimidated by Sam's change in demeanor, decided it would be better to sit down. To do so Peter switched both crutches to his right hand for support and turned his back to Sam to position the chair. At this point and without warning, Sam violently yanked both crutches away from Peter causing him to fall hard to the floor. Peter told Sam that he could not move without his crutches. Sam told Peter that he was going to check out the contents of Peter's shopping bag with the jewelry department. He also directed Peter to stay put until he returned. Sam then took Peter's shopping bag and his crutches with him. Although Peter knew the door to the security room was unlocked and unattended, Peter did not think he could move well enough without his crutches to leave the room. Moreover, the fall had caused Peter to reinjure his broken ankle. Sam returned ten (10) minutes later and found Peter still writhing in pain on the floor. Sam assisted him to his chair. Sam then

returned Peter's crutches and shopping bag and said to Peter, "You may go, I obviously made a mistake. You did not steal a watch. If I hurt you, Davidson will pay your medical expenses."

Some time later, Peter filed a civil action against Sam (Peter v. Sam). Assume that jurisdiction and venue are established and the Federal Rules of Evidence and Civil Procedures are applicable. Assume further that Sam's employment contract with Davidson provided that Davidson would indemnify Sam from liability incurred as a result of doing his job. Sam, three (3) weeks after serving his Answer and New Matter, but before any discovery, now moves in a timely and appropriate manner to join Davidson as a defendant in Peter v. Sam.

1. Assuming there are no statutory provisions applicable to these facts, what torts, if any, were committed by Sam (other than negligence) at common law, to Peter.
2. As the trial judge, how would you rule on Sam's motion to add Davidson as a defendant in this civil action and why?

Assume that Davidson was joined as a defendant and that at the trial counsel for Peter offers as evidence the statement made by Sam: "You may go, I obviously made a mistake. You did not steal a watch. If I hurt your ankle, Davidson will pay your medical expenses." Counsel for Sam and Davidson object.

3. As the trial judge what is your ruling on Peter's offer of Sam's statement? Explain.

EXAMINER'S ANALYSIS - QUESTION NO. 3

1. Sam will probably be liable at common law for the torts of (a) battery and (b) false imprisonment.
 - a. Sam is probably liable to Peter for the common law tort of battery.

Blackstone defined a battery as "...the unlawful beating of another..." [and that] "...the least touching of another's person, willfully or in anger, is a battery, for the law cannot draw the line between different degrees of violence." Blackstone Commentaries on the Law 557-558 (Gavit Ed. 1941). The modern definition of a common law battery

likewise requires an intentional act which results in a harmful or offensive touching of another. Cohen v. Lit Bros., 166 Pa. Super. 206, 70 A2d. 419 (1950); Singer v. Marx, 144 Cal. App. 2d 637, 301 P.2d 440 (1956). Moreover, in Baldinger v. Banks, 26 Misc. 2d 1086, 201 NYS 2d 629 (1964), even a six year old boy who shoved and pushed another child out of a game area was held liable for a battery because the boy knew that his actions were intended to be harmful and offensive. In our case, when Sam "violently grabbed" Peter's crutches causing Peter to fall hard and re-injure his ankle, Sam committed a battery. Specifically, the battery was twofold, in that, it was both a harmful and an offensive contact. Restatement (Second) Torts Sections 13 (harmful contact) and 14 (offensive contact). Section 13, provides in relevant part:

Battery: Harmful Contact

An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other...and (b) a harmful contact with the person of the other directly or indirectly results."

The fact that Sam grabbed Peter's crutches, as opposed to Peter's person is not material at common law or the Restatement if the object (crutches) which was touched or moved caused the battery. See Restatement Torts (Second) Sections 13, 14 (1965); Garrett v. Dailey, 279 P.2d 1091 (Wash. 1955). (defendant moved a chair and plaintiff fell to the floor); Fisher v. Carrousel Motors Hotel, Inc., 424 S.W. 2d 627 (Tex. 1967). Sam is therefore liable for a battery and Peter is entitled to compensatory and punitive damages.

Sam is not liable for an assault because Peter, with his back to Sam at the critical time of Sam's wrongful conduct could not have seen, been aware of, or in apprehension of an imminent assault by Sam. Proffitt v. Ricci, 463 A. 2d 514 (R.I. 1983); Restatement (Second) Torts Section 21 (1965).

- b. Sam is probably liable to Peter for the common law tort of false imprisonment.

False imprisonment is an intentional tort which requires an unlawful or wrongful restraint by one person of the physical liberty of another. Fagan v. Pittsburgh Terminal Coal Corp., 299 Pa. 109 149 A. 159 (1930); Tumbarella v. Kroger Co., 85 Mich. App. 482, 271 N.W. 2d 284

(1978). Generally, the word "false" has become synonymous with "unlawful" or "wrongful" restraint of one person by another. Stine v. Shuttle, 134 Ind. App. 67, 186 N.E. 2d 168 (1962); Blitz v. Boog, 328 F. 2d 596 (2d Cir. 1964). Thus, the tort of false imprisonment requires the wrongful detention or some restraint of a plaintiff's liberty by another for a period of time. More specifically, Restatement (Second) Torts Section 35 (1965), provides in pertinent part that:

- i. An actor is subject to liability to another for false imprisonment if
 - a. he acts intending to confine the other or a third person within boundaries fixed by the actor, and
 - b. his acts directly or indirectly results in such a confinement of the other, and
 - c. the other is conscious of the confinement or is harmed by it.

In the instant case, Sam directed to Peter to "...stay put until I return." By his action of taking Peter's crutches with knowledge of Peter's limited mobility it can be concluded that Sam intended to detain Peter in the security office, a boundary fixed by Sam. Even though Peter knew the door was unlocked and unattended, Peter was not under a legal duty to escape even if there was a reasonable means to do so, if doing so might cause him further injury. See, Maracle v. State 50 Misc. 2d 348, 270 N.Y.S. 2d 439 (1966). Moreover, Peter was not bound to leave or escape without retrieving his purchases. The term of Peter's detention, ten minutes, is sufficient time to complete the false imprisonment, so long as Peter recognized that he was being detained. Mendoza v. K-Mart, Inc. 587 F. 2d 1052 (10th Cir. 1978). Therefore, Sam is probably liable to Peter for compensatory and punitive damages for false imprisonment.

- c. Sam may also be liable to Peter for trespass chattel.

When Sam intentionally snatched Peter's crutches and shopping bag for ten minutes, he may have committed trespass to chattel. A trespass to

chattel may occur when one's goods are damaged or destroyed. Bankston v. Dumont, 205 Misc. 272, 38 So. 2d 721 (1949). It may also be established by an unpermitted use of the goods or to move the goods of another from place to another - even if the goods are undamaged. Vaughn v. Glenn, 44 Ga. App 426, 161 S.E. 672 (1932); Zaslow v. Kroenert, 29 Col. 2d 541 176 P. 2d 1 (1946). The Restatement of Torts (Second) is consistent with the common law. Specifically, Section 218, allows the possessor to sue for dispossession even if the dispossession does not amount to conversion, or damage to the goods. See, Comment d. If Peter's property is undamaged when it was returned by Sam. Peter is entitled to at least nominal damages.

2. The trial judge should grant Sam's motion to join Davidson as a third-party defendant pursuant to Federal Rules of Civil Procedures.

Third Party Practice is controlled by Fed. R. Civ. Pro 14(a):

- a. When Defendant may bring in third-party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. (*emphasis supplied*)

First, because three (3) weeks have passed since Sam has filed his Answer he can only join a third-party by Motion and by leave of the Court. Second, the rule on its face only requires that the court consider joining a non-party if that non-party may be liable in whole or in part for plaintiff's claim against the third-party plaintiff (Sam), and there is no substantive prejudice to the plaintiff or the named third party defendant. Under our facts, Davidson would probably be joined as a third-party defendant for the reasons which are discussed below.

Rule 14(a) provides that a party may implead under certain circumstances with the approval of the Court. Under Rule 14 Sam must establish only that Davidson may be liable for all or a portion of any liability for plaintiff's "claim". The rule defines a "claim" transactionally. Thus, the standard for joining a third-party defendant is whether the assertion of liability against a third-party defendant is derivative of the same transaction, occurrence, or nucleus of

operative facts as plaintiff's underlying claim. 6, Wright & Miller, Federal Practice and Procedure, Section 1443, at 301 (1990). If transactional relatedness and derivative liability are established, impleader is proper. United States v. Yellow Cab Co., 340 U.S. 543 (1951). Applying these standards to this case impleader is clearly appropriate. Sam was hired by Davidson as a security guard to prevent, among other things, theft losses in general and shoplifting specifically. Therefore, at the time he stopped Peter until the time he released him he was performing the job he was hired to do by Davidson. His actions turned out to be wrongful because of his decision to stop, detain and search Peter's shopping bag was not justified by the facts. His actions were clearly within the scope and purpose of his contract of employment and indemnification. This legal conclusion is consistent with the view that generally impleader will frequently involve a claim of indemnity, contribution, or some other form of vicarious liability. See 3 Moore's Federal Practice, Chapter 14, Section 14.07[1]. Sam's motion to join Davidson as a third-party defendant should be granted because Davidson may be liable in part or whole for plaintiff's claim and there is no substantial prejudice to Davidson.

3. The trial judge should rule that part of the statement by Sam: "You may go, I obviously made a mistake. You did not steal a watch." is logically relevant and admissible as a party admission. However, that part of the statement which relates to an offer to pay medical expenses is not legally relevant or admissible to prove liability.
 - a. The sentence by Sam: "You may go, I obviously made a mistake. You did not steal a watch." is relevant and admissible as a party admission against Sam and Davidson. First, the statement by Sam is relevant to issues raised by the tort of false imprisonment. Fed. R. Evid. 401, provides that "Relevant evidence" means [evidence] having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This statement by Sam is at least some evidence that has a tendency to prove that Sam's conduct was wrongful or unlawful given Sam's reaction after searching Peter's shopping bag.

The statement is admissible as a party admission pursuant to Fed. R. Evid. 801(d)(2)(A), (C) and (D) which provides that if:

"The statement is offered against a party is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or

(C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship....
(emphasis supplied).

Under Rule 801 Sam's statement is non-hearsay and therefore admissible against Sam and/or Davidson as a party admission.

- b. That part of the statement which deals with the offer by the employee on behalf of the employer to pay medical expenses is not admissible to prove liability, but may be admissible to prove that Sam was employed by Davidson.

Fed. R. Evid. 409 expressly provides that: "Evidence of furnishing, offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." The rule, however, only applies if the evidence is offered to prove liability. The policy and rationale for the rule is to avoid litigation by providing a potential party with the incentive to pay medical expenses without fear of making a tacit admission. The policy is believed to lessen the incentive to litigate. However, if the statement is offered for some other relevant purpose, such as to prove control, agency, or to prove an employment relationship that is, that Sam worked for Davidson, the statement is admissible for these other limited purposes. Of course, the court would also be required to give a limiting instruction to the jury that the evidence was admitted on this basis.

QUESTION NO. 4

Criminal Law: An individual is guilty of burglary if he or she enters a building with the purpose of committing a crime therein

Where two or more individuals agree to commit a criminal or unlawful act, and carry out an overt act in pursuance thereof, a conspiracy exists

A person may be guilty of arson by burning one's own home, and the home of a neighbor, caused by the same fire.

A warrantless search immediately following a fire to determine the cause of origin of said fire, is reasonable and justified

Limitations of a warrantless search

If an attorney, subsequent to offering evidence in trial, learns of its falsity, he or she shall take reasonable remedial measures

FACTS AND INTERROGATORIES

George and Bill were long time friends. Both needing money, they decided to enter a local jewelry store, after closing, and see if they could find any valuable jewelry to take. During the morning prior to their entry, George placed a small wire in the lock of the back door to the store, causing it to appear to be locked, when, in fact, it was not. That evening, after the store closed and all employees had left, George and Bill opened the back door and entered the store. They were unable to find any jewelry, as it was all in the store's safe, and they left empty handed. Later that evening they developed another scheme to obtain money, deciding to simulate a burglary at George's home, claim a loss on George's insurance policy and split the proceeds. No date was set for the implementation of this plan.

A few nights later, when his wife was out of town, George decided to set fire to his home by himself and therefore avoid having to split the insurance proceeds with Bill. He obtained a five gallon can of gasoline, poured the fuel

around the building and lit it. His home was severely damaged by the resulting fire and left open. High winds carried some burning debris from the roof of George's home to his neighbor's house, which also burned. Immediately after sunrise the following morning, the Police, without a search warrant or George's permission, searched the remains of his home and found the five gallon gasoline can which contained George's fingerprints. Shortly after finding the gasoline can, the Police discovered a large package of cocaine which contained George's fingerprints in one of the drawers of a dresser in a room which was not damaged by the fire.

1. Of what crimes were George and Bill guilty with respect to the jewelry store episode and the scheme to simulate a burglary of George's home?
2. Other than fraud perpetrated on the insurance carrier, of what crime or crimes was George guilty with respect to setting fire to his home?
3. How should the court rule on a Motion to Suppress the five gallon can, with George's fingerprints, at George's trial for setting fire to his home?
4. How should the court rule on a Motion to Suppress the package of cocaine with George's fingerprints at George's trial for the possession of an illegal controlled substance?
5. At George's trial, Bill testified that George was at his, Bill's, home, when the fire broke out. When he returned to counsel table, Bill leaned across George and whispered to George's counsel, "Boy, did I put one over on them. He wasn't with me." As George's counsel, and completely surprised by Bill's comment, what course of action should you consider concerning the statement made by Bill?

EXAMINER'S ANALYSIS - QUESTION NO. 4

1. a. An individual is guilty of burglary if he enters a building with the purpose of committing a crime therein.

The Model Penal Code in Section 221.1(1) defines the crime of burglary as follows: "A person is guilty of burglary if he enters a building..., with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter...." The Superior Court of Pennsylvania has held that the crime of burglary is completed at the time the individual enters the building, without

authority and with the intent to commit a crime therein. See Commonwealth v. Wiltrout, 311 Pa. Super. 115, 457 A.2d 520 (1983). The crime that George and Bill intended to commit was theft. A theft is defined by the Model Penal Code, in Section 223.2, as follows: "A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof." Although the theft was not committed, the crime of burglary was completed upon the entry of the building with the intent to commit the crime of theft. The entry of a building with the intent to commit a theft also constituted an attempted theft. The Pennsylvania Crimes Code, provides, in Section 901(a) that: "A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime." Entering the store constituted a substantial step toward the commission of the theft.

- b. Where two or more individuals agree to commit a criminal or unlawful act, and carry out an overt act in pursuance thereof, a conspiracy exists.

A conspiracy has been defined as an agreement between two or more persons to accomplish together a criminal or unlawful act or to commit a lawful act in an unlawful manner. See Commonwealth v. Savage, 388 Pa. Super. 561, 566 A.2d 272 (1989). The Model Penal Code holds that an individual is guilty of conspiracy if he or she:

- (i) Agrees with such other person or persons that they or one or more than one will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
- (ii) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime. See Model Penal Code Section 5.03(1).

The Model Penal Code also provides that an individual may not be convicted of conspiracy to commit a crime unless an overt act has been done in pursuance of the conspiracy. Under Pennsylvania law a similar situation exists and an individual may not be convicted of conspiracy unless "an overt act in pursuance of such conspiracy is alleged and proved...". 18 Pa. C.S. Section 903(e). Virtually any act performed for the purpose of carrying out the conspiracy has been considered an overt act. See United States v. Falcone, 311 U.S. 205 (1940). See also Commonwealth v. Finn, 344 Pa. Super. 571, 496 A.2d

1254 (1985); Commonwealth v. Davenport, 307 Pa. Super. 102, 452 A.2d 1058 (1982).

In the instant case, George and Bill agreed and planned a burglary and theft at the jewelry store. Even though they did not take any jewelry, their actions in planning and executing the burglary constituted a conspiracy. Their subsequent agreement to stage a burglary at George's home and then defraud the insurance company probably did not constitute a conspiracy, as there was no overt act pursuing the crime.

2. A person is guilty of arson if he or she starts a fire with the purpose of destroying a building of another or destroying or damaging an individual's own property for the purpose of collecting insurance for such loss.

The Model Penal Code, Section 220.1, provides that an individual is guilty of arson if he or she starts a fire or causes an explosion for the purpose of "(a) Destroying a building or occupied structure of another; or (b) Destroying or damaging any property, whether his own or another's, to collect insurance for such loss." Pennsylvania law is similar to the Model Penal Code in this regard. At Common Law it was not arson to burn one's own home. The Commonwealth must prove beyond a reasonable doubt that there was a fire, it was intentionally set and that the Defendant set the fire. Commonwealth v. Ford, 414 Pa. Super. 470, 607 A.2d 764 (1992). See also Commonwealth v. Scott, 409 Pa. Super. 313, 597 A.2d 1220 (1991). Thus, when George set a fire to damage his own property for the purpose of collecting the insurance proceeds, he was guilty of arson. Although he did not intend to burn the home of his neighbor, he would be guilty of arson for that fire also. When an individual does an unlawful act, he or she is responsible for the consequences even though they may not have been intended. The intent from the intended crime is transferred to the unintended result. See Commonwealth v. Gaynor, 648 A.2d 295 (Pa. 1994); State v. Gallagher, 83 NJL 321, 85 A 207.

3. & 4. A warrantless search immediately following a fire to determine the cause or origin of said fire, is reasonable and justified. Therefore, the can is admissible. However, where the dresser was in a room not damaged by the fire and the search occurred after the can was found, the subsequent search of the dresser exceeded the warrantless authority to search for the cause of the fire.

Firefighters and law enforcement officials may enter the premises without

a warrant and may stay for a reasonable time to investigate the cause of a blaze. The reasonableness may be extended where the investigation is hindered by darkness or smoke. See Michigan v. Tyler, 436 U.S. 499 (1978). A number of states have permitted warrantless searches following a fire where the victim has made no effort to secure the premises. In those cases the failure to do so was determined as evidence to show the owner's lack of expectation of privacy. See People v. Zeisler, 125 Ill App 3d 588, 465 NE 2d 1373. In this case, the police going to the fire scene immediately after sunrise the morning following the fire, would be a permissible extension of their initial right to enter the premises, especially where the house was not secured. Consequently, taking the gas can without a warrant would be permissible and a motion to quash in regard to that evidence would fail. Commonwealth v. Smith, 331 Pa. Super. 66, 479 A.2d 1081 (1984), affirmed 511 Pa. 36, 511 A.2d 796, certiorari denied 479 U.S. 1006.

As to the cocaine, looking in a dresser drawer in an undamaged room of the building would exceed the warrantless authority of the police to search for the cause of the fire. The Fourth Amendment precludes unreasonable searches and seizures and, unless an exception to the warrant requirement exists, searching private property must be performed pursuant to a properly issued warrant. The Fourth Amendment requires that a warrant be issued only upon application and an affidavit which sets forth facts showing the existence of probable cause. In the instant case, since the dresser in which the cocaine was found was in a room not damaged by the fire, to search the dresser would exceed the warrantless, nonconsensual authority granted to investigate the cause of the blaze because it would appear to have nothing to do with the origin of the fire. In Commonwealth v. Smith, supra., the Supreme Court of Pennsylvania, after noting that firemen may enter a private residence without a warrant, without violating the Fourth Amendment of the United States Constitution, if done for the purpose of fighting a fire, concluded:

"...if it is clearly shown that the search is not for the purpose of determining the cause and origin of the fire, but rather to obtain evidence of criminal activity, then such search must either be with consent or with a valid search warrant." 511 A.2d at 801.

Consequently, a motion to quash this evidence would succeed.

5. If an attorney, subsequent to offering evidence at trial, learns of its falsity, he or she shall take reasonable remedial measures.

Rule 3.3 of the Rules of Professional Conduct provides as follows: "(a) A lawyer shall not knowingly: ...(4)... If a lawyer has offered material evidence and

comes to know of its falsity, the lawyer shall take reasonable remedial measures." Here the attorney learned, immediately after Bill's testimony, that he had committed perjury and offered false testimony. Because of the nature of the testimony, it is obvious that the client, George, also knew it was false. The comment to Rule 3.3, which is entitled "Candor Toward the Tribunal", provides, in ascertaining "remedial measures" as follows:

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done....

Rule 3.3(a)(2) may also be applicable in that a lawyer shall not knowingly "... (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client...". It should also be noted that Rule 1.6(b), which pertains to confidentiality of information, has an exception that a lawyer may "... reveal such information if necessary to comply with the duties stated in Rule 3.3." One of the comments to Rule 3.3 presents a possible contrary argument, as follows:

However, the definition of the lawyer's ethical duty in such a situation may be qualified by Constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions, these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a Constitutional requirement.

Contrary to the above comment to Rule 3.3, in Nix v. Whiteside, 475 U.S. 157 (1986), a case in which an attorney talked a client out of proposed perjury, the U.S. Supreme Court held that the right to assistance of counsel was not violated by a lawyer's refusal to cooperate with an accused in presenting perjured testimony at trial. In the instant case, it does not appear that withdrawing from representation of George will remedy the situation. The only course of action open to the attorney would be to discuss the matter with George and then make a disclosure of the false testimony to the court.

QUESTION NO. 5

**Establishment Clause - - Due Process Clause - - Fourth Amendment
Unreasonable Searches and Seizures - - Supplemental Jurisdiction**

FACTS AND INTERROGATORIES

Sally is a senior at C City High School, a public school operated by C City School District, located in State P. Sally plans to graduate this year, and the program for graduation ceremonies was recently distributed. As in past years, the program will open with a non-sectarian prayer composed by Paul, the high school principal, and delivered by a local religious leader selected by the School District.

After seeing the graduation program, Sally's parents visited Paul to complain about the inclusion of a prayer as part of the ceremony. Paul explained that the customary prayer was carefully written to be non-sectarian and inoffensive to any particular religious group. Further, he noted that attendance at the graduation ceremony was voluntary and that Sally could receive her diploma without attending. Sally's parents then departed, unsatisfied with this explanation.

Upset with these "troublemakers", Paul checked Sally's school records and discovered that she had previously been suspended for possessing marijuana on school property. Now highly curious, Paul used his master key to open Sally's locker, where his inspection revealed two marijuana cigarettes. Sally was called to Paul's office, and after showing Sally the two cigarettes Paul told her that she was suspended for 30 days.

As counsel for Sally and her parents, what federal constitutional claim or claims should you assert, and with what likely result, with respect to:

1. The prayer included in the graduation ceremony; and
2. Sally's suspension from school.
3. Assume that Paul made false statements to school employees concerning Sally and her parents during the above incidents which will establish a cause of action for defamation under State P law, and that Sally's counsel includes this claim in a complaint filed in the United States District Court for State P asserting the federal constitutional claims. Does the District Court have jurisdiction over the defamation claim and why?

EXAMINER'S ANALYSIS - QUESTION NO. 5

1. Inclusion of the prayer as part of a high school graduation ceremony violates the establishment clause in the First Amendment.

It is well-established that the government may not coerce anyone to support or participate in the exercise of religion. Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355 (1984). Here, the involvement of the school district in the religious practice to occur at the graduation ceremony is clear. The school district has decided that prayer should be part of the program, composes the prayer, and selects the religious leader to perform the prayer.

On the other hand, the prayer is intentionally designed to be non-sectarian, and thus presumably inoffensive to persons attending the ceremony, regardless of their particular religious faith. Attendance at the graduation ceremony, moreover, is voluntary and not a requisite for obtaining the high school diploma.

The Supreme Court, however, has noted that there are heightened concerns with protecting freedom of conscience in elementary and secondary public schools. See Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560 (1963). Notwithstanding the non-sectarian nature of the prayer, and the voluntary nature of the proceedings, the Supreme Court in Lee v. Weisman, ____ U.S. ____ (yet to be cited), 112 S.Ct. 2649 (1992) held that a similar prayer as contained in a graduation ceremony violated the establishment clause. As the Court noted:

"The sole question is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a court can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the establishment clause of the First Amendment."

____ U.S. at ____, 112 S.Ct. at 2661 (yet to be cited).

Application of the three-part test for resolving establishment clause claims articulated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971) yields the same result. There is no evident legitimate secular purpose for a prayer, which in whatever form has only a religious connotation. The primary effect of the prayer is to advance, intentionally or not, religious concepts. Finally, the school's selection of the religious leader to present the prayer, and

the principal's composition of the prayer, plainly lead to excessive entanglement between government and religion.

2. a. Sally's suspension from school violated her right to due process under the Fourteenth Amendment.

It is well-established that the due process clause of the Fourteenth Amendment requires appropriate notice and hearing in connection with certain disciplinary actions implemented by a public school. In Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975) the Supreme Court concluded that due process was required in connection with a ten day suspension of a student. That process must include "oral or written notice of the charges against [the student] and, if [the student] denies them, an explanation of the evidence the authorities have and an opportunity to present [the student's] side of the story. 419 U.S. at 581, 95 S.Ct. at 740.

In this instance, Sally was suspended for thirty days, which clearly triggers the due process requirements established by Goss. Paul did nothing more than present the two marijuana cigarettes to Sally, and advise her that she was suspended. This is wholly insufficient under the standards established by Goss, and Sally's claim under the due process clause would be successful.

- b. Paul's inspection of Sally's locker violated the prohibition of unreasonable searches and seizures under the Fourth Amendment.

In New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985), the Supreme Court concluded that the Fourth Amendment prohibition against unreasonable searches and seizures applied in the context of a public secondary school. The test to be applied to a search, however, was not the more rigorous "probable cause" standard applicable to criminal proceedings, but rather a standard of "reasonableness"; that is, "...when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school". 469 U.S. at 342, 105 S.Ct. at 743.

Here, it is doubtful that Paul had any reasonable basis to inspect Sally's locker. His original motivation to review Sally's school records was predicated upon his attitude toward her and her parents as troublemakers. Moreover, discovery of her previous suspension for possessing marijuana would not, without more, be a basis to suspect that at that moment Sally possessed marijuana. Accordingly, Sally's claim

that the search violated her rights under the Fourth Amendment would be successful.

3. The defamation claim could be included in the complaint in United States District Court based upon supplemental jurisdiction.

Absent diversity of citizenship or a federal question, the District Court would ordinarily not have jurisdiction to hear a state law defamation action. Pursuant to 28 U.S.C. § 1367, however, District Courts now have supplemental jurisdiction to hear certain claims which would otherwise fall outside the scope of Federal Court jurisdiction.

Jurisdiction over the causes of action based upon violation of the United States Constitution would, of course, exist here. Under these circumstances, the District Court may exercise "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution". 28 U.S.C. § 1367(a). Here, the alleged defamation occurred contemporaneously with the constitutional violations asserted, and related directly to the facts giving rise to the constitutional claim. It is reasonable to conclude, therefore, that this claim would form part of the same case or controversy at issue before the District Court. See, Young v. Francis, 820 F. Supp. 940 (E.D.Pa. 1993) (supplemental jurisdiction over tort claims of misrepresentation, emotional distress and wrongful death is proper, with a federal constitutional right of association claim).

A federal court may decline to exercise supplemental jurisdiction under this statute if the claim raises a novel or complex issue of state law, or if it substantially predominates over the claims over which the court has original jurisdiction. 28 U.S.C. § 1367(C). Neither of these circumstances exist here, and thus the court should assume supplemental jurisdiction over the defamation claim.

QUESTION NO. 6

Secured Transactions: Priorities among conflicting security interests in same collateral; adequacy of description; validity of after acquired property clause; purchase money security interest in inventory; purchase money security interest in equipment

Family Law: Equitable distribution; inherited property; appreciation in value of non-marital property

FACTS AND INTERROGATORIES

David was in the business of manufacturing and selling fur garments which involved purchases of pelts and other supplies from various sources.

In 1992, David obtained a business line of credit in the amount of \$200,000 from Bank and granted Bank a security interest in the following assets of his business described in Bank's properly filed financing statements:

All of David's inventory and equipment now owned and hereafter acquired.

In 1994, David decided to begin manufacturing and selling leather garments and needed hides and specialized sewing equipment in order to expand into this new line. Since David had reached his lending limit with Bank, he made arrangements with Finance to provide funds for the purchase of an inventory of hides.

On June 1, 1994, David took delivery of a shipment of hides and made payment for same with funds provided by Finance. One week later, Finance properly filed financing statements perfecting Finance's security interest in the following:

All of David's inventory of leather hides delivered June 1, 1994 more fully described on Invoice 117 attached hereto and made a part hereof as Exhibit "A".

Shortly after purchasing the leather hides, David bought and received three sewing machines from XYZ Sewing Equipment ("XYZ"). XYZ financed the entire purchase price and took a security interest in the machines. Two months after delivery of the sewing machines XYZ properly filed financing statements specifically describing the three sewing machines as collateral.

Pressure from animal activist groups caused David's business to fail and David was unable to meet his obligations to Bank, Finance and XYZ. David never produced a single leather garment.

1. Whose security interest has priority and why?
 - a) In the fur inventory?
 - b) In the inventory of hides?
 - c) In the three sewing machines?

2. David and his wife have separated as a result of his business failure. In 1991, while married to David, David's wife inherited her parents' former residence which in 1991 had a fair market value of \$100,000. Assuming the property now has a fair market value of \$120,000, advise David regarding what potential claim he has to the property in the event a divorce action is filed.

EXAMINER'S ANALYSIS - QUESTION NO. 6

1. a. Bank has the superior claim to the fur inventory as neither Finance's nor XYZ's financing statements describe the fur inventory.

Bank has the superior claim to the fur inventory. The facts indicate Bank's security interest was properly created and perfected. This security interest would continue for a period of five years, unless sooner terminated. See, 13 Pa. C.S.A. 9403(b); U.C.C. §9-403(2).

A financing statement need not be specific as to each item of collateral but need only describe the collateral by type. See, 13 Pa. C.S.A. 9110; U.C.C. §9-110, Comments 1, 3, 4. Added language granting Bank a security interest in after-acquired inventory is valid and enforceable. See, 13 Pa. C.S.A. 9204(a); U.C.C. §9-204(1). Bank's security interest would, therefore, extend to all inventory existing as of filing and acquired by David thereafter.

Neither Finance nor XYZ would have a claim to the fur inventory since their financing statements contained restricted descriptions of collateral (i.e., Finance limited its security interest to the leather inventory and XYZ to the three sewing machines).

- b. Bank has the superior claim to the inventory of hides because (1) Finance failed to notify Bank of its intent to obtain a purchase money security interest; and (2) its

lien was not perfected when David received delivery of the hides, both of which are required to perfect a first purchase money security interest on inventory.

Bank has the superior claim to the inventory of hides. Finance intended to obtain a priority purchase money security interest (PMSI) in the inventory of leather hides. It has failed to do so. XYZ has made no effort to obtain a security interest in the hides and has no claim.

A security interest is a "purchase money security interest" to the extent that it is: (1) taken or retained by the seller of the collateral to secure all or part of its price; or (2) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used. 13 Pa. C.S.A. 9107; U.C.C. §9-107. Finance meets the requirements of subparagraph (2) in that its funds were used to purchase the leather inventory.

Finance has a perfected security interest in the inventory of leather hides. Its interest is, nonetheless, subordinate to that of Bank.

For Finance to have a priority claim over Bank it would have had to meet the following two criteria:

- 1. the PMSI must have been perfected at the time David received possession of the leather hides [13 Pa. C.S.A. 9312(c)(1); U.C.C. §9-312(3)(a)]; and**
- 2. Finance should have notified Bank, in writing, prior to filing its financing statements, of its intent to acquire a PMSI in the inventory of hides specifically describing the hides. [13 Pa. C.S.A. 9312(c)(2)(4); U.C.C. §9-312(3)(b)(c)].**

Finance did neither and, therefore, it cannot claim an interest in the leather hides superior to that of Bank.

- c. Bank has the superior claim to the three sewing machines since XYZ failed to file its financing statements in a timely manner.**

Bank has the superior claim to the three sewing machines. Finance has no claim since its financing statements limit its interest to leather hides. XYZ intended to obtain a priority PMSI in the sewing machines but

failed to do so.

XYZ would have a PMSI as defined in 13 Pa. C.S.A. 9107(1); U.C.C. §9-107. XYZ fails to have a PMSI with priority over the claim of Bank because XYZ failed to perfect its security interest within 20 days of delivery of the machines to David. [For example, 13 Pa. C.S.A. 9312(d) provides "a purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time debtor receives possession of the collateral or within 20 days thereafter." See, U.C.C. 9-312(4) requiring filing within 10 days]. XYZ perfected two months after delivery and is therefore subordinate to Bank.

2. David has a potential claim to the appreciation in value of the property his wife inherited.

In many common-law equitable distribution jurisdictions there is a presumption that all property acquired during the marriage is marital property. L. D. Wardle, C. L. Blakesley and J. Y. Parker, Contemporary Family Law §30:02; 23 Pa. C.S.A. §3501(b). This presumption may be rebutted by evidence establishing that the property is the separate property of one of the spouses. Such evidence may include, inter alia, facts showing that the property was acquired by gift, bequest, devise or descent. See, e.g., 23 Pa. C.S.A. §3501(a)(3); N.J. Rev. Stat. §2A:34-23; Brunson v. Brunson, 569 S.W.2d 173 (Ky. App. 1978). Although an inherited property may not be deemed "marital property" any appreciation in value of the inherited property occurring during marriage and prior to separation is subject to equitable distribution. Norman Perlberger, Pennsylvania Divorce Code §5.31(b)3; 1 Jack A. Rounick and Gary J. Friedlander, Pennsylvania Matrimonial Practice §22:10; 23 Pa. C.S.A. §3501(a); Solomon v. Solomon, 531 Pa. Super. 334, 611 A.2d 686 (1992).

In the instant matter, David has a potential claim to the \$20,000 increase in fair market value of his wife's inherited property as it would be considered marital property. The \$100,000 of value existing at the time of inheritance would be immune from a claim by David. David's claim to the \$20,000 increase is potential in that many other factors must be considered by the court to determine what share, if any, of the "marital property" David would be entitled to receive.

QUESTION NO. 7

Torts: Negligence, Duty of Landowner/Occupier
Torts: Affirmative Defenses, Contributory Negligence, Comparative Negligence
Civil Procedure: Bystander Liability, Federal Rules of Civil Procedure, Judgment as a Matter of Law

FACTS AND INTERROGATORIES

Phil, an undergraduate student at a private college in C City, S State, was leaving class on a cold day in January, 1994. As he exited the building, carrying a stack of 6 books that obstructed his view of his path, he stepped on ice, lost his footing and fell on the walkway directly in front of the door. He was taken to the hospital by his mother, who had been waiting in her car to pick him up after class. Phil's mother's car was parked directly in front of the building. She witnessed his fall, but didn't stop to look at the walkway area, as she rushed him to the hospital where his injury was diagnosed as a fractured ankle.

Later that day, from his hospital bed, Phil called his friend Larry, a young lawyer, and told him of his injury. Larry said that he (Phil) might be entitled to bring suit against the college, but that his fall would have to be the fault of the college. Phil asked Larry if he would go to the location of the accident and look around.

Immediately after finishing his conversation with Phil, Larry went over to the college. Just in front of the classroom building, Larry saw a ridge of hard ice, which remained from a storm several days before. After he called Phil to tell him about the ice, Phil requested that Larry do some legal research.

1. What common law tort causes of action should Phil bring against the college, to recover for the injuries he sustained in the fall, and with what likelihood of success?
2. What defense[s] should be raised by the college against Phil's action, and with what probable result?
3. Assume that an action against the college was begun in Federal Court in State S, based on diversity of citizenship (Phil's legal residence was in State A). Both Phil and his mother were named plaintiffs, with Phil's mother seeking only to recover for her emotional distress at witnessing Phil's accident.

(a) Before the time had run for filing responsive pleadings, the college retained Attorney Anne to represent it, and it requested an evaluation of the merits of Phil's mother's claim. What is Anne's evaluation? Discuss your answer.

(b) Assume that, under the law of State S, Phil's mother may not maintain an action for negligent infliction of emotional distress for witnessing Phil's fall. Under the Federal Rules of Civil Procedure, what motion[s] should Anne consider to present her legal arguments to the Court in order to defeat Phil's mother's claim before the case comes to trial. Discuss.

EXAMINERS ANALYSIS - QUESTION 7

1. Phil should bring a negligence action against the college, alleging that the college breached its duty to invitees by permitting ridges of ice to remain on the walkway several days after a storm. Phil will probably prevail in his action, although his recovery may be reduced by his own negligence, if he is found to have been negligent, and if State S is a comparative negligence jurisdiction. If State S is a contributory negligence jurisdiction, and if Phil is found to have been negligent, he will not recover.

The elements of a cause of action for negligence are: 1) Duty; 2) Breach; 3) Causal connection between the breach and an injury; 4) Actual loss or damages. Presser & Keeton on Torts, 5th Ed. (1985), pp.164-165. See also Hicks v. Arthur, 843 F.Supp. 949 (ED Pa 1994). Since Phil suffered a physical injury which necessitated his hospitalization, he has clearly met the damage element. Moreover, as a student, Phil was an invitee to whom the college owed a duty to guard against all dangers involving a risk of unreasonable harm, which invitees could not be expected to discover. Presser & Keeton, supra, at 419-434; Brown v. Rhoades, 126 Me. 186, 137 A. 58 (1927). See also Restatement (Second) of Torts, Section 343.

As it had been several days since the storm, the failure of the college to clear the ice from the entrance of the building, or to warn visitors or invitees about the ice, may reasonably constitute a breach of its duty to Phil. Harmotta v. Bender, 411 Pa. Super. 371, 601 A.2d 837 (Pa. Super. 1992), app. den., 530 Pa. 655, 608 A.2d 30, Visaggi v. Frank's Bar & Grill, Inc., 71 A.2d 638 (Sup. Ct. N.J. 1950).

The college may be expected to argue that the ice should have been obvious to Phil, and that he could have walked safely around it. Despite the

college's argument, it is likely that its failure to remove the ice or to place warnings about it, several days after the storm, will be found to have been negligent. See e.g., Ferencz v. Milie, 517 Pa. 141, 146, 535 A.2d 59, 64 (1987), where the Court stated:

"...[defendant] knew, or in the exercise of reasonable care, should have known, of the ice patches and, hence, of a generally dangerous set of conditions."

The final element of negligence is a causal connection between the breach of duty and the injury. Although it is clear that the fall on the ice caused Phil's injury, the college's [alleged] breach of its duty to Phil and its causal negligence may be expected to be disputed. A reasonable argument for Phil's attorney is that the college should have expected students to carry books between buildings, and, thus, should not be absolved of liability. See e.g., Seng v. American Stores Co., 384 Pa. 338, 121 A.2d 123 (1956), in which it was held that the issue of plaintiff's contributory negligence, as a result of carrying two shopping bags which reached to her chin and made it impossible for her to see and avoid a rain spout on the ground, was a question for the jury. Plaintiff can be expected to prevail.

2. The defenses of contributory/comparative negligence should be raised by the defendant. The issue of Phil's negligence will be a question for the jury. Phil may be barred from recovery, or his recovery may be reduced by his comparative negligence, depending on whether State S has adopted comparative negligence, pure or modified, or contributory negligence. In its Answer, defendant should also deny that plaintiff has satisfied the elements of negligence, specifically that Phil's conduct constituted an intervening cause of his injury.

It can be expected that the defendant will raise the affirmative defense of Phil's contributory/comparative negligence in its Answer, as well as denying that its breach [of duty] caused Phil's injuries. Phil's failure to notice and avoid the dangerous condition, coupled with his carrying a stack of books which obstructed his view of the walkway, will be alleged to constitute negligence on his part sufficient to defeat his claim.

If State S is a contributory negligence jurisdiction, and if Phil is found to have been causally negligent for his injury, he will not recover from the college, even if the college is also found to have been causally negligent. If the jurisdiction has adopted comparative negligence, Phil's recovery may depend on whether the jurisdiction uses the "pure" or "modified" comparative

negligence rule. Presser & Keeton on Torts, supra, at 451-462.

If State S has established a "modified" comparative negligence standard, and if the college is found to have been negligent, Phil may still recover, if the defendant's negligence is found to have been greater than his. Therefore, if the college is found to have been 51% negligent, and if its negligence is found to have caused Phil's injuries, Phil will recover 51% of the damages found by the jury. If Phil is found to have been 51% causally negligent, he will be barred from recovery. If he and the college are found equally negligent, he will recover 50% of the total verdict.

If State S has adopted a "pure" comparative negligence standard, Phil may recover the college's proportionate share of his damages, even if its negligence, as determined by the jury, is less than his. Ruparcich v. Borgman, 119 Pa. Cmwlth. 640, 547 A.2d 1279 (1988). The issue of Phil's negligence probably will be a question for the jury. Seng v. American Stores Co., supra.

3. a. Anne's evaluation of Phil's mother's claim of emotional distress at witnessing her son's injury, may depend on the law of State S. If the law requires physical manifestation of emotional distress, her claim may fail. In addition, if State S applies a "zone of danger" test for bystander liability, Phil's mother's claim will fail, as she was clearly outside the zone of danger. If State S applies a "bystander proximity" test, Phil's mother's claim may be a question for the jury.

Phil's mother was sitting in her car outside the classroom building and observed Phil's fall. Whether or not she may maintain an action for emotional distress will depend on the law of State S. Many states apply a test, known as the "zone of danger" test to determine if a bystander-witness may recover. In such jurisdictions, the witness is required to have been in danger of injury, such as a witness to an injury caused by an out-of-control vehicle which might also injure the witness. Here, since Phil's mother was in no danger of injury, she should not be permitted to proceed with her claim.

If State S has adopted the California rule enunciated in Dillon v. Legg, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), the "bystander proximity" test may be applied. That rule, developed by the California Supreme Court, in allowing a recovery by a mother who saw her child struck and killed by an automobile, although she (the mother) was in no personal danger, permits recovery by bystanders who: 1) are located near the scene of the

accident; 2) personally observe the accident; and 3) are closely related to the victim. Id. at 80.

Given the nature of Phil's accident, if State S has adopted the "bystander proximity" test, Phil's mother's claim may be a question for the jury, assuming that she sustained damages as a result of her emotional distress. However, the trauma and fright that she can allege as a result of witnessing Phil's accident do not appear to be those for which the legal protection of bystanders was intended, and the college may be expected to make such an argument in opposition to her claim. Phil's mother's claim may fail, regardless of whether State S applies a "zone of danger" or "bystander proximity" test, if she is also required to show physical manifestations of her emotional distress. Presser & Keeton on Torts, *supra*, at 364-365.

- b. Anne should consider filing a Motion to dismiss for failure to state a claim for which relief may be granted under Federal Rule 12(b)(6). Alternatively, or if the 12(b)(6) motion is denied, she may answer the Complaint and then file a Motion for judgment on the pleadings under Rule 12(c), or a Motion for summary judgment under Rule 56(b). The college may also be able to raise lack of subject matter jurisdiction, if there is not total diversity among the parties and/or if Phil's mother cannot establish damages in excess of \$50,000.

Defense counsel should carefully plan the college's defense strategy in order to obtain dismissal of Phil's mother's claim for emotional distress at the earliest point in the litigation.

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the college may file a Motion to Dismiss the Complaint for failure to state a claim for which relief may be granted. Such a motion may be filed in lieu of a responsive pleading (Answer). If the law of State S is clear that no action for emotional distress may be brought by a witness to an accident/injury, a 12(b)(6) motion would appear to be the best choice, as it would dispose of Phil's mother's claim before the defense files an Answer to the Complaint.

If the court denies the Motion to Dismiss, or if it is not the best choice, strategically, Anne should file an Answer to the Complaint, setting forth all defenses to Phil's and his mother's claims, and then file either a

pre-trial Motion for Judgment on the Pleadings or for Summary Judgment. The essential difference between such motions is that a Motion for Judgment on the Pleadings depends, for its factual support, on the averments of the pleadings alone, whereas a Motion for Summary Judgment may rely on facts developed during the course of discovery.

Rule 12(c) of the Federal Rules of Civil Procedure provides: After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56...

Rule 56(b) provides:

A party against whom a claim ... is asserted... may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Federal Rule 56(c) requires that there be no genuine issue of material fact and that movant is entitled to judgment as a matter of law.

Finally, it may be possible for the college to raise lack of subject matter jurisdiction as a defense, based on the location of the college's principal place of business and Phil's mother's legal residence, or on the lack of demonstrable damages in excess of \$50,000 to support Phil's mother's claim for emotional distress.

Based on the legal assumption in the question, as presented, the college should obtain dismissal of Phil's mother's claim for emotional distress, or judgment in its favor and against Phil's mother.

QUESTION NO. 8

Contracts:	Availability of illegality defense where party claiming illegality failed to act in good faith to remove the illegal situation
Federal Income Tax:	Allocation of purchase price to establish tax basis- Capital gains
Real Property:	Existence of Easement by necessity or by prior use
Uniform Commercial Code Sales - Section 2-207:	Addition of non-material terms to contract by memo exchange between merchants

FACTS AND INTERROGATORIES

Two years ago Bob purchased Blackacre, a two acre property fronting on a public highway, from Sam for \$25,000. Sam had operated a used car lot on one-half of Blackacre and a gas station on the other half. At the time of Bob's purchase he anticipated selling the used car lot. Bob had an appraisal done which showed the used car lot half of Blackacre had a fair market value of \$10,000 and the gas station a fair market value of \$15,000.

Bob has granted Al a valid option, in writing, to purchase the used car lot half of Blackacre for \$20,000 plus reimbursement of all subdivision costs and other costs related to the sale. In order to consummate this sale it is necessary for Bob to subdivide the property and obtain approval of the subdivision from the municipality in which Blackacre is located. Bob's engineer has indicated he does not anticipate a problem obtaining subdivision approval.

Wendy owns Whiteacre, a two acre parcel located directly behind and abutting Blackacre. Whiteacre does not abut a public road and is adjoined on the north and east by a river, on the west by a rocky cliff and on the south by Blackacre. Whiteacre and Blackacre were both part of a larger tract formerly owned by Sam. Since Wendy purchased Whiteacre ten years ago, she has accessed the house on Whiteacre via the same gravel drive Sam had used which runs through the used car lot. Neither Wendy's nor Bob's deed mentions the gravel drive.

One month ago Bob called Auto Supply, an auto supply dealer, and ordered five hundred quarts of oil for resale to his gas station customers. A few days after Bob placed the order he received a written confirmation from Auto

Supply indicating acceptance of the order to ship five hundred quarts of oil. The confirmation also indicated that a finance charge of 1.5% per month of the unpaid balance would be added if not paid in full 30 days after delivery. Bob has never discussed a finance charge with Auto Supply. Two weeks ago the oil was delivered to Bob.

Al has written to Bob indicating he is exercising his option to purchase the used car lot. Bob has had second thoughts regarding the sale of the used car lot because his son has expressed an interest in the business. Bob has written to Al indicating he cannot sell the used car lot because Blackacre has never been subdivided and the transfer would be illegal under the municipal subdivision ordinance. Bob has taken no steps to apply for or obtain subdivision approval.

1. If Al sues Bob for specific performance on the option agreement will Bob be successful in defending the position he has taken?
2. Assuming the used car lot is sold pursuant to the option what amount of the sale price, if any, would be subject to federal income tax on Bob's return?
3. If Al acquires the used car lot can he stop Wendy from using the gravel drive for access to and from the house on Whiteacre?
4. If Bob does not pay for the oil within thirty days of delivery can Auto Supply impose a finance charge of 1.5% per month?

EXAMINERS ANALYSIS - QUESTION 8

1. Bob should be unsuccessful in defending a specific performance suit on the grounds of illegality due to non-approval of the subdivision since Bob has failed to take any steps to obtain subdivision approval.

Generally, the courts will not enforce a contract entered into for an illegal purpose or which is patently against public policy. See, generally, RICHARD A. LORD, WILLISTON ON CONTRACTS, Vol. 5, Chap. 12 (1993); Holst v. Butler, 379 Pa. 124, 108 A.2d 740 (1954). In the instant case one must first consider whether or not the option contract is illegal. Performance of the option contract is only illegal if Bob does not comply with the municipal subdivision ordinance. If Bob does comply performance under the option contract will not be illegal.

Generally, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." **RESTATEMENT (SECOND)**

OF CONTRACTS § 205. The obligation to act in good faith prevents one from not acting when action is necessary to consummate the contract. See, RESTATEMENT (SECOND) OF CONTRACTS §205, comment d. The Restatement of Contracts further provides "[w]here a party's breach by non-performance contributes to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." RESTATEMENT (SECOND) OF CONTRACTS §245. Thus, where a duty of one party is subject to the occurrence of a condition, the duty of good faith requires cooperation on his part by taking affirmative steps to cause its occurrence.

Courts faced with similar facts have held that a seller may not avoid a transaction on the basis of illegality because his own failure to act renders the transaction illegal. See, Messina v. Silberstein, 364 Pa. Super. 586, 528 A.2d 959 (1987); Holden v. Kay, 144 Pa. Cmwlth. 254, 601 A.2d 453 (1991). The facts indicate that Bob intended to handle the subdivision as he had discussed the matter with his engineer and the option agreement required Al to reimburse Bob for the costs associated therewith. Logically, Bob is the party who should pursue subdivision approval as he is in control of the property.

Bob is now asserting that the option contract is illegal because it is contrary to the intent of the subdivision ordinance. Bob, having never applied for subdivision approval, cannot with certainty conclude that approval would not be given. It is Bob's own failure to fulfill a condition implicit in the option contract that has created the argued illegal circumstance. Bob cannot avoid the sale at this point and the court would most likely order specific performance in the nature of directing Bob to pursue subdivision approval and ultimately, if approved, to convey to Al.

- 2. Bob would have a taxable gain in the amount of \$10,000. The initial purchase price of \$25,000 must be allocated between the used car lot and the gas station lot according to their fair market value at the time of purchase.**

Basis is one of the most fundamental concepts in taxation. Basis is generally thought of as the amount representing the taxpayer's capital investment in the property. A taxpayer's original basis in the property may be adjusted upward or downward due, for example, to capital improvements or depreciation. Basis is also sometimes thought of as the amount which can be recovered free from federal income tax upon a bona fide sale or exchange of property. The Internal Revenue Code provides that a taxpayer's gain from the disposition of property is equal to the amount by which the amount realized from the disposition exceeds the taxpayer's adjusted basis in the property. See, I.R.C. § 1001; Treas. Reg. § 1.61-(6)(a). The facts provide no information regarding expenditures that would allow for a determination of the taxpayer's

adjusted basis and, therefore, for purposes of this analysis it is assumed that the adjusted basis is the cost basis.

Tax law also provides that where one sells or disposes of a portion of a property the taxpayer's basis in the property must be equitably apportioned in accordance with the relative fair market values of the property transferred and the property retained. See, Treas. Reg. § 1.61-(6)(a); CCH Federal Tax Service, Vol. 5, § E:3.40 (1994). In the facts, the fair market value of the used car lot portion of Blackacre when Bob purchased Blackacre was \$10,000. Assuming no adjustments, Bob's basis in the used car lot portion of Blackacre is \$10,000 and, therefore, Bob would realize a taxable gain on the sale of the used car lot of \$10,000. (i.e., the sale price of \$20,000 less Bob's basis in the used car lot of \$10,000). See, Treas. Reg. § 1.61-(6)(a), exam. (2); MARK A. SEGAL, REAL ESTATE PRACTITIONER'S TAX GUIDE § 1.03 (1990).

3. Al will not be able to prevent Wendy from using the gravel drive as Wendy has an easement by necessity or by prior use.

An easement is a right which one person has to use the land of another for a specific purpose not inconsistent with the general property interest of the owner in the property. Easements may be either express or implied. Express easements are generally evidenced in a deed or other form of conveyance. The facts indicated that neither Bob's nor Wendy's deed mentions the gravel drive. It can be deduced that there was no express easement given to Wendy for the gravel drive.

Easements may also arise by implication. Implied easements have been found where there has been continuous prior use of the easement or by necessity. To have an easement implied in fact based upon prior use one must find prior unity of ownership and prior unity of use of the properties benefited and burdened by the easement. Additionally, the prior use must not have been temporary or casual, must have been apparent and the easement must be reasonably necessary to the party claiming the easement. See, Brady v. Yodanza, 493 Pa. 186, 425 A.2d 726 (1981); Van Sant v. Royster, 83 P.2d 698 (Kans. 1938); LADNER, CONVEYANCING IN PENNSYLVANIA, § 11.02 4th Ed. (1979); BOYER, SURVEY OF THE LAW OF PROPERTY, Chap. XXVI, § 2(c) 3rd Ed. (1981).

An easement by necessity also arises by implication. It is found to exist when a parcel of land conveyed is so situated that access to the land to and from a public road may only be had by passing through the lands of the grantor. For an easement by necessity to arise one must establish that both the dominant and servient tenement were at one time under common ownership and that there is strict necessity for the easement. See, Soltis v. Miller, 444 Pa.

357, 282 A.2d 369 (1971); Borstnar v. Allegheny County, 332 Pa. 156, 2 A.2d 715 (1939). Strict necessity does not require absolute impossibility; substantial impracticability is sufficient. See, RESTATEMENT (THIRD) PROPERTY; SERVITUDES § 2.12 (Tent. Draft No. 1 1989).

Both Blackacre and Whiteacre were owned by the same grantor at one time. From the time that Wendy acquired Whiteacre she has used the gravel drive to get to and from the house on Whiteacre. Use of the gravel drive appears to be reasonably necessary given the fact that Whiteacre is surrounded on three sides by geographic conditions making it difficult if not impossible to reach a public road any way other than through Blackacre. There also appears to be strict necessity for the use of the gravel drive. The facts clearly support a finding of both an easement by prior use or an easement by necessity. Therefore, Al would not be able to stop Wendy from using the gravel drive.

4. Auto Supply should be able to charge a finance charge if Bob does not pay within thirty days of delivery. Under Section 2-207 of the Uniform Commercial Code additional terms become part of a contract between merchants if they do not materially alter the terms of the contract.

Section 2-207 of the Uniform Commercial Code (the "Code") provides:

(a) **General rule.**--A definite and seasonable expression of acceptance or a *written confirmation* which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(b) **Effect on contract.**--The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (i) the offer expressly limits acceptance to the terms of the offer;
- (ii) they materially alter it; or
- (iii) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(emphasis added) U.C.C. 2-207; 13 Pa. C.S. 2207. The Code defines a "merchant" as "[a] person who: deals in good of the kind; or otherwise by his

occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction " U.C.C. 2-104; 13 Pa. C.S. 2104. Clearly, both Auto Supply and Bob are merchants and, therefore, Section 2-207 applies to their dealings.

Section 2-207 clearly contemplates a situation where an oral agreement has been reached and a term is attempted to be added in a confirming document. Here, Auto Supply has added a term providing that interest will be charged on any overdue payment. The facts indicate the parties never discussed this term. Under 2-207, between merchants the term will become part of the contract so long as it does not materially alter the contract. Comment 5 to Section 2-207 gives as an example of a term that does not materially alter a contract ". . . a clause providing for interest on overdue invoices." The Pennsylvania Superior Court recently considered this issue and concluded that a clause providing for interest on overdue payments, not objected to in a reasonable time, did not materially alter the contract and became a part of the contract. See, Herzog Oil Field Service, Inc. v. Otto Torpedo Company, 391 Pa. Super. 133, 570 A.2d 549, 11 UCC Rep.Serv.d 471 (1990).

In the event that Bob does not make payment on a timely basis, Auto Supply should be able to charge interest on the overdue payment at a rate of 1.5% per month. This term did not materially alter the contract and, thus, became part of the contract.