

**PENNSYLVANIA BAR EXAMINATION
ESSAY QUESTIONS AND ANALYSES**

JULY 1995

**Essay Questions and Analyses
July 1995 Pennsylvania Bar Examination**

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Question #1

Frank and Wilma were each independently wealthy and had been married for several years after the death of Frank's first wife with whom he had his only child, Sam. Frank was a professor at Alma Mater University, after having retired from and sold his business. Frank was in a position to work for a nominal salary although it was understood between Frank and Alma Mater that Sam was not to be charged tuition, room and board while in attendance at Alma Mater Graduate Business School even though Sam did not qualify for any scholarship.

Frank and Wilma became estranged although they were not separated. Frank went to his attorney, Able, and had prepared and properly executed a new will leaving his entire estate to Sam. Frank also had a \$500,000 insurance policy payable to Wilma and a \$1,000,000 policy payable to Sam, both purchased with his own money. Both policies named Frank's estate as alternate beneficiaries. Frank and Wilma had no premarital or postmarital agreement.

Within a few months after executing his new will, Frank contracted a terminal illness and died. Shortly before his death and during his illness, he made, while competent, a gift of his own securities worth approximately \$603,000 to Sam which Able, but not Wilma, knew about. Frank and Sam told Able to keep this gift confidential from Wilma to whom Frank had never made any substantial gifts. Able did not ever represent Wilma.

Frank's will appointed Sam as his Executor. Sam contacted Attorney Able to help probate the estate. Sam told Able that Lawyer Larry is representing Wilma who is contemplating whether to elect to take against Frank's will. Sam told Able not to disclose in any way to Wilma or Larry, Frank's gift even though Able cautioned Sam that Sam had an affirmative duty to disclose the gift and that the gift should be reported anyway in various tax returns which would become public record. Uncomfortable with his predicament, Able resigned as counsel to Sam but Able did not, before or after the resignation, advise Wilma or her counsel of the gift.

At his death in addition to the insurance policies and the gift, Frank left an estate of \$1,000,000 after all applicable debts, expenses, taxes and family exemption. Frank had no other property or interest in properties as of his death (he and Wilma having lived in a home owned by her.) Neither Wilma nor Larry ever learned of the gift and Frank's estate has been settled with no election against his will by Wilma.

1. *Should the value of Sam's tuition, room and board be reported as gross income on Frank's federal income*

tax return(s)?

2. *Assume that Sam did, as executor, have an affirmative duty to advise Wilma or her counsel of the gift. Did Able violate any Rule of Professional Conduct by not advising Larry or Wilma of the gift?*
3. *Compare what Wilma would have received as a result of Frank's death if she had properly and timely elected against Frank's will with knowledge of the gift to what she received by not electing against Frank's will.*

Examiner's Analysis: Question #1

1. *The value of Sam's tuition, room and board at Alma Mater University should be taxable on Frank's federal income tax return(s) as employment-related income under Internal Revenue Code (IRC) Section 61 unless Sam was a dependent of Frank's and an undergraduate at Alma Mater under IRC Section 117 (d) or unless Sam was a dependent of Franks and Sam's tuition, room and board caused Alma Mater no additional costs under IRC Section 132(a)(1).*

Federal taxable income under IRC Section 61(a)(1) includes (except as otherwise provided):

...income from whatever source derived, including (but not limited to) the following items:
(1) Compensation for services, including fees, commissions, fringe benefits, and similar items.

Frank's agreement with Alma Mater that Sam receive a free education at Alma Mater is a fringe benefit in addition to Frank's salary. IRC Treas. Reg. 1.61-21(a)(1) provides that:

Examples of fringe benefits include: An employer-provided automobile, a flight on an employer-provided aircraft, an employer-provided free or discounted commercial airline flight, an employer-provided vacation, an employer-provided discount on property or services, an employer-provided membership in a country club or other social club, and an employer-provided ticket to an entertainment or sporting event. (Emphasis provided).

Since Frank's employer (Alma Mater) is in the business of providing education services, the provision of an education free of charge to Sam is such a taxable fringe benefit unless IRC Section 117(d) or 132(a)(1) applies. Section 117(d) provides an exemption for certain undergraduate tuition of a dependant and is thus not applicable to Sam's graduate tuition. Section 132 (a)(1) provides an exemption to an employee or his dependent (as defined in Section 132(f)(2)) if the fringe benefit is a "no additional cost service" provided by the employer. It does not appear that Sam is a dependent or that the tuition, room and board could be provided free of substantial incremental costs to Alma Mater. However, credit will be given to an analysis

that Sam could still be a dependent (even though in graduate school) and that, if there were openings in Alma Mater's classes and dormitories, the full tuition, room and board might have caused Alma Mater only minor additional costs which can be ignored. (IRC Reg. § 132-2(a)(5).) In the absence of qualification under IRC 117 or 132 as an exemption, Sam's free tuition, room and board will be taxable to Frank.

It does not matter that Sam is receiving the fringe benefit rather than Frank. IRC Treas. Reg. 1.61-21(a) (4) provides:

A taxable fringe benefit is included in the income of the person performing the services in connection with which the fringe benefit is furnished. Thus, a fringe benefit may be taxable to a person even though that person did not actually receive the fringe benefit. If a fringe benefit is furnished to someone other than the service provider such benefit is considered in this Section as furnished to the service provider, and use by the other person is considered use by the service provider. For example, the provision of an automobile by an employer to an employee's spouse in connection with the performance of services by the employee is taxable to the employee. The automobile is considered available to the employee and use by the employee's spouse is considered use by the employee.

Thus, the fact that Sam received the free education from Alma Mater does not itself exclude its taxability to Frank.

At what value would the free education be taxable to Frank? IRC Treas. Reg. 1.61-21(b)(4) provides:

An employee must include in gross income the amount by which the fair market value of the fringe benefit exceeds the sum of -- (i) The amount, if any, paid for the benefit by or on behalf of the recipient, and (ii) The amount, if any, specifically excluded from gross income by some other section of Subtitle A of the Internal Revenue Code of 1986.

The amount taxable to Frank would presumably be the standard tuition, room, board and other charges for the education which Sam received net of any payments made for Sam's education at Alma Mater by Frank or any other person. The facts do not indicate that anyone made payments to Alma Mater for Sam's education. Therefore, the entire normal charges for Sam's education would be taxable to Frank.

The question did not specifically ask in which of Frank's specific returns the education would be taxed but generally the value of the education would be taxable in the year when tuition, room and board payments

were due. Also, any tuition, room and board payments waived after Frank's death would be taxable to the beneficiary thereof as income in respect of the decedent under IRC Section 691(a). Extra credit will be given to candidates who recognize these issues.

2. *Both before and after his resignation, Able did not violate any rule of professional conduct by not advising Wilma or Larry of Frank's gift to Sam because Able was under an obligation to Sam not to make any such voluntary disclosure of confidential information.*

The question presented is whether Able, possessing information of primary importance to Wilma and her attorney has any duty to voluntarily disclose same under the facts and circumstances given. The facts indicate that Wilma is not, nor ever was, a client of Able's. Thus, Able was at liberty to represent Frank and Frank's son, Sam, as executor of Frank's estate. Able had no conflict under Pa.R.P.C. Rules 1.7 and 1.9. Since Wilma was not his client, Able had no duty to disclose the gift to Wilma, especially when neither she nor her attorney, Larry, appears to have made any inquiry about such a gift, either informally or under any rule of court. Thus, Able appears to have had no affirmative duty under Pa.R.P.C. 4.1 (Truthfulness in Statements to Others) or 3.3 (Candor Toward the Tribunal) to disclose the gift to Wilma or Larry.

Furthermore, Able as attorney and former attorney for Frank's estate was under an obligation to not disclose Frank's gifts to Sam under Pa.R.P.C. Rule 1.6 prohibiting the disclosure of confidential information. Certainly the gift was confidential due to the request of Frank and Sam and their lawyer/client relationship with Able. Its disclosure was not in their best financial interests even though Sam had, as a fiduciary, a duty to disclose it. Thus, Able not only did not violate the Rule of Professional Conduct by not disclosing the gift during and after his service as counsel to Sam, he also avoided violating the confidentiality rule if he had disclosed it. Able was in a predicament and he did the proper thing by resigning, which he was free to do under Pa.R.P.C. Rule 1.16(b)(3) (which allows a resignation by an attorney who is uncomfortable with his client's position on a matter when there are no compelling circumstances specified under the rule requiring him to continue representation).

Equal credit will be given to a conclusion that Able, in not disclosing even though not asked, may have been

contributing to a fraud upon Wilma and thus, would have been compelled to disclose the gift to the probate court under Pa.R.P.C. Rule 3.3(a)(2), or free to disclose the gift to Wilma under the exception to the client confidentiality rule at Pa.R.P.C. Rule 1.6(c).

3. *Wilma would have gained under an election against Frank's will.*

Under Pennsylvania Probate Estates and Fiduciaries Code (PEF), Wilma would have received more as a result of Frank's death had she elected against his will than she did by not electing against his will. A surviving spouse of a decedent has a right to elect against the provisions of his will. (PEF §2201 et seq.) Wilma had this right. She did not waive this right under any marital agreement as allowed under PEF §2207. She did not forfeit this right by any action such as slaying or desertion under PEF §2208.

What Wilma would have received by electing against Frank's will is 1/3 of Frank's augmented estate. (PEF §2203(a)(1).) His augmented estate subject to the election was basically his probate estate (the \$1,000,000) and gifts made by him in excess of \$3,000 within one year of his death under PEF §2203(a)(6). Thus, the gift to Sam in excess of \$3,000 or \$600,000 would have been added to his \$1,000,000 in probate.

Furthermore, the \$500,000 life insurance policy to Wilma would have been added to the augmented estate. Had Wilma made the election under PEF §2204(a)(4), she would have had to forfeit her \$500,000 in life insurance and since Frank's estate was the effective alternate beneficiary, it would have then reverted to his estate and been subject to the election. If she had kept the proceeds it again would have been treated as a charge against her share under PEF §2204(c).

Consequently, under PEF, the estate which was subject to Wilma's 1/3 election included the original probate assets of \$1,000,000, the gift in excess of \$3,000 or \$600,000 and the \$500,000 in life insurance payable to Wilma. These assets totaled \$2,100,000 of which Wilma was entitled to 1/3 or \$700,000. Wilma was then entitled to keep the \$500,000 of insurance and receive \$200,000 more from Frank's estate to total her \$700,000.

Note that the \$1,000,000 insurance payable to Sam was not an asset subject to the election under the PEF. Such insurance payable to someone other than the surviving spouse is specifically excluded from spousal elective rights under PEF §2203(b)(2). Also under PEF, Wilma was entitled to keep her home since no part of it was Frank's to begin with and she was entitled to keep her individual assets since nothing in the facts state that these had been given to her by Frank and thereby, depending upon the facts and circumstances, may have become an offset against her elective share.

However, Wilma did not elect against Frank's will; therefore, she only received the \$500,000 insurance policy rather than a total of \$700,000 had she elected against the will. Under the will she, of course, received nothing and she had no rights against the \$603,000 gift to Sam.

Question #2

Paul, President of Wampum Industries Corp. ("WIC"), a Pennsylvania corporation and his daughter, Donna, obtained a Certificate of Deposit ("CD") at Bank. Bank had Paul and Donna sign a depository agreement providing that the CD include the following language:

This non-negotiable Certificate of Deposit evidences that at maturity Bank promises to pay \$30,000 to the order of Paul or Donna as joint tenants with right of survivorship plus interest at 8 percent paid quarter-annually from date.

WIC regularly did electrical contracting for various state agencies in Pennsylvania. Each contract specified that the electrical cable and fixtures be made in the United States. WIC generally purchased through Volant Electrical Corp ("VEC"), a wholesaler, also a Pennsylvania corporation.

Last year, Paul ordered through Sam, a VEC salesman, electric cable for a state agency project. Paul also ordered from VEC a replacement generator necessary to supply temporary power to sites where WIC was the electrical contractor. To secure payment for the generator, WIC executed a security agreement which gave VEC a security interest in the generator and required WIC to insure it naming VEC as a loss payee. VEC also took possession of the CD which Paul pledged in writing as collateral, and perfected, by filing, its security interest in the generator.

Hearing that Commonwealth auditors were investigating WIC, Lew, VEC's in-house lawyer, as part of his ongoing compliance oversight duties, launched an investigation and confidentially talked with numerous VEC personnel. Reviewing his notes of these interviews, Lew discovered evidence that at Paul's suggestion, VEC had sold WIC foreign imported cable at 1/3 off U.S. made cable prices but had invoiced the cable as U.S. made cable to enable Paul to pass state audits. Last month, at a meeting where only VEC's board members were present, Lew disclosed his findings and the entire board learned for the first time that VEC had sold WIC foreign made cable as U.S. made.

The Commonwealth has filed a civil action against WIC, and has issued a subpoena upon VEC's board chairman to disclose what he knows regarding sales to WIC.

1. *How should Lew advise VEC's board chairman? (Do not discuss any Fifth Amendment rights).*

Last month the generator was stolen. VEC has learned that the insurance policy did not name VEC as loss payee and the insurance company, without knowledge of VEC's security interest filing, last week paid the proceeds to WIC.

2. *Does VEC have any priority rights to the insurance proceeds over WIC's other creditors?*

3. *Assuming the insurance proceeds have been spent and VEC cannot recover them from WIC, what rights, if any, does VEC have against the insurance company?*

Paul died suddenly. Any insurance proceeds received regarding the stolen generator still left a deficiency of more than \$30,000 on WIC's obligation to VEC. VEC therefore presented the matured CD to Bank which paid VEC its face amount without question. Donna, now informed of the above facts, demands of Bank that the CD be paid to her.

4. *What rights, if any, does Donna have against Bank and why?*

Examiner's Analysis: Question #2

1. *Lew should advise VEC's board chairman to claim the attorney-client privilege regarding all of the information communicated to the board by Lew. Although one usually thinks of the attorney-client privilege as keeping confidential information conveyed to the attorney by the client, in this case it protects the communications from the attorney, Lew, to the client, VEC as represented by its board of directors, which information was obtained through confidential interviews with VEC personnel. Also, because the information resulted from Lew's notes made of confidential interviews, that information should be protected by the Work Product Doctrine.*

Lew, of course, represents VEC and not its board chairman. Lew should make this clear to the chairman and emphasize that Lew's advice is given in Lew's role as VEC's legal counsel. However, insofar as the Commonwealth questions the chairman as to the chairman's knowledge which was obtained in his role as a director receiving a confidential communication from VEC's legal counsel, the chairman then represents VEC and should act in VEC's best interests. In civil matters, the communication between the client and the attorney is covered by 42 Pa. C.S. § 5928 and in criminal matters the communication is covered by 42 Pa. C.S. § 5916. In both instances, the attorney may not be permitted to testify to communications made to him by the client nor may the client be compelled to disclose the same unless, of course, the privilege is waived.

As pointed out above, for purposes of this situation, the chairman is VEC and if VEC has a privilege against disclosing confidential communications with its attorney, this privilege applies to the communications to the board of directors represented by the chairman.

In our situation, Lew, as VEC's attorney, as part of his duties, confidentially interviewed numerous VEC personnel and from his notes of those numerous interviews, Lew was able to determine and produce evidence that VEC had participated in a fraud perpetrated upon the Commonwealth by WIC. Although no action has yet been filed against VEC, the evidence garnered by Lew indicates VEC may be liable, and it is Lew's job to advise VEC concerning such possible liability and/or litigation.

Because the board had no prior knowledge of the information contained in Lew's findings, one can surmise that the board chairman's knowledge of improperly labeled sales to VEC comes only through the discussions the board had with its attorney, Lew. Although often the attorney-client privilege is invoked to protect communications from the client to the attorney, it is equally appropriate here to protect the communication by Lew to VEC's board of directors, the body charged under the Business Corporation Law with responsibility for directing the corporation. (15 Pa. C.S. § 1721.) If Lew is to properly represent his client, VEC, Lew has a duty under Rule 1.4 of the Pennsylvania Rules of Professional Conduct to communicate to VEC and this means fully informing the board of directors as to potential liability and/or litigation problems. Only in this way is VEC able to make responsible choices. Therefore, the Commonwealth cannot obtain the information from the board chairman just as it cannot compel Lew to disclose the results of his confidential investigation and confidential discussions with the board, all of which was done as VEC's legal counsel. (See Upjohn Co. v. U.S., 449 U.S. 383, 101 S.Ct. 677 (1981).) While the attorney-client privilege only protects the communication between the attorney and client and not the underlying information itself, in the situation of VEC's board, the information came solely from the attorney's communication. To compel the chairman to disclose this information is tantamount to compelling disclosure of the communication itself.

Lew's evidence came from the review and analysis of his notes that he made in confidential interviews that he had with VEC personnel, and such review and conclusions from these notes are protected under the Work Product Doctrine. (See Upjohn, supra.) Of course, the Commonwealth can interview all of VEC's employees and perhaps put together the same pattern that Lew was able to discover, but the Commonwealth is not entitled to obtain the benefit of Lew's work on behalf of his client as disclosed to his client's governing body. "Discovery was hardly intended to enable a learned profession to perform its functions... on wits borrowed from its adversary." (Justice Jackson's concurring opinion in Hickman v. Taylor 329 U.S. at 516, quoted in Upjohn, supra. at Page 396.) While VEC is not currently under investigation nor a party to legal action, Lew has every reason to anticipate that VEC could be brought into a legal proceeding and his analysis and report to the board of directors is consistent with preparation for possible litigation in which VEC would be a party.

Pennsylvania Rule of Civil Procedure 4003.3 on the scope of discovery is fairly broad and not as confining as indicated in the Upjohn case. However, even the Pennsylvania Rule states that "the discovery shall not include disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Had Lew obtained the written statements of witnesses, they would be discoverable, but Lew's conclusions and analysis drawn from notes made in interviews may fall under the protection of this rule. The fact that VEC is not currently a party to any action should not, of itself, be determinative because there is no reason to draw a distinction between discovering Lew's communication to VEC prior to VEC being a party and protecting from discovery that same communication once VEC has become a party. The better conclusion seems to be that if there is reasonable anticipation that VEC could become a party, Lew's work product and confidential communications should be protected.

Under the Restatement, the Law Governing Lawyers §136, work product is immune from discovery and is defined as being prepared by or for a lawyer in preparation for litigation then in progress or its preparation was primarily motivated by the prospect of future litigation. This Restatement rule and definition appear to be closer to the rule in the Upjohn case than to the Pennsylvania Rule of Civil Procedure discussed above.

However, regardless of the conclusion reached, the elements are the same in that it has to be work performed by a lawyer in anticipation of litigation and another party that will become adverse wishes to examine what the lawyer has done.

2. *If the insurance proceeds are still identifiable, VEC has rights to them over WIC's other creditors.*

Uniform Commercial Code §9-306(1)[13 Pa. C.S. § 9306(a)] defines proceeds to include insurances payable by reason of damage or loss to the collateral. UCC §9-306(2)[13 Pa. C.S. §9306(b)] states that a security interest continues in any identifiable proceeds received upon disposition of the collateral. Under UCC § 9-306(3)[13 Pa. C.S. §9306(c)], if the proceeds are identifiable cash proceeds (our case) the security interest continues to be perfected. Therefore, if VEC can find the proceeds and they are still identifiable as proceeds of the loss of the generator, VEC continues to have a security interest in those proceeds.

3. *VEC has no rights against the insurance company regarding the insurance proceeds which were properly paid to the named insured.*

However, because the insurance policy did not name VEC as a loss payee, VEC has no claim against the insurance company for making payment directly to WIC. Even though the failure to have VEC named as loss payee violated WIC's agreement with VEC, the insurance company has no further responsibility to anyone, including VEC, other than as stated in the policy itself. See Chrysler Credit Corporation v. Smith, 24 UCC Rep. Serv. 2d. 677 (Pa. Super. 1994), which held that the insurance company had no duty to inquire of security interests prior to making its payment to the insured named in the policy.

4. *Donna has no rights against Bank because Paul, having possession of the CD made out to him alternatively, also had the right to deal with the CD as owner.*

The CD is stated to be "non-negotiable" and under UCC §3-104(d)[13 Pa. C.S. §3104(d)] such a designation is honored and the CD would not be a negotiable instrument. Therefore, because §3-102(a)[13 Pa. C.S. § 3102(a)] states that Article 3 applies to negotiable instruments, it appears that Article 3 itself would not apply

to the question regarding the CD. However, even though Article 3 may not be applicable directly, as stated in comment 2 to §3-104[13 Pa. C.S. § 3104] "it may be appropriate... for a court to apply one or more provisions of Article 3 to the writing by analogy,...." Using analogy, under §3-110(d)[13 Pa. C.S. §3110(d)] we find rules for application when an instrument is payable to two or more persons. Using this section as an analogy, when the CD was payable to "Paul or Donna", it was payable in the alternative and, therefore, Paul, having possession of the CD, would be in a position to "negotiate" (that is transfer or assign), discharge or enforce it. This should give Paul also the power to pledge the CD to VEC as security for WIC's debt.

UCC §9-502(1)[13 Pa. C.S. §9502(a)] states that the secured party (VEC) is entitled to notify the obligor on an instrument (Bank) to make payment directly to the secured party. Thus, when VEC notified Bank to cash in the CD based on Paul's assignment of the CD to VEC as security, the Bank was legitimate in doing so. Article 9 defines "instrument" in §9-105(1)[13 Pa. C.S. 9105(a)] to include not only a negotiable instrument as defined in Article 3 but "...any other writing which evidences a right to the payment of money... and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment." While one could raise the question whether a CD is something which is transferred in the ordinary course of business, it is not unknown for CDs to be pledged for loans and when so pledged, the CD is generally delivered with an assignment or an indorsement and therefore should come under the definition of "instrument" in Article 9.

Therefore, even though Donna now owns the CD by right of survivorship, Donna would still be subject to the security interest given by Paul during his lifetime and Bank was justified in paying the CD proceeds to VEC and therefore Donna has no rights against Bank.

[This result is consistent with the provisions of 7 P.S. §604, being §604 of the Pennsylvania Banking Code of 1965, which protects the Bank, in the case of joint depositors, when it pays to the order of one of those depositors. It is also consistent with the joint ownership provisions of 20 Pa. C.S. §6303 dealing with the rights of joint account owners among themselves but not involving third parties. Also, although the question

of perfection is not raised, under §9-304(1)[13 Pa. C.S. §9304(a)] a security interest in an instrument can be perfected only by the secured party taking possession of the instrument. Thus, assuming Article 9 defines the CD as an instrument, VEC would perfect by taking possession of the CD, which in fact VEC did along with Paul's written pledge agreement.]

Question #3

On February 1, 1994, Paul purchased from Dan's Appliances ("Dan's") an "Easy" model automatic coffee

maker manufactured by West Corporation ("West"). The coffee maker had a one year warranty. On August 31, 1994, at approximately 11:00 p.m. as was his usual practice, Paul properly set the automatic timing device on his "Easy" model to begin brewing coffee at 5:30 a.m. Paul then set his alarm clock for 6:00 a.m. and went to bed. At about 5:50 a.m., September 1, 1994, Paul was awakened suddenly by the noise from his smoke detector and discovered smoke coming from the kitchen. Paul grabbed a bath robe and ran quickly out of his home to a neighbor's house where he telephoned the local fire department. The fire department quickly extinguished the blaze but not before the kitchen and family room were completely destroyed. The coffee maker during the period of time preceding the fire had only received normal wear and use.

Eric, a registered electrical engineer and fire investigator, was retained by counsel for Paul to investigate the fire. Over the last fifteen (15) years Eric has worked as an electrical engineer in a testing lab for small appliances, taught at various fire schools on the origins and causes of electrical fires, and has been retained by various local fire departments as a fire investigator. Eric examined the remains of the coffee maker and found that the coffee maker was burned so completely that a hole had been burned through the kitchen counter directly beneath the coffee maker. Eric also examined the electrical wiring in the wall and the receptacle used by the coffee maker and determined that they were not the origin or cause of the fire. Because of these facts and the fact that the coffee maker and the kitchen counter underneath burned so completely, Eric believed the coffee maker was the most probable cause and origin of the fire. Specifically, Eric was willing to state with a reasonable degree of professional certainty that he had eliminated all other causes for the fire, and that the most probable origin and cause of the fire was a short circuit in the heating element which probably resulted from a malfunction. Eric, however, would admit that he could not find a specific defect in the coffee maker which may have contributed to the malfunction because the fire had completely destroyed it. Paul subsequently filed a timely civil action against West (Paul v. West) in a Common Pleas Court of Pennsylvania.

1. *Pursuant to Pennsylvania common law, what torts, if any, (excluding negligence and breach of warranty) could Paul assert against West and with what probable result?*
2. *Assume that West has filed its Answer and that six (6) months later while discovery was still open and based upon the results of discovery thus far, counsel for Paul moved to amend his complaint in order to allege gross negligence and a demand for punitive damages. The applicable statute of limitations had not yet run. Counsel for West will not consent to an amendment of Paul's complaint. As the trial judge in Paul v. West, applying Pennsylvania Rules of Civil Procedure discuss your ruling on counsel for Paul's motion to amend his complaint.*
3. *At the trial of Paul v. West, counsel for Paul proposes to call Eric to render his opinion on the origin and cause of the fire. What objections should counsel for West be prepared to make and argue and with what probable result? Explain.*

Examiner's Analysis: Question #3

1. *Paul could assert an action in strict product liability and will probably be successful.*

Pennsylvania judicially adopted the Restatement of Torts (Second), Section 402A in Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966). Section 402A provides that:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:
 - (a) the seller is engaged in the business of selling such a product; and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although:
 - (a) the seller has exercised all possible care in the preparation and sale of his product; and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

In Berkebile v. Brantly Helicopter Corp., 337 A.2d 893 (1975), the Pennsylvania Supreme Court explained and defined the standards applicable to a strict product liability action pursuant to Section 402A. The Court held that Section 402A requires substantive proof of two elements. First, a plaintiff must prove that a product was sold in a defective condition which made it "unreasonably dangerous" to the consumer. Second, said defective condition was the proximate cause of plaintiff's injury. A product may be defective and unreasonably dangerous because of its design, manufacture, and/or because of a failure to warn. (Berkebile, supra., at 902.) Pursuant to comment (c) of Section 402A, liability may be imposed upon a manufacturer even if all possible care has been employed and there is no fault. A "seller" includes all suppliers and/or manufacturers in the chain of distribution. Clearly West is a manufacturer under 402A.

In our case if the expert testimony of Eric is admitted and accepted by a trier of fact, strict product liability can probably be established. The basis for this conclusion is that the heating element was either designed or manufactured in a defective manner which resulted in a defective product that was "unreasonably dangerous" and said defect proximately caused Paul's property damage. West, as mentioned, is clearly a

manufacturer. The product was used in a normal way as opposed to abnormal use, and there is no evidence of a substantial change in the condition of the product after purchase, or before. Under our facts, however, because the coffee maker was destroyed, Plaintiff can not prove that a specific defect caused the defective condition which made the product "unreasonably dangerous". To address this circumstance, the Pennsylvania Supreme Court adopted a malfunction theory of liability. In Rodgers v. Johnson & Johnson, 523 Pa. 176, 182 565 A.2d 751, 754 (1989), the Court held that this theory was applicable even if there is no evidence or proof of a specific product defect. Specifically, the Court stated:

A plaintiff presents a *prima facie* case of strict liability by establishing that the product was defective and that the product caused the plaintiff's injury. In most instances the plaintiff will produce direct evidence of the product's defective condition. In some instances, however, the plaintiff may not be able to prove the precise nature of the defect in which case reliance may be had on the "malfunction" theory of product liability. This theory encompasses nothing more than circumstantial evidence of product malfunction. *It permits a plaintiff to prove a defect in a product with evidence of the occurrence of a malfunction and with evidence eliminating abnormal use or reasonable, secondary causes for the malfunction.* It thereby relieves the plaintiff from demonstrating precisely the defect yet it permits the trier of fact to infer one existed from evidence of the malfunction of the absence of abnormal use and... the absence of reasonable secondary cause."

In this case, plaintiff can prove the necessary element of proof (evidence of a malfunction, absence of abnormal use and no secondary causes, etc.) to apply this theory of strict product liability. (Woodin et ux v. J. C. Penney, Co., 629 A.2d 974, 976 (Pa. Super. 1993).) For these aforementioned reasons and facts, it is probable that West will be strictly liable.

2. *Plaintiff's Motion to Amend his Complaint should be granted.*

Pa. R.C.P. 1033, provides in pertinent part that:

A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, correct the name of a party or amend his pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense...

Thus, a party may at any time amend his complaint to assert a new cause of action, defense, transaction or occurrence with the consent of an opposing party or by leave of court. The decision to grant or deny a

motion to amend a pleading is a matter of sound judicial discretion. (Berman v. Herrick, 424 Pa. 490, 227 A.2d 840 (1967).) "Our courts have established... [as] a policy that amendments to pleadings will be liberally allowed to secure a determination of cases on their merits." (Gallo v. Yamaha Motor Corp., 335 Pa. Super 311, 313, 484 A.2d 148, 150 (1984).) In this regard, Pa. R.C.P. 126, expressly provides that:

The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties. An amendment to a pleading should be allowed at any stage of the case unless to do so would violate the law or prejudice the rights of opposing counsel.

(See also Gutierrez v. Pa. Gas & Water Co., 507 A.2d 1230, 1232 (1986).) Applying these standards to Plaintiff's Motion to Amend, the motion would probably be granted for several reasons. The new allegations and proposed amendment were developed as a result of and during discovery. Therefore, this may be information that the plaintiff did not have at the time suit was filed. Second, discovery is still open for both parties thus enabling them to address any new issues, witnesses, causes of actions or defenses that may be raised. This fact reduces the risk of undue prejudices to either party. Moreover, an amendment would not violate any substantial right of West. Finally, an amendment if allowed would not violate any law or right of opposing counsel. For these reasons, plaintiff's Motion to Amend his complaint should probably be granted.

3. *The objections and applicable rules of evidence to be made and argued before admitting Eric's testimony are: (a) relevancy; (b) whether Eric qualifies as an expert **and** the proposed subject matter is beyond reach of the average layperson; and (c) whether Eric can testify with a reasonable degree of professional certainty on an ultimate issue of fact (causation).*
 - (a) *Relevancy.* Eric's proposed testimony is relevant on the issue of causation and strict product liability. Fed. Rules of Evid. 401 defines "Relevant evidence" as "...evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." The Pennsylvania Supreme Court has in effect adopted Rule 401. In Martin v. Soblotney, 502 Pa. 418, 466 A.2d 1022 (1983), the Court found that evidence is relevant if it tends to make a fact at issue more or less probable. (See also Commonwealth v. Hickman, 453 Pa. 427, 309 A.2d 564

(1973) ("relevant evidence is that which tends to establish some fact material to the case or tends to make facts at issue more or less probable".) Eric's proffered testimony is probably relevant on the issue of causation.

- (b) *Subject Matter and Qualifications.* If relevant, the admissibility of the proffered expert testimony is a three step process under Pennsylvania Evidence Law. First, the witness must be qualified as an expert. Second, the evidence must be helpful to the trier of fact and beyond the ken of the average layperson. Third the proposed expert testimony must be made with a reasonable degree of professional certainty. In Dambacher v. Mallis, 336 Pa. Super. 22, 485 A.2d 408, at 415, appeal dismissed 508 Pa. 643, 506 A.2d 428 (1984), a product liability case involving an accident which allegedly resulted from the mixing of radial and non-radial tires on a vehicle, the Court applied the following standard for qualifying an expert witness and defining appropriate subject matter which requires expert testimony:

When a witness is offered as an expert, the first question the trial court should ask is whether the subject on which the witness will express an opinion is so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman.... If the subject is of this sort, the next question the court should ask is whether the witness has sufficient skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth. (Commonwealth v. Daniels, 280 Pa. 278, 421 A.2d 721 (1980).)

It is likely that the probable origin and causes of electrical fires in small appliances is a subject matter beyond the ken of most laypersons. Eric is a registered electrical engineer and fire investigator who has 15 years of experience involving the origins and causes of electrical fires. In addition, he currently teaches local fire companies on the subject and has tested and worked with small appliances. It is more likely than not that a trial judge would find Eric qualified as an expert witness by education, training and experience and allow him to express an opinion. It is also likely, given our facts, that a trier of fact, in deciding the issue of causation, would be greatly aided by his knowledge and experience because the origins and causes of fires generally, and more specifically electrical fires, is not a subject within the general knowledge and experience of most laypersons.

(c) *Whether Eric can testify with a reasonable degree of professional certainty on an ultimate issue of fact.*

Assuming Eric is qualified to testify as an expert, can he testify as to the origin and cause of the fire if it involves an ultimate issue of fact? The Superior Court in Lewis v. Mellor, 259 Pa. Super. 509, 393 A.2d 41 (1978) adopted Fed. Rules of Evid. 701 and 704. Rule 704 provides:

Testimony in the form of opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

On this same question, the Superior Court reached a different result in Bessemer v. Reed, Shaw, etc., 344 Pa. Super. 218, 496 A.2d 762, 766 (1985), by not admitting lay or expert opinion on the ultimate issue in the case. In Kozak v. Struth, 515 Pa. 554, 531 A.2d 420 (1987) the Pennsylvania Supreme Court resolved the issue and held that the rule allowing witnesses to state opinions which embrace the ultimate issue is limited to those instances where the admission will not cause confusion or prejudice, and that "...such expert testimony must be carefully scrutinized because issues of ultimate fact, especially those of credibility, are for a jury not the expert." (Kozak, at 424.) An expert witness cannot speculate but must state their opinion to a reasonable degree of professional certainty. (McCann v. Amy Joy Donuts, 325 Pa. super. 472 A.2d 1149 (1984).) If Eric can meet this last standard, with appropriate cautionary instruction from a court to the trier of fact, the proposed expert opinion and testimony is probably admissible even though it may embrace an ultimate issue of fact.

Question #4

Bill and Sylvia shared an apartment. One day, while shopping in a department store, Sylvia purchased a number of items, paying for them with a check which she drew on a bank where she no longer had an account. That evening, while Bill and Sylvia were driving home from a movie, Paul, a policeman, stopped their car because Bill was driving erratically. Bill smelled of alcohol. Paul asked him to get out of the car and take a field sobriety test. Bill completed the test successfully and, as he was returning to his vehicle, a

small white rock, the size of a marble, fell from Bill's pocket. Paul, who had received controlled substance detection training, was suspicious as to the rock and confiscated it. It was later determined to be crack cocaine. Paul obtained a valid search warrant for Bill and Sylvia's apartment and found a container of marijuana in a kitchen drawer.

When the store management learned that Sylvia's check had not been honored, she was arrested on a bad check charge. She was also arrested for possession of an illegal controlled substance as a result of the marijuana found in the kitchen. She retained Larry, a lawyer, to represent her on both charges.

1. *Bill was charged with the illegal possession of a controlled substance. At his trial, would the crack cocaine be admissible in evidence?*
2. *Following a trial, Sylvia was acquitted of issuing a bad check. The store owner was furious and wanted her punished for anything. The store owner asked the District Attorney to charge Sylvia with theft based on her receipt of the goods by the use of a bad check. If you were the District Attorney, how would you respond to the store owner?*
3. *At Sylvia's trial for the illegal possession of marijuana, what argument or arguments would you raise opposing the admission of the marijuana and with what success?*
4. *Similar to the department store, Sylvia paid Larry his fee by issuing a check on the bank where she no longer had an account. When the check was not honored by the bank, Larry gave notice to Sylvia that he was going to ask the District Attorney to instigate a criminal prosecution against her. Discuss the propriety of Larry's proposed course of action.*

Examiner's Analysis: Question #4

1. *Does a search occur within the meaning of the Fourth Amendment in a situation where a police officer discovers and seizes an item which is open to visual observation after it has been dropped by an individual?*

Before a police officer may make a lawful stop of an individual, he or she must have specific and articulable facts, which, if taken together with rational inferences from those facts, reasonably warrant a belief that criminal activity is afoot. (See Commonwealth v. Martinez, 403 Pa. Super. 125, 588 A.2d 513 (1991).) An officer is permitted to stop a motor vehicle where the vehicle is being operated erratically and where a provision of the Vehicle Code is being violated. (Commonwealth v. Elliott, 376 Pa. Super. 536, 546 A.2d 654 (1988).) Where an officer simply observes an item which appears to be contraband and is in plain view, this does not constitute a search and, consequently, does not come within the Fourth Amendment's proscription against unreasonable searches. This principle has been applied where items have been dropped

or discarded by suspects fleeing police officers or when items of contraband are dropped on the command of private individuals. (See California v. Hodari, 499 US 621, 111 S.Ct. 1547 (1991); Trujillo v. United States, 294 F.2d 583 (CA 10 1961).) In the instant case, Paul, having made a valid traffic stop based on Bill's erratic driving, did not violate the Fourth Amendment when he subsequently requested Bill to exit the vehicle and take a field sobriety test. (Commonwealth v. Lopez, 415 Pa. Super. 252, 609 A.2d 177 (1992).) The contraband was inadvertently dropped by Bill as he returned to his vehicle. Paul, because of his training and experience, was familiar with crack cocaine. It was observed by him in plain view and not as a result of a search. Its seizure appears to have been proper, and it would probably be admissible in evidence at Bill's trial.

2. *The double jeopardy clauses of both the Federal and State Constitutions, provide that a person may not be twice put in jeopardy for the same offense.*

The United States Supreme Court, in Blockburger v. United States, 284 US 299, 52 S.Ct. 180 (1932), enunciated a test to determine whether the Double Jeopardy Clause of the U.S. Constitution applies to bar a successive prosecution for the same criminal offense. The test in Blockburger, also known as the "same elements" test, is whether each offense contains an element not contained in the other. If there are none, then they are the same offense and double jeopardy bars subsequent prosecution. The Supreme Court of Pennsylvania has recently reaffirmed that the "same elements test" is the standard in Pennsylvania. (See Commonwealth v. Cauffman, 662 A.2d 1050 (Pa. 1995).) Thus, to determine whether or not an individual can be prosecuted for a theft crime after being acquitted on a bad check charge, the elements of the offenses must be examined.

18 Pa. C.S.A. §3921 provides that an individual is guilty of theft if he or she "...unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof." 18 Pa. C.S.A. §3922, derived from Section 223.3 of the Model Penal Code, provides that an individual is guilty of theft "...if he intentionally obtains or withholds property of another by deception. A person deceives if he intentionally: (1) creates or reinforces a false impression, including false impressions as to law, value, intention or other

state of mind;...." 18 Pa. C.S.A. §4105 provides that: "A person commits an offense if he issues or passes a check... knowing that it will not be honored by the drawee." The Section further provides that the issuer is presumed to have known that the check would not be paid if he or she had no account with the drawee at the time the check was issued. While these offenses arose from the same general fact scenario, an evaluation of the crimes in question must be made to determine whether the District Attorney would be barred from further prosecution by Sylvia's earlier acquittal.

3. *Is marijuana found in an area of a residence under joint control relevant to establish constructive possession in a trial for its illegal possession?*

Evidence is generally considered to be relevant if it has a bearing on the issue to be decided. To be relevant, evidence must be both material and have probative value. (McCormick on Evidence Fourth Edition, Section 185.) To be material, there must be a relationship between the proposition for which the evidence is offered and the issue in the case. To be of probative value, the evidence must tend to establish the proposition for which it is offered. It seems clear that the marijuana is relevant in Sylvia's prosecution for its illegal possession and the question arises as to whether or not it is sufficient to sustain a conviction on the basis of constructive possession. In Commonwealth v. Mudrick, 510 Pa. 305, 507 A.2d 1212 (1986), the Supreme Court of Pennsylvania noted that constructive possession may be determined to exist in either individual, if the illegal substance was found in an area of joint control and equal access. In Mudrick, the parties lived in the residence and shared the bedroom where the illegal substance was found. See also Commonwealth v. Jackson, 659 A.2d 549 (Pa. 1995) where the Supreme Court of Pennsylvania affirmed, by an evenly divided court, a conviction where the contraband was found in a kitchen cabinet and closet. See also Commonwealth v. Macolino, 503 Pa. 201, 469 A.2d 132 (1983) and Commonwealth v. Carol, 510 Pa. 299, 507 A.2d 819 (1986) for the proposition that joint access and control establish constructive possession. In the instant case, both Bill and Sylvia occupied the apartment. Both had the power to exercise control over the contraband. While there is no direct evidence that Sylvia had any intent to exercise control over the marijuana, it is difficult to see how the Court would not find that Sylvia was in constructive possession of it.

4. *By issuing a check, drawn on a bank in which she did not have an account, Sylvia would be guilty of uttering a bad check. The ethical question is whether or not an attorney may instigate a criminal proceeding against a client whose personal check for legal services was not honored by the bank because no account for the maker existed there.*

Rule 1.6(a) of the Pennsylvania Rules of Professional Conduct, provides as follows:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in Paragraphs (b) and (c).

The only exception which may apply in this instance is found in Paragraph (c)(3) which provides that information may be revealed: "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client..."

It does not appear that the above-noted provision authorizes disclosure of confidential information, such as the client's name, the amount owed, and any other fact pertaining to the client's tendering of the check, in order to seek a criminal prosecution. The aforementioned Rule of the Pennsylvania Rules of Professional Conduct does not authorize an attorney to disclose confidential information concerning his client, in order to seek a criminal prosecution. (See also Arizona State Bar Committee on Rules of Professional Conduct, Opinion 93-11, September 28, 1993.) A criminal proceeding is not a controversy between the attorney and his or her client, but rather, a dispute between the state and the accused individual. The client's name, the amount owed the attorney, the legal services performed to incur the fee owed and any other fact pertaining to the client's tendering of the check, would be proscribed by Rule 1.6(a) in a criminal proceeding. The Official Comment to Paragraph (c)(3) provides, in part, that "A lawyer entitled to a fee is permitted by Paragraph (c)(3) to prove the services rendered in an action to collect it." This would authorize the introduction of, *inter alia*, the client's name, the amount owed and the legal services rendered to incur the fee, in evidence in a civil action, but not in a criminal matter. Larry could bring a civil action to recover his fee, but, as noted above, would be precluded from disclosing the confidential information in a criminal proceeding. His proposed action would not be proper.

Question #5

Shopmart is a large shopping mall located in C City, State P, owned by Shopmart, Inc., a business corporation. The mall has 45 retail stores, and is generally open to the public for purposes of retail shopping and observation of displays and programs that occur frequently in the open areas of the mall.

One of the stores located in Shopmart is a bookstore, which offers for sale or rent a wide variety of books and videotapes with sexual content. Although the bookstore has been open only a short time, it has already generated strong opposition from many residents of C City. Save Our Children ("SOC") an association of

citizens, began a publicity campaign against the bookstore, including letters to government officials and public pronouncements urging that it be closed. As a result of the SOC publicity campaign, several C City residents, who were not members of SOC, began continuous picketing inside the mall, in front of the entrance to the bookstore.

After representatives of Shopmart, Inc. forced the picketers to cease all such activity on mall property, SOC, naming itself as plaintiff, filed a Complaint in the proper United States District Court in State P, asserting, that C City residents have been prohibited from picketing, and that those residents have a right under the First Amendment to the United States Constitution to picket on mall property. Assuming the Complaint alleges facts as set forth above:

1. *Is SOC a proper party to bring the claim asserted in the Complaint, and*
2. *What defense or defenses should Shopmart raise with respect to the First Amendment claim, and with what likely result?*

SOC has surreptitiously obtained the business records from the bookstore, which lists all customers who have rented videotapes from the bookstore since the date it opened. These records have been furnished to Paul, the C City police chief. Paul recently announced his candidacy for mayor of C City in the upcoming election, and intends to use opposition to the bookstore as a campaign theme. To this end, he has publicly announced that he has possession of the bookstore business records and will soon release the customer names to the press. Paul has also discovered, to his dismay, that a C City ordinance prohibits any officer from the police department from becoming a candidate for public office.

3. *As counsel for Paul, advise him as to:*
 - (a) *any federal constitutional claim or claims which could reasonably be asserted against him by a customer of the bookstore, as a result of release of the customer's identity to the press; and*
 - (b) *whether the C City ordinance prohibiting police officers from becoming candidates for public office is valid under federal constitutional principles.*

Examiner's Analysis: Question #5

1. *SOC does not have standing under Article III of the Constitution to bring the First Amendment claim against Shopmart.*

Article III of the Constitution limits exercise of federal judicial power to "cases" and "controversies", a core

component of which is the concept of standing. (Lujan v. Defenders of Wildlife, ___ U.S. ____ {citation pending}, 112 S.Ct. 2130, 2136 (1992).) The three "irreducible" elements of standing are that (i) the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest, (ii) there must be a causal connection between the injury and the conduct complained of, and (iii) it must be likely that the injury will be redressed by a favorable decision. (Id., at 2136.)

In this instance, the claim was brought by SOC, rather than by a resident who has been prohibited from picketing at the bookstore. There is no indication in the facts that SOC, as an organization, has been prohibited from engaging in the picketing activity, or that SOC has expressed an interest in or a desire to picket at Shopmart. As an association, SOC has standing only if (i) its members would otherwise have standing to sue in their own right, (ii) the interests it seeks to protect are germane to the association's purpose, and (iii) neither the claim asserted nor the relief requested requires participation of individual members of the association in the lawsuit. (Hunt v. Washington State Apple Advertising Comm., 432 U.S. 333, 343, 97 S.Ct. 2434, 2441 (1977); Freedom Republican v. Federal Election Comm., 13 F. 3d 412, 415 (D.C. Cir. 1994).)

Here, the standing question is easily resolved. The facts indicate that the picketing residents were not members of SOC. Nor do the facts indicate that members of SOC intended to picket or were otherwise threatened with even the possibility of injury to their First Amendment interests. Thus, it is impossible for SOC to meet the initial requirement of organizational standing that members would otherwise have standing to sue in their own right. Accordingly, SOC does not, under Article III of the Constitution, have requisite standing to bring the First Amendment claim.

2. *Shopmart, Inc. should raise the absence of state action as a defense to the federal constitutional claim of SOC, and that defense would likely be successful.*

SOC has asserted a federal constitutional right, under the First Amendment, to conduct picketing on Shopmart property. It is axiomatic, however, that the First and Fourteenth Amendments to the Constitution

safeguard the rights of free speech and assembly with respect to governmental action, not action by the owner of private property used for private purposes. (Lloyd Corporation, Ltd. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219 (1972).) In Lloyd, the Supreme Court considered whether a shopping center, which was open to the public and served the same purposes as a "business district" of a municipality, was the functional equivalent of a "company town" which the court, in Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276 (1946), had held was subject to the constraints of the First Amendment despite private ownership.

The Lloyd court distinguished Marsh, noting that the company town performed the full spectrum of municipal powers, and provided all services typically provided by a municipality, and generally stood in the shoes of the state. With respect to a retail shopping center, the court noted that there was "no comparable assumption or exercise of municipal functions or power". (Lloyd, 407 U.S. at 569, 92 S.Ct. at 2229.) Likewise, the court held that the property did not lose its private character merely because the public is generally invited to use it for designated purposes. (See also Pruneyard Shopping Center v. Robins, 417 U.S. 74, 100 S.Ct. 2035 (1980).)

On this basis, Shopmart should assert that the constraints of the First Amendment do not apply to the operation of its private property, because of the lack of state action. This defense would be successful.

3.
 - (a) *A bookstore customer could assert that Paul's actions would violate the customer's right of privacy under the First and Fourteenth Amendments to the United States Constitution.*
 - (b) *The ordinance prohibiting candidacy for public office by a C City police officer could be challenged as a violation of Paul's First Amendment rights of free speech and association, but such challenge would likely be unsuccessful.*

- (a) As police chief of C City, Paul would be deemed a state actor for purposes of application of certain constitutional restraints on his conduct. While there is no "right of privacy" found in any specific guaranty of the Constitution, the Supreme Court has recognized that certain privacy interests may be created by the constitutional protections afforded by the First, Fourth, Ninth, and Fourteenth Amendments. At least two different types of privacy interests have emerged from decisions of the Supreme Court: the individual

interest in avoiding disclosure of personal matters; and the interest in independence in making certain kinds of important decisions. (Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869 (1977).)

In this instance, a customer's concern would obviously focus on the disclosure of his or her business transaction with a bookstore which rented videotapes with sexual content. In Whalen, the Supreme Court recognized that names and addresses of persons who have obtained certain drugs and controlled substances, pursuant to a doctor's prescription, was information personal in character and potentially embarrassing if disclosed. This private information was deemed sufficient to implicate the privacy interests created under the Constitution. Likewise, information concerning disciplinary action regarding military academy students, and "rap sheet" information about alleged criminal activities has been deemed personal information of the sort subject to privacy protections. (See Department of Air Force v. Rose, 425 U.S. 352, 92 S.Ct. 1592 (1976), and U.S. Dept. of Justice v. Reporters Comm., 489 U.S. 749, 109 S.Ct. 1468 (1989).)

It is reasonable to conclude, therefore, that a customer would have a privacy interest in the record of his or her business transaction with an "adult" bookstore. Because there is no legitimate purpose supporting Paul's disclosure of such private information, he should be advised that there would likely be liability under the Constitution for such disclosure.

- (b) The First Amendment rights of free speech and association protect a citizen's right to participate in political activities, including candidacy for public office. (Broderick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908 (1970).) In Broderick and U.S. Civil Service Commission v. Nat'l Assoc. of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880 (1973), however, the Supreme Court recognized that these rights are not absolute. A state can impose limitations upon a public employee's exercise of such rights, where a balancing between the employee's First Amendment right and the interests of the state support such a restriction.

In Krisher v. Sharpe, 763 F.Supp. 1313 (E.D. Pa. 1991), aff'd at 944 F.2d 897 (3rd Cir. 1992), cert. denied 112 S.Ct. 874 (1993), the court upheld an identical restriction with respect to officers of the Pennsylvania

State Police. The court noted that law enforcement officers occupy a position of trust, and accessibility to information not generally available to the public. Moreover, police are obligated to enforce laws in a neutral and evenhanded manner, without political interference. The court noted that permitting state police to run for office would, to some extent, undermine public confidence in the state police and cultivate a public perception of politically motivated law enforcement. These interests were deemed sufficient to support the restriction on First Amendment rights of the police officers.

Accordingly, Paul would likely be unsuccessful in any challenge to the C City ordinance restricting his ability to become a candidate for mayor.

Question #6

Oliver, a widower with three sons, owns four farms. Oliver resides on farm 1. Al, the eldest son who is age 45, resides on farm 2; Charlie, age 40, lives on farm 3; and Don, age 35, lives on farm 4. Oliver is currently in poor health and would like to give each farm to the son who resides there but is concerned about various problems his sons are experiencing.

Oliver properly executed and delivered a deed conveying farm 2 to Al. The deed provided: "until Al attains age 50, any transfer of the premises, voluntary or involuntary, shall be null and void."

Oliver also properly executed and delivered a deed conveying farm 4 to Don. Oliver was concerned about Don's lifestyle and immaturity and provided in the deed: "until Don has attained age 40, any transfer of the premises without the consent of Ed while Ed is still living, which consent shall not be unreasonably withheld, shall be null and void." Ed is a trusted family friend.

Oliver was reluctant to convey farm 3 to Charlie because Oliver is not on speaking terms with Charlie. Because of further deterioration of his health, however, Oliver instructed his attorney to prepare a deed conveying farm 3 to Charlie.

Oliver signed the deed at his attorney's office and took the deed with him. He placed the deed for farm 3 to Charlie in a desk drawer, intending to give it to Charlie whenever Oliver could get up the nerve to visit him.

Oliver knows that his neighbor, Ned, whose property is upstream from farm 1 operates a processing plant on his property. Ned has a contract with the city which allows Ned to deposit waste into the city's sewage system. In order to prevent harm to landowners downstream from its system, the city included a term in the contract with Ned which requires Ned to pretreat the waste he deposits into the city's system. Oliver is certain that Ned is not properly pretreating any waste. City's treatment plant is directly upstream from farm 1 and Oliver can prove that Ned's failure to pretreat waste is causing harmful discharge from the treatment plant which affects farm 1.

Shortly thereafter Oliver died.

1. *Can Al's creditor who recently won and entered a valid and enforceable judgment against Al, age 45, sell farm 2 to satisfy Al's debt?*
2. *Don, still age 35, wants to convey farm 4 to his latest girlfriend, Gloria, as an engagement present. Don does not want to ask Ed for his consent. Can Don convey valid title to Gloria without Ed's consent?*
3. *Shortly after Oliver's death, the deed to farm 3 was found in Oliver's desk drawer. Does Charlie have valid title to farm 3?*
4. *Prior to his death, Oliver consulted counsel regarding any rights he may have arising from the contract between City and Ned. Exclude from consideration any statutes or governmental regulations concerning environmental protection, or nuisance related actions. How should Oliver's counsel advise?*

Examiner's Analysis: Question #6

1. *The provision in the deed which makes it impossible to transfer title for a period of time (five years) is invalid as a disabling restraint on alienation. Only the disabling provision is invalid and the invalidity does not affect the conveyance to Al, who acquires title free of the disabling restraint. Al's farm, therefore, can be sold by the judgment creditor.*

The terms of a donative transfer of an interest in property which seek to invalidate a later transfer, in whole or in part, constitute a disabling restraint on alienation. (Restatement (2d) Property (Donative Transfers), § 3.1.) Restraints on alienation are contrary to the policy of freedom of alienation of property. See 20 Pa.C.S.A. § 8301 which provides that the Court of Common Pleas may authorize the sale of real property where legal title is otherwise inalienable.

The Restatement (2d) Property (Donative Transfers) provides:

§ 4.1 Validity of Disabling Restraint

- (1) A disabling restraint imposed in a donative transfer on an interest in property is invalid if the restraint, if effective, would make it impossible for any period of time from the date of the donative transfer to transfer such interest.

Restraints on alienation run counter to the policy of freedom of alienation, so that to be upheld they must in some way be justified. Disabling restraints are especially objectionable because, if effective, they enable the person restrained to deny the validity of such person's own transfer, whether voluntary or involuntary. (Restatement (2d) Property (Donative Transfers) § 4.1, Comment (a).) It is the impossibility of the current transfer of the interest in property for some period of time that makes the disabling restraint invalid.

Here, the terms of the disabling restraint make the current transfer of farm 2 impossible and such restraint may continue to exist for a period of five (5) years. The disabling restraint on Al's farm is therefore null and void. If the disabling restraint is invalid, the donee may transfer the property at any time free of the disabling

restriction. (Grossman v. Hill, 384 Pa. 590, 122 A.2d 69, 72 (1956).) Al takes free of the disabling restraint; Al may transfer the property at any time and a judgment creditor may sell the farm to satisfy Al's debt.

2. *A disabling restraint on alienation of property is valid when: (i) It is possible to currently transfer the property interest that is subject to the restraint in some manner; and (ii) Considering the purpose, nature and duration of the restraint, the legal policy favoring freedom of alienation does not reasonably apply. Don, therefore, cannot convey valid title to Gloria without Ed's consent.*

Section 4.1 of Restatement (2d) of Property (Donative Transfers) provides in § (2):

- (2) Any other disabling restraint in a donative transfer of an interest in property is valid if, and only if, under all the circumstances of the case and considering the purpose, nature, and duration of the restraint, the legal policy favoring freedom of alienation does not reasonably apply.

A disabling restraint may be upheld in the limited situation when justification for it may be found and when the property interest that is subject to a disabling restraint is currently transferable in some manner from the time that the interest comes into effect. (Restatement (2d) of Property (Donative Transfers), comment Subsection (1).)

While the question whether a particular restraint on alienation is unreasonable and so invalid is basically a question of law, the answer depends upon factual considerations such as the time within which the restraint may be exercised. (Rice v. Rice, 468 Pa. 1, 359 A.2d 782 (1976).)

Here, Don may currently transfer farm 4 with the consent of Ed, which consent may not be unreasonably withheld. The purpose of the restraint is to protect Don and farm 4 from unwise decisions due to Don's immaturity. The purpose of the restraint is a reasonable one and the restraint is limited in duration. In this situation, the policy favoring freedom of alienation does not reasonably apply and the restraint is valid. (Lauderbaugh v. Williams, 409 Pa. 351, 186 A.2d 39 (1952).) Therefore, Don cannot transfer valid title to Gloria without Ed's consent.

3. *In order for a conveyance of real estate by deed to be valid there must be a delivery of the deed; retention of the deed with the intent to deliver in the future is not an effective delivery.*

It is essential to the validity and effectiveness of a deed that there be a delivery of the deed. (Fiore v. Fiore, 405 Pa. 303, 174 A.2d 858 (1961).)

To make a valid gift there must have been not only an intention to make it but to do so at the time and not in the future, and it must be accompanied by an actual or constructive delivery to the donee by which the donor released all dominion over the property and invested the donee with full title to and control over the same. (Tradesmen's Nat'l Bank & Trust Co. v. Forshey, 162 Pa. Super. 71, 73, 56 A.2d 329, 331 (1948).)

The intent of the donor to make an immediate transfer is essential.

"When a deed is found among a decedent's private papers, the burden of proving delivery falls on the putative grantee." (Leahey v. Leahey, 309 Pa. 347, 163 A. 677 (1932).) There is no delivery in law where the grantor keeps the deed in his own possession with the intention of retaining it. (Van Buskirk v. Van Buskirk, 378 Pa.Super. 418, 548 A.2d 1270 (1988).)

Here, Oliver retained the deed in his own possession. He did not deliver or record the deed nor did he indicate a present intention to deliver the deed to Charlie. Instead, he manifested an intention to make a gift sometime in the future when he could get up the nerve to visit Charlie. Charlie does not have valid title to farm 3.

4. *Although he is not specifically identified, Oliver is a member of the class of downstream landowners and, as such, is probably a third party beneficiary of the contract between Ned and City and may bring an action for specific performance or damages against Ned.*

The general principle for what constitutes a third party beneficiary was articulated in the seminal case of Spires v. Hanover Fire Ins. Co., 364 Pa. 52, 56-57, 70 A.2d 828, 830-831 (1950) (plurality opinion):

To be a third party beneficiary entitled to recover on a contract it is not enough that it is

intended by one of the parties to the contract and the third person that the latter should be a beneficiary, but both parties to the contract must so intend and must indicate that intention in the contract....

The more recent Supreme Court decision in Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744 (1983) extended the Spires principle. This broader view set forth in Guy v. Liederbach holds that the obligation to the third party need not appear in the contract itself. The Guy Court set forth a two part test for determining whether one is an intended third party beneficiary:

- (1) the recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties;" and
- (2) the performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance". (Id. 501 Pa. at 60, 459 A.2d at 751. See also Sullivan v. County of Bucks, 92 Pa. Cmwlth. 213, 499 A.2d 678, 686 (1985).)

The broader view is contained in the Restatement (2d) Contracts (1981) § 302:

Intended and Incidental Beneficiaries

- (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
 - (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
 - (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
- (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

The third party beneficiary need not be separately identified but may be a member of a class. The Pennsylvania Supreme Court applied the Restatement (2d) Contracts § 302 in Scarpitti v. Weborg, 530 Pa. 366, 609 A.2d 147 (1992) where it held that purchasers of lots in a residential subdivision who were required by subdivision restrictions to have their house construction plans reviewed and approved by an architect

retained by the subdivision developer, were third party beneficiaries of an implied contract between the developer and architect and had a cause of action against the architect for his alleged failure to properly review and approve plans of other lot purchasers in the subdivision.

The issue of Oliver's status as a third party beneficiary will be resolved by the trier of fact. Under the foregoing analysis, Oliver is probably an intended beneficiary and has a right to performance to effect the parties' intention (Section 1), and City and Ned intended to give Oliver the benefit of the promised performance (Subsection (b)). Failure of Ned to perform can thus impose liability in a civil suit by Oliver for damages or specific performance. (See Restatement (2d) Contracts § 302, Illustration 10.)

There is also a valid argument that Oliver is an incidental beneficiary to the contract because one of the parties to the contract is the City, a governmental entity. This fact situation is specifically addressed by Restatement (2d) Contracts § 313(2), which provides:

- (2) In particular, a promisor who contracts with a government or governmental agency to do an act or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless:
 - (a) the terms of the promise provide for such liability; or
 - (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.

Comment (a) to Section 313(2) provides support for the proposition that beneficiaries of government contracts are not intended beneficiaries:

Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested. In case of doubt, a promise to do an act for or render a service to the public does not have the effect of a promise to pay consequential damages to individual members of the public unless the conditions of Subsection (2)(b) are met.

This comment supports a finding that Oliver is an incidental beneficiary because the contract was a government contract.

Question #7

On January 2, 1995, Dan Driver, age 55, left his home in C-City, Pennsylvania, driving his 10 year old car and heading for the turnpike. As he approached the toll booth to enter the turnpike, he put his foot on the brake, but the car did not stop and continued at the same speed. Dan panicked and suffered a fatal heart attack. His car rear-ended the car in front of it in line at the toll booth, which was occupied by Phyllis Poe, also a Pennsylvania resident. She suffered serious injuries in the accident.

Shortly after she recovered, Phyllis consulted Attorney Andrew to represent her in a suit against Dan's Estate. In her first meeting with Andrew, she told him that she was stopped when she was hit in the rear. Unaware of the failure of Dan's car's brakes, Phyllis told Andrew that she did not know what had caused the accident, but that she had learned that Dan had died of a heart attack.

1. (a) *Based solely on the information provided to Andrew by Phyllis at their first meeting, on what theory[ies] of liability, if any, could a negligence action be brought against Dan's Estate to recover for Phyllis' personal injuries and property damage. Discuss.*
- (b) *How should Andrew advise Phyllis about the likely outcome of her claim against Dan's Estate?*
- (c) *Briefly discuss any ethical considerations for Andrew, and the applicable Rule of Professional Conduct.*

Assume that suit is brought against Dan's Estate in the appropriate State Court in Pennsylvania within one year of the accident. The applicable statute of limitations is two years. Dan's Estate is represented by Defense Counsel Claudia, who has been informed by Dan's widow and by his personal physician that Dan had no history of heart disease, and that the autopsy showed only one massive fatal heart attack, and that his heart had no other damage. Dan's widow was not aware of the failure of Dan's brakes.

2. (a) *What defenses, if any, should Claudia raise in the Answer? Discuss.*
- (b) *What steps should Claudia take in order to establish the facts necessary to support a motion for summary judgment?*

Assume that Phyllis' suit against Dan's estate proceeded, and that six months after filing suit, Andrew learned, through discovery, that Dan's brakes had failed as a result of gradual wear and tear over several years. Andrew also learned that, one week prior to the accident, Dan's car was certified in its annual safety inspection performed by Gary, despite the fact that Gary failed to check the condition of Dan's brakes. Gary is the owner and operator of Gary's Garage, a sole proprietorship, located in Pennsylvania.

3. *Assuming that the Pennsylvania Rules of Civil Procedure are in effect, what procedural steps should Andrew take to pursue Phyllis' claim against Gary's Garage? Discuss.*

Examiner's Analysis: Question #7

1. (a) *Because of the lack of information about Dan's medical history, Andrew's best choice would be to bring an action in negligence, without pleading specific facts, relying on res ipsa loquitur, which may permit the jury to find Dan negligent, in the absence of specific factual evidence of the cause of the accident. Alternatively, Andrew may allege, in support of a negligence action, that Dan may have been negligent if he suffered from a heart condition that made a fatal heart attack foreseeable.*
- (b) *Andrew should advise Phyllis that she may not be able to sustain her burden of proof of Dan's negligence, if his medical history does not support the allegation of foreseeability.*
- (c) *The comments to Rule 3.1 of the Rules of Professional Conduct permit actions to be brought even though the facts have not been fully developed, and even if the attorney believes that his client's position may not prevail. Andrew may base an action in negligence on res ipsa loquitur, in the absence of evidence of the cause of the accident, and in light of Phyllis' injuries and her lack of negligence.*

- (a) Phyllis has sustained serious injuries, through no negligence on her part. The practical problem facing Andrew is whether to bring suit on Phyllis' behalf without knowledge of all the facts of the accident. Moreover, it is not likely that Andrew will be given access to Dan's medical records or to his vehicle without beginning suit and undertaking discovery.

It is well accepted that the happening of an accident does not, by itself, establish negligence. Negligence consists of the following elements: (i) A duty or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct; (ii) A failure on the part of the actor to act in accordance with the standard (breach); (iii) A reasonably close causal connection between the breach and an injury (legal or proximate cause); (iv) Actual loss or damage resulting from the occurrence. (Prosser & Keeton on Torts, 5th Ed., pp. 164-165.)

It is clear that every driver owes a duty to others on the highway. That duty can be most simply stated as the duty to drive safely. If a driver fails to recognize a risk and fails to take steps to guard against it, and if that failure causes an injury to one to whom the duty was owed, the driver may be found to have been negligent. Based on the information given him by Phyllis, and without knowing of Dan's medical history,

Andrew may consider alleging that if Dan suffered from a heart condition, and if he continued to drive his car, he may have breached a duty to Phyllis and others on the highway, if his heart attack caused the collision. Alternatively, if Dan failed to maintain his car's brakes, he may be found to have been negligent if the brake failure caused the accident. (See e.g. Maloney v. Rath, 69 Cal. 2d 442, 445 P.2d 513, 71 Cal Rptr. 897 (1968).) However, without more medical or other information, there is no evidence of Dan's knowledge or conduct prior to the accident, and so no proof of negligence on his part.

Alternatively, Andrew may rely on the doctrine of *res ipsa loquitor*, in the absence of factual evidence of Dan's negligence. *Res ipsa loquitor* is considered evidentiary in nature and not a matter of substantive or procedural law. (Gilbert v. Korvette, Inc., 457 Pa. 602, 327 A.2d 94 (1974).)

Res ipsa loquitor means "the thing speaks for itself". Because Phyllis may not learn the cause of the accident, and the theory of negligence, i.e., the foreseeability of a heart attack, may fail, *res ipsa loquitor* will permit the jury to be instructed that the mere occurrence of an accident such as this may be sufficient to establish a breach of duty and a valid cause of action. The criteria for the application of *res ipsa loquitor* are: (i) The event must be one that ordinarily does not occur in the absence of negligence; (ii) It must be caused by an agency or instrumentality within the exclusive control of the defendant; (iii) It must not have been due to any voluntary action on the part of the plaintiff. (Prosser & Keeton on Torts, supra at 244, quoting 4 Wigmore Evidence, 1st Ed. 1905, Section 2509.) Smith v. City of Chester, 357 Pa. Super 24, 515 A.2d 303, 305 (1986), in which it was held that a jury need not exclude all alternatives, but that the defendant's negligence must be the more probable explanation.

An alternative for Andrew might be to begin suit by filing a writ of summons against Dan's Estate, and then undertaking discovery of the cause of the accident prior to preparing a Complaint. (See Rules 1007(1) and 4001-4014 of the Pennsylvania Rules of Civil Procedure.)

- (b) Andrew should also advise Phyllis that the theory of liability based on Dan's knowledge of a serious heart condition may not be supported by the evidence, and that, as plaintiff, she has the burden of proof. See e.g., McGovern v. Tinglof, 344 Mass. 114, 181 NE 2d 573 (1962), in which a driver who suffered a severe heart attack, of which he had no advance warning, was held not to be responsible for an accident. In contrast, in the case of Freifield v. Hennessy, 252 F.2d 97 (3d Cir 1965), defendant's medical history of several episodes of fainting, was held sufficient to rebut the defense of unforeseeability and permit the case to go to the jury.

Based on Andrew's information at the time, either result is possible. However, he should advise Phyllis that, if Dan's Estate introduces evidence to refute the allegations of negligence on Dan's part, Phyllis will not sustain her burden of proof and her action will fail.

- (c) Rule 3.1 of the Rules of Professional Conduct provides, in part:

" A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that it not frivolous..."

The Comment to Rule 3.1 provides that it is not frivolous to file an action on behalf of a client if the facts are not yet known, and the lawyer expects to develop those facts during discovery, even if the lawyer believes that his client will not ultimately prevail. The Comment further states that an action is frivolous if undertaken "primarily for the purpose of harassing or maliciously injuring a person, or if the lawyer is unable to make a good faith argument on the merits of the action...." Andrew is within the Rules to bring a negligence action on Phyllis' behalf, since he knows that Dan died of a heart attack and Dan's medical history may make his driving negligent because of the foreseeability of an attack.

2. (a) *Claudia should assert, in the Answer to the Complaint, that the accident was not caused by Dan's negligence, but rather, that Dan's heart attack was not foreseeable. The lack of foreseeability defense should prevail, but the jury may apply res ipsa loquitor and find Dan's Estate liable for Phyllis' injuries, in the absence of an explanation for the accident, and in light of Phyllis' injuries and lack of negligence.*

(b) *The elements of summary judgment are that no material facts are in dispute and that movant is entitled to judgment as a matter of law. In order to establish the fact that Dan had no pre-existing heart condition that would have made an attack foreseeable, Claudia should obtain Dan's medical records, including the autopsy report, and include them, plus an affidavit from Dan's personal physician. In order to rebut Claudia's motion, Andrew will be required to file counter-affidavits or discovery material, as one may not simply rely on the unsupported allegations contained in pleadings to defeat a motion for summary judgment. (Rule 1035 Pa. R. Civ. Proc.)*

(a) Claudia was informed of Dan's medical history and the lack of foreseeability of a fatal heart attack. Therefore, in the Answer to the Complaint, she should deny that Dan was negligent, and state that he had no knowledge of a condition which would cause a fatal heart attack. If sufficient evidence is developed during discovery to support Claudia's non-foreseeability defense, she may obtain dismissal of Phyllis' action against Dan's Estate based on foreseeability of a fatal heart attack. (Smith v. Southeastern Stages, Inc., 479 F.Supp. 593 (N.D. Ga 1977).) Under the 1994 amendments to the Pennsylvania Rules of Civil Procedure, a general denial of Dan's negligence is permitted. (Rule 1029(e) Pa. R. Civ. Proc.)

(b) Claudia should prepare a motion for summary judgment, alleging that there are no material facts in dispute and that Dan's heart attack was not foreseeable. To support such a motion, Rule 1035(a) of the Pennsylvania Rules of Civil Procedure requires that undisputed facts be established by pleadings, discovery or affidavit. Therefore, Claudia should obtain Dan's medical records from his physician, as well as the autopsy report, through discovery, and attach those records, plus an affidavit from Dan's personal physician stating that Dan had never been diagnosed or treated for a heart condition. Alternatively, defendant may support the motion by establishing, through discovery, that Phyllis has no evidence of Dan's negligence. (See e.g. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).) The motion for summary judgment should be granted insofar as the action based on foreseeability of a heart attack is concerned.

In order to defeat a motion for summary judgment, a party must show, by affidavits, discovery and pleadings, that there is a material fact in dispute. Phyllis may not simply deny the allegations of the motion and rely

on the unsubstantiated allegations of the Complaint. (Rule 1035(b) Pa. R. Civ. Proc.)

3. *Andrew should prepare and file an Amended Complaint against Gary's Garage in the action of Phyllis v. Dan's Estate. Alternatively, Andrew may file a second Complaint against Gary's Garage, alone, and then move to consolidate the two actions.*

The servicing of Dan's car by Gary may be a cause of the accident between Dan's car and Phyllis'. Accordingly, Andrew may seek to amend his original Complaint to add Gary's Garage as a defendant. Rule 1033 of the Pennsylvania Rules of Civil Procedure provides that a party may add another party with consent of adverse parties or by leave of court. It can be assumed that Dan's Estate will not object to the addition of Gary's Garage as a defendant.

The Amended Complaint against Gary's Garage will be timely, as it will be filed within the applicable statute of limitations. Since Andrew learned of Gary's Garage and its connection to Phyllis' accident within two years of the occurrence, the joinder of Gary's Garage is clearly within the permissible time period.

Under Rule 2226(b) of the Pennsylvania Rules of Civil Procedure, a plaintiff may join persons against whom joint, several or separate relief is sought, or where the right to relief arises from the same transaction or occurrence, if common questions of law or fact concerning liability will arise. Here, the issue[s] of fact concern the cause of the accident between Dan's and Phyllis' cars, and the issue of law is whether the accident was caused by negligence; accordingly, Gary's Garage should be joined as a defendant.

Alternatively, Andrew may file a second Complaint against Gary's Garage, alone, and then move to consolidate the two actions. Rule 213 of the Pennsylvania Rules of Civil Procedure, provides:

- "(a) In actions pending in a county which involve a common question of law or fact or which arise from the same transaction or occurrence, the court on its own motion or on the motion of any party may order a joint hearing or trial of any matter in issue in the actions, may order the actions consolidated, and may make orders that

avoid unnecessary cost or delay."

There should be only one trial on the merits of Phyllis' claim for damages for her injuries and property damage as a result of the motor vehicle accident with Dan's car. Therefore, all claims related thereto should be brought in a single proceeding in order to avoid unnecessary delay or use of court facilities.

Question #8

Paul and Mary were married twenty years ago. They are the parents of Debbie, age 19, presently a student at State University, and Sam, age 13. Paul, a successful businessman, often works evenings to service the demands of his customers. Mary has never worked outside of the household.

Thinking he could ease his travel demands, last year Paul completed a training course and received a private pilot's license for single engine airplanes. Last month Paul visited Al, the owner of Al's Airplane Sales ("Al's"), and purchased a used single engine airplane. Paul felt this was a wise purchase since he would no longer have to fly commercially or rent an aircraft. Prior to Paul's purchase of the plane Al told Paul that the airplane had suffered two belly landings and that Al had made extensive repairs to the craft, some major, before getting the plane back into the air. Al also provided Paul with a copy of the logbook for the plane that detailed the earlier repairs and included certificates that the plane had thereafter passed inspection as "airworthy" by two different inspectors. Paul asked Al if, in fact, the plane had passed inspection as being airworthy and Al confirmed this fact. Al told Paul the plane was being sold "as is--where is" and a

confirming letter was signed by Al and Paul in which Al acknowledged the accuracy of the logbook and Paul confirmed receipt of the logbook and the "as is--where is" nature of the sale.

Paul flew the plane three times. After the third flight, one week ago, he presented the plane for its annual inspection and was advised by the inspector that the plane was grounded due to major defects. Paul has had the inspection results confirmed by two independent inspectors.

Last night Paul returned home earlier than expected and found Mary in bed with another man. When confronted Mary said she has been having an affair with this individual for over a year.

1. *Paul has filed an action against Al claiming breach of express and implied warranties under the Uniform Commercial Code. Discuss the bases and likelihood of success of Paul's claims and Al's defenses.*
2. *If Paul files for a divorce and his children continue to live with Mary how likely is it that he will:
(a) Be ordered to pay alimony to Mary?
(b) Be ordered to pay child support for Debbie?
(c) Be ordered to pay child support for Sam?*
3. *Assuming a divorce decree is entered and Paul is ordered to pay both alimony for Mary and child support for Sam how will Paul and Mary report the payment/receipt of those payments on their respective federal income tax returns?*

Examiner's Analysis: Question #8

1. (a) *Paul's best chance of success will be on his breach of express warranty claim.*
(b) *Al should be able to defend the implied warranty claims based upon his disclaimer.*
- (a) Article II of the Uniform Commercial Code (the "UCC") generally applies to transactions in goods. Sections 2-313, 2-314 and 2-315 address warranties recognized by the UCC, both express and implied. (See 13 Pa. C.S. §§2313, 2314 and 2315.) Section 2-316 addresses ways in which a merchant may exclude or disclaim both express and implied warranties. (See 13 Pa. C.S. § 2316.) Close examination of each of these sections is necessary to resolve the issue presented.

Section 2313 of the Pennsylvania UCC provides:

Express warranties by the seller are created as follows:

- (1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty

that the goods shall conform to the affirmation or promise.

- (2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

This section goes on to provide that formal words such as "warrant" or "guarantee" need not be used by the seller for an express warranty to be found. (13 Pa. C.S. §2313(b).)

Al made an express affirmation, both orally and in writing, to Paul that the airplane had been certified as "airworthy" as set forth in the logbook. In addition, Paul asked Al if this fact was correct and Al confirmed its accuracy. Paul is in a strong position to argue that this affirmation of fact was a part of the basis of the bargain between him and Al and therefore created an express warranty by Al to Paul. The fact that Al may not have known that the logbook and certificates of airworthiness were inaccurate will not preclude the express warranty claim. If the information in the logbook became a part of the basis of the bargain, whether Al so intended or not, an express warranty claim will be possible. In a similar case the Eighth Circuit court stated:

In this case, the seller provided the buyer with the logbook which set forth the repair and inspection history of the airplane. Vining [the buyer] and his pilot examined those entries and relied on the certifications of the airplane as airworthy. Those certifications consequently formed part of the basis of the bargain as a description of the goods, similar to a description that might be provided by a blueprint. Under these circumstances, Eugene [the seller] expressly warranted the accuracy of that description--the airworthiness of the plane--and is liable for damages arising from the breach of that warranty.... To create an express warranty of the plane's airworthiness, however, there is no requirement that Eugene have actual knowledge of the airplane's airworthiness or lack of airworthiness.

(Limited Flying Club v. Wood, 632 F.2d 51, 56 (8th Cir. 1980); see also Miles v. Kavanaugh, 350 So. 2d 1090 (Fla. Dist. App. 1977).)

Al will undoubtedly argue that he has disclaimed this warranty with the "as is--where is" language in the

confirming letter signed by him and Paul. Section 2316 of the UCC addresses exclusion or modification of warranties. Subsection (a) of this Section says "[w]ords or conduct relevant to the creation of any express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this division on parol or extrinsic evidence (Section 2202) negation or limitation is inoperative to the extent that such construction is unreasonable." Since the logbook was referenced in the confirming letter signed by the parties it appears that there is no parol evidence problem relating to the representation that the plane was airworthy. The issue is whether the attempted disclaimer and the express warranty can be read to be reasonably consistent. In this case, it is more likely than not that they cannot be so read.

In his treatise on the UCC Anderson states:

An express warranty that has been clearly bargained for may be in direct contradiction with a general disclaimer of all warranties. From the fact that the express warranty was a basis for the bargain, it can readily be concluded that the general disclaimer that would eliminate that express warranty was never actually seen, bargained for, or agreed to. In such case the express warranty and the disclaimer cannot be construed together as consistent with each other and the Code therefore directs that the disclaimer be ignored.

(ANDERSON, UNIFORM COMMERCIAL CODE, Vol. 3 §2-316:34 (3rd Ed. 1983); see also QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST, Vol. 1, 2d Ed., ¶ 2-316[A][4].) It is, therefore, likely that Paul would be successful in a breach of express warranty claim under the UCC. (See Limited Flying Club, Inc. v. Wood, 632 F.2d 51 (8th Cir. 1980).)

- (b) The UCC also provides that where the seller of goods is a merchant (as Al was) that, unless excluded or modified, the goods would be impliedly warranted to be merchantable. (13 Pa. C.S. §2314.) Section 2315 also provides:

Where the seller at the time of contracting has reason to know:

- (1) any particular purpose for which the goods are required; and

- (2) that the buyer is relying on the skill or judgment of the seller to select or furnish suitable goods; there is unless excluded or modified under section 2316 (relating to exclusion or modification of warranties) an implied warranty that the goods shall be fit for such purpose.

These warranties are commonly known as the implied warranty of merchantability and the implied warranty of fitness for particular purpose. Unless excluded, the implied warranty of merchantability would clearly apply to this sale. It is difficult to determine from the facts provided whether the implied warranty of fitness would be applicable. For this warranty to apply, Paul would have to show that Al had reason to know the particular purpose for which the plane was being purchased and that Paul was relying on some particular skill or judgment on Al's part to select the proper plane for his uses. The facts are not developed enough for this type of determination to be made.

One must next focus on the effect of the "as is--where is" language on the implied warranties. Section 2316(c)(1) provides "[u]nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the attention of the buyer to the exclusion of warranties and makes plain that there is no implied warranty." It appears clear from this section that the "as is--where is" language would be effective in excluding these implied warranties. Paul was clearly aware that the sale was "as is--where is" as evidenced by the confirming letter.

In conclusion, it appears that Paul would be successful on a breach of express warranty claim. Paul's claim based on breach of implied warranty will most likely fail.

2. (a) *Marital misconduct by Mary will be a factor in determining whether Paul will be required to pay alimony.*
- (b) *Paul may be ordered to pay support for his daughter if payment would not cause an undue financial hardship.*

(c) *Paul will be required to pay child support for his son according to the state support guidelines.*

- (a) The Divorce Code of the Commonwealth of Pennsylvania provides for the award of alimony where a divorce decree has been entered, as the court deems reasonable, if the court finds that alimony is necessary. (23 Pa. C.S. §3701(a).) In determining whether alimony is necessary and in determining the nature, amount, duration and manner of payment of alimony the court is directed to consider seventeen enumerated factors, including, without limitation, matters such as the relative earnings and earning capacity of the parties, the ages, physical and mental health of the parties, the duration of the marriage, the relative education of the parties and other relevant factors. (23 Pa. C.S. §3701(b).) One factor to be considered by the court is "[t]he marital misconduct of either of the parties during the marriage." (23 Pa. C.S. §3701(b)(14).) Paul should argue that the admitted adulterous affair by Mary is a bar to the granting of alimony.

States have approached fault as a factor to affect entitlement to alimony in different ways. Alimony statutes may be divided into several categories. Some completely bar alimony when the party seeking alimony has been guilty of marital misconduct. Some expressly state that fault or misconduct may be considered as a factor. Several statutes are completely silent on the issue of fault. (See generally CONTEMPORARY FAMILY LAW, Vol. 3, §32:10.) The Pennsylvania statute follows the second approach.

It is difficult to determine how a court would rule on the alimony issue. The court must consider all of the seventeen enumerated factors set forth in the Divorce Code before making a ruling on the issue of alimony. The facts are silent on most of the enumerated factors including any marital misconduct by Paul. The court must consider the misconduct of either of the parties in considering an alimony award. (See Remick v. Remick, 310 Pa. Super. 23, 456 A.2d 163 (1983); Teribery v. Teribery, 357 Pa. Super. 384, 516 A.2d 33 (1986).) If the court is convinced after weighing all factors that alimony is proper despite the misconduct a court may award alimony. "[I]t is within the court's discretion to discount spouse's marital misconduct as

only one of several factors where there is evidence of both forgiveness and marital misconduct by the other spouse." (PERLBERGER, PENNSYLVANIA DIVORCE CODE, REVISED EDITION, §6.3.14.)

Paul should be prepared to establish the marital misconduct and to present the other factors to be considered in a light most favorable to a denial of alimony to defeat an alimony claim. Paul may, however, be required to pay alimony if the trier of fact deems it necessary.

- (b) Paul may be ordered to pay support for his daughter although she is nineteen years of age. Again, there is a lack of uniformity among states on the issue of postsecondary education support. The statute in Pennsylvania says "a court may order either or both parents who are separated, divorced, unmarried or otherwise subject to an existing support obligation, to provide equitably for educational costs of their child whether an application for this support is made before or after the child has reached 18 years of age." (23 Pa. C.S. §4327(a).) The statute further provides:

A court shall not order support for educational costs if any of the following circumstances exist:

- (1) Undue financial hardship would result to the parent.
- (2) The educational costs would be a contribution for postcollege graduate educational costs.
- (3) The order would extend support for the student beyond the student's twenty-third birthday. If exceptional circumstances exist, the court may order educational support for the student beyond the student's twenty-third birthday.

(23 Pa. C.S. §4327(f).) The Pennsylvania statute also catalogues various other factors that the court must consider in making the support determination such as the earnings of the parents, the earnings of the child, the availability of financial aid and the willingness and ability of the child to pursue his or her education.

If the court, after determining that there is a need, is satisfied that a support order would not create an undue financial hardship on Paul it is very likely that he will be ordered to provide support for his daughter. The

Pennsylvania courts have found this duty and have so ordered. (See Gieringer v. Mowery, 433 Pa. Super. 44, 639 A.2d 1202 (1994); McGettigan v. McGettigan, 433 Pa. Super. 102, 639 A.2d 1231 (1994).)

- (c) Paul will be ordered to pay support for his son in an amount as prescribed by the Pennsylvania support guidelines. It is universally accepted that parents have an absolute duty to provide for the support and maintenance of their minor children. The Pennsylvania statute clearly indicates "[p]arents are liable for the support of their children who are unemancipated and 18 years of age or younger." (23 Pa. C.S. §4321.) Section 4322 further provides that "[c]hild and spousal support shall be awarded pursuant to a Statewide guideline as established by general rule by the Supreme Court, so that persons similarly situated shall be treated similarly." The guidelines for child support in Pennsylvania are set forth at Pennsylvania Rule of Civil Procedure 1910.16.2(a).

There is no doubt that the court, after applying the guidelines will order Paul to pay child support for his minor son. The amount will depend upon his income as it relates to that of his wife.

3. *Mary must include the alimony received as income on her federal income tax return and Paul may deduct the alimony payments on his return. Mary need not include the support received as income and Paul may not deduct the child support payments on his return.*

Section 71(a) of the Internal Revenue Code (the "Code") states "[g]ross income includes amounts received as alimony or separate maintenance payments." This section goes on to define alimony. Essentially, a monetary payment to an exspouse pursuant to a court order designating the payment as alimony will trigger Section 71(a) thus requiring Mary to include the alimony received in her gross income on her federal income tax return.

Section 215(a) of the Code states "[i]n the case of an individual, there shall be allowed as a deduction an

amount equal to the alimony or separate maintenance payments paid during such individual's taxable year." Thus, Paul can deduct the payment made to Mary as alimony. (See generally CCH FEDERAL TAX SERVICE, §A:7.60.)

In contrast, child support payments are not considered to be part of the gross income of the payee spouse and are not deductible by the payor spouse. (I.R.C. §71(c)(1).) Therefore, Mary, need not include in her gross income any amount received as child support and Paul may not deduct any child support payments on his federal income tax return. (See CCH FEDERAL TAX SERVICE, §A:7.20.)