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PENNSYLVANIA BAR EXAMINATION

Essay Questions and Examiners' Analyses

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Question No. 1: Facts and Interrogatories

Frank was a real estate investor residing in Pennsylvania with his business offices located on Blackacre which he owned in equal shares with his wife, Ethel, without any survivorship provisions. While married to Ethel, Frank executed a valid will leaving his entire estate without further specificity “. . . to my spouse in any and all events.” The will named Bank as Frank’s executor.

Ethel divorced Frank against his wishes. Frank did not have a prenuptial agreement with Ethel; and after the divorce, they continued equal ownership of Blackacre.

While Frank was working in his offices one evening at Blackacre, the heating system exploded causing total destruction by fire of the offices which Ethel and Frank had fully depreciated for federal income tax purposes. Frank and Ethel had fire insurance on the building. Frank died as a result of the fire leaving no intestate heirs. He was survived by Ethel, who has made a claim for his entire estate under the will.

Attorney Able and his law firm have represented Frank, his business and Ethel over the years. Able’s law firm now represents Bank in the administration of Frank’s estate. Although Able’s firm does not represent Ethel in her claim for all of Frank’s estate, Able continues to represent her in her real estate business and is currently advising her on the federal income tax consequences to her resulting from the fire and her equal share of the forthcoming insurance proceeds for the building. Furthermore, Able has become romantically involved with Ethel, and they are engaged to be married.

Art, an associate in Able’s firm and subordinate to him, has been assigned by Able the task of representing Bank in its capacity as executor of Frank’s estate. Although Ethel and Bank will consent to the Bank’s representation by Able’s firm after a disclosure and discussion of the potential or actual conflicts, Art does not believe that Able’s firm can properly represent Bank due to its past and present representation of Ethel and due to Able’s current relationship with her. Able vehemently disagrees and orders Art to proceed with the representation. Art obliges.

1. Assuming that Ethel has no offsetting losses, is her share of the fire insurance proceeds taxable to her for federal income tax purposes; and, if so, how might she plan after the fire to avoid same?
2. Assume that Able’s belief that his firm’s representation of Bank would not adversely affect his firm’s relationship with Ethel was unreasonable and that Able’s belief that his firm’s representation of Bank would not be adversely affected by his responsibilities to Ethel was unreasonable.
 - (a). Did Art violate the Pennsylvania Rules of Professional Conduct when he obliged Able in representing Bank?
 - (b). Would it make a difference if it were not clear whether or not Able’s beliefs were unreasonable?
3. Assume that all of the circumstances of Frank’s will are admissible as evidence in an applicable proceeding. Is Ethel entitled to Frank’s estate?

4. Assume for purposes of this subpart 4 only that after his divorce from Ethel, Frank made a new will leaving his entire estate to charity. Assume further that he thereafter began dating his secretary, Wilma, and married her without executing another will or prenuptial agreement before his death. What argument (other than to elect against his will) can be made that Wilma is entitled to Frank's estate and in what proportion?

Question No. 1: Examiner's Analysis

1. **Ethel's insurance proceeds will be taxable to her for federal income tax purposes unless she spends the proceeds on replacement property that is similar or related in service or use to Blackacre within a period of time specified under Section 1033 of the Internal Revenue Code.**

Under Sections 1001(c) and 1033(a) of the Internal Revenue Code (IRC), cash insurance proceeds for the destruction of property are taxable as if the property were sold except to the extent that the taxpayer buys or constructs replacement property and elects to defer the gain under IRC §1033. The facts show that Frank and Ethel's building was fully depreciated for tax purposes meaning there remained no tax basis in the building improvements which were destroyed. The insurance check would be obviously in excess of the tax basis thus causing a taxable gain and possible depreciation recapture under IRC §1250.

Ethel can defer this tax under IRC §1033 by rebuilding or purchasing a new office building or property which is similar or related in service or use to the Blackacre building and making the Section 1033 election. This replacement must occur within a period ending two years after the close of Ethel's tax year in which the gain from the involuntary conversion is realized. The entire fire insurance proceeds must be reinvested to defer the entire gain. The drawbacks to a Section 1033 deferral are that the replacement property has the lower (transferred) basis of the destroyed property (to the extent of the deferral) and an eventual realization of the deferred gain when and if the replacement property is disposed. IRC §1033(b).

2. **Art should have refused to represent Bank on account of the conflicts because they are imputed to him under the Pennsylvania Rules of Professional Conduct (Pa. R.P.C.) even when he acts at the direction of his superior unless the issue is not clear.**

Under Pa. R.P.C. Rule 5.2, a lawyer is bound by the Rules of Professional Conduct with respect to his firm's conflicts (which are imputed to him under Pa.R.P.C. Rule 1.10) even when the lawyer acts at the direction of his superior. Art was asked to represent Bank in the administration of Frank's estate when Bank and Ethel were probably going to have potentially conflicting positions on whether Ethel was entitled to any of Frank's estate. Although Art's firm did not represent Ethel with respect to this issue, Art's firm represented Ethel on other issues and Able was engaged to marry her. These conflicts are imputed to Art under Pa.R.P.C. Rule 1.10. The Bank's position was likely directly adverse to Ethel under Pa. R.P.C. Rule 1.7(a) and Art through his superior Able may well have been materially limited in representing Bank due to Able's relationship with Ethel under Pa. R.P.C. Rule 1.7(b). This predicament can only be resolved if both clients consent after consultation about the conflicts and if Able's firm reasonably believes that the representation of Bank will not adversely affect Ethel nor be adversely affected by the firm's relationship with Ethel.

The facts state that Able was not reasonable in his belief that the conflict could be resolved (i.e., his belief that Bank's representation would not adversely affect Ethel and not be adversely affected by Ethel). The facts further state that Art believed that Able was being unreasonable. Yet Art acceded to Able's instructions to nevertheless represent Bank. Thus, Art violated Pa. R.P.C. Rule 1.7 and he is not

excused from the violation, despite his protest, when following instructions from Able. Pa. R.P.C. 5.2(a). See the Comment to Pa. R.P.C. 5.2.

Had the question of reasonableness been arguably close, Art under Pa. R.P.C. Rule 5.2(b) would not have been in violation. This Rule states that:

A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Thus Art could have followed Able's instructions if the facts were that Able was not unreasonable in his resolution of a close question even if in Art's opinion it was the wrong resolution. See the Comment to Pa. R.P.C. 5.2.

3. Under 20 Pa. C.S.A. §2507(2) Ethel's divorce from Frank would deny her any provision under his will unless his testamentary phrase ". . . in any and all events" was intended to preserve the provision for her despite the divorce.

20 Pa. C.S.A. §2507(2) provides:

If the testator is divorced from the bonds of matrimony after making a will, any provision in the will in favor of or relating to his spouse so divorced shall thereby become ineffective for all purposes unless it appears from the will that the provision was intended to survive the divorce.

Prior to this provision, a Pennsylvania will in favor of a spouse was enforceable by the spouse even after a divorce. Jones's Estate, 211 Pa. 364. This statutory provision alleviates the burden on a divorced testator to hurriedly change his or her will and overcomes problems associated with incapacity, procrastination, oversight, etc. The provision would appear to deny Ethel any share of Frank's estate.

However, the provision allows a testamentary bequest to a spouse made in a will executed before a divorce to nevertheless withstand the divorce if the will provides for same. The statute does not require any specific language to state such an intention. Thus, Ethel can assert that despite her divorce, Frank's will made a bequest to her ". . . in any and all events" including divorce. First, Ethel can assert that with respect to her identity in Frank's will, it speaks as of the will's execution (not the testator's death) and that, as such, she fully qualifies as the unnamed "spouse" in Frank's will. In Re: Jones' Estate, 211 Pa. 364, 60 A. 915 (1905); Solms' Estate, 253 Pa. 293, 98 A. 596 (1916). She can also argue the facts that Frank had no other heirs and that he opposed the divorce (and thus presumably retained affection for her) were Frank's reasons for the "any and all events" phrase. Furthermore, Frank and Ethel owned their office building together. Whether or not these facts, law and the quoted language in Frank's will would be enough to overcome the statutory provision against divorced spouses would have to be determined in court. Since these favorable facts and circumstances are admissible as evidence according to the facts, they may be enough to satisfy the exception to the statute.

4. Wilma could claim all of Frank's estate under 20 Pa. C.S.A. §2507(3) providing that one marrying a testator with a will which is not later revoked is entitled as a pretermitted spouse to an intestate share of his estate which in Frank's estate is his entire estate under 20 Pa. C.S.A. §2102(1).

Wilma can successfully counter Frank's bequest to charity with 20 Pa. C.S.A. §2507(3) which provides as follows:

If the testator marries after making a will, the surviving spouse shall receive the share of the estate to which he would have been entitled had the testator died intestate, unless the will shall give him a greater share or less if it appears from the will that the will was made in contemplation of marriage to the surviving spouse.

It is probable that Frank's will was not made in contemplation of marrying Wilma because at the time, he had not started dating Wilma. Also, Frank's will did not give Wilma a greater share than an intestate share (because Frank's will did not by name give Wilma any share at all). Thus, the exceptions do not apply and the general rule of Section 2507(3) stands allowing Wilma to take an intestate share as a pretermitted spouse since she married Frank after he made his will. This share is 100% under 20 Pa. C.S.A. §2102(1) due to there being no other heirs of Frank. There being no greater share than 100%, Wilma takes Frank's entire estate under this section of the Pennsylvania Estates and Fiduciaries Code.

Also, Wilma did not have a prenuptial agreement with Frank in which agreement she might have waived her rights (partially or in full) to his estate.

Finally, Frank left no newer will to counter Wilma's rights under 20 Pa. C.S.A. §2507(3), thereby allowing Wilma to take all.

The same result would occur under the Uniform Probate Code Section 2-301.

Question No. 2: Facts and Interrogatories

Autotown, Inc. (“Autotown”) is a Pennsylvania corporation in the business of renting and leasing automobiles to the public. All of Autotown’s cars are obtained new from Don’s Auto Sales (“Don’s”).

Several years ago, Autotown desired to extend its auto leasing business into the neighboring state of Maryland. In furtherance of its desire, Autotown purchased Maryland Leasing, Inc. (“MLI”), a Maryland corporation, by merging it into Autotown. Autotown issued shares to MLI’s owners Ben and Ed. The Maryland business locations of MLI were owned by Ed who leased them to MLI. These leases were assumed by Autotown at the merger. Following the merger, Ben and Ed have served as directors of Autotown.

In 1999, Ed’s real estate leases with Autotown were expiring. Autotown’s Chairman, Carl, negotiated an agreement with Ed whereby Autotown would purchase Ed’s Maryland sites for \$3 million. Carl believed this price was fair because it was derived by capitalizing the net rental payments paid by Autotown [that is, determining the value of each site from the net rental income produced by it, which is one of the acceptable methods of valuation for income producing property.] When purchased, these properties would become 30% of Autotown’s total assets.

Under Maryland corporation law, shareholders must vote on any purchase made by a corporation from one of its directors if the purchase price reaches at least 20% of the corporation’s assets. If this shareholder approval procedure is not followed, Maryland law provides that a derivative action may be brought, and the court will void the transaction and hold the nondissenting directors liable (that is, surcharged) for any portion of the purchase price that is not recovered. At the directors’ meeting Ben advised the board that in his opinion the properties were worth at most \$2 million. In spite of Ben’s opinion, after full disclosure of the nature of the agreement, Autotown’s board by a majority vote of the noninterested directors, approved Carl’s agreement with Ed, believing it to be in Autotown’s best interest. Ed abstained, and Ben dissented.

After the sale closed, Ed’s creditors took the entire sale proceeds. After making demand upon Autotown’s board and being rejected, Ben then brought a derivative action in the Maryland courts seeking to (a) void the purchase of Ed’s Maryland properties and (b) hold all directors who voted in favor of paying the \$3 million purchase price liable for any loss to Autotown.

As counsel for the Autotown director-defendants, how do you advise on the following:

1. Which state’s law should be applied with respect to Ben’s derivative action?
2. On the merits, what is the probable outcome to each part of Ben’s derivative action?
3. Who should pay the cost of the directors’ defense?

Last week, after returning a rental car to Autotown, Pat asked if Autotown could sell her a new car at a good price. Pat gave her preference to Autotown which immediately asked Don’s to bring over this model for Autotown to test drive. Thinking Autotown would purchase it, Don’s delivered a new car and left it along with the manufacturer’s certificate of origin (“MCO”) at Autotown’s lot.

Yesterday, after learning that Autotown was hopelessly insolvent, Don's sought the return of its new car and learned that Autotown had sold it to Pat and had spent the proceeds. Pat had bought the car reasonably believing that Autotown was the owner.

4. Under the Uniform Commercial Code, can Don's recover the car from Pat?

Question No. 2: Examiner's Analysis

1. Pennsylvania is the state of Autotown's incorporation and its law should be applied to determine the duties and liabilities of Autotown's directors towards Autotown.

Autotown is a Pennsylvania corporation. Although MLI was a Maryland corporation, it was purchased by Autotown and merged into Autotown and therefore the resulting entity is a Pennsylvania corporation. It follows that Autotown's incorporators understood that as the state of incorporation Pennsylvania law would govern Autotown's internal affairs and that Ben and Ed, after merging their corporation into Autotown would have a similar understanding and expectation. Generally speaking, questions involving the internal affairs of a corporation (that is, the relations among the corporation, its shareholders, directors, officers, etc.) are resolved pursuant to the laws of the state of incorporation. Restatement 2nd, Conflict of Laws, §302. In order to achieve uniformity, and to give effect to the expectations of the parties (that is, the corporation, its shareholders, directors, officers, etc.) the law of the state of incorporation usually is applied to determine the duties owed by an officer or director to the corporation and the extent of a director's or officer's liability to the corporation and/or its shareholders. Restatement 2nd, Conflict of Laws, §309. Therefore, the decision regarding the director's liability to Autotown regarding the purchase of Ed's properties should be decided under Pennsylvania law. See Zapata Corporation vs. Maldonado, 430 A.2d 779 (Del. 1981).

The issue as to what law to apply has nothing to do with property, but rather has everything to do with corporate governance. That is, it is a question of when the shareholders must be given a voice in corporate decisions. That question must be answered by the law of the state of incorporation. (See CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987).)

2.(a). Because a majority of the disinterested directors, in good faith, approved the transaction knowing Ed's interest, the contract is binding and cannot be avoided.

The Pennsylvania Business Corporation Law (BCL) does not require the shareholders to ratify contracts with insiders such as directors, nor does it provide that such contracts are voidable. The BCL in §1728 [15 Pa. C.S.A. §1728] provides that such contracts are not void or voidable solely because they are with an interested director provided, among other things, that the remaining disinterested directors know the material facts of the relationship (that is, that Ed owned the properties being purchased) and they approve the transaction by a majority vote of the disinterested directors -- all of which happened in Autotown's case. Therefore, the transaction cannot be voided simply because it was a purchase from a director even though the purchase was for a significant amount of assets.

2.(b). Although Pennsylvania has no automatic surcharge, Autotown's directors have a duty of care and if they paid too much for Ed's property without sufficient investigation as to value, they can be liable for this overpayment, but such has not been proved.

Section 1712(a) of the Pennsylvania Business Corporation Law (BCL) [15 Pa. C.S.A. §1712(a)] provides that a director has a fiduciary duty to the corporation to perform in good faith and in a manner he

reasonably believes to be in the best interest of the corporation and "with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances." Although, as we have seen in the discussion above, there is nothing per se wrong with the corporation purchasing assets from a director, this does not relieve the directors from their duty of care and especially their duty to investigate or at least question the reasonableness of the price. Even BCL §1715(d) [15 Pa. C.S.A. §1715(d)] in creating a presumption that the directors act in the best interest of the corporation assumes that there has been no breach of fiduciary duty which includes, among other things, some reasonable assurance that the corporation is paying a fair price and obtaining fair value.

Other than Ben's opinion -- which might be given some weight because he had been involved with Ed in business operations from these sites at the time the leases were entered into -- there is no indication that Ed's properties are not worth the \$3 Million that Carl recommended be paid as a fair price. While this price may be more than Ed could have received at a distress sale, Carl knew that Autotown was operating from these sites and losing control of them might harm Autotown's business. All of this means, simply, that these sites may have had significantly higher value to Autotown which was currently doing business on them than they might to anyone else and it would not be unreasonable for Autotown to pay this higher price to obtain them.

Carl could also reason that if the rental being paid was fair, using capitalization of these rents is a legitimate method to determine the proper value. Although it is not the only method for determining the value of property, capitalization of rents paid is one of the methods that can be used for determining value especially if your alternative is either to purchase the property or to continue paying those rents. However, Carl could have taken greater pains in determining whether the rents being paid accurately reflected the fair rental values of these properties. After all, the rents were established in negotiations between Ed and MLI, a corporation in which Ed had an ownership interest. With Ed having an interest in both sides, there is a natural question raised as to whether the rents accurately reflected arms length negotiation and/or fair market values.

On the other hand, except for Carl, there is no evidence that anyone else did any investigation as to the fair rental values or fair market price of these properties. Even Ben, in stating that the properties were worth at best \$2 Million, did not cite any basis for his opinion that would make it a more reliable guide than Carl's method of capitalization of the rents. Thus, while Carl's opinion does not indicate the value of these properties based on market value or comparable sales, he is the only one who did any investigating to come up with an estimate of the value of the properties Autotown was using and would like to purchase. Therefore, of the two opinions given at the board meeting, Carl's had a more legitimate basis.

The fact that Carl's opinion had a more legitimate basis than Ben's, does not necessarily relieve the directors of the duty to inquire further, especially when Autotown is spending \$3 Million to buy properties which, if properly valued, will comprise 30% of the corporation's assets. To hold the directors liable, Ben cannot rely on Marydel law which would authorize a surcharge without proof of loss. On the contrary, under Pennsylvania law, the burden is upon Ben to show the loss caused by the failure of the directors to exercise due care -- that is, Ben must show that the properties are worth significantly less than the \$3 Million purchase price. So far, Ben has not met this burden, because the facts indicate that, except for his own opinion, Ben has not produced any evidence that the properties were not worth the purchase price paid. Therefore, there is insufficient evidence to hold the directors liable for a possible overpayment.

3. Autotown should either pay the cost of defense or indemnify the directors for the costs they incurred.

In the initial claim that Ben has brought against the directors, Ben is seeking to void the contract and to hold the directors liable for the loss to Autotown. As discussed above in number 1, this action cannot be maintained under Maryland law. Therefore, under §1743 of the BCL [15 Pa. C.S.A. §1743] the directors should be indemnified for their costs of defense.

Assuming that Ben proceeds under Pennsylvania law to hold the directors liable for agreeing to pay too high a purchase price because they failed to do adequate investigation, the directors should also be reimbursed or indemnified if they are successful on the merits. BCL §1743 [15 Pa. C.S.A. §1743]. Should Ben prevail on the merits, BCL §1742 allows the corporation to pay these expenses to the extent that the Court of Common Pleas in the county where Autotown has its registered office determines as proper.

Although not specifically required to be addressed by the question, Pennsylvania law does provide for these costs to be reimbursed to the corporation by the shareholder if the shareholder does not prevail in the derivative action. BCL §1782(c) [15 Pa. C.S.A. §1782(c)] provides that the corporation can require the shareholder bringing the derivative action to post security to reimburse the corporation for its reasonable expenses, including attorneys fees, that the corporation may incur because of the derivative action. Among the reasonable expenses that the corporation may incur, are the mandatory indemnification provisions of §1743, to which §1782(c) specifically refers.

4. Don's ownership interest in "Pat's car" is not "cut off" because Pat is not a buyer in the ordinary course, and Don's may recover it.

Under the facts presented, Don's was the owner of the car that Autotown sold to Pat who purchased in good faith and without knowledge of Don's interest. Autotown was not in the business of selling cars, its business being only in leasing cars. This is important because under the definition of a buyer in the ordinary course of business contained in UCC §1-201(9) [13 Pa. C.S.A. §1201] the buyer must buy goods from a person "in the business of selling goods of that kind" as well as buying in good faith and without knowledge that the sale is in violation of the ownership rights of another person. Thus, if Autotown is not in the business of selling automobiles, Pat cannot be a buyer in the ordinary course of business and therefore cannot qualify under §2-403(2) [13 Pa. C.S.A. §2403(b)], which would have allowed Pat to prevail over Don's, if Pat were a buyer in the ordinary course. Although there is no question that Don's entrusted goods to Autotown, a merchant leasing and renting automobiles, Autotown is not a merchant in the business of selling automobiles. Therefore, Don's ownership rights in the automobile have not been cut off and Don's has the right to possession of this car. See Perimeter Ford, Inc. v. Edwards, 399 SE.2d 520, 15 UCC Rep. 2d 138 (Ga. Ct. App. 1990).

Question No. 3: Facts and Interrogatories

When Dave and Gloria met, Dave was a widower and Gloria had just gone through a particularly bitter divorce that left her feeling financially insecure. Over time, Gloria and Dave fell in love. In 1992, Dave and Gloria moved into an apartment together, filed a joint tax return, bought furniture and opened a joint bank account. In December, 1993, Gloria received a \$75,000 bonus from her employer for work performed during that year. She immediately used all of the bonus to buy a painting for herself. The painting tripled in value within six months of Gloria's purchase.

Dave repeatedly asked Gloria to go with him to the courthouse to get married to "make it official," but Gloria always replied that she was still not ready to be a wife again. Once, during an argument about their relationship, Dave told Gloria that "legally, we are already married." Gloria was puzzled by the remark but did not pursue the issue.

Gloria had been injured in a 1991 car accident and learned that her lawsuit was going to settle. The impending settlement made Gloria feel financially secure. Gloria and Dave obtained a marriage license, and on January 1, 1995, Gloria and Dave were married by a judge. After the ceremony, Dave gave Gloria an expensive sapphire wedding band. In July, 1995, Gloria received a lump sum payment of \$500,000 from her lawsuit and promptly invested the \$500,000 in mutual funds in her own name. The mutual funds have since doubled in value.

Soon after the wedding, Lenny, Dave's 34 year old son, moved in with Gloria and Dave. Lenny was a constant source of irritation to Gloria. Lenny's business consisted of collecting and trading designer pocket protectors.

One day in June, 1999, while Lenny was out of town, Gloria and Dave had a bitter argument about Lenny. Gloria stormed out of the house to her car. A recently delivered cardboard box addressed to Lenny was on the driveway behind Gloria's car. Lenny's titanium alloy mountain bike, which Gloria had given to him as a birthday present, was on the driveway in front of her car. Gloria picked up the cardboard box, which was filled with designer pocket protectors, and threw the box into her car trunk. Gloria then got into her car, turned on the engine and drove forward over the bike, leaving the bike's front fender crumpled and front tire flattened. Gloria then backed out of the driveway and drove until she saw a dumpster. She stopped the car, took the cardboard box from the trunk, tossed it in the dumpster and watched as a trash truck emptied the dumpster and crushed the contents.

Gloria is thinking about divorcing Dave and needs legal advice regarding the following issues:

1. Excluding negligence, which common law torts could Lenny assert against Gloria and with what likelihood of success?
2. Assume Gloria and Dave have always lived in Pennsylvania. Gloria wants to know what would happen to certain assets if she and Dave divorced.
 - (a). On what basis could Dave claim that the painting is property that is subject to equitable distribution and with what likelihood of success?
 - (b). Discuss whether or not (1) the sapphire ring and (2) the mutual funds that were purchased with the proceeds from Gloria's personal injury action would be property that would be subject to equitable distribution.

3. Gloria has decided not to file a divorce complaint at this time but wants certainty regarding her legal relationship to Dave before they were married by a Judge. What civil action should Gloria file to obtain a ruling on the specific issue of her marital status from 1992 until January 1, 1995?

Question No. 3: Examiner's Analysis

1. **Lenny could assert the common law tort of conversion against Gloria for the loss of his box of designer pocket protectors and assert the common law tort of trespass to chattel against Gloria for the damage to his bike. Lenny is likely to be successful in both actions.**

The **Restatement (Second) Torts**, defines the tort of common law conversion:

Section 222A. What Constitutes Conversion

- (1) Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.
- (2) In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important:
 - (a) the extent and duration of the actor's exercise of dominion or control;
 - (b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
 - (c) the actor's good faith;
 - (d) the extent and duration of the resulting interference with the other's right of control;
 - (e) the harm done to the chattel;
 - (f) the inconvenience and expense caused to the other.

The intent required is not necessarily a matter of conscious wrong-doing, but rather an intent to exercise dominion or control over the goods which is in fact inconsistent with plaintiff's rights. **Prosser & Keaton on Torts**, Section 15, 5th Edition (1984). Conversion at common law is a tort by which defendant deprives plaintiff of his right to a chattel or interferes with plaintiff's use or right to a chattel without plaintiff's consent and without lawful justification. Chrysler Credit Corp. v. Smith, 434 Pa.Super. 429, 643 A.2d 1098 (1994), appeal denied 539 Pa. 664, 652 A.2d 834. Conversion is complete when the defendant takes, detains or disposes of the chattel. **Prosser & Keaton on Torts**, Section 15, 5th Edition (1984).

When Gloria left the house, she saw the recently delivered cardboard box addressed to Lenny on the driveway behind her car. Gloria picked up the box and put it in her car trunk. This intentional act caused interference with Lenny's right of possession of the package and the interference became serious when Gloria tossed Lenny's property into the dumpster, disposing of and destroying the box and its contents. The conversion was complete when Gloria disposed of the box and the box was destroyed. Because the box and its contents were completely destroyed, the harm to Lenny's property was severe, and it would be just to require Gloria to pay the full value of the property. Thus, Lenny would likely succeed in a conversion action against Gloria and Gloria would be liable to Lenny for the full cost of the destroyed property.

Trespass to chattel has been characterized as "the younger brother of conversion." **Prosser & Keaton on Torts**, 5th Edition (1984). While conversion is confined to serious, major interferences with

chattel, trespass to chattel involves minor interferences resulting in some damage but not as sufficiently serious or as sufficiently important as conversion. **Prosser & Keaton on Torts**, 5th Edition (1984). Thus, the degree of interference is an important factor in distinguishing conversion from trespass to chattel.

A trespass to chattel may be committed by intentionally dispossessing another of the chattel, or using or intermeddling with a chattel in the possession of another. **Restatement (Second) Torts**, Section 217. "Intermeddling" is defined as "intentionally bringing about a physical contact with the chattel." **Restatement (Second) Torts**, Section 217, Comment e. The intermeddling must be harmful in order for liability to attach to the actor. **Restatement (Second) Torts**, Section 218, Comment e.

Section 218. Liability to Person in Possession

One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,

- (b) the chattel is impaired as to its condition, quality, or value...
- (d) ...harm is caused to some person or thing in which the possessor has a legally protected interest.

Trespass to chattel does not require the actor to have wrongful intent. Rather, it is the intent to intrude upon or intermeddle that is an essential requirement for a trespass to chattel action. **Prosser & Keaton on Torts**, Section 14, 5th Edition (1984).

On her way from the house to her car, Gloria noticed that Lenny's titanium alloy mountain bike, which Gloria had given to Lenny as a gift, was on the driveway, in front of her car. The facts clearly indicate that Gloria could have backed out of the driveway without interfering and intermeddling with Lenny's bike. However, instead of backing the car up, Gloria decided to drive forward, over the bike, causing the interference and damaging the bike's fender and front wheel. Gloria intended to perform the act which brought about physical contact with Lenny's property. When Gloria intentionally brought about a physical contact with Lenny's chattel, she intermeddled. Because the intermeddling was harmful and resulted in damage to Lenny's bike, liability attached to the actor, Gloria.

While consent and privilege may be a defense to liability for trespass to chattel, there is nothing in the facts to indicate that Lenny had given Gloria permission to drive over his bike or that Gloria, even though she had given the bike to Lenny as a gift, was privileged to damage Lenny's property. Therefore, based upon general common law, Lenny is likely to be successful in an action against Gloria based on trespass to chattel and Gloria will be liable for all of the damage she caused to Lenny's bike.

2.(a). Dave should argue that Gloria acquired the bonus, and subsequently the painting, during Dave and Gloria's common law marriage and therefore the painting is marital property and subject to equitable distribution in an action for divorce. Based on the facts provided, it is very likely that a court would determine that a common law marriage did not exist prior to Dave and Gloria's wedding by a Judge in 1995. Consequently, the likely outcome of Dave's argument is that the painting would be considered a non-marital asset.

Pennsylvania statute provides for the equitable distribution of all marital property in the event of divorce or annulment:

23 Pa.C.S.A. Section 3502 Equitable division of marital property

(a) General rule

In an action for divorce or annulment, the court shall, upon request of either party, equitably divide, distribute or assign, in kind or otherwise, the marital property between the parties without regard to marital misconduct in such proportions and in such manner as the court deems just after considering all relevant factors. . . .

In order to be subject to equitable distribution in an action for divorce or annulment, the asset or property must be marital. Pennsylvania statute defines the concept of marital property:

23 Pa.C.S.A. Section 3501 Definitions

(a) General rule

As used in this chapter, "marital property" means all property acquired by either party during the marriage, including the increase in value, prior to the date of separation, of any non-marital property acquired pursuant to paragraphs (1) and (3), except:

- (1) Property acquired prior to marriage or property acquired in exchange for property acquired prior to marriage...
- (3) Property acquired by gift, except between spouses, bequest, devise or descent....
- (8) Any payment received as a result of an award or settlement for any cause of action or claim which accrued prior to the marriage...regardless of when payment was received.

(b) Presumption

All real or personal property acquired by either party during the marriage is presumed to be marital...The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a).

The timing of the acquisition of property is critical to the classification of property as marital. All property acquired during the marriage by either party is presumed to be marital, with certain exceptions as set forth in 23 Pa.C.S.A. Section 3501. Gloria acquired the \$75,000 bonus from her employer for work performed in 1993, when Dave and Gloria were living together. These funds were then used to acquire the painting. In order to support his claim that the painting was marital property, Dave would have to argue that he and Gloria were married when the bonus was earned and it, was therefore, marital property, which was used to acquire an asset, the painting, which would also be marital property. In this situation, Dave should argue that from 1992 through January 1, 1995, a common law marriage existed and therefore, the painting was marital property.

Pennsylvania statute acknowledges the existence of common law marriage in this Commonwealth:

Sec. 1103 Common-law marriage

This part shall not be construed to change the existing law with regard to common-law marriage. **23 Pa.C.S. Section 1103**

Pennsylvania caselaw provides the specific standard for determining whether or not a common law marriage exists.

In Pennsylvania, the test for determining if a common law marriage exists is whether a man and woman uttered, "verba in praesenti," the present tense exchange of words stated for the purpose of establishing the relationship of husband and wife. Staudenmayer v. Staudenmayer, 552 Pa. 253, 714 A.2d 1016 (1998). In Staudenmayer, the Pennsylvania Supreme Court held that while objective indicia of

marriage may be introduced, including but not limited to evidence of cohabitation and the reputation of marriage, if the party claiming to be married does not meet the burden of establishing that a man and woman uttered, "verba in praesenti" by clear and convincing evidence, the party has not proved that a common law marriage exists. Id.

Every time Dave asked Gloria to go with him to the courthouse to get married and "make it official," Gloria always replied that she was "still not ready to be a wife again." In fact, Gloria's repeated statement that she was "still not ready to be a wife again" would appear to reflect her intent not to be a wife during that time. Gloria's repeated statement also seems to be inconsistent with the common law requirement of the exchange of words with the intent to establish a husband and wife relationship. The facts do not reflect such a verbal exchange taking place.

Clearly objective indicia of marriage between Dave and Gloria existed from 1992 until 1995, such as co-habitation, the filing of a joint tax return, and the opening of a joint bank account. However, even though Gloria and Dave held themselves out as a married couple for certain purposes, this alone is not sufficient to establish a common law marriage in Pennsylvania. Furthermore, it seems unlikely that Gloria would testify that she uttered the required words to Dave, which would probably make it difficult for Dave to prove by clear and convincing evidence that a common law marriage existed. A presumption of a common law marriage will not arise based on co-habitation and reputation when parties are present and able to testify. Id. As a result, Dave's argument in support of the existence of a common law marriage would probably not be successful.

Consequently, because the facts do not disclose that Gloria ever intended to be Dave's wife prior to 1995 or that Gloria ever exchanged words with Dave in the present tense to establish the legal relationship of husband and wife prior to their wedding by a Judge, it would appear that Dave and Gloria became husband and wife on January 1, 1995. Dave's argument in support of his claim that the painting was marital property based on a common law marriage theory would likely fail. However, if it is determined that a common law marriage existed beginning in 1992, the full value of the painting would be marital property and subject to equitable distribution.

2.(b). If Gloria and Dave divorce in Pennsylvania, the court would likely find that:
(1) the sapphire ring, which was given to Gloria by Dave as a gift following the wedding ceremony, would be marital property and subject to equitable distribution, and (2) the mutual funds that were purchased with the proceeds from Gloria's personal injury action, which accrued prior to the date of marriage, would be non-marital, notwithstanding the fact that the proceeds were paid during the marriage, except for any increase in value of the mutual funds, during the marriage, prior to separation.

The sapphire ring was given by Dave to Gloria after the wedding ceremony on January 1, 1995. Therefore, because it was a gift between spouses, after the date of marriage, prior to separation, pursuant to 23 Pa.C.S.A. Section 3501(a)(3) the ring is considered marital and subject to equitable distribution in the event of divorce.

Gloria's personal injury action accrued in 1991, prior to the marriage. Therefore, the personal injury proceeds are non-marital property, despite the timing of the payment of the proceeds, which occurred during the marriage, prior to separation. Gloria acquired property, mutual funds, in exchange for the personal injury proceeds, which was property acquired prior to the marriage. Pursuant to 23 Pa.C.S.A. Section 3501(a)(1), the mutual funds are therefore Gloria's separate, non-marital property. However, the

entire increase in value of this non-marital property during the marriage is properly designated as marital property for the purpose of equitable distribution. Smith v. Smith, 439 Pa. Super. 283, 653 A.2d 1259 (1995), allocatur denied at 663 A.2d 693 (Pa. 1995). An inflation caused increase does not justify excluding the increase in value from marital property. Anthony v. Anthony, 355 Pa. Super. 589, 514 A.2d 91 (1986).

Therefore, the increase in value of the mutual funds, during the marriage, prior to the date of separation, is marital property and subject to equitable distribution.

3. **A party may file a complaint for declaratory relief if seeking a ruling from the court regarding rights, status or a legal relationship. Gloria may properly file a Complaint for Declaratory Relief for the purpose of obtaining a judicial determination on the specific issue of her marital status from 1992, until January 1, 1995.**

Declaratory Judgments are expressly authorized in Pennsylvania by the adoption of the Declaratory Judgments Act. **Standard Pennsylvania Practice** Section 66:1, 42 Pa.C.S.A. Sections 7531-7541. An action for declaratory judgment is available to obtain declaration of existing legal rights, duties or status of parties if determination will aid in determination of genuine, justiciable controversy. Warner v. Continental/CNS Ins. Companies, 456 Pa. Super 295, 688 A.2d 177 (1997).

Specifically, Pennsylvania statute provides:

Section 7532. General scope of declaratory remedy

Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree. **42 Pa.C.S.A. Section 7532**

A party seeking only declaratory relief may file a complaint seeking only declaratory relief and caption that civil action as "Action for Declaratory Judgment":

Pa.R.C.P. No. 1601 provides:

Rule 1601. Action for Declaratory Relief Alone. Jury Trial. Waiver.

(a) A plaintiff seeking only declaratory relief shall commence an action by filing a complaint captioned "Action for Declaratory Judgment." The practice and procedure shall follow, as nearly as may be, the rules governing the Action in Equity.

The Pennsylvania Rules of Civil Procedure also permit a party to include a claim for declaratory relief as a part of any action at law or in equity. Pa.R.C.P. No. 1602. However, because Gloria does not wish to file a divorce complaint at this time and does not appear to have any other action pending, Gloria may seek a court determination only on the narrow issue of her marital status prior to her marriage by a Judge in 1995. Consequently, Gloria should file a Complaint for Declaratory Relief alone.

The purpose of the Declaratory Judgment Act is set forth in 42 Pa.C.S.A. Section 7541:

Section 7541. Construction of subchapter.

(a) General rule. - This subchapter is declared to be remedial. Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations and is to be liberally construed and administered.

The facts indicate that Gloria seeks relief from uncertainty with respect to the legal status of her relation to Dave from 1992 to 1995. The outcome may have a significant impact on the determination of economic rights during that time period. Thus, Gloria's goal would be consistent with the articulated purpose of the Declaratory Judgment Act.

Further, Pennsylvania statute specifically provides for the use of a Declaratory Judgment when the validity of a marriage is at issue:

Section 3306. Proceedings to determine marital status.

When the validity of a marriage is denied or doubted, either or both of the parties to the marriage may bring an action for declaratory judgment seeking a declaration of the validity or invalidity of the marriage and, upon proof of the validity or invalidity of the marriage, the marriage shall be declared valid or invalid by decree of the court and, unless reversed upon appeal, the declaration shall be conclusive upon all persons concerned. **23 Pa.C.S.A. Section 3306.**

Either party to a marriage has the right to have the validity or invalidity of a marriage established by decree of court when the validity of the marriage is either denied or doubted. As a result, Gloria may properly file a Complaint for Declaratory Relief to obtain a determination of her marital status from 1992 until 1995.

Question No. 4: Facts and Interrogatories

John, a successful stockbroker in M-City, Pennsylvania, began attending crack cocaine parties with some of his friends. Before long, John was addicted to cocaine and was spending \$300 a day on his drug habit. In early December, 1998, after reporting to work late for the third day in a row, John was terminated from his employment.

Having spent all of his money on his drug habit, John became desperate to obtain drugs. One night, in an effort to obtain money for his drug habit, John took his loaded handgun, which he had a license to carry, to downtown M-City and approached Mary, a wealthy-looking woman who was walking alone. While holding the handgun in his right hand, John approached Mary and told her that he would shoot her if she did not give him her purse. Mary, overcome with fear, did nothing except stare at the gun which she observed was about six inches long and had a white handle. John ripped Mary's purse from her shoulder and fled the scene.

Immediately after the incident, Mary provided a description of the handgun and her stolen purse to the police. The description of both items was televised the next day on the morning news. The day after the incident, Fred, who lived two doors from John, went to John's apartment to borrow a cup of milk. While Fred was waiting for John to fill the measuring cup with milk, he saw a gun on John's coffee table which fit the description of the gun Fred had seen on the news earlier that morning. Fred also saw a purse near the couch which fit the description of the purse given on the morning news. Believing he could help solve a crime, Fred went back to his apartment and grabbed his camera. He returned to John's apartment and, with the camera hidden, asked John for another quarter cup of milk. When John went to get the milk, Fred took a photograph of the gun. When Fred left, he immediately went to the local 1-hour photo shop. When the photo was almost developed, Fred called the police and told them what he had observed. The police detective told Fred to meet him at Mary's house with the photograph of the gun. At her house, Mary identified the gun as being similar to the one used the night before. Mary was also given a description of the purse by Fred and Mary confirmed that it sounded like it was hers. Based on Fred's personal observations of the gun and purse, the photograph taken by Fred of the gun, and Mary's identification of the gun and purse, the police secured and properly executed a search warrant for John's apartment for the gun and purse. When the evidence was seized, Mary positively identified her purse and the gun.

1. Other than possession of an instrument of crime, with what crime(s) will John most likely be charged and convicted with regard to the incident involving Mary?
2. After criminal charges are filed against John as a result of the incident with Mary, defense counsel files a motion to suppress the gun and purse as evidence at trial which attacks the foundation for the issuance of the search warrant. What arguments should the prosecution make in opposition to the Motion to suppress the gun and purse as evidence and with what likelihood of success?

While John was awaiting his trial date (being free on \$50,000 bail posted by a stockbroker friend), he became saddened over what he had done to Mary. He called Father Bob who was the pastor at a parish which John had attended years ago. John asked Father Bob to meet him at a local restaurant for lunch. During lunch, John told Father Bob all about his drug usage, and he admitted fault for the unfortunate incident with Mary. Unbeknownst to John, a man named Larry was seated in the next booth. Larry overheard the conversation and reported it to the police. After Larry notified the police of the conversation, Larry was never heard from again by the police and was unavailable as a witness at trial.

3. At trial, the prosecutor subpoenas Father Bob to testify as to John's admission of fault for the incident with Mary. As John's counsel, you would like to prevent Father Bob from testifying about this damaging admission. Other than hearsay, what objection would you raise to block this testimony and with what likelihood of success?

Question No. 4: Examiner's Analysis

- 1. John will be charged with theft by unlawful taking or disposition, receiving stolen property, robbery, simple assault, terroristic threats and recklessly endangering another person and will most likely be convicted of all crimes.**

Initially, John would be convicted of theft by unlawful taking or disposition. 18 Pa.C.S.A. Section 3921, entitled "Theft by unlawful taking or disposition", provides that a person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive the person of that property. Movable property is defined under 18 Pa. C.S.A. Section 3901 as "property the location of which can be changed". A defendant is guilty of theft by unlawful taking if he unlawfully takes, or exercises control over, movable property of another with the intent to deprive him thereof. Com. ex rel. Lagana v. Com. Office of Atty. Gen., 443 Pa. Super. 609, 662 A.2d 1127 (1995). As applied here, it is clear that John took Mary's purse and the contents thereof with the intent to deprive her of this property. The facts clearly state that John was looking for money in order to support his crack cocaine habit. It can be inferred that John believed that Mary's purse would have contained money. The purse and its contents would be classified as movable property as its location is easily susceptible to change by virtue of the fact that it can be carried from place to place.

John will also be convicted of the theft offense of receiving stolen property. 18 Pa. C.S.A Section 3925 provides that a person is guilty of theft if he intentionally receives or retains movable property of another knowing that it has been stolen. As used in this statute, the word "receiving" includes acquiring possession or control of the property. To convict a person of receiving stolen property, the Commonwealth must show that the property was stolen, that the defendant was in receipt, possession or control of the property and that the defendant had "guilty knowledge", that is, that he knew or had reason to know that the property was stolen. Com. v. Tillery, 417 Pa. Super. 26, 611 A.2d 1245 (1992). As indicated above, it is clear that John stole Mary's purse and the contents thereof and that he was in actual possession and control of the purse as it was found in his apartment. Since John stole the purse and it was in his apartment, there is no question that he knew that the property was stolen. Thus, he could be convicted of the offense of receiving stolen property.

John would be convicted of robbery. Under 18 Pa. C.S.A. Section 3701(a), a person is guilty of robbery if, in the course of committing a theft, he threatens another with or intentionally puts them in fear of immediate serious bodily injury, or physically takes or removes property from the person of another by force, however slight. In this case, the facts state that while John was holding a gun in his right hand, he approached Mary and told her that he would shoot her if she did not give him her purse. This was done in the commission of the crime of theft as discussed above. John's words and actions would support a finding that he intentionally put Mary in fear of immediate serious bodily injury. See, Commonwealth v. Rodriguez, 449 Pa.Super. 319, 673 A.2d 962 (1996) and Commonwealth v. Ross, 391 Pa.Super. 32, 570 A.2d 86 (1990). John could likewise be convicted of robbery as he took the purse from Mary with force as the facts indicate that he ripped the purse from Mary's shoulder before he fled the scene.

John would be convicted of simple assault. 18 Pa. C.S.A. Section 2701(a)(3) provides that a person is guilty of simple assault if he attempts by physical menace to put another in fear of imminent

serious bodily injury. John, by his words and actions, attempted to put Mary in fear of imminent serious bodily injury so that Mary would comply with his demand to turn over her purse. The establishment of these facts would be sufficient to convict John of the crime of simple assault.

John would be convicted of terroristic threats. 18 Pa. C.S.A. Section 2706 (a) provides that a person is guilty of terroristic threats if he threatens to commit any crime of violence with intent to terrorize another or acts in reckless disregard of the risk of causing such terror. To prove the offense of terroristic threats, the Commonwealth must prove that the defendant made a threat to commit a crime of violence, and that threat was communicated with an intent to terrorize another or with reckless disregard of the risk of causing such terror. Commonwealth v. Tizer, 454 Pa. Super.1, 684 A.2d 597 (1996). Also see, In re: Maloney, 431 Pa.Super. 321, 636 A.2d 671 (1994) and Commonwealth v. Griffin, 456 A.2d 171 (1983). John's threat to shoot Mary if she did not hand over her purse would qualify as a threat to commit a crime of violence and even if he didn't have the intent to terrorize Mary, it is likely that this action would be construed as a reckless disregard of the risk of causing such terror in Mary. Accordingly, John would be convicted of the crime of terroristic threats.

Finally, John would be convicted of recklessly endangering another person. 18 Pa. C.S.A. Section 2705 provides that a person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of serious bodily injury. A person who points a loaded firearm at another individual can be found guilty of recklessly endangering another person. Newcomer v. Civil Service Commission of Fairchance Borough, 100 Pa.Cmwlt. 559, 515 A.2d 108 (1986). Because John pointed a loaded gun at Mary, he will be charged and likely convicted of recklessly endangering another person.

Although John could be convicted of the above crimes, some of the crimes will merge for sentencing purposes. For example, see Commonwealth v. Gilliam, 302 Pa.Super. 50, 448 A.2d 89 (1982), Commonwealth v. Robinson, 379 Pa.Super. 204, 549 A.2d 977 (1988) and Commonwealth v. Berrena, 421 Pa.Super. 247, 617 A.2d 1278 (1992).

2. The prosecutor should argue that the evidence supplied by Fred and Mary provided sufficient probable cause for a search warrant to be issued and the gun and purse collected in the search should be admissible as evidence.

Both the federal and state Constitutions require that search warrants be based on probable cause in order to be valid. The standard for evaluating whether probable cause exists for the issuance of a search warrant is the totality of the circumstances test as set forth in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983) and adopted by the Pennsylvania Supreme Court in Commonwealth v. Gray, 509 Pa. 476, 503 A.2d 921 (1985). 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 supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Commonwealth v. Jones, 542 Pa. 418, 424, 668 A.2d 114, 116 (1995).

The prohibition against illegal search and seizure applies only to actions of governmental authorities, not to the actions of private citizens, and the government is not precluded from using the evidence obtained by a private person unless that person was acting as an instrument or agent of the state at the time the evidence was obtained. Commonwealth v. Kean, 382 Pa.Super. 587, 556 A.2d 374 (1989). Neither the federal nor the state Constitution provides a remedy for a victim of an unreasonable private

search or requires exclusion of evidence obtained thereby. Coolidge v. New Hampshire, 403 U.S. 443 (1971) and Commonwealth v. Dingfelt, 227 Pa.Super. 380, 323 A.2d 145 (1974).

Where the informant is not a paid or anonymous tipster but an identified eyewitness who voluntarily reports his observations to the police, credibility usually may be assumed. Commonwealth v. Weidenmoyer, 518 Pa. 2, 539 A.2d 1291 (1988).

On these facts, Fred, a neighbor of John's, observed the gun and purse during a routine visit. Without any direction from or communication with governmental authorities, he took and had developed a photograph of the gun. It was only after the photograph of the gun was almost developed that he even contacted the police to inform them of what he had observed. The prosecution should argue that all of these actions were taken by Fred in his capacity as a private citizen and there was no government action to this point.

When the detective was contacted, the detective merely asked Fred to deliver the photograph to Mary's house where it could be viewed by Mary. Based upon the fact that Fred came forward and identified himself as an eyewitness, observed both the gun and the purse described by Mary, had a photograph of the gun, and the fact that Mary positively identified the gun as the type of gun used in the attack the day before and identified her purse, it appears that this would have provided more than ample probable cause upon which the magistrate could have issued a warrant to search John's apartment for the gun and purse. Because it appears that the search warrant was properly issued, the evidence seized in connection therewith should be admissible and defense counsel's motion to suppress this evidence should be denied.

3. Defense counsel would try to argue that the conversation with Father Bob was privileged under the clergyman's privilege, but this argument will probably fail.

The clergyman's privilege is codified at 42 Pa. C.S.A. Section 5943. The privilege precludes the disclosure of any information which has been acquired in secret or confidence by a member of the clergy during the course of his or her duties. Commonwealth v. Stewart, 547 Pa. 277, 690 A.2d 195 (1997). The privilege is limited to information told in confidence to members of the clergy in their role as confessor or spiritual counselor. Commonwealth v. Patterson, 392 Pa.Super. 331, 572 A.2d 1258 (1990). Confidential communications to a member of the clergy, even for counseling or solace, do not fall within the protections of the privilege unless motivated by spiritual or penitential considerations. See, Commonwealth v. Stewart, supra.

In this case, John asked Father Bob to meet him at a local restaurant for lunch. Although the facts indicate that John told Father Bob about his drug habit and admitted fault for the incident with Mary, there is no indication that John was motivated by either spiritual or penitential considerations. Even though John was sad over what he had done to Mary, he did not ask Father Bob for any spiritual guidance and he did not ask for forgiveness for what he had done. Further, the fact that John asked to meet Father Bob at a local restaurant, rather than a more private setting, brings into question John's intentions with respect to preserving confidentiality.

If the prosecution calls Father Bob to testify at John's trial, Father Bob will probably be required to testify as to his conversation with John because it does not fall within the parameters of the clergyman's privilege.

Question No. 5: Facts and Interrogatories

Cathy was employed by C City, Pennsylvania, as Chief of Police. She supervised a force of 25 police officers and reported directly to the Mayor of C City. Under C City policy, the police chief was appointed and could be terminated at the discretion of the Mayor, with or without cause. Paul was one of the police officers supervised by Chief Cathy. He was employed by C City on March 1, 1999, and under C City policy had to serve a probationary period of six months before becoming a permanent employee. The policy provided that the Police Chief could terminate a probationary employee without cause during the probationary period.

On June 1, 1999, Cathy issued a written reprimand to Paul for the unauthorized use of a police vehicle for personal business. The document was given to Paul, and a copy placed in his personnel file. Cathy informed no other person of this action. Paul, however, was outraged by the reprimand and contacted a reporter for a television station in C City. During a televised interview with the reporter on June 3, 1999, Paul stated, "For a long time it's been well known within the police department that Police Chief Cathy has been diverting money from the Police Benefit Fund for her own personal use."

The following day Cathy called Paul to her office and terminated his employment effective immediately because of the television interview. She then distributed copies of medical records from Paul's personnel file to the Mayor and all members of C City Council showing that Paul had been treated for mental illness a year before he was employed by C City, in an attempt to demonstrate that Paul's statements were attributable to his illness.

Meanwhile, the Mayor was investigating the expenditures from the Police Benefit Fund. The fund was comprised solely of money voluntarily donated by the police officers and was intended for social events, retirement gifts and similar purposes. No monies from C City were placed in the Fund. The Mayor's investigation disclosed two disbursements that Cathy made to herself within the past year without any documentation of the purpose of the expenditures.

Disgusted by the recent events, the Mayor terminated Cathy's employment on July 1, 1999. In a memo distributed that day to all members of C City Council, the Mayor stated, "I have found improprieties in the Police Benefit Fund and have terminated Cathy because she was responsible."

In reality, the two disbursements were to reimburse Cathy for money she had advanced for a police holiday party and a gold watch given to a retiring officer. Cathy had neglected to put documentation of these expenditures in the file.

1. What claim or claims based upon the United States Constitution should Paul assert with respect to (a) his termination because of the television interview, and (b) Cathy's distribution of his medical records, and what will be the likely result?
2. Advise C City whether, based upon the United States Constitution, Paul was entitled to a hearing before Cathy terminated his employment.
3. What claim or claims, based upon the United States Constitution, should Cathy assert with respect to the termination of her employment by the Mayor, and what will be the likely result?

Question No. 5: Examiner's Analysis

1.(a). Paul should assert that the termination of his employment as a result of the television interview violated his rights under the Free Speech Clause of the First Amendment. This contention would likely be unsuccessful.

Two cases, Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983) and Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968) establish the principle that a public employee is entitled to First Amendment protection for speech that is a matter of public concern provided that the employee's interest in expressing a view on the subject outweighs the harm to a public employer that can result when an employee engages in such speech. The Supreme Court has recognized that the public employee's free speech rights and the public's interest in having public employees speak out on the operations of government must be balanced against the need of public employers to maintain order in the workplace so as to be able to serve the public effectively and efficiently.

The initial inquiry is whether the speech is a matter of public concern. Connick, supra, at 461 U.S. 147, 103 S.Ct.1690; Denton v. Morgan, 136 F.3d 1038, 1042 (5th Cir. 1998). If it is determined that the speech involves a matter of public concern, the next inquiry is whether the employee's interest in expressing such views is greater than the state's interest in regulating employee conduct in order to deliver governmental services. Waters v. Churchill, 511 U.S. 661, 668, 114 S.Ct. 1878,1884 (1994).

Here, the speech in question was Paul's assertion, during a television interview, that the police chief of C City was diverting money from the Police Benefit Fund for her own personal use. In order to determine whether this is a matter of public concern, the Court must look at the "content, form and context of a given statement, as revealed by the whole record." Connick, supra, 461 U.S. at 146, 103 S.Ct. at 1690. Allegations of corruption or wrongdoing have been recognized as matters of public concern. See, Wallace v. Texas Tech University, 80 F.3d 1042, 1051 (5th Cir. 1996). The speaker's motive has also been deemed relevant to this inquiry. See, Linhart v. Gladfelter, 771 F.2d 1004, 1010 (7th Cir. 1985). Here, the Police Benefit Fund is comprised of employee contributions, not C City tax dollars. It is an internal fund used only to benefit the officers themselves. Moreover, the context of Paul's statements suggest an attempt at revenge for a routine personnel action taken by his supervisor. These factors would suggest a conclusion that the speech did not involve a matter of public concern. On the other hand, it can be argued that the diversion of funds by a person holding the position of police chief, whether comprised of public or private monies, is a matter that reflects on the integrity of the police and as such would be of serious concern to the public.

Even assuming, however, that the speech did involve a matter of public concern, the balancing of interests required by Pickering would be in favor of Cathy and C City. The disruption caused by Paul's allegation, and the insubordination evidenced thereby, indicate a substantial basis for the action taken by Cathy regardless of the content of Paul's speech. Paul could have, for example, lodged a private complaint with the Mayor or other official if he believed he had evidence of improper activity. Making such an allegation to the media, in an apparent attempt to personally attack Cathy because of the disciplinary action, is both unnecessary and highly disruptive. See, the criteria described in Wright v. Illinois Department of Children and Family Services, 40 F.3d 1492, 1502 (7th Cir. 1994).

Moreover, Paul's statement was untrue. This may affect whether the speech is deemed a matter of public concern or the balancing of interests under Pickering; untrue statements could hardly be of concern to the public, and certainly such statements would not count for much when balanced against the need of

the government as employer to efficiently and effectively provide public services. Accordingly, Paul's claim under the Free Speech Clause of the First Amendment would likely be unsuccessful.

1.(b). Paul should assert a violation of his constitutional right to privacy arising out of the Fourteenth Amendment and will likely be successful.

The constitutional right of privacy arising out of the Fourteenth Amendment includes an individual interest in avoiding disclosure of personal matters. Nixon v. Administrator of General Services, 433 U.S. 425, 457, 97 S.Ct. 2777, 2797; Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869 (1977). When considering the propriety of specific disclosures, this right will be balanced against the public's interest in and the need for invasion of this privacy interest. See, Whalen, *supra*, 429 U.S. at 602-604, 97 S.Ct. at 877-79.

Medical records have been held to constitute highly personal information, and within the scope of protections afforded by the constitutional right to privacy. United States v. Westinghouse Electric Corporation, 638 F.2d 570 (3rd Cir. 1980). Thus, the medical records contained in Paul's personnel file are protected by this right of privacy. Cathy's interest in disclosing these records to the Mayor and members of C City Council was to demonstrate that Paul's public statements regarding her behavior could have been the result of his past mental illness. This governmental interest in disclosure does not outweigh Paul's privacy rights in the confidentiality of his medical records. Accordingly, Paul's claim would likely be successful.

2. As a probationary employee, Paul has no property interest in continued employment and thus is not entitled to a hearing under the Due Process Clause of the Fourteenth Amendment prior to his termination.

The Due Process Clause of the Fourteenth Amendment requires that a public employee with a property interest in his employment be afforded notice and opportunity to be heard prior to deprivation of that interest. Board of Regents of State College v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972). A property interest protectable by the Due Process Clause does not arise from a unilateral expectation of a benefit, but rather from a legitimate claim of entitlement to that benefit. Moreover, a property interest for due process purposes arises from state law, policy, or mutual understandings. See Piecknick v. Commonwealth of Pennsylvania, 36 F.3d 1250, 1256 (3rd Cir. 1994). In an employment context, an employee at-will is generally held not to have an entitlement arising by law, policy or agreement which would create a property interest that is protected by the Due Process Clause. See, Board of Regents v. Roth, *supra*; Conner v. Clinton County Prison, 963 F. Supp. 442 (M.D. Pa. 1997).

As a probationary employee, Paul could be terminated without cause during the six month probationary period. As such, he was an employee at-will without any continuing entitlement to employment by C City. Absent a property interest in employment, Paul would not be entitled to the procedural protections afforded by the Due Process Clause of the Fourteenth Amendment.

3. Cathy should assert that she was entitled to procedural due process under the Due Process Clause of the Fourteenth Amendment prior to her termination because her liberty interest was infringed, and would likely be successful.

Although Cathy was an employee at-will and had no property interest in continued employment as Chief of Police of C City, the Due Process Clause of the Fourteenth Amendment also protects the liberty interests of an employee. In Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507 (1971), the Supreme Court recognized that an individual has a protectable interest in reputation, and that "where a person's

good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.” Id. at 437, 91 S.Ct. at 510.

In order to assert a liberty interest claim, the government action must involve a publication that is substantially and materially false. See Codd v. Velger, 429 U.S. 624, 627-29, 97 S.Ct. 882, 883-85 (1977). The content of the publication must, of course, adversely affect the reputation of the employee and be taken in connection with some adverse employment action affecting the employee. See, Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976).

Here, the Mayor published a false statement that there were improprieties in the Police Benefit Fund and that Cathy had been terminated because she was responsible for those improprieties. This stigmatizing comment was made to all members of C City Council, and was not true. The statement was made in connection with the termination of Cathy’s employment.

Moreover, an opportunity for Cathy to be heard in connection with this allegation would have provided an opportunity to correct the Mayor’s misimpression. The expenditures were appropriate, and only the necessary documentation was missing. Thus, there was a factual dispute that had a significant bearing on the employee’s reputation, and a hearing would have served a useful purpose. See, Codd v. Velger, supra, 429 U.S. at 627, 97 S.Ct. at 883-84. Accordingly, Cathy could successfully assert the right to a hearing under the Due Process Clause of the Fourteenth Amendment.

Question No. 6: Facts and Interrogatories

Ann resided in C County, Pennsylvania, where she owned a lot and building. She leased the lot and building to Tom, a bookstore owner, for a period of two (2) years pursuant to a valid written lease dated January 1, 1998. The lease provided that the building would be used and occupied for the sale of books. On April 1, 1998, an accidental fire totally destroyed the building. The lease did not mention the tenant's obligation in case of a fire. Tom moved his business to a new location and stopped paying rent to Ann.

After the fire Ann decided that she did not want to rebuild on the lot. Instead she had her attorney prepare a valid written deed conveying the empty lot to her daughter, Sue. After the deed was properly signed and acknowledged, Ann had it recorded and placed the deed in her desk drawer for safekeeping. Ann continued to pay the real estate taxes on the property. When her real estate taxes were increased in 1999, she considered selling the property and had it appraised. She mentioned to the appraiser that she had prepared and recorded the deed but had never delivered the deed to Sue. On April 1, 1999, Ann died unexpectedly.

1. Prior to her death, Ann brought an action against Tom in C County Court for damages arising from his breach of the lease agreement. How should the Court rule in Ann's action?
2. After Ann's death, Sue found the deed conveying the property to her and claimed that she had valid title to the real estate. The personal representative of Ann's estate brought an action to set aside the deed. How should the Court rule?

Ed was a sole proprietor who sold and installed new windows in homes in C County. Ed regularly used telemarketing to solicit business and called Sue three (3) times in one week for this purpose. After the third call Sue wrote a letter to Ed and demanded that he stop calling her and advised Ed that if she received another phone call from him that she would "consider that Ed had entered into a contract with her for her listening services for a fee of \$75 per hour or fraction thereof with a \$75 minimum charge." Sue stated in the letter that payment was due within 30 days of billing and a late charge would be imposed on delinquent accounts. Ed made three (3) phone calls to Sue to solicit business after receipt of her letter, and Sue billed him for \$225 plus late fees. Ed refused to pay.

Ed also called Bob who explained to Ed that he had purchased 15 new windows from another vendor but still needed them installed. After discussing the size and style of the windows, Ed told Bob that he would send him a price in the mail. On January 4, 1999, Ed mailed a letter stating that he would install 15 windows in Bob's home for \$1,500. The letter stated, "You may accept this offer until February 3, 1999." Bob received the letter on January 6, 1999. On January 7, 1999, Ed decided he had underbid the job and sent a second letter to Bob stating, "I revoke my offer." On January 8, 1999, Bob had not received Ed's January 7 letter, and Bob sent a note to Ed saying, "I accept." On January 10, 1999, Ed received Bob's January 8 acceptance letter and immediately consulted with Attorney Able.

3. Sue files suit against Ed for breach of contract arising from Ed's failure to pay for her telephone listening services. Will Sue's action be successful?
4. Ed asks Able if an enforceable contract exists by which he is bound to install the windows for Bob for \$1,500. How should Able advise Ed?

Question No. 6: Examiner's Analysis

1. The Court will rule against Ann in her action for breach of the lease agreement.

Historically, the general rule was that in the absence of a lease provision to the contrary, a tenant is not relieved from the obligation to pay rent despite the total destruction of the leased premises. Hoy v. Holt, 91 Pa. 88 (1879). This rule was based on the principle that although a building was an important element of consideration for the payment of rent, the tenant's interest in the soil remained to support the lease even when the building was destroyed.

Modern courts have often refused to apply common law property principles and have instead analyzed lease agreements utilizing contract law. Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979). Courts now recognize that the actual subject matter of most leases is the building leased rather than the land upon which it stands.

In Albert M. Greenfield and Co. v. Kolea, 475 Pa. 351, 380 A.2d 758 (1976), the Supreme Court applied contract principles rather than common law property principles to a case where the tenant leased premises for the sale and repair of used cars. When the building was totally destroyed by fire, the tenant could not continue his used car business and he stopped paying rent. The Court held that a tenant was not obligated to pay rent following the destruction of the leased premises by an accidental fire. Id. 380 A.2d at 760.

The Pennsylvania Supreme Court based its analysis on the contract principle of impossibility of performance. The Court reasoned that when the building was destroyed by fire, it became impossible for the landlord to furnish the agreed consideration, the building. Without the building, the tenant could not carry on his used car business as contemplated by the parties when they entered into the lease agreement.

The same result is reached basing the analysis on the contract theory of frustration of purpose. The purpose of the agreement, to use the property for a book store, has become frustrated. There has been frustration of an object of the agreement that was fundamental to the parties and the law excuses the tenant's performance. Cunningham, Stoebeck & Whitman, The Law of Property, § 6.87 (2d ed., 1993).

Pennsylvania appellate courts have consistently applied principles of contract law to cases involving both residential and commercial leases: Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 329 A.2d 812 (1974); Pugh v. Holmes, supra.; Teodori v. Werner, 490 Pa. 58, 415 A.2d 31 (1980); Pawco, Inc. v. Bergman Knitting Mills Inc., 283 Pa. Super 443, 424 A.2d 891 (1980). Here, a Court would find that the accidental destruction of the building excused the parties from further performance of the lease agreement under the contract principles of frustration of purpose or impossibility of performance. Ann will not prevail in her action for damages.

2. The trier of fact will probably find that Sue has valid title to the real estate.

Delivery of the deed is necessary to make it legally operative. Whether there has been delivery of a deed is a question of fact and depends upon the intention of the grantor as shown by his words and actions and by the circumstances surrounding the transaction. Abraham v. Mihalich, 330 Pa. Super. 378, 479 A.2d 601 (1984).

It is not necessary that the grantor hand the deed to the grantee. Delivery may be inferred from the words and acts of a grantor evidencing an intent to surrender her title to the property and to invest the

grantee with title. Such an intent, accompanied by actions or words sufficient to effectuate the intent, may constitute delivery. Stiegelmann v. Ackman, 351 Pa. 592, 41 A.2d 679 (1945). The act of recording a deed raises a presumption of delivery. Lewis v. Merryman, 271 Pa. 255, 114 A. 655 (1921). In Merryman, the Pennsylvania Supreme Court stated, "the strongest evidence of delivery was the fact of recording." Id., 114 A. at 656.

The rule is well stated in Chambley v. Rumbaugh, 333 Pa. 319, 5 A.2d 171, 172 (1939):

The signing, sealing, acknowledging and recording of a deed constitute prima facie evidence of its delivery, or, as it is sometimes stated, give rise to a presumption of delivery, (citations omitted) which, however, is merely a factual presumption and, as such, rebuttable. Whether there was a delivery in fact in any given case depends upon the intention of the grantor as shown by his words and actions and by the circumstances surrounding the transaction, and constitutes a question to be determined from all the evidence by the jury, or, in equity proceedings, by the chancellor.

The mere assertion of a grantor that his deed was not delivered is usually not sufficient to overcome the presumption of delivery arising from recording. Stiegelmann v. Ackman, supra, 41 A.2d at 681.

Here, the Court will look at all of the facts and circumstances to determine Ann's intent. Ann had the deed prepared, properly executed it and caused it to be recorded. The recording of the deed raises the presumption of delivery.

Ann's statement to the appraiser that she had not delivered it to Sue would not be considered sufficient to overcome the presumption of delivery arising from the recording. The fact that she had the property appraised is probably not sufficient to overcome the presumption of delivery under these facts.

Thus, it depends on how the trier of fact resolves the factual question of Ann's intent based on all of the evidence. Sue will probably prevail in her claim that she has valid title to the real estate.

3. Sue will not prevail in a breach of contract action because an enforceable contract was not created.

The elements of an enforceable contract are offer, acceptance, consideration or a mutual meeting of the minds. Schreiber v. Olan Mills, 426 Pa. Super. 537, 627 A.2d 806, 808 (1993). The Restatement (2d) Contracts (1981) § 24 defines an offer as "the manifestation of willingness to enter a bargain, so made as to justify another person in understanding the assent to that bargain is invited and will conclude it."

It is settled that for an agreement to exist, there must be a 'meeting of the minds,'...; the very essence of an agreement is that the parties mutually assent to the same thing.... The principle that a contract is not binding unless there is an offer and acceptance is to ensure that there will be mutual assent.... Hahnemann Med. College and Hosp. of Phila. v. Hubbard, 267 Pa. Super. 436, 406 A.2d 1120, 1122 (1979) (Citations omitted).

It is well-settled that an offer may be accepted by conduct. Whether particular conduct constitutes acceptance must be determined on the basis of what a reasonable person in the position of the parties would

be led to understand by such conduct under all of the surrounding circumstances. O'Brien v. Nationwide Mutual Ins. Co., 455 Pa. Super. 568, 689 A.2d 254 (1997).

In determining whether a contract exists, all of the essential elements, including consideration, must be present. Com. of Pa. Dept. of Trans. v. First Pennsylvania Bank, N.A., 77 Pa. Cmwlth. 551, 466 A.2d 753 (1983). There can be no consideration, however, if one of the parties acts without any intention of binding himself to a contract. Ratony Estate, 443 Pa. 454, 277 A.2d 791 (1971).

The Pennsylvania Superior Court was presented with the issue of whether an enforceable contract had been formed in a situation similar to the factual scenario here. Plaintiff had sent a letter to a telemarketer warning that if Plaintiff received any additional telemarketing phone calls, the telemarketer would be billed for Plaintiff's "listening services." The Court held that Plaintiff's letter and the subsequent telephone call by the telemarketer did not create an enforceable contract.

The Court held:

It is axiomatic that before a contract may be found, all of the essential elements of a contract must exist, e.g., consideration. (Citation omitted). There obviously can be no bargained-for-exchange ('consideration') if one of the parties acts without any intention of binding itself to a contract for 'listening services.' There was no 'unconditional' manifestation on the part of Olan Mills (defendant) or its representative that a contract was acknowledged by behavior of the defendant.

Unlike Accu-Weather, Inc., supra., at bar there was no 'offer', 'acceptance', 'consideration' or 'mutual meeting of the minds' to effectuate the elemental aspects of a contract. (Citation omitted) Schreiber v. Olan Mills, supra., 627 A.2d at 808.

The Court found that the communication from plaintiff to the defendant was in the nature of a "cease and desist" request rather than an offer to "listen for hire" to the solicitations of the defendant. The only purpose of plaintiff's letter was to have Olan Mills remove plaintiff from its calling list; it was not to solicit a purchaser for listening services. Similarly, the only purpose of the additional calls that Olan Mills made to plaintiff was to solicit orders, not to obtain listening services. The essential elements of contract formation were not present as a matter of law. Schreiber v. Olan Mills, Id. 627 A.2d at 808.

Applying the same analysis to the within matter, a Court would probably find that no contract was formed. When Ed telephoned Sue, he was not responding to her letter which offered listening services for a fee. Instead, he was clearly acting to solicit business. He acted without any intention of binding himself to a contract for listening services.

Under the objective theory of contracts approach as found in the Restatement (2d) Contracts (1981) there must be an objective manifestation of intent in order for there to be an enforceable contract. In the facts presented, it appears that there is no objective manifestation of intent to form a contract. Sue will not prevail in her breach of contract action.

4. Able should advise Ed that an enforceable contract was formed when Bob accepted Ed's offer by sending his acceptance on January 8, 1999.

The general rule is that the acceptance of an offer by mail creates a contract at the time of dispatch by the offeree (unless the offer stipulates that acceptance is not effective until received or an option contract is involved). Restatement (2nd) Contract § 63.

"Where the use of the mails as a means of acceptance is authorized or implied from the surrounding circumstances, the acceptance is complete by posting the letter in normal mail channels, without more." Falconer v. Mazess, 403 Pa. 165, 168-169, 168 A.2d 558, 559 (1961) (Citations omitted).

It is also well-settled that the revocation of an offer is effective only upon receipt by the offeree. Owen M. Bruner Co. v. Standard Lumber Co., 63 Pa. Super. 283.

Applying the general rules to the within facts, a Court would find that Ed's January 7 revocation letter was not effective on January 8 because it had not yet been received by Bob. The power of acceptance was therefore still in force on January 8 when Bob accepted Ed's original offer.

Further, Bob's acceptance was effective when it was dispatched on January 8. An enforceable contract was thus created on January 8, 1999 for the installation of the 15 windows by Ed. Able should accordingly advise Ed that he is legally bound by his offer to install 15 windows for \$1,500.

Question No. 7: Facts and Interrogatories

A talented 22 year old golfer (“Golfer”) had been loaned a set of golf clubs, valued at \$25,000, by a wealthy patron of golf. Golfer lived in an apartment in C-City, Pennsylvania. He had been working as an insurance adjuster in C-City for two years. Prior to receiving the loaned clubs, Golfer played golf with an inexpensive set of clubs. On March 30, 1998, Golfer had taken a vacation day from work. Since he had no car of his own, he planned to take the bus to his local golf course to practice for the upcoming U.S. Open qualifying tournament. His goal in life was to qualify for the professional golf tour, and the pro at the local golf course thought that he had a good chance to do so.

As Golfer approached the bus stop, he saw that the bus was already there and taking on passengers. As he ran toward the bus, he swung his golf bag onto the bus through the rear door. His hand was holding the golf bag, which was inside the bus as the door closed, and his feet were on the sidewalk. As the bus began to move into traffic, he held onto the bag because he didn’t want to lose the valuable clubs. As the bus moved, Golfer lost his footing and began to be dragged by the moving bus. The other passengers on the bus shouted to the driver to stop but he didn’t do so. As a result, the bus dragged Golfer for two blocks. Jill, a passenger on the bus who witnessed the incident, became very upset at the scene. She yelled out the window to Golfer, “Just let go of the bag, and your hand will slip out, and you won’t be dragged by the bus.” When Golfer didn’t let go of the bag, he continued to be dragged until the bus reached the next stop.

Golfer was taken to the local hospital, where he was diagnosed with permanent nerve damage to his left arm. He was hospitalized for five days and was out of work for a month. The doctors told him that he might not be able to play golf again. Shortly after his return to work, Golfer went to see a local attorney to find out if he had any legal recourse against Transit, Inc. (“Transit”), a corporation with its principal place of business in C-City which owned the bus involved in his accident. The driver of the bus involved in Golfer’s accident had been an employee of Transit, Inc. since early 1998. On his employment application he noted a conviction for illegal drug use in 1997, for which he received a suspended sentence and several traffic violations in 1997 and 1998. Golfer’s attorney filed a tort action in the appropriate county court for C-City on Golfer’s behalf against Transit to recover for the injuries sustained by Golfer.

1. What legal theories should be raised by Golfer’s attorney in the tort action and with what likelihood of success?
2. What damages may be claimed by Golfer in his action against Transit, and with what likelihood of success?
3. At trial, Jill was unavailable as a witness and the attorney for Transit called another passenger as a witness and asked him to repeat what he heard Jill say to Golfer as the bus was moving, referring to the statement about letting go of the golf bag.
 - (a). For what purpose(s) should defense counsel seek to introduce the statement?
 - (b). On what basis should Golfer’s attorney object, and how should the court rule on the objection?

Assume that, at trial, Golfer’s attorney sought to introduce the driver’s conviction for illegal drug use and his record of traffic violations into evidence against Transit.

4. What objections should defense counsel raise, and how should the court rule?

Question No. 7: Examiner's Analysis

- 1. Golfer's Attorney should bring an action on behalf of Golfer against Transit for negligent hiring and for vicarious liability, as Driver's employer, for Driver's negligent operation of the bus. If he prevails, Golfer's recovery may be reduced by his comparative negligence.**

Golfer's Attorney should bring suit on behalf of Golfer against Transit, seeking to recover damages for Golfer's personal injuries and losses caused by the accident involving the Transit bus. The legal bases of the action are the vicarious liability of an employer for the negligence of its employee, plus negligent hiring. The elements of an action for negligence are:

1. A duty or obligation recognized by law, setting a standard of conduct for the protection of others against unreasonable risks;
2. Breach of the duty;
3. Causal connection between the breach and an injury;
4. Actual loss or damage.

Prosser & Keeton on Torts, 5th Ed., 1984, p. 149, Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298 (3d Cir 1995). The Complaint should allege that Driver was negligent in failing to ensure that all passengers were on the bus before pulling into traffic from the bus stop, and for failing to stop the bus when the passengers called for him to do so.

The allegations against Transit are based on its legal responsibility, as Driver's employer, for Driver's negligence which occurred in the course of his employment. Moser v. Bascelli, 865 F.Supp.249, 254 (E.D. Pa 1994). As a carrier, Transit may be held to a higher standard of care to ensure the safety of the public. Prosser & Keeton, at 56.

In addition, Golfer may allege that Transit was negligent in hiring a Driver with a record of a drug conviction and traffic violations, which was provided to Transit on Driver's employment application. An action for negligent hiring is based on the allegation that the employer knew or, in the exercise of ordinary care, should have known of the prior criminal conduct of the employee and the employee's record of traffic violations, which related to Driver's fitness to perform his job. The elements of an action for negligent hiring are:

- (1) an employment relationship;
- (2) the employee was incompetent or unfit to perform the work assigned by the employer;
- (3) the employer breached its duty to use reasonable care in hiring, either by a failure to conduct a reasonable investigation, or by hiring the employee with actual or constructive knowledge of the employee's incompetence or unfitness;
- (4) the wrongful act of the employee caused the injury;
- (5) the employer's negligent hiring was the proximate cause of the injury.

Causes of Action, Volume 4, p. 293. See also Dempsey v. Walso, 431 Pa. 562, 246 A.2d 418 (1968) R. J. Reynolds Tobacco Co. v. Newby, 145 F.2d 768 (9th Cir. 1944), later app 153 F.2d 819 (9th Cir. 1946), Restatement (Second) of Torts, Section 307. Although Transit knew of Driver's history, it is not clear that his prior drug conviction or traffic violations rendered him unfit to perform the work required or that such unfitness, if established, had any causal connection to the accident involving Golfer.

Golfer is likely to succeed in his action against Transit on the employer's vicarious liability for Driver's negligence, although Golfer's recovery may be reduced by his own negligence in causing or contributing to his injuries, assuming he was not found to have been more than 50% responsible for his injuries. 42 Pa.C.S.A. Section 7102. If he is found to have been more than 50% responsible for his injuries, he will not recover.

Should the evidence develop that Golfer was aware of the risk and knowingly ignored it, the defense of assumption of the risk might be available, which would preclude recovery.

2. Golfer may claim all damages that were caused by the defendant's negligence, including compensation for his past and future medical expenses, past lost wages and future lost earning capacity, and compensation for his pain and suffering, including loss of life's pleasures. His recovery may be reduced by his comparative negligence.

Golfer may be entitled to recover for all damages that were caused by the negligence of Transit or the negligence of Driver for which Transit is vicariously liable. The measure of damages may include: 1. Expenses for medical care received by Golfer, and compensation for future medical care; 2. Pain and suffering, including the loss of life's pleasures; 3. Past lost earnings or wages; 4. Future lost wages or lost earning capacity. Prosser & Keeton, supra at 7-8, 165.

Thus, Golfer may recover for the hospital and other medical expenses he incurred or will incur as a result of the accident with the bus. In addition, he may recover the wages he lost, i.e., the month he missed from his work as an insurance adjuster. Moreover, Golfer may try to claim damages for future lost earning capacity for his planned future employment as a golf pro. In the case of Riddle v. Anderson, 85 Cmwlt. Ct. 271, 481 A.2d 382 (1984), the Court allowed evidence of a narrowing of plaintiff's economic horizons as a result of an injury that made it impossible for him to pursue the career for which he was preparing. Similarly, here, Golfer was training to become a golf professional, a career with brighter economic prospects than those of an insurance adjuster, his current job.

In order to be recoverable, future lost earnings must be reasonably certain and quantifiable. Serhan v. Besteder, 347 Pa.Super. 11, 500 A.2d 130, 133 (1985). In addition, plaintiff must prove "... that [his] economic horizons have been shortened as a result of the tortfeasor's negligence." Riddle v. Anderson, supra at 384-385. In order to prevail, Golfer must show that it is likely that he would have qualified for the professional golf tour and the amount he would have earned as a professional golfer. However, such evidence [of professional golfer's earnings] may be ruled to be too speculative to be admissible at trial.

Finally, the trier of fact may award damages to Golfer to compensate him for his pain and suffering and for the loss of life's pleasures, based on the evidence.

As stated in response to Question #1, it is anticipated that Golfer's recovery may be reduced by his own negligence.

3.(a). Defendant should attempt to introduce Jill's statement in order to support the claim that Golfer was comparatively negligent and that he had notice that he could save himself.

Defendant should seek to introduce evidence of the statement made by Jill that Golfer could have saved himself if he had let go of the golf bag in support of the defense that Golfer was comparatively negligent. That is, that Golfer would not have been injured if he had removed his hand from the golf bag

and, thereby, released himself from the bus door. Additionally, the evidence may be offered to establish notice to Golfer that he could extricate himself from the bus and thereby avoid injury.

3.(b). The appropriate objection is that the statement is inadmissible hearsay. The objection is likely to be overruled and the evidence admitted as an excited utterance or present sense impression. In addition, if the statement is offered to prove notice, not for its truth, it may not be hearsay.

The appropriate objection is that the statement is inadmissible hearsay. Pennsylvania Rule of Evidence 801(c) defines hearsay as "...a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Defendant's counsel may argue that the statement is being introduced as notice to Golfer that he could release himself from the bus, rather than as proof of the truth of the matter asserted, as well as that the statement is admissible under the exceptions to the hearsay rule, if it is found to be hearsay.

The court may rule that the statement is admissible as evidence of notice to Golfer. Alternatively, it may be admissible as an excited utterance or present sense impression, both of which are exceptions to the rule against hearsay. If so, it would be admissible for the truth of the matter stated, as well as for the fact of its having been stated. Pennsylvania Rules of Evidence, Rule 803(2) and 803(1).

In order to qualify as excited utterances, statements must relate to a startling condition and be made while the declarant was excited as a result of the event or condition. See e.g., Allen v. Mack, 345 Pa.407, 28 A.2d 783 (1942).

Present sense impression is also a recognized exception to the hearsay rule under both the Pennsylvania and Federal Rules of Evidence. Present sense impressions are statements describing or explaining an event, made at the time of the event, thereby enhancing their credibility because the declarant would not have forgotten or thought about the statement.

4. Defense counsel should object to introduction of Driver's criminal record and his record of traffic violations on the grounds that they are not relevant and that the prejudicial effect of the evidence outweighs its probative value. The evidence may be ruled admissible in support of the claim of negligent hiring.

Golfer's Attorney should seek to introduce evidence of Driver's criminal conviction for illegal drug use and his traffic violations to establish Transit's negligence in hiring someone with such a criminal and driving record. Defense counsel should object to the introduction of Driver's criminal record and his record of traffic violations on the grounds of lack of relevance as well as on the basis that the evidence, if admitted, is likely to be more prejudicial than probative.

To be admissible, evidence must be relevant. Relevance is defined in Rule 401 of the Pennsylvania Rules of Evidence as: "...evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 provides that only relevant evidence is admissible. However, it appears that the record of traffic violations would be ruled to be relevant to the negligent hiring claim. Since there is no evidence that Driver was under the influence of drugs at the time of the accident involving Golfer, his criminal record may be ruled not to be relevant.

Additionally defense counsel should object to the introduction of evidence of Driver's criminal record and his record of traffic violations on the ground that, if relevant, the evidence is more prejudicial

than probative. Pennsylvania Rule of Evidence 403 excludes evidence if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. The evidence may be found to be relevant to the issue of whether Transit was negligent in hiring Driver, since the information was available to Transit at the time it hired Driver. However, since there is no causal connection between Driver's record and the accident, the court may find that the potential for prejudicing the trier of fact by introduction of evidence of a prior criminal conviction and multiple traffic violations outweighs its probative value, and thereby exclude it from evidence.

Question No. 8: Facts and Interrogatories

Sam is the owner of a construction supply business. He has a working capital line of credit with Bank that is secured by a properly perfected security interest in all of Sam's "present and future accounts, inventory and equipment."

Sam has recently agreed to buy paint and a paint mixing machine from Paint Company ("PaintCo"). The paint to be purchased will be resold by Sam to his wholesale and retail customers. The mixing machine will be used by Sam to mix paints at his place of business. PaintCo has agreed to finance Sam's purchase of its paint and the mixing machine. Prior to the delivery of the paint and mixing machine, Sam signed a security agreement and financing statements that described the paint and mixing machine as collateral. PaintCo properly filed the financing statements prior to delivering any paint or the mixing machine to Sam. Neither Sam nor PaintCo notified Bank of their arrangement.

Last week, Sam received a telephone order from a new customer to purchase paint. The new customer plans to sell the paint purchased from Sam to its retail customers. Sam immediately prepared a memo, which he forwarded to the new customer, which confirmed the order and further stated, "If payment in full is not made within 30 days of delivery, interest will accrue on the unpaid balance at a rate of 1.5% per month." Sam had not discussed interest with the new customer when the order was placed.

Because of the long hours Sam devotes to his business, Sam's wife of ten years has left him. With each represented by separate counsel, Sam and his wife executed a prenuptial agreement just before they were married. The agreement had included schedules where each fully disclosed their respective assets with values. On the wife's schedule was a diamond necklace that Sam had given her just before they signed the agreement that he said he had purchased for \$25,000. Based upon Sam's indication of what he had paid for the necklace, his wife valued the necklace at \$25,000 on her schedule. The agreement provided that, in the event of divorce, the wife would keep the necklace and waive any claim to Sam's business. When the wife recently had the necklace appraised, she learned it was a fake worth only \$500. Sam knew the necklace was a fake all the time but never disclosed this to anyone.

1. If Sam defaults on his loans with Bank and PaintCo, which creditor has superior claim to (a) the paint and (b) the mixing machine Sam purchased from PaintCo?
2. If Sam's customer does not pay within 30 days of delivery, can Sam impose the interest charge provided for in his memo?
3. What contract theory could Sam's wife advance in an attempt to set aside the prenuptial agreement?
4. If the necklace truly was a diamond worth \$25,000, would the prenuptial agreement likely be enforceable in the event of a divorce?

Question No. 8: Examiner's Analysis

1. **Bank has superior claim to the paint inventory. PaintCo has superior claim to the mixing machine.**

Both Bank and PaintCo have perfected security interests in both the paint and the mixing machine. The question is one of who has priority as a result of their respective perfected security interests.

Bank has a superior claim to the paint inventory supplied to Sam by PaintCo. Bank's financing statements did not need to specifically describe paint. A financing statement need not be that specific. A description of collateral by type is sufficient. 13 Pa. C.S.A. 9110; U.C.C. §9-110, comments 1, 3, 4. Language granting Bank a security interest in after acquired inventory is likewise valid. 13 Pa. C.S.A. 9204(a); U.C.C. §9-204(1). Bank's security interest would, accordingly, extend to and cover the after acquired paint inventory.

It appears that PaintCo intended to obtain a "purchase money security interest" (PMSI) in the paint inventory it provided Sam. A security interest is a PMSI to the extent that it is taken or retained by the seller of the collateral to secure all or part of the price to be paid for the goods sold. 13 Pa. C.S.A. 9107; U.C.C. §9-107. PaintCo has obtained such a security interest. PaintCo's security interest in the paint inventory is, nonetheless, subordinate to Bank's security interest.

Because both Bank and PaintCo perfected by filing and Bank filed first, to have priority over Bank PaintCo would have to meet two tests. First, its PMSI would have to be perfected prior to Sam taking possession of the paint inventory. 13 Pa. C.S.A. 9312(c)(1); U.C.C. §9-312(3)(a). Second, it would have to have given notice to Bank, in writing, prior to the filing of its financing statements of its intent to obtain a PMSI in the inventory of paint that it was supplying to Sam. 13 Pa. C.S.A. 9312(c)(2)(4); U.C.C. §9-312(3)(b)(c). PaintCo failed to do so and, thus, has a subordinate interest to that of Bank in the paint inventory.

PaintCo does, however, have a PMSI in the mixing machine, which would constitute equipment, that has priority over the prior security interest of the Bank. A PMSI in collateral other than inventory takes priority over a prior non-PMSI filing so long as the PMSI is perfected prior to, or within twenty days, of the debtor taking possession of the collateral. 13 Pa. C.S.A. 9312(d); U.C.C. §9-312(4) (note, the uniform version of the U.C.C. requires the filing to take place within ten days). PaintCo has met these requirements and, therefore, has a superior claim to the mixing machine.

2. If Sam's customer does not pay within thirty days of delivery, Sam will be entitled to charge and collect the finance charge.

Both Sam and his customer appear to be "merchants" as that term is defined by the Uniform Commercial Code. They are each "[a] person who: deals in goods of the kind; or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. . . ." 13 Pa. C.S.A. 2104; U.C.C. §2-104.

As merchants they would be governed by Section 2207 of the Code. This section provides:

- (a) General rule. A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
- (b) Effect on contract.-The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
 - (1) the offer expressly limits acceptance to the terms of the offer;

(2) they materially alter it; or

(3) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

13 Pa. C.S.A. 2207; U.C.C. §2-207. Section 2207 addresses the situation where an oral order is confirmed by a memo which adds terms to the agreement. Here, the term in question is one that provides for interest on overdue payments. Comment 5 to Section 2207 indicates that a “clause providing for interest on overdue invoices” is one that does not materially alter the agreement. See, also, Herzog Oil Field Service, Inc. v. Otto Torpedo Company, 391 Pa. Super. 133, 570 A.2d 549, 11 UCC Rep. Serv. 471 (1990); White and Summers, UNIFORM COMMERCIAL CODE, 4th Ed., §1-3, p. 14 (1995).

Assuming that Sam’s customer does not object to the additional term, Sam should be able to impose the interest if his customer is late in making payment.

3. Sam’s wife could attempt to void the prenuptial agreement based upon fraud and misrepresentation.

In the Pennsylvania Supreme Court case of Simeone v. Simeone, the Court observed, “Absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their agreements.” Simeone v. Simeone, 525 Pa. 392, 581 A.2d 162, 165 (1990). Sam’s wife should argue that Sam committed fraud by misrepresenting the purchase price and nature of the necklace to her which misrepresentation became part of the basis of the bargain in the prenuptial agreement.

The Restatement of Contracts is instructive on this issue and is consistent with Pennsylvania law. Restatement Second Section 164 indicates: “If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.” See, College Watercolor Group, Inc. v. William H. Newbauer, Incorporated, 360 A.2d 200 (1976). The Restatement Second further provides: “A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts. . . . A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.” Restatement Second of Contracts §162. A misrepresentation is generally an assertion that is not in accord with the facts.

Thus, generally, in order to avoid a contract because of fraud, one must prove (1) that there was a false representation as to a material fact; (2) made with knowledge of its falsity, or with reckless disregard for its truth; (3) by the person charged with having knowledge of the fact; (4) intending for the recipient of the fact to act upon the fact; and (5) which actually misled the recipient thereby causing injury. Sam’s statement that the necklace had been purchased for \$25,000 viewed in the context of the execution of the prenuptial agreement satisfies each and every element set forth above. If Sam’s wife can prove what Sam has done she should be successful in setting aside the prenuptial agreement.

4. If the necklace truly were a diamond, the prenuptial agreement would likely be enforceable because it appears from the facts that full and fair disclosure was made by each party prior to entering into the agreement.

The seminal case in Pennsylvania regarding the validity of prenuptial agreements is Simeone v. Simeone, 525 Pa. 392, 581 A.2d 162 (1990). The Simeone court stated, “Prenuptial agreements are

contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts. . . . Absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their agreements.” Id. at 165. In reviewing the standard to be used in evaluating prenuptial agreements the Court further stated, “. . . the reasonableness of a prenuptial bargain is not a proper subject for judicial review. . . . If the parties viewed an agreement as reasonable at the time of its inception, as evidenced by their having signed the agreement, they should be foreclosed from later trying to evade its terms by asserting that it was not in fact reasonable.” Id. at 166. The Court did, however, retain the disclosure requirement that has long been the law of the Commonwealth. The court stated, “. . . we do not depart from the long standing principle that a full and fair disclosure of financial positions of the parties is required.” Id. at 167.

The facts indicate that the schedules that were attached to the prenuptial agreement entered into by Sam and his wife represented full disclosure of their respective assets. Following Simeone, and assuming that the necklace was in fact a diamond worth \$25,000, the prenuptial agreement should be enforceable in the event of a divorce.

Grading Guideline

Question No. 1

1. **Taxability of casualty insurance proceeds**

- IRC imposes a tax on proceeds from an involuntary conversion in excess of basis.
- Income tax on proceeds from involuntary conversion can be deferred by reinvesting the proceeds in property that is similar or related in service or use to the converted property.

5 points

Comments: Applicants are expected to recognize the income tax implications for casualty insurance proceeds and to discuss how these tax implications can be deferred.

2. **Responsibilities of subordinate lawyer**

- Subordinate lawyer is bound to avoid conflict of interest even when superior directs him to proceed.
- Subordinate lawyer who acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty does not violate the Rules of Professional Conduct even if the supervisory lawyer's interpretation of the conflict is ultimately incorrect.

5 points

Comments: Applicants are expected to recognize that a conflict of interest exists which is imputed to Art. Applicants should discuss the rules applicable to a subordinate attorney when acting at the direction of a supervising lawyer and apply these rules to the facts in reaching a well reasoned conclusion.

3. **Effect of divorce on will**

- Spouse generally forfeits testamentary bequests and devises under will drawn before the divorce.
- Exception to general rule exists where a contrary intention is expressed in will.
- Language in will may have indicated an intention to have the provisions for spouse withstand the divorce.

5 points

Comments: Applicants should recognize the general rule relating to the effect of a divorce on a bequest made to spouse in a prior will, and that there is an exception where a contrary intent is expressed in the will. Applicants should discuss the language used in the will and the relevant facts in reaching a well reasoned conclusion.

4. **Pretermitted spouse**

- Spouse that is married to decedent after his will is executed is entitled to intestate share of estate.
- Intestate share of surviving spouse is 100% of estate under facts and circumstances.

5 points

Comments: Applicants are expected to recognize the right of a spouse, who is married to a decedent after his will is executed, to receive an intestate share of the estate and to apply the facts to the law in reaching the conclusion that the intestate share is 100% of the estate.

Question No. 2

1. **Choice of laws**

- Duties and liabilities of directors towards their corporation are governed by the law of the state of incorporation, i.e. Pennsylvania. Thus, the Maryland statute has no application.
- Pennsylvania is the state of incorporation therefore Pennsylvania law is applicable.

4 points

Comments: Applicants should recognize that the law of the state of incorporation governs the duties owed by directors to the corporation, that Pennsylvania is the state of incorporation and that its law applies.

2.(a). **Interested director transaction**

- When (i) a majority of disinterested directors, (ii) with knowledge of the interest of another director, (iii) approve the transaction, the contract is binding and cannot be avoided.

4 points

Comments: Applicants should recognize that this is a transaction (i) with an interested director (ii) that was approved by a majority of disinterested directors and that the disinterested directors had full knowledge of Ed's interest; and apply these principles in reaching a conclusion that the contract cannot be avoided.

2.(b). **Duty of care**

- A director has a duty to (i) act in good faith and in a manner he believes is in the corporation's best interest, and (ii) exercise such care, including reasonable inquiry, skill and diligence as a prudent person should.
- Under this standard, a reasonable inquiry might require more valuation information.
- If the director fails in his duty, he may be liable to the corporation for any loss suffered by such failure, e.g., an overpayment on a purchase of real estate.

4 points

Comments: Applicants should recognize that in buying Ed's properties, the disinterested directors must use their best judgment and this requires making reasonable inquiry into the value of the properties. Applicants should discuss director liability based on whether there is sufficient evidence of (i) lack of value received for the purchase price paid, which represents overpayment, and (ii) insufficient inquiry leading to such overpayment.

3. **Reimbursement for costs**

- Ben's case, if based only on the Maryland statute, cannot succeed against the directors.
- If the directors are held not liable, the corporation must pay for the cost of their defense.
- If Ben is successful in imposing liability on the directors (e.g., for lack of inquiry into the value of the properties leading to paying too much), the court of the county where Autotown's registered office is located may require the corporation to pay all or part of the expenses.

4 points

Comments: Applicants should refer to their answers in 2 as to director liability and recognize that if they concluded that the directors had no liability, Autotown must pay for their defense. If applicant has decided the directors are liable, he must then realize that payment for their defense by the corporation is subject to court approval.

4. **Buyer in ordinary course**

- Don's owns the car and is entitled to recover possession.
- Autotown was not in the business of selling cars, and therefore Pat cannot be a buyer in the ordinary course of business.

4 points

Comments: Applicants should recognize that Don's is the true owner and that Pat is a good faith purchaser but should note the definition of "buyer in the ordinary course of business" and that Pat does not qualify because Autotown was not in the business of selling cars.

Question No. 3

1. **Common law torts: conversion, trespass to chattel**

- Conversion
 - Intent to exercise dominion or control over chattel, interference with possessory right of another resulting in serious damage
- Trespass to chattel

- Intent to perform act which interferes with thing in which possessor has legally protected interest; condition, value or quality of chattel is impaired.

9 points

Comments: Applicant is expected to identify the common law causes of action of Conversion and Trespass to Chattel, discuss the elements of each action, apply the facts and reach well supported conclusions.

2. **Common law marriage, equitable distribution**

- A common law marriage is established by a man and woman uttering words of present tense with the intention of becoming husband and wife.
- Subject to certain exceptions, all real or personal property acquired by either party during the marriage is presumed to be marital.
- Property acquired prior to marriage is non-marital for purposes of equitable distribution, subject to certain exceptions.
- Property given from one spouse to the other spouse as a gift is marital for purposes of equitable distribution.
- The increase in value of non-marital property from the date of marriage, through final separation, is marital for purposes of equitable distribution.
- Any payment received as a result of an award or settlement for any cause of action or claim which accrued prior to the marriage regardless of when payment was received is not considered marital property for purposes of equitable distribution.
- Property acquired in exchange for property acquired prior to marriage is non-marital for purposes of equitable distribution.

7 points

Comments: An applicant should discuss the rule regarding common law marriage in Pennsylvania and demonstrate an understanding of the difference between marital and non-marital property for purposes of equitable distribution and apply these principles to the facts in reaching a well reasoned conclusion.

3. **Declaratory Judgment**

- Declaratory relief is available to a party who seeks a determination by the court regarding rights, status and/or legal relationships.
- An action seeking declaratory relief may be filed alone or as a part of any action at law or in equity.
- Either or both parties may file an action seeking declaratory relief in order for the court to determine marital status when the marital status of the parties is uncertain.

4 points

Comments: Applicant should identify a declaratory relief action, recognize the types of situations where declaratory relief is appropriate and conclude that a declaratory judgment action would be proper under this set of facts.

Question No. 4

1. **Robbery, Theft by Unlawful Taking, Simple Assault, Terroristic Threats, Recklessly Endangering**

- A person is guilty of robbery if, in the course of committing a theft, he a) threatens another with or intentionally puts them in fear of immediate serious bodily injury **or** b) physically takes or removes property from the person of another by force, however slight.
- John's words and actions support a finding that he put Mary in fear of immediate serious bodily injury **or** he could be convicted because he ripped the purse from Mary's shoulder with force.
- Theft by unlawful taking requires the unlawful taking or exercising unlawful control over movable property of another with intent to deprive the person of that property
- The purse is movable property and John clearly intended to, and did, take the property with the intent to deprive.
- The elements of simple assault include an attempt by physical menace to put another in fear of imminent bodily injury.
- John's words (threat) and actions (pointing gun) would be sufficient to put Mary in fear of imminent serious bodily injury.
- A person is guilty of terroristic threats if he commits any crime of violence with intent to terrorize another or with reckless disregard of the risk of causing such terror.
- The crime of recklessly endangering requires reckless conduct which places another in danger of serious bodily injury

12 points

Comments: Applicants are expected to identify the crimes and the elements thereof and apply the facts to the required elements in reaching a well reasoned conclusion.

2. **Search and Seizure**

- Search warrants must be based on probable cause
- Totality of Circumstances Test is used to determine probable cause
- Government can rely on private persons not acting as instruments of state

4 points

Comments: An applicant should recognize the requirements for the issuance of a search warrant and note the fact that Fred was a private citizen, not state actor. Applicants should apply these principles to the facts in reaching a conclusion that there would be sufficient probable cause to issue warrant.

3. **Clergyman's Privilege**

- The Privilege prevents disclosure of confidential information acquired by clergy during course of duties.
- The communication must be motivated by spiritual or penitential considerations.
- The fact that the conversation took place in a public restaurant calls into question whether he intended this to be a confidential communication and the privilege may not apply for this reason.
- The facts do not indicate that John was motivated by spiritual or penitential considerations and the privilege would also not apply for this reason.

4 points

Comments: Applicants are expected to identify the clergyman's privilege, discuss the required elements, and apply these principles to the facts in reaching a well reasoned conclusion.

Question No. 5

1.(a). **First Amendment**

- Public employee is entitled to First Amendment protection for speech that is a matter of public concern.
- Employee interest in expressing a view on the subject must outweigh the harm to a public employer in maintaining order in the workplace and providing required services safely and efficiently.

5 points

Comments: An applicant should recognize the applicability of the First Amendment Right to Free Speech to public employees; discuss the matter of public concern and balancing components and apply these principles to the facts in reaching a well reasoned conclusion.

1.(b). **Right to Privacy**

- Constitutional right to privacy exists in avoiding disclosure of highly personal matters such as medical records.
- Privacy right is balanced against public interest in disclosure.

5 points

Comments: An applicant should recognize that there is a constitutional basis for a right to privacy in highly personal matters such as medical records; that a balancing of interests is required; and should apply these principles to the facts in reaching a well reasoned conclusion.

2. **Due process - property interest**

- Due Process Clause of Fourteenth Amendment requires that notice and an opportunity to be heard be afforded to employee prior to deprivation of a property right.
- Property interest requires legitimate claim of entitlement to benefit that arises from state law, policy or mutual understandings.
- At-will employee does not have property interest in employment.

5 points

Comments: An applicant is expected to recognize the applicability of the Due Process Clause of the Fourteenth Amendment; discuss the need for a property interest and apply these principles to the facts in reaching a well reasoned conclusion.

3. **Due process - liberty interest**

- Due process clause protects liberty interests as well as property interests.
- Protectable interest in reputation exists where a person's good name or reputation is at stake because of what the government is doing to him.
- Liberty interest requires a publication that is substantially and materially false which adversely affects the reputation of the person and which is taken in connection with an adverse employment action affecting the employee.

5 points

Comments: An applicant should recognize that the due process clause is applicable to a liberty interest; discuss the requirements for a liberty interest to be recognized and apply these principles to the facts in reaching a well reasoned conclusion.

Question No. 6

1. **Landlord Tenant - accidental destruction of leased premises**

- Common Law rule was that tenant is not relieved of the obligation to pay rent despite total destruction of the leased premises.
- Modern courts analyze lease agreements under principles of contract law.

- Application of contract law principles of impossibility of performance or frustration of purpose excuses Tom's performance.
- Accidental destruction of the building excuses parties from further performance of lease agreement.

5 points

Comments: An applicant should note the difference between the common law and the modern trend in this area; recognize the application of contract principles to a lease agreement; and apply these principles to the facts in reaching a well reasoned conclusion.

2. **Delivery of a Deed**

- Delivery of a deed is necessary for effective transfer of title.
- Valid delivery is determined by the intent of the grantor.
- Grantor's intent is a question of fact which may be inferred from his words and actions.
- Recording the deed raises a presumption of delivery.

5 points

Comments: An applicant is expected to recognize that the delivery of a deed is required to transfer title and that delivery may be determined by the grantor's intent and is a question of fact. An applicant should apply these principles to the facts and may be given full credit for a well reasoned analysis reaching either result.

3. **Creation of an enforceable contract**

- Elements of a valid contract are offer, acceptance, consideration or a mutual meeting of the minds.
- An offer is the manifestation of willingness to enter a bargain so made as to justify the offeree to understand that assent to the bargain is invited and will conclude it; Ann's letter is not an offer to Ed.
- An offer may be accepted by conduct and whether particular conduct constitutes acceptance is determined on the basis of what a reasonable person in the position of the parties would be led to understand by such conduct under all of the surrounding circumstances.
- There was no "meeting of the minds" or mutual assent to effectuate a contract.

5 points

Comments: An applicant should discuss the basic elements of contract formation and apply these principles to the facts in reaching a well reasoned conclusion.

4. **Time of formation of contract**

- The acceptance of an offer by mail creates a contract at the time of dispatch by the offeree.
- Revocation of an offer is effective upon receipt by the offeree.
- Ed's letter of January 7 was too late to be an effective revocation because acceptance had already occurred.
- Ed is legally bound by his offer to install 15 windows for \$1,500.

5 points

Comments: An applicant should discuss the time at which an acceptance is effective and the time at which a revocation is effective and apply these principles to the facts in reaching a well reasoned conclusion.

Question No. 7

1. **Negligence - vicarious liability**

- Elements of negligence include duty, breach, causation and damages.
- Employers are liable for negligent acts of employees during course of employment.
- Claim for negligent hiring exists where employer breaches duty to use reasonable care in hiring by hiring persons the employer knows to be unfit, the employee causes an injury and the employers negligent hiring was the proximate cause of the injury.
- Golfer's comparative negligence may bar or limit recovery.

8 points

Comments: An applicant is expected to identify the elements of a negligence cause of action and apply these elements to the facts in discussing a claim for negligent hiring and an employers vicarious liability for the negligent acts of employees. An applicant should also recognize the applicability of comparative negligence and the likelihood that Golfer's recovery will be limited by his comparative negligence.

2. **Damages**

- Past and future medical expenses are recoverable.
- Past and future lost earnings are recoverable but future lost earning must be reasonably certain and quantifiable.
- Damages for pain and suffering and loss of life's pleasures are recoverable.

4 points

Comments: An applicant is expected to identify and discuss the basic elements of tort damages and to apply the facts to these principles. An applicant should recognize the requirements necessary to recover for future lost wages and apply these principles in addressing plaintiff's prospects to recover future lost wages.

3. **Hearsay - notice, present sense impression, excited utterance**

- Statement can be offered as evidence of notice to Golfer and to establish Golfer's negligence.
- Statement offered as notice rather than for the truth of the matter in the statement is not hearsay.
- Excited utterance exception to hearsay rule applies to statement relating to startling condition which was made when declarant was excited as a result of the condition.
- Present sense impression exception to hearsay rule applies to statements which describe an event which are made at the time of the event.

4 points

Comments: An applicant should recognize the different purposes for which the statement can be offered; discuss the effect the purpose has on whether the statement is classified as hearsay and identify and discuss the exceptions to the hearsay rule that are applicable.

4. **Relevance - prejudicial effect vs. probative value**

- Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.
- Where probative value of evidence is outweighed by unfair prejudices caused by its introduction, the evidence is inadmissible.

4 points

Comments: An applicant should discuss the basis for an objection on the grounds of relevancy as well as the prejudicial effect outweighing the probative value of the evidence and apply these principles to the facts in reaching a well reasoned conclusion.

Question No. 8

1. **Purchase money security interests**

- Paint is inventory; machine is equipment
- PMSI is retained in goods to secure price paid for goods
- PMSI in inventory has priority over prior security interest in the inventory if notice is given.

- PMSI in equipment has priority over prior security interest in the equipment if PMSI is perfected.

5 points

Comments: The applicant is expected to recognize a conflict in the competing interests of Bank and PaintoCo; to identify the class of collateral involved; to define a PMSI and to properly discuss the priorities of each class of collateral under the facts.

2. **Addition of term in confirming memo between merchants**

- Parties are merchants
- Written confirmation between merchants constitutes acceptance even if terms are added as long as new term does not materially alter contract
- Interest clause does not materially alter contract

5 points

Comments: The applicant should identify the parties as merchants; discuss the legal principle relating to a written confirmation between merchants which adds a new term; and apply the principle to the facts in reaching a well reasoned conclusion.

3. **Effect of fraud on enforceability of contract**

- Fraud or misrepresentation are bases for avoiding enforceability of contract
- Manifestation of assent must be induced by misrepresentation
- Sam misrepresented the price and nature of necklace
- Person making misrepresentation must know the assertion is not true and intend assertion to induce party to manifest assent.

5 points

Comments: The applicant should discuss the elements of fraud and misrepresentation and apply these principles to the facts in reaching a well reasoned conclusion.

4. **Enforceability of prenuptial agreement**

- Prenuptial agreements are evaluated under criteria for contracts
- Reasonableness of prenuptial agreement is not subject to judicial review
- Full and fair disclosure of financial position of parties is required

5 points

Comments: The applicant should recognize and discuss the principles of law applicable to prenuptial agreements and apply these principles to the facts in reaching a well reasoned conclusion.