

**PENNSYLVANIA BAR EXAMINATION
ESSAY QUESTIONS AND ANALYSES**

JULY 1996

Glossary

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2. **Uniform Commercial Code Article IV - Bank Deposits and Collections:** (a) Forgery of signature of drawer of check renders it not properly payable and payor bank suffers loss as it cannot charge the item to the drawer's account; (b) Payor bank's customer has duty to review all statements of activity in customer's account (together with returned items) when submitted by payor bank; (c) Customer has only one year to notify payor bank of check forgery to receive credit for the item; (d) Customer of payor bank bears loss of all repeated check forgeries that occur more than a reasonable time not exceeding 30 days after customer has received the first bank statement containing such a check forgery unless prior to the payor bank's payment the customer has notified it of the forgery; (d) Payor bank is not failing to exercise ordinary care solely because its business practices do not require it to examine the check's signature.
3. **Rules of professional conduct:** (a) An attorney may not communicate with a party known to be represented by legal counsel; (b) An organization is represented by its in-house legal counsel and its management personnel; and to the extent their statements are admissions (or binding upon the organization), communication with them would also be within this rule.
4. **Trading securities using material, non-public inside information:** (a) In-house legal counsel is an insider and information gained in performance of duties is inside information; (b) The inside information is material if a person would use it as a basis for the decision to buy or sell the security; (c) Federal securities laws prohibit trading in securities under circumstances that are unfair or deceptive; (d) A person is prohibited from trading in a security having non-public material inside information concerning such security.

Question No. 3

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who is behaving suspiciously or if the officer has reason to believe that the individual may be armed and dangerous; (d) Property inherited by an individual during marriage is not considered to be marital property; (e) The court must consider the earning capacity of both parents in determining child support.

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Question No. 8

1. **U.C.C.:** (a) secured transactions; (b) classification of collateral as equipment or consumer goods; (c) perfection of purchase money security interest in each type of collateral; (d) the necessity of filing to perfect
2. **Contracts:** requirement that acceptance be unequivocal in order for a contract to be formed
3. **Real property:** effect of judgment entered against one spouse on the ability of both spouses holding as tenants by the entirety to convey real estate
4. **Real property:** (a) effect of divorce on tenancy by the entirety; (b) effect of pre- and postdivorce judgments on property subsequent to divorce

Question No. 1: Facts and Interrogatories

Frank and Wanda Jones were married and had a two-year-old daughter, Doris. They owned their home, Blackacre, as tenants by the entirety.

In August 1995, Wanda, pregnant, wanted a divorce. She went to Attorney Able for advice and a separation agreement. Able negotiated a separation agreement with Frank's attorney and the agreement was signed in September 1995. The agreement provided that after the birth of Wanda's child, the parties would divorce. It further provided partial property settlement payments by Frank to Wanda, support payments for Doris, temporary alimony payments to Wanda and temporary sole possession of Blackacre to Wanda. Other matters were left for future settlement at the time of actual divorce.

Among the items mentioned in their separation agreement were the remaining payments due Frank under an agreement not to compete against a business he had sold. The monthly payments were to continue for four more years. Frank assigned these payments to Wanda for one year. The determination of the recipient of the remaining payments was deferred to the time of actual divorce and final settlement.

In April 1996, two weeks after delivering her baby, Wanda died. The baby, Sam, survived. Wanda had not changed her will (hereinafter Will) which named Frank executor, left her jewelry to Doris, and left half of the residue of her estate to Frank and the balance to Doris. Wanda's estate did receive the remainder of one year's covenant-not-to-compete payments. Wanda and Frank's separation agreement did not address their deaths in any manner. Wanda had had no other issue.

Frank objects to Sam's taking anything in Wanda's estate because he confirmed through blood tests that he is not Sam's father. Frank, therefore, wants to maximize Doris' inheritance. Frank also has taken Wanda's valuable heirloom jewelry, which she inherited from her mother, from the joint safe deposit box which he still had with Wanda at the time of her death. Frank wants to hold the jewelry for Doris without paying any Pennsylvania inheritance tax thereon and without otherwise including it in Wanda's probate estate because this is how the jewelry was handled when Wanda's mother died.

You, as the attorney for Wanda's executor, are responsible for all matters including the preparation of Wanda's final federal income tax return. Her Will was valid and she left significant assets in excess of her jewelry.

1. Assume that the covenant-not-to-compete payments are taxable for federal income tax purposes and are not alimony payments. Are the covenant-not-to-compete payments which Wanda received prior to her death income taxable to her for federal income tax purposes? Are said payments received by her estate so taxable to her estate? Explain.
2. Who is entitled to Blackacre? Explain.
3. Assume that Wanda's jewelry is Pennsylvania inheritance taxable in her estate. Under the Pennsylvania Rules of Professional Conduct, can you discuss with Frank his theory on how to avoid the tax? Explain.
4. Assume instead that Wanda left no jewelry and that her Will made no bequest of jewelry to Doris. Who is entitled to Wanda's estate? Explain.

Question No. 1: Examiner's Analysis

1. **The covenant-not-to-compete payments due Frank and assigned to Wanda in a property settlement remain taxable to Frank and are not taxable to Wanda or her estate.**

The payments under Frank's agreement not to compete were earned by him and, although the payments can be assigned, the tax responsibility of the payments cannot be assigned under the assignment of income doctrine.

The doctrine is not applicable when the property generating income is assigned in full. In Frank's case, the payments were only assigned for one year and there is no evidence that the entire agreement was assigned even if the agreement could be considered property. If instead Frank had assigned to Wanda the ownership of a certificate

of deposit without restriction or retention, then the income from such certificate or property accrued after the assignment would be taxable to her and not Frank. This simply is not the case at hand.

Also, in the context of a divorce, the payments might qualify as alimony causing taxability to Wanda and a deduction to Frank. However, the facts indicate that the payments were not alimony under the Internal Revenue Code.

The assignment of income doctrine is best described in Lucas v. Earl, Guy, (1930, S.Court) 8 AFTR 10287, 281 U.S. 111, 74 L.Ed. 731. Justice Holmes wrote in disallowing the attempted assignment of the taxability of income that it is but "...an arrangement by which the fruits are attributed to a different tree from that on which they grew." His analogy was that the fruit of the tree is taxable income to the owner of the tree even when the fruit is assigned to a third party. Only when the entire tree is assigned to the third party will its fruit become income taxable to the third party.

Inasmuch as Frank did not assign his entire agreement but only twelve out of many more remaining payments, the payments remain taxable to Frank rather than Wanda to the extent she received them during her life and rather than Wanda's estate to the extent it received them after her death. Furthermore, even if the entire agreement had been transferred to Wanda, the agreement would have remained taxable to Frank because it is only income or the "fruit" of a tree. There is no principal or a "tree" to transfer since in this case, the "tree" is Frank's agreement not to compete which only he could perform and which he could not assign.

2. Frank is entitled to Blackacre as a survivor of a tenancy by the entireties.

Blackacre passes by survivorship to Frank because (1) Blackacre was held as tenants by the entireties by Frank and Wanda, (2) tenancies by the entireties have automatic survivorship, (3) Frank survived Wanda while married to her, and (4) their separation agreement did not provide to the contrary.

A tenancy by the entirety is peculiar to a married couple. The theory is that husband and wife are but one and hold real estate as one without any right to convey a divided or even undivided half alone. Tenancy by the entirety has automatic survivorship. Black's Law Dictionary, Fourth Edition (1951); Ladner on Conveyancing in Pennsylvania, §1.08. Inasmuch as Frank and Wanda held Blackacre as tenants by the entireties as stated in the facts and did not alter this status in their separation agreement or by divorce, Frank takes Blackacre as survivor. Frank's allowing Wanda exclusive possession of Blackacre did not, without any more specific agreement, alter the ownership of Blackacre or Frank's right to survivorship. In fact, the facts state that death was specifically not addressed in the separation agreement which was but a prelude to a formal property settlement agreement at divorce. Consequently, Frank takes Blackacre by survivorship upon Wanda's death.

It should be noted that the facts do not state that Frank and Wanda were not, in fact, divorced between Sam's birth and Wanda's death. If this had occurred, the tenancy by the entireties would have by operation of law become a tenancy in common without survivorship such that at Wanda's death, her estate and Frank would each own an undivided half of Blackacre. 23 Pa.C.S.A. §3507(a). Candidates are not expected to raise this issue.

3. As attorney for Wanda's estate, one may discuss with Frank his theory of non-taxability of the jewelry under Pennsylvania Rule of Professional Conduct 1.2(d). However, one cannot counsel or assist Frank in violating the inheritance tax laws.

Attorneys are often approached by innocent or less than innocent clients with questions and theories about circumventing or even breaking the law. Obviously, attorneys should avoid becoming co-conspirators with their clients for any illegal activity or circumvention of an applicable law. Where does an attorney draw the line on such discussions when initiated by the client?

The Pennsylvania Rules of Professional Conduct (Pa.R.P.C.) and specifically Rule 1.2(d) address this problem as follows:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine

the validity, scope, meaning or application of the law.

The comments to this rule further explain that:

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6 (where a lawyer can break confidences to avoid a crime involving death, substantial bodily harm or substantial financial injury). However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers it is criminal or fraudulent. Withdrawal from the representation or rectification, therefore, may be required.

The above rule and comments directly apply to any conversation Frank's attorney would have with Frank about Wanda's jewelry. Frank apparently has experienced removing taxable jewelry from an estate and delivering it to the beneficiary without reporting it for inheritance tax purposes or he at least observed this being done in his mother-in-law's estate. As attorney for Wanda's estate, one should very forcefully and directly clarify the appropriate procedures (including the jewelry in probate, having it appraised and including it in the inheritance tax return) and not in any way indulge in what would amount to a conspiracy to avoid the taxation. Consequently, the estate attorney can discuss Frank's theory but only sufficiently to discount it and set Frank, as executor, on the proper course of action.

4. Frank is entitled to half of Wanda's estate under her will, and Doris and Sam will share the remaining half.

Wanda's will left Frank half of her estate and was a valid will. Frank and Wanda's separation agreement did not change her will or address the impact of her death on Frank's rights. She did not herself change her will. There apparently was no divorce which would have by statute been deemed to have changed her will to exclude Frank. Pennsylvania Estate and Fiduciary Code (PEF) §2507(2). There are no other circumstances in the facts altering this result. The separation alone (which does not amount to desertion by Frank) without a contractual waiver of Frank's rights to take under Wanda's will does not deny him of half of her estate.

The remaining half of Wanda's estate by will is devised and bequeathed to Doris. Since she survives under the facts, she is entitled to her inheritance subject to any rights of Sam who was born after Wanda made her will.

Pennsylvania statutes protect such afterborn children. Specifically, PEF §2507(4) provides:

If the testator fails to provide in his will for his child born or adopted after making his will, unless it appears from the will that the failure was intentional, such child shall receive out of the testator's property not passing to a surviving spouse, such share as he would have received if the testator had died unmarried and intestate owning only that portion of his estate not passing to a surviving spouse.

In Wanda's case, the facts do not indicate that she intentionally excluded afterborn children in her will. To do so would be unusual. Therefore, under PEF §2507(4) Sam qualifies as an afterborn child. He is entitled to an intestate share of what Frank does not receive which translates into an intestate share in half of Wanda's estate.

Pennsylvania's intestate laws at PEF §2103(1) provide that the estate of a decedent not passing to a surviving spouse passes to his or her issue. In Wanda's case, she had two children. Therefore, as the only issue of Wanda, Sam and Doris would take in equal shares the half of Wanda's estate not passing to Frank. Sam and Doris

would each receive one-fourth, therefore, of Wanda's estate.

Note that Blackacre is not part of Wanda's estate since it passed by operation of law to Frank as survivor under their tenancy-by-the-entirety ownership of Blackacre.

Only if a divorce occurred before Wanda's death would the ownership of Blackacre convert into a tenancy in common and would there be a half interest of Blackacre in Wanda's estate. Also, such a divorce would terminate Frank's interests in Wanda's estate under her will under PEF Code §2507(2).

Finally, it is further noted that Frank would not, in the absence of a divorce, have seriously considered electing against Wanda's will since in general, his interest would have been one-third of her augmented estate as distinguished from the half he received under her will. (*See* PEF Code §2200, *et seq.*) The facts do not preclude the possibility that there were sufficient non-probate assets to possibly make an election a wiser choice for Frank (i.e., that one-third of her augmented estate would be more than one-half of her probate estate). However, candidates are not expected to raise this issue.

Question No. 2: Facts and Interrogatories

In 1965, realizing that television signals could not be received in their mountainous community, 500 residents of City, Pennsylvania formed Cable Service Co. ("CASCO"), a Pennsylvania corporation, to receive and distribute electronic signals by cable, and to sell and repair electronic appliances. Although City permits other cable distributions, most residents have remained customers of CASCO.

CASCO sells electronic appliances, components and parts but only as a distributor to local retail stores. As of the end of last year, CASCO had 1,200 shareholders, 20,000 cable customers, and a net worth of \$8 million.

Ed, an appliance dealer, has always purchased his appliances and components from CASCO on credit. Ed gave CASCO a security agreement and CASCO properly filed financing statements, all of which identify CASCO's security interest in "all of Ed's inventory now owned and after acquired." Last year, Bank granted Ed an unsecured line of credit loan for \$50,000. The note Ed signed authorized Bank to set off all or any portion of the outstanding loan balance against Ed's accounts at Bank, at any time Bank, in its sole discretion, deems Ed's ability to pay to be impaired.

Both CASCO and Ed have always had all of their accounts at Bank which has rendered monthly statements to them and returned all checks paid during the same period.

Last week, Ed deposited the \$200,000 he received from his super sale into a special sales proceeds account at Bank. This account was solely used to hold sale proceeds. However, Ed's depleted inventory is now worth \$160,000 and Ed's debt to CASCO is \$300,000. Yesterday, Bank deemed Ed to be financially impaired, and set off its \$50,000 loan against Ed's proceeds account. Ed is furious, claiming this will cause him to default in paying CASCO for inventory sold and seriously hurt his business.

1. As attorney for Bank, how would you advise Bank on the effectiveness of this set off?

Last week, Sam, head of CASCO's security department, died without assets. CASCO then discovered that Sam had embezzled \$100,000 over the past two (2) years by stealing numerous CASCO checks, making them payable to himself and very crudely forging CASCO's treasurer's signature. The losses in the first year were \$25,000, but during the last 12 months grew by \$75,000.

2. As attorney for CASCO, advise its board as to what legal theories CASCO should consider in an action against Bank to recover its losses, and with what likelihood of success, and why?

Last month, Carol, a middle manager at CASCO, retained attorney Al, claiming CASCO permitted ongoing sexual discrimination. Al met with Lenn, CASCO's in-house legal counsel, regarding Carol's allegations, which Lenn disdainfully rejected. Al then secretly investigated Carol's allegations by entering into social conversations with her peers and colleagues at CASCO and directing the conversation toward the "difficulty of working with women." From these conversations, Al built an imposing file documenting a pattern of sexual discrimination. Believing that Carol's claim could not be resolved, Lenn began to worry that the publicity of her allegations would hurt CASCO's stock price, so Lenn sold his 5,000 shares at \$20. Unable to reach a settlement, Al filed Carol's complaint, in which he characterized the conversations that he undertook as admissions by management of sexual discrimination. CASCO's stock price immediately fell to \$10 as a result.

3. Has Al violated any of the Pennsylvania Rules of Professional Conduct, and why?
4. Does Lenn have any liability as a result of the sale of his stock, and why?

Question No. 2: Examiner's Analysis

1. **CASCO's security interest in Ed's inventory continues in identifiable proceeds, and Bank's set-off will be subordinate to CASCO's security interest.**

The facts tell us that CASCO had a security interest in Ed's inventory with properly filed financing statements. Thus, CASCO has perfected its security interest as provided in U.C.C. §9-302(1) [13 Pa.C.S.

§9302(a)]. U.C.C. §9-306(2) [13 Pa.C.S. §9306(b)] provides that a security interest in collateral continues in any identifiable proceeds with "cash proceeds" being defined in the preceding subsection. Therefore, CASCO's security interest in Ed's inventory continues in the proceeds which are identifiable in Ed's account at Bank. This is consistent with §9-203(3) [13 Pa.C.S. §9203(c)]. Because this account was used solely for sale proceeds the proceeds remain identifiable, and CASCO's security interest continues.

Bank's set-off against \$50,000 in Ed's account was not a payment by Ed to Bank in the ordinary course of operating Ed's business. Thus, Bank cannot be considered to be a recipient of funds mentioned in comment 2(c) of this section, but rather would be more in a position of an unsecured creditor prior to Ed's depositing the proceeds into his account at Bank which is the earliest point in which Bank would be a secured creditor in those proceeds through possession under U.C.C. §9-305 [13 Pa.C.S. §9305].

U.C.C. §9-312 governs priorities among conflicting security interests in the same collateral and subsection (6) states that for purposes of subsection (5) the date of filing or perfection as to the collateral is also the date of filing or perfection as to proceeds. Subsection (5) gives priority in this case to the creditor who first filed or perfected, and since CASCO perfected first by filing against the inventory and Bank, if it is perfected at all, became perfected when the funds were deposited into Ed's account at Bank, CASCO perfected first and therefore CASCO has the priority claim to these proceeds. U.C.C. §9-312(5)(a) [Pa.C.S. §9312(e)(1)]. (*See Michigan National Bank v. Flowers Mobil Home Sales, Inc.*, 217 S.E. 2d 108, 17 U.C.C. Rep. 861 (NC Ct. App. 1975). In fact, in most jurisdictions, the right of Bank to set off its claim against the balance in Ed's account is not a security interest that would prevail against a levying creditor who levied prior to Bank's exercising its set-off rights. (*See United States v. First National Bank of Arizona*, 348 F. Supp. 388 (D. Ariz. 1970) aff'd, 458 F.2d 513 (9th Cir. 1972).)

However, in Pennsylvania the rule is not so straightforward. Our superior court in Pennsylvania National Bank and Trust Company v. CCNB Bank, N.A., 667 A2d 1151 (1995) held that the depository bank does have an ongoing right of set-off superior to any assignment or security interest in the deposit if the depository bank's right of set-off arose prior to the creation of the assignment or security interest. The court held that this right in the depository bank to exercise a set-off exists even if the depository bank does not exercise its rights until after a security interest or assignment is created in the deposit account. The court was faced with the issue as to whether the depositor's assignment to a certificate of deposit created a perfected security interest in that certificate that had priority over the depository bank's common law right of set-off which had not yet been exercised but which existed at the time of the assignment. The superior court stated that Article 9 of the Code "...does not dictate the analysis to be applied in deciding the priority scheme between a security interest and a set-off in the same collateral." However, in the situation at hand, the right of set-off did not arise until Ed deposited the sale proceeds in his special account at Bank at which time the cash proceeds were already subject to CASCO's security interest. Also, the question raised here is whether Article 9 does apply because Article 9 addresses priorities regarding a security interest in proceeds of inventory.

Even though U.C.C. §9-104(i) and (l) [13 Pa.C.S. §9104 (9) and (12)] exempt both the right of set-off and consensual security agreements in deposit accounts from the provisions of Article 9, nevertheless, the latter subsection states that with respect to proceeds and priorities in proceeds the Code does apply. In most jurisdictions, because there is no common law right created in Bank in any account until the set-off is actually exercised, Bank's interest in the account would not have arisen until the set-off and priority rules discussed above would apply. Under the Pennsylvania rule as stated in Pennsylvania National Bank and Trust Company v. CCNB, N.A., the solutions provided Code §9-306(2) and (3) [13 Pa.C.S. §9306(b) and(c)] should apply and together with §9-312(5)(a) [Pa.C.S. §9312(e)(1)] indicate that Article 9 does dictate the analysis to be applied in deciding the priority scheme between a security interest in the proceeds of the sale of inventory and a set-off in the deposit accounts once those proceeds are deposited. Thus, CASCO should have the priority in the proceeds and Bank cannot exercise its right of set-off if objected to by CASCO.

Because Bank does not have any rights to Ed's inventory or other assets, and further because Ed's assets are worth only slightly more than his liabilities, Bank is justified in believing Ed's ability to pay Bank is impaired. If Ed were to suffer any operating losses or if there were any expenses of liquidating Ed's inventory, it is very possible that Ed would have insufficient cash upon a liquidation to pay Bank in full. Therefore, Bank's decision to exercise its set-off would not be in bad faith but would be justified under the contract and the surrounding circumstances.

2. CASCO should allege that Bank has no right to charge CASCO's account for checks bearing Sam's

crude forgery. However, (a) CASCO will lose as to the \$25,000 embezzled more than a year ago and (b) CASCO probably cannot overcome the burden of its own failure to notify Bank of improperly paid checks which were shown on the statements.

Under U.C.C. §4-401(a) [15 Pa.C.S. §4401(a)] Bank may charge against CASCO a check that CASCO authorized. When Sam forged the signature of CASCO's treasurer, the check was not authorized by CASCO and therefore is not properly payable. Ordinarily in such a situation CASCO would be successful in demanding Bank credit its account for such an item. However, U.C.C. §4-406 [13 Pa.C.S. §4406] probably will bar CASCO from all of its claim for credit.

Under the facts given, Bank has always rendered monthly statements to CASCO, and, without further information, one can assume that these statements indicated a charge to CASCO's account for each of the checks Sam forged. Under subsection (d) of §4-406, CASCO is precluded from asserting against Bank Sam's forged (unauthorized) signature on those checks that were paid 30 days following receipt of the first bank statement given to CASCO which contained a check forged by Sam. Subsection (c) provides that CASCO must exercise reasonable promptness in examining Bank's statements to determine whether any payment was not authorized. If CASCO should reasonably have discovered the unauthorized payment pursuant to Sam's forgery -- which CASCO should have done partly because of the crude forgery and partly through its own reconciling processes -- CASCO must promptly notify Bank of this fact. Subsection (d) then goes on to provide that if CASCO does not perform the duty imposed by subsection (c), CASCO cannot assert later unauthorized signatures by Sam to the extent such later items could have been avoided had CASCO reported the earlier items. Since all of the forgeries were by Sam and extended over a two-year period, had CASCO reported the first forgeries, Bank could have avoided paying all of the forgeries that followed. Therefore, CASCO is barred from these later forgeries.

Under subsection (f) of §4-406 CASCO is also precluded from asserting against Bank Sam's forgeries on checks contained in a statement given to CASCO more than a year ago, regardless of Bank's lack of care. Therefore, because of its laches, CASCO is barred from even recovering on the first forgeries.

To the extent that Bank failed to exercise ordinary care in the paying of Sam's forged checks, CASCO might be able to have the losses allocated between Bank and CASCO pursuant to subsection (e) of §4-406. However, unless the items were large items, it may have been reasonable for Bank not to have examined the signature. U.C.C. §3-103(a)(7) defines "ordinary care" as the "...observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged." The definition specifically states that for a bank using automated means, reasonable commercial standards do not require the bank to examine the check if not examining the check is consistent with the bank's normal procedures and such procedures do not vary unreasonably from general banking usage. Thus, Bank may not have had any requirement to look at the signature on the check, and therefore its failure to detect the forgery may not have been a failure to exercise ordinary care.

3. AI violated Rule 4.2 of the Pennsylvania Rules of Professional Conduct when, without Lenn's consent, AI spoke with other CASCO employees regarding Carol's claim against CASCO.

Under the Pennsylvania Rules of Professional Conduct, Rule 4.2 prohibits a lawyer from communicating about the subject of his client's representation with the other party when the lawyer knows the other party to be represented by counsel, unless counsel has given consent. Under the facts presented, AI knew that Lenn represented CASCO and had spoken with Lenn concerning Carol's claim. Without Lenn's knowledge or consent, AI spoke with employees at CASCO to obtain information regarding the claim in which AI was representing Carol. When he filed his complaint, AI characterized the persons at CASCO with whom he spoke as persons of sufficient authority that their statements constituted admissions of CASCO. The comment to the rule provides that:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter and representations with persons having a managerial responsibility on behalf of the organization, and with any other persons. . . whose statement may constitute an admission on the part of the organization.

From the complaint itself, it appears that AI believed when he interviewed CASCO employees that such employees were sufficiently high in the management hierarchy that their statements would be admissions of

CASCO. To the extent that Al was correct in this assumption, Al has transgressed the prohibitions of Rule 4.2 in that he knew CASCO was represented by Lenn and nevertheless, without Lenn's presence or authorization, talked with CASCO representatives concerning Carol's claim. If Al needed to conduct an investigation, other discovery procedures are available and should have been utilized rather than the methods Al in fact employed. Of course, if Al was mistaken and none of the persons with whom he spoke were sufficiently high in CASCO's management to constitute a violation of Rule 4.2, Al's belief will not change a non-violation into a violation. However, Al may have a problem arguing convincingly that his characterization of these employees with whom he spoke is 100% incorrect.

4. **Lenn has violated Rule 10(b)(5) in selling his CASCO shares while in possession of material inside information not available to the public.**

Rule 10b-5 (17 CFR Chap II §240.10b-5) promulgated by the Securities and Exchange Commission under Section 10 of the Securities Act of 1934 (15 USC §78j), makes it unlawful for any person to engage in any act which operates as a fraud or deceit upon any person in connection with the purchase or sale of a security. Lenn sold his shares at \$20 because he was afraid that the publicity resulting from Carol's allegations against CASCO would adversely affect CASCO's stock price. Lenn regarded this information as material, and Lenn appears to have judged the situation correctly because CASCO stock price did in fact fall to \$10 once Carol's complaint was filed and made public. When Lenn sold his CASCO shares, only he, Carol, and Al knew of Carol's allegations. Therefore, it can be assumed that the purchaser of Lenn's shares was ignorant of Carol's claim.

While possessing superior information is not by itself a violation of Rule 10b-5, if such information is obtained because of one's position in the corporation whose stock is being traded, there is an unfairness in using that information for one's own benefit at the expense of the investing public, and Rule 10b-5 is then violated. In the situation presented, Al approached Lenn to discuss Carol's claim only because Lenn was known to Al as being CASCO's general legal counsel. Thus, Lenn received information because of his position at CASCO. To then use such information, not for CASCO's benefit but to avoid a personal loss, is a practice which operates as a fraud or deceit upon the purchasing party of those CASCO shares and a violation of the rule.

While Rule 10b-5 does not itself explicitly state what damages arise from its violation, some courts have used the rule itself to make whole the party who was "defrauded" because of the insider's violation of the rule. This ambiguity of a remedy to a private party was eliminated when Congress amended the Securities Act of 1934 by adding Section 20A (15 USC §17t-1) which specifically gives a right of action to persons who trade contemporaneously with the insider who violates the insider trading rules. Therefore, Lenn, having violated Rule 10b-5, will be required to reimburse the loss that he avoided, that is, pay \$10 for each of the 5,000 shares sold.

The SEC itself may also bring an action against Lenn for a violation of 10b-5 which could be a criminal action, or under Section 21A, a monetary penalty up to three times the loss avoided. (However, candidates are not expected to discuss this aspect of Lenn's possible liability.)

Question No. 3: Facts and Interrogatories

Paula and David, medical doctors, were employed as senior medical research associates at A&B Laboratories ("A&B"). A&B employs over 300 persons at this facility. Both were unmarried and worked in A&B's Cancer Research Department (Department). During the course of their employment, David, on several occasions, asked Paula for a date. Paula politely but firmly rejected David's requests. David was emotionally crushed by the rejections but did not disclose his feelings for Paula.

Sometime later while attending a medical conference, David learned from a former colleague that Paula has been HIV-positive since her medical intern days. After returning to the Department, David told several friends and colleagues that Paula was HIV-positive and falsely stated that her medical condition was affecting her job performance. Soon David's disclosures had quickly spread throughout their workplace. Later, in a memorandum to management, David repeated his allegation and detailed why he found Paula to be incompetent in performing her job and disclosed that Paula was HIV-positive. Finally, David also recommended that management should terminate her employment. David retained a copy of his memorandum for his file.

Carl, a co-worker of David and Paula, had been told by David and other employees about Paula's medical condition and her job performance. Carl confronted Paula with the allegations. Paula admitted she was HIV-positive but denied she was incompetent or that her medical condition affected her work. The management of A&B, based upon David's memorandum and follow-up conversations with David, decided to terminate Paula's employment. A&B had no evidence other than David's allegations that Paula was incompetent or that her medical condition was a threat to A&B employees. Paula was devastated by David's disclosure of her medical condition within the A&B organization and her termination based upon allegations of incompetency. As a result, she developed great anxiety attacks and had many sleepless nights.

Paula filed a timely civil action against David (Paula v. David) in a Pennsylvania Court of Common Pleas. Jurisdiction and venue were established. David answered the complaint by denying all substantive allegations. Within 60 days of service of the complaint on David, counsel for David joined A&B as an additional defendant. During the course of discovery, counsel for Paula served a discovery request on David for the production of copies of his memorandum to management and any professional liability insurance coverage for the last 3 years.

1. Under Pennsylvania common law, what torts (except negligence and intentional infliction of emotional distress), if any, could Paula reasonably assert against David, and with what probable success?
2. Assume that Paula's complaint against David included allegations of negligence, intentional infliction of emotional distress and wrongful discharge. Discuss whether or not David's joinder of A&B is permissible under the Pennsylvania Rules of Civil Procedure.
3. Discuss whether counsel for Paula's request for production is permitted by the Pennsylvania Rules of Civil Procedure.
4. At the end of discovery and based upon the above stated facts, counsel for David filed a motion for Summary Judgment on the cause of action for intentional infliction of emotional distress alleged in Paula's complaint. Counsel for Paula opposes the motion. As the trial judge, how would you rule on David's motion for Summary Judgment, and why?

Question No. 3: Examiner's Analysis

1. **Paula could assert, with probable success, a cause of action for (a) invasion of privacy and (b) defamation.**
 - (a) Invasion of privacy by publication of a private matter

The tort of invasion of privacy is not one but "...a complex of four [torts]." Vogel v. W.T. Grant Co., 458 Pa. 124, 129 n.9, 327 A.2d 133 (1974); Prosser and Keeton on Torts, Section 117, at 851 (5th Ed. 1984); Restatement of Torts (Second), Section 652A (1965). The four torts are (1) an intrusion upon seclusion; (2)

appropriation of name or likeness; (3) publicity given to private life; and (4) publicity that places a person in a false light. DeAngelo v. Fortney, 357 Pa. Super. 127, 515 A.2d 594 (1986). Pennsylvania courts have cited with approval the Restatements of Torts (Second), Sections 652 B-E for support in defining and addressing these torts. Vogel, supra; Harris By Harris v. Easton Pub. Co., 335 Pa. Super. 141, 483 A.2d 1377 (1984); Nagy v. Bell Telephone Co., 292 Pa. Super. 24, 436 A.2d 201 (1981). Section 652 D, Restatement (Second) of Torts defines the privacy tort most applicable here, as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of ... privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public. (*emphasis supplied*)

The crucial fact issues in determining whether David's conduct established an invasion of privacy are whether the disclosure (1) is a private matter, (2) was publicized, (3) would be highly offensive to a reasonable person, and (4) is of no public concern. A person's medical condition is usually assumed to be a personal and private matter. Further, it is a matter that Paula treated privately and did not share with her colleagues or fellow employees for whatever reason. Paula's nondisclosure is understandable given the nature of the disease, the state of medical knowledge, and the varied public opinions and reactions to persons who are HIV-positive. Moreover, A&B had no evidence that Paula's medical condition put her co-workers at risk. "Publicity" on the other hand, means that the matter is either made public by communicating it to the public at large, or to so many people that it must be regarded as public knowledge. Nagy v. Bell Telephone Co., supra. In this case, David's statements spread throughout their work place of some 300 workers. Although we do not know the exact number of people informed, it probably suffices to be a publication under these circumstances. Being HIV-positive is a private matter and publication is probably established under our facts.

The next issue is whether or not a reasonable person of ordinary sensibilities would find such publicity highly offensive. "In making this determination the customs of the time and place, occupation of the plaintiff and habits...of fellow citizens are material." Harris By Harris, supra, at p. 1384. (*See also*, Restatement (Second) of Torts, Section 652D (1967), comment c.) The manner and nature of David's disclosure would likely be offensive to a person of ordinary sensibilities. First, David tied his disclosure of her medical condition to her performance and professional competence. In doing so, David has probably committed slander, thus making his conduct even more offensive and reprehensible. Second, this is not a disease that is openly discussed or debated without strong opinions and emotions being expressed on all sides of this medical condition. To disclose such facts to the public at large, or as in this case "her" colleagues and fellow employees could, under these circumstances, be found by a reasonable fact-finder to be highly offensive to a reasonable person of ordinary sensibilities.

It is more probable than not under our stated facts that David would be liable for an invasion of privacy by publicity of a private matter.

- (b) Defamation by libel and slander per se

In Elia v. Erie Ins. Exchange, 634 A.2d 657, 659 (Pa. Super. 1993), citing Title 42, Pa.C.S., Section 8343(a), (b), which in part codified the common law, the court held that:

In an action for defamation, the plaintiff must prove:

- (1) the defamatory character of the communication;
- (2) its publication by the defendant;
- (3) its application to the plaintiff;
- (4) the understanding by the recipient of its defamatory meaning;
- (5) the understanding by the recipient of it as intended to be applied to the plaintiff;
- (6) special harm resulting to the plaintiff from its publication; and
- (7) abuse of a conditionally privileged occasion.

On the other hand, a defendant has the burden of proving when relevant to the defense:

- (1) the truth of the defamatory communication;

- (2) the privileged character of the occasion on which it was published.

Defamation is composed of the "...twin torts of libel and slander -- the one being, in general, written while the other, ...is oral." Prosser on Torts, Defamation, Section 111 (5th Ed. 1984). A statement has "defamatory character" if it tends to harm an individual's reputation so as to lower it in the estimation of the community or deter third persons from associating or dealing with a person. Zartman v. Lehigh County Humane Soc., 333 Pa. Super. 245, 482 A.2d 266 (1984). Further, only statements of fact can support an action for libel or slander as opposed to expressions of opinion. Baker v. Lafayette College, 350 Pa. Super. 68, 504 A.2d 247 (1986), affirmed, 516 Pa. 291, 532 A.2d 399 (1987). The essential elements of a cause of action for defamation (libel and slander) can probably be established pursuant to Section 8343. In this case, David has probably committed slander per se when he falsely informed his colleagues that Paula was an incompetent doctor. Further, David committed libel when he repeated his statement in writing. In this latter regard, David may claim a conditional privilege but he will probably be unsuccessful because David's statements were intentional and known to be false. A conditionally privileged communication is one made on a proper occasion from a proper motive, in a proper manner, and based on reasonable cause. Baird v. Sun & Bradstreet, Inc., 446 Pa. 266, 285 A.2d 166 (1971). Therefore, Paula will probably prevail in proving that either (1) no privilege existed, or that (2) the privilege was abused. Clearly, David's statements lack a proper motive and there is no reasonable basis for the statements. David is probably liable to Paula for any actual harm to Paula's reputation (general damages). Restatement of Torts (Second), Section 473. Paula would have the burden of proving "special damages," if any. Title 42, Pa.C.S., Section 8343.

David's statements to his colleagues in regard to Paula having "Aids" may under other circumstances be considered to be slander per se, however, under our facts, truth is a complete defense. Chicarella v. Passant, 343 Pa. Super. 330, 494 A.2d 1109 (1985).

Because Paula is a private person and the matter is of no public concern and does not involve the news media, the First Amendment constitutional privilege does not apply. New York Times v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

2. **David's joinder of A&B is probably permissible under the Pennsylvania Rules of Civil Procedure.**

David's joinder of A&B is probably valid. Pa.R.C.P. No. 2252, Joinder of Additional Defendants, provides:

- (a) ...any defendant or additional defendant may join as an additional defendant any person, whether or not a party to the action, who may be
- (1) solely liable on the plaintiff's cause of action, or
 - (2) liable over to the joining party on the plaintiff's cause of action, or
 - (3) jointly or severally liable with the joining party on the plaintiff's cause of action, or
 - (4) liable to the joining party on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the plaintiff's cause of action is based. (*emphasis supplied*)

This rule is broadly interpreted to effectuate its purpose of avoiding multiple lawsuits by resolving in one action all claims arising out of the same transactions or occurrences on which plaintiff's cause of action is based. Samango v. Pileggi, 363 Pa. Super. 423, 428, 526 A.2d 417, 420 (1987); Garrett Electronics Corp. v. Kampel Enterprises, Inc., 382 Pa. Super. 352, 555 A.2d 216 (1989).

The applicable subsections for our facts are more probably subsections (1) and possibly (3). Although, it is not likely in our facts that A&B would be liable to plaintiff on any cause of action sounding in defamation or invasion of privacy, A&B may be solely liable for wrongful discharge. Joinder is permissible where, as here, a defendant is being joined on the basis of sole liability on an action (wrongful discharge) alleged in plaintiff's complaint. Garrett Electronics v. Kampel Ent., *supra*. It is also possible, but not probable that A&B may be jointly and severally liable with David for intentional, or negligent infliction of emotional distress. At least Paula would argue that A&B's termination of her employment was based upon David's allegation and that any emotional distress which resulted was jointly caused by David and A&B.

Therefore, the joinder of A&B as an additional defendant should be permitted.

3. **Paula's discovery request is appropriate and will be permitted pursuant to applicable Pennsylvania Rules of Civil Procedure.**

All of the requested discovery is well within the general scope of discovery provided by Pa.R.C.P. No. 4003.1, which provides:

- (a) ... a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.
- (b) It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (*emphasis supplied*)

Paula's counsel's requests for production are relevant to issues in the litigation, namely, defamation and privacy. At the very least, her requests satisfy the discovery standard provided for by Pa.R.C.P. No. 4003.1 (b), that is, they are "...reasonably calculated to lead to the discovery of admissible evidence." Further, a request for production of documents may be directed to any tangible thing, including a document within the scope of Rule 4003. The requested documents in this case are specifically included pursuant to Rule 4009, Production of Documents and Things:

- (a) Any party may serve on any other party a request
 - (1) to produce and permit the party making the request or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other compilations of data from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test or sample any tangible things which constitute or contain matters within the scope of Rules 4003.1 through 4003.5 inclusive and which are in the possession, custody or control of the party upon whom the request is served; ... (emphasis supplied)

A like result would be achieved pursuant to Fed. R.Civ. Pro. 26(b)(1) and 34.

The insurance request is specifically allowed by Pa.R.C.P. No. 4003.2:

A party may obtain discovery of the existence and terms of any insurance agreement under which any person carrying or an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify (sic) or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of such disclosure admissible in evidence at trial.

It is not clear from our facts, however, that the insurance policy sought is one in which the carrier "...may be liable ... to indemnify..." the insured. That is to say, the insurance policy at issue specifically covers professional malpractice which probably cannot be used to cover conduct involving intentional torts (privacy, defamation, etc.). However, given the liberal interpretation of our discovery rules, a trial judge would most likely permit discovery because it may meet the minimal discovery standard and the issue of admissibility is not decided by such discovery.

4. **David's motion for summary judgment should be denied because there are genuine issues of material facts in dispute.**

Pa.R.C.P. No. 1035 provides for summary judgment. Summary judgment "...shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, establish that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pa.R.C.P. No. 1035 (*emphasis supplied*). In our case, the burden rests with the moving party (David) to demonstrate that there are no genuine issues of material facts. Day v. Volkswagenwerk Akfeingesellschaft, 318 Pa. Super. 225, 231, 464 A.2d 1313, 1316 (1983), allocatur denied. Moreover, in determining whether or not there is a dispute of material fact the court must view the evidence in a light that is most favorable to the non-moving party (Paula), giving that party the benefit of all favorable inferences that might be drawn from the evidence. Graf v. State Farm Ins. Co. 507 Pa. 414, 415 (Pa. Super. 1986). Therefore, David's motion for summary judgment could

only be granted if there is no genuine issue of any material fact and David is entitled to summary judgment as a matter of law. David will not likely meet this standard viewing the above stated facts in a light most favorably to plaintiff. Paula must ultimately prove that David's acts are intentional (or done with reckless disregard of the consequences) and that his conduct exceeds all bounds tolerated by decent society. Field v. Phila. Electric Co., 388 Pa. Super. 400, 565 A.2d 1170 (1989). Although a fact-finder might decide these issues for or against David or Paula, there is enough evidence on this record that David's conduct is disputed and material. These factual issues (and others) cannot be decided as a matter of law for David if all favorable inference are given to the non-moving party (Paula). Rosen v. Tesoro Petro Corp., 339 Pa. Super. 226, 582 A.2d 27 (1990). Applying these principles to the facts and records stated above, David's motion for summary judgment probably should be denied.

Question No. 4: Facts and Interrogatories

Sally, a stock broker, sold shares in a nonexistent company to certain of her clients. She deposited the monies received for the bogus stock into her personal bank account. Sally also prepared fictitious monthly reports on the stock and sent them to the unsuspecting clients.

Tanya, Sally's secretary, discovered Sally's scheme. Afraid of direct involvement, Tanya sent an anonymous letter to the local police. It stated, in part, that: "Sally is selling stock in a company which does not exist. All of her records are in a locked filing cabinet in her office. Be careful. She carries a loaded pistol at all times." Based solely on this letter, the police went to a District Justice and obtained a warrant to search Sally's office. They went to her office, properly executed the warrant, and discovered incriminating evidence exactly where the letter said it was. When the police entered her office, Sally displayed violent behavior, and one of the female officers, concerned for her own safety, frisked Sally for weapons. The officer felt an envelope in Sally's jacket pocket, removed it, and found that it contained a white powder which was later determined to be illegal cocaine.

1. Other than violations of securities statutes and regulations, of what crime was Sally guilty with respect to the sale of the phony stock?
2. How should the Court rule on a motion to suppress the records of Sally's illegal stock transactions?
3. Assuming the warrant was valid, how should the Court rule on a motion to suppress the cocaine at Sally's trial for the possession of an illegal controlled substance?

Prior to her arrest, Sally lived with her husband, Harold, and their two small children. Harold is a construction worker whose earnings were approximately twenty-five percent of Sally's. After Sally's arrest, Harold left the home, obtained a divorce and was awarded custody of their two children. The home in which they had lived was left to Sally by her father when he died. This occurred shortly after her marriage to Harold, and the home never was transferred into joint ownership. At his death, it was valued at \$150,000. Even though Sally and Harold made extensive repairs, it is now worth \$75,000 because of the deterioration in the neighborhood. Sally, who was fired by her firm and lost her brokers license, currently works as a clerk in a local store, earning the minimum wage.

4. How should the Court have treated the home in the equitable distribution of Sally and Harold's assets during their divorce action?
5. On what basis should the Court decide the request by Harold for child support from Sally?

Question No. 4: Examiner's Analysis

1. **When an individual intentionally obtains property of another by deception, she is guilty of the crime of theft.**

Pennsylvania's Penal Code provides, in 18 Pa.C.S. Section 3922 as follows:

- (a) Offense defined: A person is guilty of theft if he intentionally obtains or withholds property of another by deception. A person deceives if he intentionally:
 - 1.(c) Creates or reinforces a false impression, including false impressions as to ... value ...;
 - 3.(f) fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship.

In order to obtain a conviction under this section, the commonwealth must establish both the presence of a false impression and the fact that the victim relied upon that impression. Commonwealth v. Lawson, 437 Pa. Super. 521, 650 A.2d 876 (1994). In the instant case, Sally sold stock in a nonexistent company. She obtained the funds and deposited them in her personal account. It is clear from the evidence that the commonwealth could establish both the existence of false representations and the obtaining of money as a result. By paying for the bogus stock, the victims were relying on the misrepresentation. Sally is guilty of theft under these circumstances. Under common

law this crime is known as "false pretenses." Sally would also be guilty of violating both 18 Pa.C.S. §4107 (a) (7) which makes it a misdemeanor if an individual "...makes a false or misleading written statement for the purpose of promoting the sale of securities...", and 18 Pa.C.S. §3927 (a), which provides that an individual is guilty of theft if he or she "...obtains property upon agreement... if he intentionally deals with the property obtained as his own and fails to make the required payment or disposition."

2. The standard for evaluating whether probable cause exists for the issuance of a search warrant is the "totality of circumstances" test.

In the instant case, the police obtained a search warrant based solely on an anonymous letter, without any corroboration. In determining whether the District Justice had sufficient probable cause to properly issue the warrant, the information offered must be viewed in a common sense, non-technical manner. Commonwealth v. Jones, 542 Pa. 418, 668 A.2d 114 (1995). The Pennsylvania Supreme Court, in Commonwealth v. Jones, *supra*, noted:

The standard for evaluating whether probable cause exists for the issuance of a search warrant is the 'totality of circumstances' test as set forth in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983)... A magistrate is to make a 'practical, common-sense decision' whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supply hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. 668 A.2d at 116, 117.

It has been recognized that anonymous information, by itself, is not a sufficient basis for the issuance of a warrant. In this case, Tanya had first-hand, detailed knowledge of the evidence and its location, but her veracity was totally unknown to the police and District Justice. Without corroboration by another source, there is no objective basis for crediting this hearsay information with accuracy. There was no other evidence to support the letter and, since the informant was unknown, there was no way to determine his or her reliability. (*See Illinois v. Gates*, *supra*. *See also Commonwealth v. Gray*, 509 Pa. 476, 484, 503 A.2d 921, 925 (1985).) In federal matters, the United States Supreme Court has held evidence to be admissible despite the lack of probable cause where it was seized in good faith in the execution of an apparently valid search warrant. (*See United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 (1984).) The Pennsylvania Supreme Court has held that the Pennsylvania Constitution independently requires the exclusion of such evidence. Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991).

Thus, in the instant case, based solely on an anonymous letter, the District Justice did not have sufficient information to properly issue a search warrant. The court should sustain the motion to suppress the evidence obtained from Sally's filing cabinet.

3. The Supreme Court of the United States has determined that a police officer may frisk the outer clothing of an individual who is behaving suspiciously if he or she believes that the person may be "armed and dangerous." However, where the envelope removed did not feel like a weapon or illegal drugs, the contents should be excluded from evidence.

A police officer may frisk the outer clothing of a person who is behaving suspiciously if the officer believes that the individual may be "armed and dangerous." Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968). In the instant case, the officer had some advance notice, even though it came from an anonymous letter, that Sally may be armed. When she displayed violent behavior, and the officer felt that her safety was threatened, a frisk search of Sally's outer clothing was appropriate. The officer felt an envelope which she removed and which contained illegal cocaine. The evidence would not feel like a gun or other weapon. In refining Terry v. Ohio, *supra*, the Supreme Court has said that an officer conducting a frisk search for weapons may properly seize illegal drugs only if he or she immediately recognizes the character by his or her "plain feel." Minnesota v. Dickerson, 508 U.S. 124, 334 S. Ct. 2930 (1993). In that case the Court precluded the admission of drugs where the officer explored the defendant's pocket after concluding that it did not contain a weapon, but was unable to tell from his touch that the material he was removing contained illegal drugs. In the instant case, there is no way that the police officer, in properly searching Sally for weapons, could remove an envelope containing cocaine. The envelope would not feel like a gun or other weapon. It would seem impossible for the officer to immediately recognize that the envelope contained illegal drugs simply by feeling it during a search of her clothing. The court would exclude the evidence of the cocaine. It should be noted that Pennsylvania has not yet determined whether, under the Pennsylvania Constitution,

a frisk for weapons can be permissibly expanded to a search for drugs. Thus, in the instant case, even if the officer felt the powder in the envelope during the course of the frisk, the cocaine might be suppressed under the Pennsylvania Constitution.

4. Property received by inheritance during the marriage is not considered to be marital property.

In Pennsylvania, when a spouse receives an inheritance during his or her marriage, the property is not considered to be marital property subject to equitable distribution. If the value of the property appreciated during the marriage, and prior to separation of the parties, the increase in value would be subject to equitable distribution. Ling v. Ling, 442 Pa. Super. 106, 658 A.2d 805 (1995). Sally received the real estate by inheritance from her late father during her marriage with Harold. Generally the cost of repairs is considered to be similar to payments for upkeep and maintenance. Thus, regardless of any repairs which were done to the property, its value was less at the time of their separation than it was when she received it. Consequently, no part of the real estate would be considered to be marital property and a court would not consider it in any order of equitable distribution.

5. The amount of child support is generally determined by the earning capacity of the parent or parents, rather than on actual earnings.

In Pennsylvania the court must consider the earning capacity of both parents in determining child support. Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974). 23 Pa.C.S. §4322 (a) states that:

In determining the reasonable needs of the child or spouse seeking support and the ability of the obligor to provide support, the guidelines shall place primary emphasis on the net incomes and earning capacities of the parties, with allowable deviations for unusual needs, extraordinary expenses and other factors, such as the parties' assets, as warrant special attention.

In the instant case, Sally, prior to the termination of her job as a stock broker and the loss of her broker's license, earned four times as much as her husband, Harold. She is now working as a clerk for a minimum wage. The Superior Court of Pennsylvania has held that a court must consider certain factors in determining what he or she can realistically be expected to earn. (*See Diehl on Behalf of Beaver v. Beaver*, 444 Pa. Super. 91, 663 A.2d 232 (1995).) Earning capacity has been defined by Pennsylvania's courts as "...not an amount which the person could theoretically earn, but as that amount which the person could realistically earn under the circumstances considering the individual's age, health, mental and physical condition and training." Myers v. Myers, 405 Pa. Super. 290, 592 A.2d 339 (1991). The court will also take into consideration whether or not the parent deliberately reduced his or her income in order to avoid an obligation to support minor children. It does not appear that Sally intentionally reduced her income to avoid supporting her children. However, it appears that she could realistically earn more than a minimum wage, even though she lost her license as a securities dealer (the occupation which provided her with her previous high income). In determining Harold's request, the court should focus generally on Sally's earning capacity rather than her minimum wage earnings. Clearly, Sally has an obligation to provide support for her two small children who are in the custody of her former husband. Although she lost her professional license and limited her employment capacity by virtue of her own improper conduct, she obviously has the realistic ability to earn more than minimum wage as a store clerk. The court should evaluate all of the factors, including her age, health, mental and physical condition and training and issue an award based on her realistic capacity rather than actual earnings. In addition, there is no reason to believe that Harold is earning less than he is able to earn.

Question No. 5: Facts and Interrogatories

As a result of declining economic conditions, an eroding tax base, and a shrinking population, C City (located in State P) is experiencing symptoms of urban blight and decay. Particularly in residential areas of the city, the crime rate has been increasing and the general appearance and character of neighborhoods are declining. As part of a coordinated effort to address these problems, C City Council is proposing to enact four ordinances intended to address various problems the council believes are, at least in part, causing the decline of C City.

1. The first ordinance would ban all signs on buildings and yards within residential areas, regardless of the content of the message contained on such signs. The purpose is to prevent further visual clutter and the unsightly appearance of these signs, which have proliferated in recent years.
2. The second proposed ordinance will prohibit "half-way" houses within residential areas. A "half-way" house is a facility in which persons released from prison live in partial confinement until their full sentence is served. The presence of several half-way houses within C City is a factor which the council associates with the increasing crime rate.
3. The third proposed ordinance will prohibit youths under the age of 18 from admission to adult dance halls and night clubs located in C City. The city council has determined that restricting minors from these facilities would lessen access to alcohol and drugs, and reduce difficulties associated with groups of juveniles congregating in and around these areas.
4. In order to reduce drug trafficking and other unlawful activity in public housing units owned by C City, the fourth proposed ordinance would prohibit access to public housing units to all persons other than residents of these units, their invited guests, and those conducting official business on the premises. Access to public housing for distribution of political campaign literature, and other forms of canvassing and solicitation, would therefore be prohibited.

As C City solicitor, the city council has requested your opinion whether these proposed ordinances, if properly and validly enacted under state and local law, will be valid under the United States Constitution. Advise city council regarding the significant constitutional issues presented by each proposed ordinance, and advise whether each ordinance would be valid under the Federal Constitution.

Question No. 5: Examiner's Analysis

1. **The proposed ordinance which prohibits signs within residential areas will likely be invalid under the provisions of the First Amendment of the United States Constitution.**

Signs, including yard and building signs, are a form of expression protected by the free speech clause of the First Amendment. Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97 S.Ct. 1614 (1977). Therefore, local ordinances which discriminate on the basis of the content of the signs' messages, or prohibit or substantially limit signs without the strong justifications necessary under the First Amendment, will likely be invalid. (*See* Metromedia, Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882 (1981); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118 (1984).)

In City of Ladue v. Gilleo, ___ U.S. ___, 114 S.Ct. 2038 (1994), the Supreme Court considered an ordinance, which, for purposes of the Court's analysis, was held to prohibit the display of virtually any sign on residential property. Although there was no impermissible content discrimination, the Court noted that its prior decisions "...have voiced particular concern with laws that foreclose an entire medium of expression." 114 S.Ct. at 2045. By wholly eliminating a common means of speaking, such broad prohibitions can suppress too much speech. *Id.* Recognizing that residential signs are an unusually cheap, convenient and potentially effective form of communication, the Court held that the prohibition on virtually all signs swept too broadly, and that the government's legitimate interest in eliminating visual clutter could be served in less restrictive ways.

Accordingly, it is likely that C City's proposed ordinance which would prohibit all signs in residential areas would not be valid under the First Amendment. Although there is no discrimination on the basis of content of the message, the scope of the proposed ordinance is too broad, and cannot be supported on the aesthetic justifications

presented.

2. **The proposed ordinance which will prohibit half-way houses within residential areas is subject to review under the Equal Protection Clause of the Fourteenth Amendment and will likely be valid under the rational basis test.**

The proposed ordinance which will prohibit half-way houses discriminates between types of residential uses in C City, and bans only residential uses involving prisoners released from total confinement. This classification should be reviewed under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Ordinances which do not involve suspect classifications or impinge on fundamental rights are subject to equal protection examination under the rational basis test, and will be upheld if the ordinance is rationally related to a legitimate governmental purpose. There is a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. Hodel v. Indiana, 452 U.S. 314, 101 S.Ct. 2376 (1981). In City Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 105 S.Ct. 3249 (1985), the Supreme Court reviewed a local ordinance requiring a special permit for a group home for mentally retarded persons under the Equal Protection Clause. Although the Court held that mentally retarded persons did not constitute a suspect classification, the Court nevertheless appeared to apply a heightened rational basis analysis to the ordinance in question. Using that standard, the Court found that the classification was based upon irrational prejudice emanating from negative attitudes and fears about the mentally retarded, and therefore was not rationally related to any legitimate state interest.

More recently in Bannum, Inc. v. City of St. Charles, 2 F.3d 267 (8th Cir. 1993), the Court considered an ordinance which initially did not permit residential properties to be used as half-way houses. The Court concluded that the failure to include a half-way house as a permitted use was not arbitrary or irrational in the first instance. The Court also considered a subsequent amendment to the ordinance, which permitted a half-way house only with a conditional use permit. The Court held that because of legitimate concerns for public welfare, the local government could rationally wish to control the location of residential facilities for persons convicted of crimes, as a means of protecting public safety. It found, unlike Cleburne, that the justification for the classification based upon persons convicted of crimes was not based upon irrational prejudice, but rather upon a realistic view that criminals recently released from prison could pose a threat in some locations within the municipality.

Using a rational basis analysis under the Equal Protection Clause, it is therefore likely that C City's proposed ordinance prohibiting half-way houses in residential areas would be valid. It is certainly reasonable for C City Council to conclude that the individuals who would reside in these facilities may pose a threat to the public welfare, particularly in view of the increasing crime rate in C City.

3. **The proposed ordinance prohibiting minors from admission to dance halls and night clubs will likely be valid under the provisions of the First Amendment and Equal Protection Clause of the Fourteenth Amendment.**

The proposed ordinance which would prohibit youths under the age of 18 from admission to dance halls and night clubs located in C City should be examined under the associational rights protected by the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment.

Supreme Court cases have identified constitutionally protected freedom of association in two contexts: (i) certain intimate human relationships which must be secured against undue intrusion by the state, and (ii) engaging in joint activities which are protected by the First Amendment. Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244 (1984). Restricting minors of a designated age from "associating" in adult dance halls and night clubs, however, does not fall within the associational activities protected by the First Amendment.

In City of Dallas v. Stanglin, 490 U.S. 19, 109 S.Ct. 1591 (1989), the Supreme Court concluded that the ability to mingle for social purposes in a dance hall simply does not "...involve the sort of expressive association that the First Amendment has been held to protect." Id., at 26, 109 S.Ct. at 1595. Moreover, such recreational activities did not qualify as a form of intimate association as recognized in other cases dealing with associational rights under the First Amendment.

Because the ordinance would also discriminate among age groups of patrons, the ordinance at issue in City of Dallas was also examined under the Equal Protection Clause. Having concluded that no fundamental constitutional right was involved, the Supreme Court reviewed the City of Dallas ordinance under the rational basis analysis. Based upon the need to protect teenagers from corrupting influences in such facilities, and the need to control illegal drug and alcohol use, the Supreme Court held that there was a rational relationship between the age distinctions and the legitimate objectives of the municipality.

It is likely, therefore, that C City's proposed ordinance would withstand scrutiny under the Equal Protection Clause and the First Amendment.

4. **The proposed ordinance restricting access to public housing facilities will likely be deemed a valid restriction on First Amendment free speech rights.**

Restrictions on general access to C City public housing facilities clearly has the potential to infringe upon First Amendment rights of free speech. The breadth of the ordinance necessarily means that persons who wish to distribute political literature, or engage in other forms of canvassing or solicitation, could not do so within C City public housing units, unless invited by a resident. As early as Martin v. Struthers, 319 U.S. 141 (1943) the Supreme Court has recognized that door-to-door solicitation is a protected form of expression.

The government need not, however, permit all forms of speech on property it owns and controls. International Society for Krishna Conscious v. Lee, ___ U.S. ___, 112 S.Ct. 2701 (1992). The constitutionality of government regulation of its own property depends upon the character of the property at issue; specifically, whether the property is a traditional public forum, a designated public forum or a non-public forum. United States v. Kokinda, 497 U.S. 720, 110 S.Ct. 3115 (1990). In traditional public fora, or designated public fora, governmental limitations on expressive activity are subject to strict scrutiny and must be narrowly tailored to serve a compelling interest. By contrast, in a non-public forum, the government may limit access so long as the limitation is reasonable and not based upon a desire to suppress the content of speech. Id.

There is little doubt that the public housing units operated by C City would be deemed a non-public forum. Those units are used for residential purposes, and not for traditional free speech activities. In Daniel v. City of Tampa, 38 F.3d 546 (11th Cir. 1994), cert. denied, 115 S. Ct. 2557, the Court recognized that such public housing was a non-public forum. Further, it held that enforcement of a limitation of access similar to that proposed by C City was a reasonable means of combating rampant drug and crime problems on public housing property. Absent evidence that enforcement of the restriction in a particular case was motivated by disagreement with content of speech, the Court concluded that the First Amendment was not violated by such restrictions on access.

Here, likewise, it is likely that the proposed ordinance should be upheld against a First Amendment challenge. Although Martin v. Struthers, supra, would ordinarily protect the right of solicitation, in this instance, the government is entitled to control the use of its own property. The access restriction is not predicated on the message to be conveyed, and is reasonable in light of the need to reduce unlawful activity occurring within public housing units.

Question No. 6: Facts and Interrogatories

Paul Promoter entered into a valid, written agreement with Al, the owner of ABC Theater, to stage a one-week-long series of performances by Steve, a rock singer. Al agreed not to charge rent or overhead, but to accept one-half of the gross receipts generated by the performances. Tickets were to be sold in advance and at the door. Although Paul spent \$25,000 for promotions, stage equipment, and an advance payment to Steve, ticket sales were very slow. Aware that tickets were not selling well, Al rented ABC to Sam ten (10) days prior to Paul's scheduled concert for a term of one (1) month.

1. Angry and upset, Paul filed an action for breach of contract against Al seeking to recover damages for: (a) his out-of-pocket expenses, (b) lost profits, (c) emotional distress, and (d) punitive damages. Assuming that Al is liable for the breach of contract, will Paul be successful in recovering each of these items of damages? Explain.
2. Paul was aware that DEF Theater, which is located one block from ABC, had not scheduled any performances the week of Steve's concert. Dee, the owner of DEF, heard of Paul's dilemma and asked Paul if he was interested in renting DEF. Paul was furious with Al and refused Dee's offer stating that his feelings were hurt and he would never again trust another theater owner. Dee persisted and told Paul that she would rent DEF to him for \$50,000 a week, payable in advance, and one-half of the gross receipts. Paul refused to negotiate with her. Will Paul's conduct with Dee have any effect on his recovery of damages against Al? Explain.
3. Al no longer wanted to operate ABC and decided to give ABC to his long-time, trusted friend and attorney, Able. He instructed Able to prepare a deed conveying ABC from Al to Able. Able had not prepared any deeds for several years and after explaining the circumstances to Ann, a young associate in his law firm, Able instructed Ann to prepare the deed for Al's signature. If the deed is prepared by Ann and executed by Al, will Able or Ann violate any Pennsylvania Rules of Professional Conduct? Explain.
4. Assume that ten (10) years ago another attorney had prepared a deed properly conveying Al's hunting cabin from Al to Al's son. Although Al had delivered the deed to his son, no one had ever recorded the deed. Al had forgotten about the prior deed to his son and instructed Ann to prepare a deed conveying the hunting cabin from Al to his daughter. Al properly executed the deed and delivered it to his daughter as a birthday gift. Al's daughter, who had no knowledge of Al's prior deed to his son, recorded the deed. Who has title to the hunting cabin? Explain.

Question No. 6: Examiner's Analysis

1. **Paul will probably recover the amount he spent in preparation for the contract; he probably will not recover lost profits; he will not recover damages for emotional distress or punitive damages.**

Generally when there has been a breach of contract, damages are awarded in order to place the aggrieved party in the same position he would have been in had the contract been performed. Adams v. Speckman, 385 Pa. 308, 122 A.2d 685 (1956). The damages that may be awarded in a breach of contract action are measured by the loss in the value to the injured party of the other party's performance caused by its failure, in addition to any other loss, including incidental or consequential loss, caused by the breach. Douglas v. Licciardi Construction Co., 386 Pa. Super. 292, 562 A.2d 913 (1989). The burden is on the party claiming damages to prove the items and amount of his damages with reasonable certainty.

The goal in assessing damages is that a person who has been unjustly deprived of his rights should be as fully compensated as possible for the injury he sustained. The following rules are generally applicable to the measure of damages in these situations.

- (a) Paul's expenses

When the non-breaching party has incurred expenses on the faith of the contract, he is entitled to reimbursement for such expenses if they are reasonable and proper. Harmon v. Chambers, 358 Pa. 516, 521, 57 A.2d 842, 845 (1948).

Paul spent \$25,000 in preparation for the concert. If he can prove the amount of these damages with reasonable certainty and that the expenses were reasonable and proper, he may recover the \$25,000 from Al. Reimbursement of that sum will place Paul as nearly as possible in the same position as he was in prior to Al's breach.

Paul probably cannot, however, recover his out-of-pocket expenses if he also recovers lost profits. Reliance damages may only be recovered when lost profits are uncertain or highly speculative and not recoverable. Restatement (2d) Contract (1981) §349, Comment a. Under the facts stated, lost profits are uncertain and probably not recoverable and, therefore, Paul could recover his out-of-pocket expenses.

(b) Lost profits

To recover for lost profits in a breach-of-contract action, there must be affirmative evidence that the loss resulted from the breach of contract. Delahanty v. First Pennsylvania Bank, 318 Pa. Super. 90, 464 A.2d 1243 (1983). It is not necessary that the amount be shown with absolute or mathematical certainty but only that it be approximated by competent proof. Northeastern Vending Co. v. P.D.O., Inc., 414 Pa. Super. 200, 606 A.2d 936 (1992).

Paul entered into the contract for the purpose of making a profit and his lost profits are a natural result of Al's breach. Although it is not necessary to prove lost profits with mathematical certainty, the fact-finder may not reach its verdict on the basis of speculation or conjecture. Various methods may be used to prove lost profits including profits made by others or by the injured party himself in similar business circumstances.

Under these circumstances, it will probably be difficult for Paul to prove lost profits with reasonable certainty. Paul will face the difficulty of establishing such profits when it was intended that tickets be sold at the door and there remained an additional ten (10) days for ticket sales when Al breached the contract. Moreover, the fact that ticket sales were slow will be considered by the trier-of-fact. Accordingly, Paul will probably be unable to prove lost profits with reasonable certainty.

(c) Emotional distress

Pennsylvania courts do not allow damages for emotional distress to be recovered in a breach-of-contract action. Rodgers v. Nationwide Mutual Ins. Co., 344 Pa. Super. 311, 315, 496 A.2d 811, 815 (1985). In D'Ambrosio v. Pennsylvania National Mutual Casualty Co., 494 Pa. 501, 431 A.2d 966 (1981), the Pennsylvania Supreme Court suggested that emotional distress damages may be recoverable on a contract where the breach is of such a kind that serious emotional disturbance was a particularly likely result. This theory has not been adopted by Pennsylvania courts. Even under the suggested possible approach in D'Ambrosio, *id.*, Al's conduct would hardly be considered to be so wanton and reckless as to warrant recovery for emotional distress.

(d) Punitive damages

Under Pennsylvania law, punitive damages are not recoverable in a breach-of-contract action. Rittenhouse Regency Affiliates v. Passon, 333 Pa. Super. 613, 482 A.2d 1042 (1984). Paul, therefore, will not recover punitive damages.

Thus, Paul will probably be successful in recovering the \$25,000 he spent as a result of his preparation for the contract; he probably will not recover lost profits; he will be unable to recover damages for emotional distress and he will be unable to recover punitive damages in this breach-of-contract action.

2. **While the non-breaching party is required to make reasonable efforts to mitigate his losses, he is not required to undergo unreasonable expense or undue risk in order to mitigate his losses; Paul's damages would probably not be reduced by his failure to mitigate under these circumstances.**

A party who suffers loss due to a breach of contract has a duty to make reasonable efforts to mitigate his losses. Gorzelsky v. Lecky, 402 Pa. Super. 246, 586 A.2d 952 (1991), alloc. denied 598 A.2d 284. The amount recoverable by the damaged party is reduced by the amount of losses which could have been avoided by that party's reasonable efforts to avoid them. State Public School Building v. W. M. Anderson, 49 Pa. Commonwealth Ct. 420, 410 A.2d 1329 (1980). The party who has breached the contract or caused the loss has the burden of showing that the losses could have been avoided through the reasonable efforts of the damaged party. Williams v. Masters,

Mates and Pilots of America, Local No. 2, 384 Pa. 413, 120 A.2d 896 (1956).

The non-breaching party is held to a standard of reasonable conduct in preventing loss. The non-breaching party is not required to take measures that involve undue risks or expenses. Gorzelsky v. Lecky, *supra*, 586 A.2d at 956. According to the Restatement (2d) of Contracts, damages are limited by the loss "the injured party could have avoided without undue risk." Restatement (2d) Contracts (1981) §350(1). The law does not mandate that Paul take the risk of paying an additional \$50,000 in advance to rent DEF in order to mitigate damages. Thus, although Paul refused to negotiate with Dee, his actions probably had no effect on his duty to mitigate damages.

Although Paul failed to make any effort to avoid his losses, Al will have to show that such losses could have been avoided through reasonable efforts by Paul in order to reduce the amount of damages recoverable. Paul's duty to mitigate damages did not require him to take the risk of paying \$50,000 in advance for the substitute contract and his recovery will probably not be affected by his failure to negotiate with Dee.

3. **Able will violate Pa.R.P.C. No. 1.8(c) if he prepares the deed conveying ABC to himself and Ann will violate Pa.R.P.C. No. 1.10(a) if she prepares the deed.**

Pa.R.P.C. No. 1.8(c) prohibits a lawyer from preparing an instrument giving the lawyer any substantial gift from a client, except where the client is related to the donee within the third degree of relationship. Able is a friend but not a relative, and the gift is substantial. Able cannot, under any circumstances, prepare the deed conveying ABC from Al to himself, and to do so will violate Pa.R.P.C. No. 1.8(c).

Pa.R.P.C. No. 1.10(a) provides:

- a. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9, or 2.2.

When Ann prepares the deed, she would have knowledge of the identity of the donee and she would also be aware that no consideration was paid for the conveyance. Her participation in the transaction would thus involve her knowingly representing Al when Able would be prohibited from doing so by Rule 1.8(c). The comment to Rule 1.10(a) explains that it gives effect to the principle of loyalty to the client as it applies to lawyers who practice in the same firm. The basis of this subsection of the rule is that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client on the premise that each lawyer is vicariously bound by the loyalty owed by each lawyer with whom the lawyer is associated.

Thus, Able will violate Rule 1.8(c) if he or Ann prepares the deed, and Ann will violate Rule 1.10(a) by representing Al when Able is clearly prohibited from doing so.

If Able instructs Ann to prepare the deed, he may violate Rule 5.1(b) which provides that "a lawyer having direct supervisory authority over another lawyer should make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct."

4. **Al's son has title to the hunting cabin. Failure to record the deed in this situation does not affect Al's son's title to the property.**

Delivery of the executed deed is all that is necessary to pass title between the grantor and the grantee. Failure to record a deed does not render it void under all circumstances or as to all persons. An unrecorded deed is valid as against the grantor himself, his heirs and devisees, or as to a subsequent grantee to whom the property is conveyed without consideration. Land v. Commonwealth Pa. Housing Finance Agency, 101 Pa. Commonwealth Ct. 179 (1986); *See* Ladner, *Conveyancing in Pennsylvania*, §18.03, 4th ed. (1979).

A deed that has not been recorded is void as to any subsequent bona fide purchasers for value without actual or constructive notice. 21 P.S. 351; Long John Silver's, Inc. v. Fiore, 255 Pa. Super. 183, 386 A.2d 569 (1978). Al's daughter is a donee without notice of the prior deed. Because she is a donee, rather than a subsequent bona fide purchaser for value, she is not protected by the Pennsylvania recording statute. Al's son has valid title to the hunting cabin.

Question No. 7: Facts and Interrogatories

The Boom Demolition and Construction Company ("Boom"), a Pennsylvania corporation based in C City, was clearing a large lot in preparation for the construction of a housing project. All applications for necessary permits had been made, including an application for a 3-day permit for blasting, to remove underground rock from the site. Boom's Vice President for Business Development, Mr. Big ("Big"), learned that the C City Engineer had recommended that the blasting permit be denied because of concern about neighborhood opposition to the project. Upon learning this, Big contacted the Engineer and paid him \$10,000, by Boom Company check, to change his report and to recommend approval of the blasting permit. The check was listed on Boom's checkbook register as "filing fees and research for blasting permit application." The only copy of the original negative report was given to Big, which he locked in a Boom company safe in his office at the company. No one else was aware of the bribe of the Engineer or of the reason for the approval of the blasting permit. The permit was issued, and Boom began its 3-day blasting operations.

Mr. and Mrs. Homeowner ("Homeowners") lived in a development house adjacent to the Boom construction site. Following the completion of Boom's blasting operations, which were properly carried out by trained professionals, and notwithstanding the care with which the blasting was conducted, the Homeowners discovered that their house had sustained \$100,000 in damage from the vibrations from the blasting. They retained Attorney Able to represent them against Boom to seek reimbursement of the cost of repair of their house.

1. What tort cause[s] of action, excluding negligence and trespass, may the Homeowners bring against Boom to recover for their property damage, and with what likely result? Discuss.

Assume that, before filing the action for damages, and after only one day of Boom's planned 3 days of blasting, the Homeowners discovered that their house had sustained damage.

2. What emergency judicial relief might the Homeowners seek to stop the blasting, and with what likely result? Discuss.

Assume that an action for damages against Boom was brought by Able, representing the Homeowners, in the appropriate county court in Pennsylvania. Boom was represented by defense counsel Diligent, who was unaware of the original denial of the blasting permit, or of the payment to the Engineer. No criminal charges had been brought against either the Engineer or Big, although the statute of limitations for such charges had not expired. The state court civil action proceeded to discovery.

3. At a pretrial deposition, Big was asked about the payment to the Engineer and the changed Engineer's report on the blasting permit application. How, if at all, should Big or his counsel respond to the question, and what is the likelihood of success of a properly-filed motion to compel Big to answer the question? Discuss. For purposes of this question, assume that Big's counsel knew of the payment for the changed report.
4. A pretrial request for production of documents directed to Boom sought production of the checkbook register, the cancelled check, and original Engineer's report. May Boom's counsel refuse to produce the documents on the same basis raised by Big and/or his attorney in part 3 above? Discuss.

Question No. 7: Examiner's Analysis

1. **Able should bring an action against Boom for private nuisance and for strict liability seeking monetary damages. Both causes of action will probably succeed. The strict liability claim can be expected to prevail because blasting is an abnormally dangerous activity.**

Able should bring an action against Boom for private nuisance and for strict liability for damage caused by abnormally dangerous activities. Both actions may be expected to succeed. The strict liability claim will succeed because blasting has been recognized by the courts as an abnormally dangerous activity.

A private nuisance is a civil wrong based on a disturbance of rights to land. The Restatement (Second) of Torts, Section 822, provides:

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land and the invasion is either

- (a) intentional and unreasonable, or
- (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Liability for abnormally dangerous activities is defined in the Restatement (Second) of Torts, Section 519, as "...liability for harm to the person, land or chattels of another resulting from the [kind of harm anticipated from the] activity..." despite the exercise of the utmost care to prevent harm. Blasting in a residential community, such as the one in which the Homeowners live, would clearly meet the test of an abnormally dangerous activity in Section 520 of the Restatement. Since liability for damage caused by abnormally dangerous activities is strict liability, Boom's lack of negligence and lack of intent to cause damage are not relevant to a determination of liability. Prosser & Keeton, supra at 534. See e.g., Federoff v. Harrison Construction Company, 362 Pa. 181, 66 A.2d 817 (1949), in which strict liability was found for damage to plaintiffs' house caused by vibrations from defendant's blasting.

Because of the dangerous nature of the activity undertaken by Boom, both actions can be maintained, and because the restatement definition of private nuisance links the existence of such a cause of action to an abnormally dangerous activity, the proof of strict liability will also establish the nuisance claim.

2. **Able may seek injunctive relief, on an emergency basis, in order to prevent any further damage to Homeowners' house. Based on the fact that there has already been damage, and future damage is unknown, the injunction may issue.**

Rule 1531 of the Pennsylvania Rules of Civil Procedure provides, in relevant part:

(a) A court shall issue a preliminary or special injunction only after written notice and hearing unless it appears to the satisfaction of the court that immediate and irreparable injury will be sustained before notice can be given and a hearing held, in which case, the court may issue a preliminary or special injunction without a hearing or without notice.

In order to demonstrate entitlement to injunctive relief, which is an equitable and extraordinary remedy, Able must demonstrate that there is a risk of immediate and irreparable injury unless the court stops the blasting immediately. Additionally, the court will consider whether the Homeowners' claim is likely to succeed on the merits, and it may balance the hardship to Boom with the public interest and risk to the Homeowners of denying an injunction. The issue of whether the damage to the Homeowners' house is irreparable or may be remedied by monetary damages, can be expected to be considered by the court. In general, courts will enforce strict rules in purely residential areas. York v. Stallings, 217 Or 13, 341 P.2d 529 (1959). Keeton, Trespass, Nuisance and Strict Liability, 59 Colum. L.Rev. 457 (1959). (See also Beecher et. ux. v. Dull, et. al., 294 Pa. 17, 143 A. 498 (1928); Cmwlth of Pa. DER v. Glasgow Quarry, Inc., 351 A.2d 689 (1976); Kembel v. Schlegel, 478 A.2d 11, 329 Pa. Super. 159 (1984).)

Since the Homeowners have sustained property damage after only one day of blasting, and the risk of further damage and/or personal injury is unknown, the court can be expected to issue an emergency or temporary injunction.

3. **Big should refuse to answer, or his attorney should refuse to permit him to answer the question, citing Big's constitutional privilege against self-incrimination. The refusal to answer will be upheld.**

In general, discovery is permitted of any material that is relevant to the subject matter of the action and is not privileged. Pa.R.C.P. No. 4003.1. The question of relevance is broadly interpreted, and if the information sought "...appears reasonably calculated to lead to the discovery of admissible evidence," the request is permissible under the rules, even if the evidence will not be admissible at trial. Rule 4003.1(b). Although we do not have a great deal of information on the bribe of the Engineer, the reason(s) for the Engineer's original negative report, or the relationship of these factors to the claims raised by the Homeowners, it can be expected that discovery will be permitted, whether or not the information discovered will be admissible at trial. Therefore, the issue is whether the material sought is privileged.

The Fifth Amendment to the United States Constitution provides that "No person...shall be compelled...to be a

witness against himself." Since the statute of limitations for criminal prosecution of Big and/or the City Engineer for bribery has not expired, Big or his counsel, on his behalf, must raise the privilege against self-incrimination and refuse to answer the deposition questions about the payment to the Engineer and the alteration of the report. Even though the action at issue is a civil action for damages, not a criminal proceeding, Big must invoke the privilege or be found to have waived it, should a criminal prosecution be brought. Brown v. United States, 356 U.S. 148, 2 L.Ed2d 589 (1958); Com. Ex. Rel. Esterline v. Esterline, 181 Pa. Super. 532, 124 A.2d 133 (1956).

4. **Production of the checkbook register, the cancelled check and the original report may not be avoided because of the privilege against self-incrimination, as the documents are the property of the corporation, and a corporation is not a "person" under the United States Constitution. Since the documents are discoverable, under the rules of civil procedure, Boom Corp. must produce them.**

Assuming that the checkbook register and the original Engineer's negative report are discoverable (see discussion of Rule 4003.1 in response to issue #3, above), the issue is whether Boom Corporation may raise the constitutional privilege against self-incrimination and, thereby, refuse to produce the requested documents. The court can be expected to rule that the privilege against self-incrimination does not apply to corporations.

The documents requested by Attorney Able, the Boom Corporation check and check register, and the Engineer's first report that was "purchased" by Big on behalf of Boom with Boom funds, are the property of Boom Corporation. The Fifth Amendment privilege against self-incrimination has been held not applicable to a corporation, because a corporation is not a person. United States v. White, 322 U.S. 694, 64 S.Ct 1248 (1944), Wilson v. United States, 221 U.S. 361, 31 S.Ct 538 (1911), United States v. Cohen, 388 F.2d 464 (1967). In United States v. White, *supra*, the Supreme Court held that an officer of a labor union could not avail himself of the privilege against self-incrimination and thereby refuse to produce the corporation's records on the ground that the records might tend to incriminate the union officer. Accord Com. ex. rel. Camelot Detective Agency, Inc. v. Specter, 303 A.2d 203 (1973). The privilege attaches to the documents in connection with the privilege against self-incriminating testimony. Since the corporation cannot incriminate itself, and the documents are its property, Boom must produce the requested documents.

The act of production doctrine does not apply, as the corporation was the recipient of the discovery request, not any individual corporate officer who might become the target of a criminal action. United States v. Sancetta, 788 F.2d 67 (2d Cir. 1986).

Question No. 8: Facts and Interrogatories

Wendy, a single mother of two minor children, is a computer science professor. She recently decided to convert her home into a bed and breakfast. Wendy plans to keep her teaching job until her planned bed and breakfast generates sufficient income to support herself and her children. She decided that teaching and operating the bed and breakfast would be easier if she purchased a home computer. The computer could be used by Wendy's children to play games and do homework, used by her in conjunction with her teaching duties, and used to maintain an accounting and scheduling system for the bed and breakfast.

Wendy visited Honest Al's Consumer Heaven ("Al's") where she learned she could purchase two computers for about the same sum she had planned to spend on one computer. Additionally, she could receive very low interest financing from Al's. Wendy decided to purchase two computers; one to be used exclusively by her children for games and homework assignments, and one for Wendy to use for teaching related activities and accounting and scheduling for the bed and breakfast. Wendy took advantage of Al's special financing, and in conjunction therewith, readily signed Al's financing agreement that granted Al's a security interest in the two computers she had purchased. No financing statements were filed by Al's.

After Wendy purchased the computers, Bank lent Wendy the money she needed to make renovations to her house. The Bank loan is secured by a first lien mortgage on the house and a properly perfected security interest in all of Wendy's goods, accounts, inventory and equipment, including, without limitation, any computer equipment.

Wendy has contacted Ace Interior Decorating ("Ace") and has received a proposal for interior decorating for the house. The proposal, signed by Ace's president, provided details regarding price, time for performance, and the work to be performed, and further provided that Wendy may accept the proposal by sending a letter of acceptance to Ace. Wendy has written to Ace, indicating in her letter, "Your proposal is very attractive. Let's meet next Friday to see if we can negotiate a deal."

Wendy has learned that Joe and Mary, who own a vacant lot adjoining her house as husband and wife, are in the process of getting a divorce and wish to sell the vacant lot. Joe has recently had a judgment entered against him in the county where the lot is located. The issuance of a decree divorcing Joe and Mary is imminent. Joe's counsel has also advised that additional judgments will soon be entered against Joe.

1. If Wendy defaults on her obligations to Al's and Bank, which lender will prevail in claiming the computers Wendy purchased from Al's?
2. Assuming Ace has made a valid offer and that Ace has received Wendy's letter, is there an enforceable agreement between Wendy and Ace?
3. Can Joe and Mary presently convey the vacant lot to Wendy free of the judgment against Joe?
4. Assuming Joe and Mary are divorced prior to the conveyance to Wendy, can Joe and Mary then convey the vacant lot to Wendy free of the pre-divorce judgment against Joe or any postdivorce judgment entered against Joe?

Question No. 8: Examiner's Analysis

1. **Al's should prevail over Bank regarding the computer used by Wendy's children by claiming a purchase money security interest in a consumer good. Bank should prevail over Al's with respect to the computer used by Wendy arguing it constitutes equipment in which a security interest could only be perfected by filing.**

The most basic and general of all perfection rules in the Uniform Commercial Code is the filing rule. Section 9302 of the Pennsylvania Uniform Commercial Code (the "Code") generally provides that "a financing statement must be filed to perfect all security interests except..." for those specifically enumerated in the section. 13 Pa. C.S.A. §9302(a). U.C.C. 9-302. One must determine if Al's is perfected without filing as Bank would otherwise prevail as to both computers since Bank has properly perfected its security interest in both goods and equipment.

Subpart (a)(4) of Section 9302 of the Code states an exception to the filing requirement if the secured party holds a purchase money security interest in consumer goods. If the computers sold and financed by Al's were and are "consumer goods" then Al's will have a valid purchase money security interest in the computers by virtue of its financing agreement (which grants Al's a security interest in the computers) without the necessity of filing.

Section 9109 of the Code states "Goods are (1) 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes." It further provides that "Goods are (2) 'equipment' if they are used or bought for use primarily in business...." The computer being used exclusively by Wendy's children is a consumer good. The computer being used by Wendy in conjunction with her teaching job and for accounting and scheduling at the bed and breakfast appears to have crossed the line that lies between consumer goods and equipment.

Al's financing agreement included sufficient language to allow it to be construed as a security agreement. Therefore, Al's has a perfected purchase money security interest in the computer being used by Wendy's children and should prevail over Bank. With respect to the computer being used by Wendy, Bank should prevail. Bank has properly perfected by filing and Al's has not. Al's will have great difficulty in its attempts to have this computer classified as a consumer good. (*See, In re Phillips*, 42 U.C.C. Rep. 679 (Bankr. W.D. Va. Dec. 1985).)

2. Wendy has failed to properly accept the proposal from Ace. Wendy's purported acceptance was equivocal and merely expressed an interest in meeting to see if an agreement could be reached at a future date.

An essential prerequisite to the formation of a contract is the mutual manifestation of assent to the same terms. An agreement is usually reached by a process involving an offer and a valid acceptance. Generally speaking, in order for there to be a valid acceptance four conditions must be met. First, the offeree must have knowledge of the offer. Second, the offeree's response must manifest unequivocal agreement with the offer. Third, the offeree's response must become effective while the offer is still open. Finally, the offeree's response must comply with the terms of the offer. The facts support a conclusion that the second requirement has not been met.

An acceptance of an offer must be unequivocal. WILLISTON ON CONTRACTS §6:10 (Richard A. Lord ed., 4th ed.); RESTATEMENT (SECOND) OF CONTRACTS §57. It must represent a present expression of intent to accept the offer as stated. The acceptance must be without condition or reservation and without any intent to delay final commitment until some further expression of assent is given by the offeree or some further agreement is reached. WILLISTON ON CONTRACTS §6.13 (Richard A. Lord ed., 4th ed.).

Wendy indicated that the offer was interesting and that she would like to meet to see if a deal could be reached. This expression is equivocal and is not one which relays a present intent to accept the proposal and be bound by its terms. Accordingly, there is not an enforceable agreement between the parties.

3. While married, Joe and Mary hold the property as tenants by entirety and can convey the property to Wendy free and clear of the judgment filed against Joe.

By law, a judgment is a lien against all real estate (within the jurisdiction of the court which rendered the judgment) of the party against whom it is entered from the time of its entry. Given this general rule one would initially suspect that Joe and Mary, as husband and wife, could not convey the lot to Wendy free and clear of the judgment lien. In Pennsylvania, however, the general rule would not apply because Joe and Mary, as husband and wife, presumably hold the property as tenants by entirety.

Under Pennsylvania law, a conveyance of an estate in land to a husband and wife creates in them a tenancy by entirety unless the deed clearly shows a different intent. (*See, Holmes Estate*, 414 Pa. 403 (1964).) In an early case, the Pennsylvania Supreme Court discussed this type of tenancy and stated:

A conveyance to a husband and wife [as tenants by entirety] is neither a tenancy in common nor a joint tenancy. The estate of joint tenants is a unit made up of *divisible parts*; that of the husband and wife [holding as tenants by entirety] is also a unit; but it is made up of *indivisible parts*. In the first case [joint tenants or tenants in common] they are holders of different moieties or portions and upon the death of either the survivor takes a new estate. He acquires by survivorship the moiety of his deceased cotenant. In the last case [tenancy by entirety], although there are two *natural* persons, they are but one person in *law*, and upon the death of either the survivor takes no new

estate. It is a mere change in the properties of the person holding, and not an alteration in the estate holden. The loss of an adjunct merely reduces the legal person holding the estate to an individuality identical with the natural person. The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporators. Stuckey v. Keefe's Extrs., 26 Pa. 397, 199 (1856). (*Bracketed comments added.*)

As tenants by entirety, neither tenant can compel partition or terminate or sever the tenancy by his or her individual act. Additionally, a judgment entered against one spouse during the joint lives of both spouses does not attach as a lien against the entirety estate of the parties.

In his treatise on conveyancing in Pennsylvania, Ladner states:

Consequently, if a judgment is entered against the husband alone and he dies before the wife, her title, as survivor, to the real property owned by entirety when the judgment was entered is free and clear of the lien of the judgment because her title, relating back to the date of original acquisition by her and her husband, antedates the judgment. Nor would such a judgment bind the entirety estate during the joint lifetimes of the husband and wife, for only the husband's expectant interest would be bound by the lien of the judgment; and when he dies first his interest dies with him. Hence the husband and wife together can convey good title, free and clear of the lien of the judgment against either of them alone . . . LADNER ON CONVEYANCING IN PENNSYLVANIA, Vol. 1, §1.08(d).

(*See also, Stop 35, Inc. v. Haines*, 374 Pa. Super. 604, 543 A.2d 1133 (1988).) Therefore, as long as the conveyance occurs prior to the divorce of the parties and they are both alive or occurs after the death of Joe, the property can be conveyed to Wendy free and clear of the judgment entered against Joe.

4. **Once a final divorce decree is entered between Joe and Mary their estate in the property is converted by operation of law to that of tenancy in common and they will not be able to convey a complete interest in the property to Wendy free and clear of the judgment or judgments entered against Joe.**

Since 1949, the law in Pennsylvania has been that upon divorce a tenancy by entirety is automatically transposed into a tenancy in common with each spouse taking a one-half interest. (*See*, 23 Pa. C.S.A. §3507.) In a tenancy-in-common situation each owner holds an undivided fractional interest in the same property. Each owns the whole of his undivided interest, and not an undivided part of the whole. Accordingly, each tenant in common may convey, encumber, or devise his undivided interest in the property.

Clearly, if any judgments are entered against Joe after the divorce decree is entered they will attach to his undivided one-half interest in the property as a tenant in common and Joe and Mary will not be able to convey the property free and clear of that judgment lien.

A more difficult question is could Joe and Mary convey after divorce free and clear of the judgment lien entered against Joe prior to the divorce? The courts that have considered this issue, however, have concluded otherwise. The reasoning is essentially that the postdivorce tenancy-in-common interest of each spouse dates back to the original date of acquisition as though the property had never been held as tenancy by the entirety. Upon divorce the pre-divorce judgment attaches to the estate that the judgment debtor spouse has had since the date of acquisition. (*See, Wirtz v. Phillips*, 251 F. Supp. 789 (W.D. Pa., 1965); *Weir v. Taylor*, 45 D. & C. 2d 197 (1967).) Therefore, Joe and Mary cannot convey the property to Wendy after their divorce free and clear of the pre-divorce judgment against Joe.

Grading Guideline

Question No. 1

1. Assignment of income doctrine

- * One who has earned taxable payments cannot assign the income taxability thereof to an assignee.
- * Income earned on property which is assigned is taxable to the assignee.

5 points (25%)

Comments: A passing score will be given to a candidate who recognizes that income cannot be assigned. Additional credit over a bare passing grade will be given to a candidate who recognizes that only if a property generating income is assigned will the income from such property become taxable to the assignee to the extent it is accrued or paid after the assignment. A candidate whose answer contains less than the above requirements for a passing grade will be given partial credit depending upon what portion of the minimum answer is given.

2. Tenancies by the entirety

- * A tenancy by the entirety is a form of real estate ownership between husband and wife.
- * The surviving tenant by the entirety is entitled to the entire property by virtue of survivorship.
- * Survivorship and other rights to a property held by tenants by the entirety can be altered by contract.

5 points (25%)

Comments: A passing grade will be given to a candidate who recognizes Blackacre was held by Frank and Wanda as tenants by the entirety, that the survivor of such tenants takes the entire property upon the death of one tenant and that this status was not altered by any separation agreement. Additional credit over a bare passing grade will be given to a candidate who discusses other aspects of a tenancy by the entirety, including the fact that its characteristics continue until a death or divorce or until the tenancy is modified either directly or indirectly by contract. Additional credit over a bare passing grade will be given to a candidate who recognizes that an agreement to give one tenant by the entirety exclusive possession does not of itself alter the survivorship status of the tenancy. A candidate whose answer contains less than the above requirements for a passing grade will be given partial credit depending upon what portion of the minimum answer is given.

3. Discussion with client of client's proposed unlawful conduct

- * A lawyer may answer questions from a client of whether a proposed course of conduct is unlawful.
- * A lawyer cannot advise a client how to conduct an unlawful or fraudulent course of action.

5 points (25%)

Comments: A passing grade will be given to a candidate who recognizes that as Frank's attorney, the candidate can only answer his questions of whether a proposed course of conduct is unlawful. Additional credit over a bare passing grade will be given to a candidate who discusses how a lawyer should not become a co-conspirator with a client by discussing with the client how to circumvent enforcement of valid civil and criminal laws. A candidate whose answer contains less than the above requirements for a passing grade will be given partial credit depending upon what portion of the minimum answer is given.

4. After-born children

- * A child born to the testator after the making of his or her will shall receive an intestate share of the property not passing to the surviving spouse unless a contrary intent appears.
- * A separation agreement alone will not alter the parties rights to each other's estate at death unless specific provisions regarding same are made.

5 points (25%)

Comments: A passing grade will be given to a candidate who recognizes that Frank will receive from Wanda's estate what her will provided notwithstanding the separation and that Doris will receive the balance of Wanda's estate pursuant to Wanda's will except for the fact that Sam is an after-born child entitled to a statutory share of Wanda's estate. Additional credit over a bare passing grade will be given to a candidate who properly calculates Sam's share to be an intestate share of Wanda's estate not passing to her spouse (which in this case amounts to an equal share with Doris).

Question No. 2

1. **Priority of security interest in proceeds vs. Bank's right of set-off.**

- * CASCO's security interest in Ed's inventory continues in identifiable proceeds of the sale when deposited at bank.
- * Bank's right of set-off comes from both common law and its loan agreement with Ed, and U.C.C. Article 9 exempts both from its coverage.
- * However, priorities need to be resolved and Article 9 does resolve the question of priorities in proceeds as opposed to rights to a deposit account.
- * Bank's set-off rights arise when the proceeds are deposited which is subsequent to the attachment of CASCO's security interest.

5 points (25%)

Comments: To achieve a passing grade, a candidate is expected to know that CASCO has a perfected security interest in the proceeds of the sale of the inventory when those proceeds are identifiable in Ed's account at Bank. For full credit, a candidate is expected to see Bank's rights to set-off are to the account balance and arise upon deposit, and then attempt to resolve this claim vs. CASCO's claim to proceeds as such, using the U.C.C. rules as to priorities. A candidate is not expected to be aware of the rule in Pennsylvania National Bank and Trust Company vs. CCNB Bank, N.A. at 667 A.2d 1151 (Pa. Super. 1995).

2. **Bank's liability for payment of CASCO's unauthorized checks and effect of monthly statements of account activity.**

- * Bank is deemed to know CASCO's signature and ordinarily is liable for payment on an unauthorized signature.
- * CASCO is precluded from seeking the \$25,000 credit from Bank for unauthorized payments shown on monthly statements given more than one year ago.
- * CASCO is probably also precluded from recovering from Bank the \$75,000 recent embezzlement because had CASCO reported the first unauthorized payments shown on the monthly statements, Bank could have prevented loss on the subsequent forgeries.
- * Bank's failure to discover the crude forgery is not per se a failure to exercise ordinary care--it depends upon Bank's procedures and general banking usage.

5 points (25%)

Comments: To achieve a passing grade, a candidate is expected to recognize that while Bank is charged with knowing CASCO's signature, Bank sent to CASCO monthly statements with the paid checks and that CASCO is responsible for looking at the items and reporting any unauthorized payments shown. To obtain full credit, a candidate is expected to note that Bank's initial liability is not necessarily evidence of Bank's negligence, and that CASCO's ongoing failure to discover and report the forgeries allowed Sam's scheme to continue, and this failure shifts the loss to CASCO.

3. **An attorney cannot communicate with management personnel of an adverse party represented by counsel when the topic involves matters of the legal action.**

- * Al represented Carol in her claim against CASCO, an adverse party known by Al to be represented by Lenn.
- * Without Lenn's permission, Al discussed facts of the case with CASCO "management personnel."

- * To the extent these "management personnel" are persons of sufficient responsibility to constitute their statements as an admission by CASCO, AI has violated the Pennsylvania Rule of Professional Conduct that prohibits a lawyer from communicating directly with the other party.

5 points (25%)

Comments: To achieve a passing grade, a candidate is expected to recognize that AI's personal investigation of CASCO's management personnel is, by AI's own statement, without the knowledge of CASCO's attorney. For full credit, a candidate is expected to discuss that AI knew Lenn represented CASCO, which includes for this purpose, representing these management persons whose statements can be attributed to CASCO, and that to the extent that AI will need to testify to identify the "admissions," AI cannot also represent Carol's action.

4. **Selling to avoid losses while in possession of material inside information**

- * As attorney for CASCO, Lenn was informed of Carol's claim of sexual discrimination.
- * While this information was not yet public, AI concluded that Carol's claim would adversely affect CASCO's stock price, that is, the information was material.
- * Lenn traded on the non-public information, which later events showed to be material, and thus violated SEC Rule 10b-5 and must reimburse the loss he avoided.

5 points (25%)

Comments: For a passing grade, a candidate is expected to recognize that Lenn improperly has traded on information not available to the public. To obtain full credit, a candidate is expected to recognize that (1) Lenn obtained his information because his position at CASCO required it, (2) the information was material, that is, it was the knowledge of Carol's allegations that led to CASCO's stock price decline, and (3) Federal Securities laws prohibit Lenn from using such information in trading CASCO's stock to avoid a loss.

Question No. 3

1. **Torts: privacy/defamation**

(a) Privacy allocation

- * Publication of a private matter (2 points)
- * Publicity (1 point)
- * Highly offensive (1 point)
- * Not of legitimate public concern (1 point)

(b) Defamation allocation

- * Libel/slander (2 points)
- * Recognition of slander per se (1 point)
- * Elements: defamatory character, communication about plaintiff, and defaming statement (3 points)

11 points (55%)

Comments: A candidate is expected to know elements of tort, key facts; better papers will address publicity/private matter issue. A candidate is expected to know elements of defamation, whether slander or libel; better papers will discuss slander per se. No credit for negligence or IIED.

2. **Pa.R.C.P. No. 2252: joinder of additional defendant**

Joinder requirements/conclusion

- * Sole liability to plaintiff (1 point)
- * Cause of action/same transaction occurrence (1 point)

2 points (10%)

Comments: A candidate is expected to make a correct legal conclusion and to discuss sole or joint liability.

3. **Pa.R.C.P. No. 4003.1, 4003.2, 4009: discovery procedure**

Basic discovery standard

- * Scope of discovery (4003.1) (2 points)
- * Production by party opponent (4009) (1 point)
- * Discovery insurance policy (4003.2) (1 point)

4 points (20%)

Comments: A candidate is expected to discuss basic discovery standard and the relationship to the evidentiary standard and production or non-production of memo/policy.

4. **Pa.R.C.P. No. 1035: motion summary judgment**

- * Answer/conclusion (1 point)
- * Criteria of Rule 1035: materiality/undisputed facts, and ruling as a matter of law (2 points)

3 points (15%)

Comments: A candidate is expected to define the legal standard required; better papers will discuss what may or may not be a "material issue" of fact of a cause action for IIED.

Question No. 4

1. **Did Sally's conduct, by selling shares in a non-existent company and depositing the monies received in her personal account, constitute a theft?**

- * Sally, a stock broker, sold shares in a non-existent company to certain of her clients. She also prepared fictitious monthly reports and forwarded them to the client.
- * When an individual intentionally obtains the property of another by deception, he or she is guilty of the crime of theft. In common law this is known as obtaining property by "false pretenses."

4 points

Comments: To achieve a passing score, a candidate is expected to recognize that obtaining the property of another by deception constitutes the crime of theft. To obtain full credit, a candidate is expected to understand and discuss that the commonwealth must establish both the presence of a false impression and the fact that the victim relied on that impression. By paying for the bogus stock, the victims were relying on the misrepresentation.

2. **Can an individual successfully challenge a search warrant issued by a district justice based solely on an anonymous letter?**

- * A district justice issued a search warrant based solely on an anonymous letter stating that Sally kept records of sales of fraudulent stocks locked in a filing cabinet her office.
- * In determining whether a district justice had sufficient probable cause to properly issue a search warrant, the information offered must be viewed in a common sense, non-technical manner. Anonymous information, by itself, is not a sufficient basis for the issuance of a warrant. The veracity of the individual supplying the information is totally unknown.
- * Without corroboration by another source, there is no basis for crediting the anonymous letter with accuracy. Since the informant was unknown, there was no way to determine his or her reliability.

4 points

Comments: To achieve a passing score, a candidate is expected to recognize that in order for a valid search warrant to be issued by a district justice, given all of the circumstances set forth in the affidavit, including the veracity of the

persons supplying information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The totality of the circumstances must be evaluated in a common sense, non-technical manner. To obtain full credit, a candidate is expected to discuss the fact that the anonymous letter cannot be credited because the reliability of the individual supplying the information in the first instance was unknown. The candidate is further expected to be cognizant of the fact that, without additional corroboration, there is no basis for crediting the anonymous letter.

3. **Can Sally successfully assert that the cocaine found in her jacket pocket was improperly seized?**

- * A police officer may frisk the outer clothing of a person who is behaving suspiciously if the officer believes that the individual may be "armed and dangerous."
- * A police officer, who is frisking the outer clothing of an individual for weapons cannot explore a pocket or its contents after concluding that it did not contain a weapon. An officer is unable to seize contraband if he or she could not tell from his or her touch or "plain feel" that the material was contraband.
- * Although the officer had some advanced notice that Sally may have been armed, when she displayed violent behavior, the officer could properly frisk her outer clothing for weapons. The officer felt an envelope which she removed. Although the envelope contained illegal cocaine, the officer was unable to tell from her touch that the material she was removing contained illegal drugs. Consequently, the envelope and its contents would be excluded from evidence.

4 points

Comments: To achieve a passing score, a candidate must be cognizant of the fact that a police officer may frisk the outer clothing of a suspiciously behaving individual if the officer believes that that person may be armed and dangerous. To obtain full credit, a candidate must articulate an understanding that if the officer, through his or her "plain feel" finds other items, they may be seized only if the officer immediately recognizes the illegal character of that which he or she is feeling. In the instant case, the envelope would not feel like a gun or other weapon and would not be immediately recognized as containing illegal drugs. Consequently it would be excluded from evidence.

4. **Can Sally successfully exclude her home, which she inherited from her father, from her marital estate?**

- * In Pennsylvania, when a spouse receives an inheritance during his or her marriage, said property is not considered to be marital property subject to equitable distribution.
- * Sally had received the home by inheritance by her late father during her marriage with Harold and, consequently, it would not be considered to be marital property.

4 points

Comments: To achieve a passing score, a candidate is expected to know that property inherited during a marriage will not be considered part of the marital estate. To obtain full credit, the candidate must articulate an understanding of the law that property inherited during a marriage is not marital property and, in the instant case, even if there were repairs done to the property, its value was less at the time of the parties separation than it was when she received it. Consequently, no part of the real estate would be considered to be marital property and, therefore, it would not be part of any order of equitable distribution.

5. **Should the court consider Sally's ability to earn money rather than her actual current earnings in determining whether or not she should provide child support?**

- * The amount of child support is generally determined by the earning capacity of the parent or parents, rather than on actual earnings.
- * Sally had been a successful stock broker who had been arrested for theft by selling shares in a non-existing company and then preparing fictitious reports on the stock which she sent to unsuspecting clients.
- * Sally was fired from her firm because of her conduct, lost her broker's license and currently works as a clerk in a local store, earning the minimum wage.

- * Pennsylvania recognizes earning capacity not as an amount which the individual could theoretically earn but the "...amount which the person could realistically earn under the circumstances...." Since she did not deliberately reduce her income to avoid her support obligation, the court should focus on her earning capacity rather than her actual current earnings. The court should also consider the effect of her prior conduct on her ability to now obtain a higher paying job.

4 points

Comments: To achieve a passing score, a candidate is expected to understand that an individual's earning capacity is that amount that he or she could realistically earn under all of the circumstances. To obtain full credit, a candidate must articulate, not only an understanding of the term "earning capacity" but also apply the facts of the instant case to that standard. Although Sally lost her professional license and, as a result of her own improper conduct, she is currently earning only the minimum wage, the court should evaluate all of the circumstances and issue an award based on her realistic capacity to earn money rather than her current actual earnings.

Question No. 5

1. **The validity of the ordinance prohibiting signs on buildings and yards within residential areas**

- * Recognition of applicability of the First Amendment
- * Recognition that the ordinance effectively prohibits the display of all signs on residential property
- * Recognition of the substantial state justification necessary to support such a ban
- * Conclusion that the state's interest in eliminating visual clutter and unsightly appearance is not substantial enough to support a total ban

5 points

Comments: A candidate who recognizes the applicability of the First Amendment will receive two points. If the candidate recognizes that the ordinance includes a total ban, and that the restriction is invalid under the First Amendment, the candidate will receive either three or four points, depending upon the level of analysis. A candidate will receive five points if they fully analyze and discuss all of the items noted above.

2. **The validity of the ordinance prohibiting half-way houses**

- * Recognition of the applicability of the Equal Protection Clause
- * Determination of the test to be applied under the Equal Protection Clause (rational basis)
- * Analysis of the state's interest in prohibiting half-way houses under the rational basis test
- * A conclusion as to the validity of the ordinance

5 points

Comments: A candidate who recognizes the applicability of the Equal Protection Clause will receive two points. If the candidate addresses the issue of the applicable test of the Equal Protection Clause, and provides at least some analysis, three or four points will be awarded. Five points will be awarded for a thorough discussion and analysis of all items listed above.

3. **The ordinance prohibiting minors from admission to dance halls and night clubs**

- * Recognition of the applicability of the Equal Protection Clause
- * Recognition of the applicability of the right of association under the First Amendment
- * Determination of the test to be applied under the Equal Protection Clause (rational basis)
- * Analysis of the interest of the state supporting the distinctions created by the ordinance under the rational basis test, and a conclusion as to the validity of the distinction
- * Determination of whether the social and recreational activities constitute an associational right protected under the First Amendment, and a conclusion with respect to the status of those rights

5 points

Comments: A candidate who recognizes the applicability of either the Equal Protection Clause or the Associational Rights Clause of the First Amendment will receive at least two points. A candidate who further analyzes either of the constitutional claims, by recognizing the items noted above, will receive either three or four points depending upon the level of analysis. A candidate who recognizes both constitutional claims and provides at least some discussion and analysis of the items noted above will receive five points.

4. **The ordinance restricting access to public housing facilities**

- * Recognition of the applicability of the First Amendment to the ordinance restrictions
- * Recognition of the distinction between public and non-public fora
- * Recognition of the constitutional test applicable to non-public fora
- * Conclusion as to the validity of the ordinance under the First Amendment

5 points

Comments: A candidate who recognizes the applicability of the First Amendment will receive two points. A candidate who discusses the distinction between public and private fora for applying First Amendment tests will receive three points. A candidate who further analyzes the ordinance under the attached applicable to non-public fora will receive either four or five points, depending upon the level of the analysis.

Question No. 6

1. * Paul may recover the \$25,000 he spent in preparation for the concert if the expenses are reasonable and proper and can be proven with reasonable certainty.
- * Lost profits may be recovered if the non-breaching party can show that the loss resulted from the breach and can prove the amount lost with reasonable certainty. Under the facts stated, Paul will probably be unable to establish lost profits with reasonable certainty.
- * Paul will not recover damages for emotional distress because Pennsylvania courts do not allow damages for emotional distress in a breach of contract action.
- * Paul will be unable to recover punitive damages because punitive damages are not recoverable in a breach-of-contract action under Pennsylvania law.

8 points (Two points were allocated for each subsection.)

Comments: Partial credit may be given when the candidate states the general rule of law for each category of damages. To obtain full credit, the candidate must apply the law to the specific facts stated. Credit is also given for the recognition that reliance damages may only be received when lost profits are uncertain.

2. * Paul's recovery will probably not be affected by his failure to negotiate with Dee. While the non-breaching party is required to make reasonable efforts to mitigate his losses, he is not required to undergo unreasonable expense or undue risk in order to mitigate his losses.

4 points

Comments: Partial credit is given for recognition of the non-breaching party's duty to mitigate damages. To obtain full credit, the candidate must also explain that the non-breaching party is not required to undergo undue risk or burden in order to mitigate.

3. * If Able prepares the deed conveying ABC from Al to Able, he will violate Pa.R.P.C. No. 1.8(c) which prohibits a lawyer from preparing an instrument giving the lawyer any substantial gift from a client, except where the client is related to the donee within the third degree of relationship.
- * Ann will violate Pa.R.P.C. No. 1.10(a) if she prepares the deed conveying ABC from Al to Able. Rule 1.10(a) prohibits Ann, as an associate in Able's firm, from representing Al when Able would be prohibited from doing so by Rule 1.8(c)

4 points (Two points were allocated for each subsection.)

Comments: In order to achieve full credit, the candidate must recognize that Able's drafting of the deed is a per se violation of Rule 1.8 and that the rule of imputed disqualification applies to Ann, a member of his firm. Credit may also be given for the recognition that Able will also violate Pa.R.P.C. No. 5.1(b) concerning a lawyer with supervisory authority over another lawyer, but no credit is lost if this is not mentioned.

4. * Al's son has title to the hunting cabin because delivery of the executed deed passes title between the grantor and grantee. A deed that is not recorded is void as to any subsequent bona fide purchaser for value without notice. Al's daughter is a donee rather than a bona fide purchaser for value and she is not protected by the Pennsylvania recording statute.

4 points

Comments: Partial credit is given for a discussion of the effect of failure to record a properly executed and delivered deed. Full credit is obtained by concluding that the daughter is not a bona fide purchaser for value and is not protected by the recording statute and that Al has title to the cabin.

Question No. 7

1. **Causes of action for strict liability for unreasonably dangerous activity and private nuisance**

- * Elements of private nuisance
- * Elements of strict liability cause of action for abnormally dangerous activity

40%

Comments: A candidate who identifies the two causes of action without substantial analysis will receive a passing score. Identification of causes of action and careful analysis of and application to facts will receive full credit.

2. **Temporary or special injunction under Pa.R.C.P.**

- * Homeowners should seek temporary or special injunction and allege likelihood of immediate and irreparable injury and likelihood of success on merits and lack of an adequate remedy at law.

20%

Comments: A candidate who identifies the relief to be requested will receive a passing score. Full credit will be given to a discussion of the elements of such a request.

3. **Big should assert his 5th Amendment privilege against self-incrimination.**

- * What information is discoverable
- * 5th Amendment privilege against self-incrimination
- * Availability of 5th Amendment privilege in civil action

25%

Comments: A candidate who recognizes that Big or his attorney should invoke Big's constitutional privilege against self-incrimination will receive a passing score. Analysis of the privilege and discussion of the applicability of the privilege in civil actions will receive full credit. A candidate who discusses the scope of discovery, but misses the 5th Amendment privilege, will get one point.

4. **Applicability of 5th Amendment privilege to discovery request to corporation**

15%

Comments: Recognition that privilege does not apply to corporation will receive full credit. Discussion of scope of

discovery without recognition that a corporation is not a "person" for purposes of 5th Amendment will receive one point.

Question No. 8

1. **How should the computers be classified under the Uniform Commercial Code (i.e., consumer goods or equipment), and how will that classification affect the claimed security interests of the lenders?**

- * Goods are "consumer goods" if they are used or bought primarily for personal, family or household purposes. Goods are "equipment" if used for business purposes.
- * A vendor can perfect a security interest in consumer goods without filing if its financing document grants it a security interest in the consumer goods.
- * One must file in order to perfect a security in equipment.
- * Al's will have a purchase money security interest in the computer being used by the children because it was bought and is being used for family purposes. Bank will have the superior claim to the other computer because it is equipment.

6 points (30%)

Comments: A candidate will receive two points for recognizing that there is a distinction between the two computers. To get two points, the candidate will have to recognize that one computer falls within the consumer goods category and one within the equipment category. The candidate will receive an additional two points for discussing the fact that Al's has a perfected security interest in the computer that is a consumer good without the necessity of filing. To get full credit, the candidate should recognize that filing is not necessary. A candidate will receive two points for discussing the fact that Bank has the superior position regarding the computer that is equipment because it has filed to perfect and Al has not.

2. **An acceptance to a contract offer must be unequivocal.**

- * In order to validly accept an offer, the offeree's response must manifest unequivocal agreement with the offer.
- * A response to an offer indicating that the offer is interesting and requesting a meeting to see if the parties could come to terms is not an unequivocal response.

4 points (20%)

Comments: A candidate will receive one point for recognizing that the issue involves the contract issue of the validity of the acceptance. If the candidate discusses the requirement that an acceptance must be unequivocal, the candidate will receive an additional two points. The final point will be earned if the candidate concludes the acceptance is defective and is only an invitation to meet to see if an agreement can be reached.

3. **A husband and wife while married can convey a property free and clear of a judgment entered against only one spouse.**

- * A conveyance to a husband and wife in Pennsylvania creates a tenancy by the entirety.
- * As tenants by the entirety, spouses can convey real estate free and clear of a judgment entered against any one of the spouses.

4 points (20%)

Comments: A candidate will receive two points for discussing the fact that a conveyance to a husband and wife in Pennsylvania creates in them a tenancy by the entirety. A candidate will receive an additional two points if the candidate recognizes that as tenants by the entirety the spouses may jointly convey their real estate free and clear of a judgment entered against one of the spouses.

4. **A divorce has the effect of terminating a tenancy by the entirety and creating a tenancy in common.**

Any judgment entered after divorce will be a lien on the undivided one half tenants-in-common interest of a spouse. Additionally, a pre-divorce judgment is a lien on the tenant-in-common interest of a spouse following divorce.

- * Upon divorce, a tenancy by the entirety is converted to a tenancy in common.
- * Any judgment entered post divorce attaches to the tenant-in-common interest of the party.
- * A pre-divorce judgment is also a lien on the tenant-in-common interest without refileing.

6 points (30%)

Comments: A candidate will receive two points for a discussion of the fact that a tenancy by the entirety is converted to an tenancy in common by operation of law upon divorce of the parties. A candidate will receive two points for a discussion of the effect of a postdivorce judgment against one of the former spouses on the ability of the parties to convey the property free of the judgment. To get full credit, the candidate must recognize that there is a problem. A candidate will receive two points for a discussion of the effect of a pre-divorce judgment against one of the former spouses on the ability of the parties to convey the property free of the judgment. To get full credit, the candidate must recognize that there is a problem.