

JULY 1999 PENNSYLVANIA BAR EXAMINATION

Model Sample Answers

Pennsylvania Board of Law Examiners
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Question No. 1: Model Sample Answer

1. Ethel's ("E") share of the fire insurance proceeds will be taxable to her, probably as capital gain/loss income, unless she re-invests the proceeds in similar property within two years.

Income is defined as any economic benefit and any accession to wealth. Gain or loss on property is only realized upon its sale or disposition. The fire's destruction of the building is a "disposition" and the proceeds from the fire insurance are the amount by which E's gain/loss, as determined by her basis, will be determined. In analogy, it is similar to a situation where E sold the building for the value of the fire insurance proceeds. As E had fully depreciated the building, her basis in what is presumably a capital asset has been reduced to zero. Therefore, the entire share of the fire proceeds to which E is entitled will be considered recognized gain, or income to E.

The gain, however, may not be recognized if E re-invests the proceeds into similar property within two years. The Federal Tax Code provides that in the event of a loss, insurance proceeds and the resulting gain/loss thereon, will not be recognized as income to the extent they are re-invested in similar property within two years. Any excess proceeds not invested within the two year period will be considered income, probably capital gain income to E.

Additionally, any unreimbursed casualty losses may be deducted as they are the result of a sudden and unexpected loss, to the extent they exceed \$100, and 10% of E's AGI.

Therefore, the fire insurance proceeds will probably be treated as capital gain income to E, with no offsetting basis. E, however, may avoid recognition of this income if she rolls the proceeds over into property of a similar type within a two year period.

2.(a). A subordinate's duties under the RPC, when a superior orders his action, are governed by Rule 5.2. A subordinate attorney has a duty to adhere to the Rules of Professional Conduct regardless of conflicting instructions unless the duty is not clear. In such a case, when the problem has been brought to the attention of a supervising attorney, and the supervising attorney has made a decision on the propriety of the action, the subordinate may rely on the judgment of the supervising attorney.

The question here is whether Art's duty was unclear. Rule 1.7 provides that a lawyer may represent two clients with potentially conflicting interests only when (1) the lawyer reasonably believes that there will be no conflict and (2) when both clients consent after full disclosure. In this case, we are told that Able's belief that the firm's representation of Bank would not be affected by his responsibilities to Ethel is unreasonable. Since Rule 1.7 cannot be met, there is no disputed opinion. Therefore, Art cannot rely on Able's conclusion and must, under Rule 5.2, disobey. Since he proceeded with the representation, Art has violated Rule 1.7, and under Rule 8.4 he may face disciplinary action.

2.(b). As discussed above, if the matter of reasonableness is in dispute legitimately, and the issue of informed consent is clear, then Art may rely on the ruling of his superior under Rule 5.2. Complying with Able's order in this case would not constitute a violation of Rule 1.7.

3. Ethel is entitled to Frank's entire estate because the will specifically stated she was entitled to it "in all events."

Ordinarily, divorce cuts off a spouses right to collect under a former spouse's will. An exception to this is if the will or some other writing has words of intent to leave property to that spouse despite divorce.

In this case, Frank and Ethel's divorce does not cut off her right to take Frank's entire estate because he left the estate to his spouse in any or all events. Ethel could argue that Frank intended to leave her his estate despite divorce because of these words. Because Ethel divorced Frank against his wishes, he also had intent to leave her his estate. Her case is also strengthened by the fact that they continued equal ownership of Blackacre after the divorce.

Because he manifested an intent for Ethel to take his estate in any or all events, the divorce did not cut off Ethel's right to collect under Frank's will and she is entitled to his estate.

4. Wilma would argue that she was a pretermitted spouse entitled to an intestate share of the estate. A pretermitted spouse arises when a testator has a valid will but does not amend it to include a spouse upon subsequent marriage. The spouse in such cases is entitled to an intestate share. Here, Frank's will was not modified to include Wilma after their marriage. She is thus entitled to an intestate share. Since Frank had no other issue or parents, this share in Pennsylvania would be the entire estate.

Question No. 2: Model Sample Answer

1. Pennsylvania (PA) state law should probably be applied over Maryland (MD) state law. There is a strong presumption toward PA since that is where the corporation is headquartered and incorporated.

The problem does not state what specific test (1st Restatement, 2nd Restatement, minimum contacts, or government interest) MD uses. Since the modern trend seems to be to look toward which forum has a greater interest in the outcome, that test shall be applied. Note that if the case was filed in PA, the court would use an amalgam of the minimum contacts/government interest test.

Here, the state of incorporation is PA and the corporation's headquarters are in PA. The MD leasing business is only 30% (at most) of the entire assets of the corporation. Furthermore,

Autotown purposely availed itself of PA law by choosing to incorporate there. Obviously, PA has a strong interest in regulating the governance of its corporations and its board. MD, on the other hand, has very little interest here, since it receives, at most, tax revenues from the businesses. MD has no interest in controlling a PA corporation. Therefore, PA law should be applied.

2. Each part of Ben's derivative action will likely fail on the merits, even if Maryland law did apply, because Autotown's directors will be protected under the business judgment rule with regard to any alleged violations of their duty of care, and will be protected by board of directors' approval by a majority of disinterested directors with regard to any alleged violation of the duty of care.

The issue here is whether the directors, by virtue of Ben's advice and the circumstances surrounding the purchase of Ed's Maryland sites, violated their duties of care and loyalty to the corporation. A director must discharge his or her duties in good faith and with a reasonable belief that what she does is in the corporation's best interests. A director must also exercise that degree of care which a reasonably prudent person would exercise in the care of her own business. With reference to the first part of this standard, the duty of loyalty, a director's actions will be insulated if the action, even if it involves self dealing by one of the directors, is either fair to the corporation or approved by a majority of disinterested directors or a majority of all shareholders. With reference to the second part of the standard, directors will benefit from the protection of the business judgment rule, which insulates directors from liability for not exercising reasonable care if their actions are informed, have a rational basis, or are based on a good faith reliance on either the financial statements of the corporation, its book value, or a report from a competent source as to the fairness of a proposed transaction.

In this case, the directors' approval of the transaction will not violate the duty of loyalty, notwithstanding Ed's obvious interest in the transaction. Not only was there full disclosure of the nature of the agreement to the directors, but a majority of the disinterested directors approved it. Ben's duty of loyalty claim will therefore fail. In addition, the directors' decision here appears to be informed. They were apprised by Ben of his take on the proposed deal, but there is nothing to indicate that Ben had any special financial information that Carl did not. Carl's belief that the transaction was fair, based on acceptable method of valuation, could have just as easily been relied on by the directors. A disagreement will not preclude operation of the business judgment rule here. Ben's derivative action should fail as to both voiding the purchase and holding the directors liable.

3. Because Ben's derivative action should fail on the merits, the cost of the directors' defense should be paid by the corporation.

A corporation must reimburse its directors for the costs of defending a derivative suit where the directors prevail on the merits of the case. Because it is likely that Ben's action will fail both with regard to the alleged violations of duty of care and duty of loyalty, Autotown must pay for their defense.

4. Under the Article 2 of the Uniform Commercial Code, a person who buys a good from a person engaged in the regular sale of those goods and purchases without notice of a failure in the title of those goods and for value, may reasonably expect that they have clear title to the goods.

Pat has some serious issues to resolve to retain ownership. First, was Autotown regularly engaged in the business of selling automobiles. It is unclear from the facts whether Autotown had previously sold new cars but it probably had not and thus Pat would lose. Second, goods that have a title create notice as to ownership. If Autotown sold the car with Don's MCO, a reasonable person would conclude that Autotown did not own the car. Thus Pat would have notice and lose. Finally, did Pat pay a fair value for the car? If not, he will lose if it was so unreasonably low as to create apprehension in the eye of any reasonable person.

Question No. 3: Model Sample Answer

1. Lenny can assert against Gloria the tort of trespass to chattels (for his bike) and conversion of chattels (for his box of pocket protectors). He will probably succeed on both claims.

First, with respect to the bike, the tort of trespass to chattels requires that the defendant intentionally deprived the plaintiff of the full enjoyment of plaintiff's chattel, and that actual damages resulted. Here, Gloria almost certainly intended to do the act that resulted in the damage; such an intent is enough because intent to cause the damage is not required. Also, actual damages clearly resulted. Gloria therefore will be liable to Lenny for the full extent of the damage she caused to the bike.

Second, with respect to the box of pocket protectors, the tort of conversion of chattels requires that defendant intended to permanently deprive plaintiff of possession of the chattel. Such an intent can be inferred from defendant's taking of the chattel and keeping it for a long time, or from doing substantial damage to it. Intent also can generally be satisfied if one is "substantially certain" that a certain result will follow from one's actions. Because Gloria threw the box into the dumpster and watched it get crushed, she was at least substantially certain that it would be destroyed and therefore is liable to Lenny.

2.(a). Dave could make a claim that the painting should be subject to equitable distribution by asserting that he and Gloria had entered into a common law marriage prior to Gloria's purchase of the painting, and therefore the painting is marital property subject to equitable distribution. This claim would likely fail though.

A common law marriage, recognized in PA, is entered into where the individuals express, in present language, their intent to be regarded as married. Present language must be used. Cohabitation and reputation (holding one-self out as being married) is relevant circumstantial evidence of a common law marriage.

Here, Dave merely expressed on one occasion that he and Gloria were legally married, a comment which was met with puzzlement, not agreement. Further, Gloria had continuously rebuffed Dave's suggestions that they get married by virtue of solemnization. Without proof that Gloria actually intended to be married to Dave prior to buying the painting or before its value tripled, Dave's claim that the painting is subject to equitable distribution will fail because property owned by either spouse before entering into the marriage is not considered marital property for purposes of equitable distribution.

2.(b).(1). The sapphire ring would be property subject to equitable distribution because it was property acquired by Gloria during the course of the marriage and not subject to any exceptions which would remove it from the category of marital property.

Subject to a limited number of exceptions - educational degrees, inheritance where one spouse is specifically named devisee, veteran's benefits, non-possessory future interests - property acquired during the course of the marriage by either spouse is considered marital property and subject to equitable distribution when the marriage terminates. Here, Dave has given Gloria the ring after the ceremony. Despite the likely intent that only Gloria wear the ring, the ring will be considered marital property just like most other property acquired by either spouse during the course of the marriage.

2.(b).(2). The proceeds from the mutual funds - i.e., the amount the investment has increased in value - will be subject to equitable distribution. Dave will therefore be entitled to some share of the \$500,000 earned from the lump sum payment, but not necessarily half.

Property acquired or earned before the marriage is excluded from marital property for purposes of calculating equitable distribution. However, the amount of appreciation on one spouse's property is considered marital property and this may be equitably distributed. Here, the car accident giving rise to the lump sum payment to Gloria happened before the marriage, and thus the payment will be considered Gloria's outright. The money earned on the initial lump sum payment is marital property, and therefore will be subject to equitable distribution, though it need not be split in half.

3. The issue is what civil action Gloria should file to obtain a ruling on the specific issue of her marital status from 1992 until January 1, 1995.

Gloria should file a declaratory judgment action in court. Declaratory judgment actions are for the purpose of defining the legal rights and status of a party. Pursuant to a declaratory judgment action, the court will most likely decide if Gloria and Dave had a common law marriage during this time period.

Question No. 4: Model Sample Answer

1. John will definitely be charged with robbery. There is also a possibility for assault, and if robbery fails, theft.

Robbery is the unlawful taking of the property or goods of another with the use of force or threats of intimidation in the person's presence. What distinguishes robbery from theft is that force is employed. In a robbery, the victim must feel threatened and compelled to give up her property. In contrast, a theft is the unlawful taking of the movable property with the intent to permanently deprive the person of the property. The common law calls this crime larceny, but in PA it is called theft.

In the instant case, the facts state that Mary was overcome with fear and did nothing but stare at the gun. This constitutes fear which is a necessary element of robbery. Furthermore, the purse was taken in her presence - John ripped it from her shoulder. This satisfies the element of robbery stating goods must be taken from the person's presence.

Mary could also say there was a theft if the robbery claim failed. Moreover, usually to be a theft in the case of a purse being grabbed, the victim would not realize the force or fear. It would be the case where a purse was taken without the victim knowing. Because Mary was very aware of the purse being taken, she can assert robbery.

Criminal assault is the creation of apprehension of imminent harm. John approached Mary with his handgun and told her he would shoot her if she did not give him her purse. Mary was overcome with fear, which would establish that she was in apprehension of imminent harm. John is likely to be convicted of criminal assault based on these facts.

John could most likely be charged and convicted of terroristic threats, which is threatening to commit any act of violence with the intent to terrorize another or cause psychological harm. John did exactly that when he told Mary he would shoot her if she did not give him the purse.

In the alternative, John could be charged with reckless endangerment of another. In Pa, reckless endangerment involves a reckless conduct which results in serious bodily injury or threat of bodily injury. Here, John held a loaded gun to Mary's head and told her he was going to shoot her if she didn't give him the purse. He then proceeded to rip the purse from her. This conduct could be considered as reckless and by using the gun placed her in imminent threat of serious bodily injury (being shot).

2. The prosecutor will most likely defeat the motion to suppress the gun and purse. First, the photos of these objects were obtained by a private individual, which means there was no state action. There was enough information for a judge to determine there was probable cause to issue the search warrant.

First, the prosecutor will argue that Fred's actions in taking photos of the gun and describing the purse were not state action which would give rise to a defendant's Fourth Amendment right. In order for the defendant to argue there was a violation of the Fourth Amendment prohibition against unreasonable searches and seizures, he needs to first assert there was government conduct. Here he needs to show he had a reasonable expectation of privacy. Clearly, the defendant had a reasonable expectation of privacy in his home but the fact that Fred provided the information and took the photo means there was no state action, no government conduct.

For there not to be an unreasonable search and seizure under the Fourth Amendment, the search warrant needs to be supported by probable cause. While Fred's actions in gathering the evidence are not subject to the constraints of the Fourth Amendment, the police's actions in executing the search warrant are. There is government conduct in that it was the police who took these actions - they are state actions. And as related earlier, Fred had a reasonable expectation of privacy in his home. The privacy inquiry in assessing whether the search was unreasonable, was whether there was a valid search warrant. This means that you need to examine the warrant and determine if there was probable cause for the judge to issue it. A valid search warrant is upheld if given the "totality of the circumstances" a judge could determine there was common sense reason that there was criminal property in the defendant's home. While in Pa, search warrants cannot be upheld based on an anonymous tip. Here, there was strong evidence - that being the photo of the gun which was legitimately taken and the confirmation by Mary that this was her purse. A neutral magistrate, based on this evidence, the photo, Fred's personal observations and Mary's ID could easily conclude there was probable cause to issue a search warrant. Thus, the motion to suppress the evidence would be denied. This would not be an unreasonable search and seizure under the Fourth Amendment.

3. An objection based on privilege should be raised but will be overruled by the Court.

Pursuant to the PaRE (Rules of Evidence), all relevant evidence that is not otherwise privileged is admissible. Relevant means having any tendency to make the existence of a material fact more or less likely. The evidence in question here is clearly relevant as it goes to the ultimate issue of John's guilt for the robbery of Mary and is an admission by the perpetrator of the crime.

Thus, the only objection to the admission of this evidence is that it should be excluded based on the "parishioner-priest" privilege which is recognized in many jurisdictions. This privilege protects information communicated between a parishioner and his religious advisor when the communication is made for purposes of spiritual counseling.

In this case, the privilege will not apply due to the circumstances under which the conversation took place. The meeting between John and Bob was in a restaurant, during a casual lunch, within the listening range of other patrons. It did not take place in a religious or spiritual setting and appeared to be based on John's need to talk to someone and not based on obtaining religious counseling. John made no effort to keep the conversation private and thus he assumed the risk of

someone overhearing and reporting his comments. In light of the above, any objection based on privilege will be overruled.

Question No. 5: Model Sample Answer

1.(a). Paul should assert claims based upon the First Amendment right to freedom of speech. He will likely succeed in his freedom of speech claim.

The First Amendment guarantees a right to freedom of speech and in the context of public employment an employee is entitled to comment on matters of public concern without fear of recrimination by her public employer, unless the comments would have a significant impact on her job, i.e. be attributed to the governmental entity. Paul is employed by the City government, a governmental actor, and was fired by the City based upon his comments in a TV interview. This will violate his right to free speech if it is found that the alleged corruption is a matter of public concern, which it appears to be. Although a strong argument may be made by the City that this was a purely private dispute between employer/employee and that therefore the “public comment” prohibition on free speech should not apply.

While the City has a strong argument, the Court should uphold Paul’s claim that he was dismissed from public employment for commenting on a matter of public concern, in violation of his first amendment right to free speech.

1.(b). Paul will win in an action against C-City for a violation of his right to privacy. He had a right to keep his files sealed. The right to privacy has been found by the Supreme Court as one of a penumbra of rights in the Bill of Rights, applicable to the states through the Fourteenth Amendment. It is also a fundamental right. If violated, the state must show a compelling state interest why it must be violated.

Here, Cathy, a state actor, distributed personal information about Paul to the public in order to clear her own name. Similar cases involving insurance records, prescription information, and medical records have found a strong privacy interest. Cathy’s personal vendetta obviously does not meet the standard of a compelling state interest, therefore she will be held liable.

2. The Due Process Clause provides that a person may not be deprived of life, liberty or property without due process of law. An individual must have one of these interests harmed before he can maintain a due process claim. In regards to public employment, a property right, or entitlement, exists when an employee can only be terminated “for cause.” When such an entitlement exists, an individual is entitled to due process of law as determined by balancing (1) the importance of the interest to the individual; (2) the value of the process; and (3) efficiency concerns. Usually a “for cause” employee is entitled to notice and a hearing, or at least quick post-termination relief before his dismissal.

Paul, however, was still a probationary employee and entitled to be dismissed “at will;” he therefore has no property entitlement to his position and cannot maintain a right for due process before termination. Paul was not entitled to a hearing before his termination.

3. Cathy does not have any claim with respect to her termination and based on the U.S. Constitution that is likely to succeed. She could assert that she was entitled to a pre-deprivation hearing of her side of the story but (like Paul, albeit for different reasons) will not succeed.

Cathy has no entitlement in her job that is a property interest due procedural protections under the Fourteenth Amendment. For one, her employment is apparently expressly at the pleasure of the Mayor, who may fire her “with or without cause.” Hence, she has no reasonable expectation of tenure or being subject to termination only for good cause. Second, she is a high-ranking policy-making official appointed by the Mayor. Accordingly, she is basically a political appointee who is (and should be) accountable to the Mayor and whatever political concerns the Mayor has. Again, this compels the conclusion that Cathy has no property right in her job entitled to procedural due process protection.

Cathy might also argue that the Mayor, in firing her for the (incorrect) reason she did, has “deprived” her of a reputational interest subject to due process protection. The Supreme Court has specifically held, however, that one’s good reputation is not a liberty or property interest within the meaning of the due process clause, so this claim would fail as well.

Question No. 6: Model Sample Answer

1. Ann is only entitled to the rental for the time that Tom occupied the premises but cannot get any rent due on the remainder of the lease after the building burned down.

Traditionally, a tenant was responsible for rent and the damage to the premises. However, modern courts do not hold the tenant liable for rent or damages if the building is destroyed through no fault of the tenant. Thus, Tom will not be liable for any rent after the building burned down and he vacated as long as he did not cause the fire.

When an event which makes performance of a contract impossible occurs through no fault of either party and occurs after the contract but before full performance, the duties under the contract are discharged.

Here, the fire occurred after the lease was signed and makes performance by Ann impossible. She cannot lease the building to Tom in exchange for rent because it was destroyed. Thus both Ann and Tom are discharged and the lease/contract will not be enforced.

2. The Court should rule that Sue has valid title to the property if it finds that Ann intended to convey the property to Sue.

In order for property to be conveyed from the owner to another party, a valid deed and delivery must exist. A valid deed contains a description of the property and is signed by the party to be charged. The deed in this case appears to be valid, therefore, the only question is whether it was validly delivered.

A deed is validly delivered if it is the intent of the conveyor to presently convey the property to another. While physical delivery of the deed to the other is a clearly valid delivery, delivery can be through other means. Delivery may be to a third person or it may be through recordation.

Recording the deed is presumed to be a valid delivery unless it is shown to the contrary. In this case, the facts to the contrary are that Ann held the deed for safekeeping, did not tell Sue of the deed, continued to pay taxes on the property, and considered selling it.

The Court would need to determine whether Ann intended to presently convey the property to Sue in order for there to be a valid delivery and title in Sue. Although the recordation is a presumption of delivery, if the representative presents the other facts to overcome the presumption, the court may find that Ann had a contrary intent.

3. Sue would not be successful in a breach of contract suit against Ed. In order to have a valid contract, there must be mutual assent, consisting of offer and acceptance, and consideration. An offer must be specific in its terms, indicate an intent of the offeror to be bound, and be communicated to the offeree. The offer must be accepted by the offeree who the offer was directed toward, be unequivocal, and be communicated to the offeror.

An offer that is intended to be accepted by performance is a unilateral contract. This letter appears to be an offer for a unilateral contract which would be accepted by performing the act of calling Sue.

Consideration is a bargained-for exchange that has legal value. The legal value is either promising to do something that you are not legally obligated to do or refraining from doing something that you have a legal right to do.

The letter from Sue appears to be an offer to Ed for Sue to provide listening services if Ed calls her that Sue intends to be bound by and that was communicated to Ed. It invites acceptance by performance of Ed. As a unilateral contract, Ed would accept the contract by calling Sue.

The problem is with the consideration. This does not appear to be a bargained-for exchange or have legal value. Without adequate consideration, there is not a valid contract.

It also could be found that there was not mutual assent. Ed may not have realized that Sue was making a firm offer. He may have thought that she was merely making a threat. If Ed did not think that Sue made a legitimate offer, he could not have accepted the offer by calling since there would be no meeting of the minds.

Sue may be unsuccessful in her action against Ed if the Court finds there was not mutual assent or that there was inadequate consideration.

4. Able should advise Ed that an enforceable contract exists between him and Bob and that he must perform the work for the agreed upon price.

Pursuant to contract law, an offer may be accepted unless it has been validly revoked through lapse of time or certain actions by either party. When a contract is formed by writings sent by mail, a revocation is not effective until it is received. However, pursuant to the mailbox rule, an acceptance by mail is valid on dispatch with some limited exceptions including one dealing with acceptance of an option contract.

The offer made by Ed was not a valid option contract because there was no consideration given by Bob to hold the offer open. Accordingly, the above mailing rules apply. As such, since Ed's revocation of 1-7-99 was not received by Bob prior to Bob's mailing of an acceptance on 1-8-99, the acceptance will be valid and a binding contract exists between the parties.

Question No. 7: Model Sample Answer

1. Golfer's attorney should institute a negligence claim against the driver of the bus and a claim of respondeat superior in negligence against Transit, Inc. Additionally, attorney could raise a theory of negligent hiring against the Transit company. The negligence claim is likely to be successful but Golfer may be barred from recovery if he assumed the risk. Alternatively, his recovery may just be reduced since he was comparatively negligent and PA follows a partial or modified version of the common law rule on comparative negligence.

In order to succeed on a negligence claim, Golfer must show duty, breach, causation and damages. Did the driver owe Golfer a duty? If so, what is the standard of care? The driver had a duty to act as a reasonably prudent bus driver. Bus drivers generally know that people often run late for buses and try to "hop on" at the last second. Thus, was it foreseeable that a person would hop on at the last minute? Although driver may not have seen Golfer, it is foreseeable that an individual would try to catch the bus at the last moment. Thus, driver breached his duty of care to Golfer because Golfer was in the "zone of danger."

Next, was Golfer's injury the legal cause and cause in fact of driver's actions? Golfer would not have received permanent nerve damage to his left arm but for the driver's continued driving

of the bus after the claims from the passengers to stop. Additionally, driver's negligence is the proximate cause of Golfer's injury because his actions proximately caused Golfer to be dragged two blocks, suffering permanent injury and no superseding cause entered to relieve driver of being the proximate cause of Golfer's injuries. Thus, it is fair to hold driver liable as it is foreseeable that when a passenger is being dragged with one arm in the bus and his body outside that a passenger would suffer permanent nerve damage. Damages are clear because Golfer has sustained permanent physical injury.

Liability. It is likely that driver will be held negligent. It is also likely that Golfer will sue the Transit Co. because they are the ones with the deep pockets. The Transit Co. will be held liable under the theory of respondeat superior, since driver was acting within the scope of his duties (driver was driving the bus and making regular scheduled stops). Golfer will be successful in his claim of negligence but if the jury finds that he was contributorily negligent in jumping onto the bus, his recovery may be reduced by the percentage he was at fault. PA follows the modified theory. Therefore, if driver is found to be more than 50% responsible, he will recover nothing. While it is clear that Golfer was negligent to jump onto the bus in such a manner, it appears that the driver is more responsible for driver's injuries because he could have stopped and reduced the injuries Golfer suffered.

Golfer may also assert a claim of negligent hiring against Transit Inc. Golfer would need to show Transit negligently hired Driver and had it not hired Driver based on his records, Golfer would not have been injured. Transit Inc. was aware of Driver's record relating to traffic violations and a prior drug use, but that information most likely would not put Transit on notice of the injury resulting with Golfer. Had the golfer been injured by Driver running a red light, I think the claim against Transit for negligent hiring would be successful. In the present case, Transit had no notice as to the possibility of an injury as Golfer suffered via the employment records and therefore should not be held liable.

2. Golfer will most likely be able to recover compensatory damages from Transit not punitive damages. Compensatory damages are damages to compensate plaintiff for injuries. Included in compensatory damages are medical bills, lost wages, pain and suffering, and loss of consortium if spouse involved. Also, plaintiff may be entitled to loss of future earning capacity if injury is one such that they could not earn the money expected to be earned as a result of the accident. Golfer will likely be able to recover for his medical bills for five days spent in the hospital, and lost wages for the month he missed from work. Since Golfer was a golfer trying to turn pro, which is evidenced by an upcoming tournament for the US Open, it is speculative how much earning potential he has since he is not yet a professional. So, Golfer may not be able to recover for permanent damages to his left arm. Further, Golfer probably could not get punitive damages. Punitive damages are to punish defendant for their acts when malice or recklessness is involved. There is no showing of that here.

3.(a). Defense counsel should seek to introduce Jill's statement in its claim to prove comparative negligence on the part of Golfer or assumption of risk.

Defense counsel will want to admit the statement to prove what was going on inside Golfer's head at the time he was being dragged. If Golfer had notice of his predicament and knew of and assumed the risk, his negligence claims may fail. The statement may have given Golfer notice of what was happening to him. If Jill was correct in her assessment of the scene, Golfer could have easily stopped himself from being dragged by the bus. He would have had the knowledge to control what was happening to him and would have been able to assume any further risk himself. This seems particularly true because Golfer continued to hold onto the bag after Jill made the statement to him.

3.(b). Golfer should object to introduction of the statement because it is hearsay but will lose his argument. Hearsay is an out of court statement made by a declarant offered for the truth of the matter asserted. The statement at issue is hearsay. However, the court should rule that the statement comes in under the exception to the hearsay rule as an excited utterance. Jill made the statement under the stress of the excitement and it pertained to the event which caused the excitement. As an alternative, the statement may be admitted as a present sense impression. The declarant need not be unavailable for either hearsay exceptions. Furthermore, if the court finds that the statement is being admitted for the purpose discussed in 3.(a)., it will also be admissible.

4. Defense counsel should object that the offered evidence is (1) not relevant, (2) not admissible as impeachment evidence and (3) even if relevant, substantially more prejudicial than probative.

Taking the second subject first, the Court should rule that the evidence is not admissible as impeachment evidence. In PA, convictions are admissible only if they are convictions for felonies involving dishonesty or false statement. None of the offered convictions is of that nature.

As to relevancy, the Court should rule the convictions irrelevant without additional foundation. The facts do not indicate that the conviction or traffic violations had anything to do with bus driving by the Bus Driver. Nor are there facts suggesting Bus Driver was on drugs or in violation of traffic laws then Golfer was hurt. Accordingly, the offered evidence does not appear to make any material fact in the lawsuit more likely or less likely, and is inadmissible as irrelevant.

Finally, even if not excluded on the above grounds, the Court should rule the proffered evidence inadmissible on grounds that its probative value is substantially outweighed by the potential prejudice to the defense. The evidence threatens to both confuse and mislead the jury as to what is at issue in the suit. The drug conviction, in particular, may inflame the jury against the Bus Driver even though there is no apparent connection between Golfer's accident and drug use. The traffic violations also threaten to lead the jury to conclude that Bus Driver did something wrong here when no such connection appears tenable on the record. In sum, having little to no probative value and threatening to lead the jury astray from the issues presented by this lawsuit, the conviction and traffic violations should be excluded on grounds that their probative value is substantially outweighed by the potential for unfair prejudice to defendant.

Question No. 8: Model Sample Answer

1. If Sam defaults, Bank will have priority to the inventory (the paint) and PaintCo. will have priority to the equipment (mixing machine).

Inventory - In secured transactions a creditor has an interest in any collateral sufficiently described in the security agreement and is considered a perfected secured creditor if properly perfected by filing, possession or control or a PMSI for super priority. When a second secured creditor who finances the sale of goods and takes a security interest in the goods (PMSI) attempts to gain priority over the first perfected secured creditor, they must take a PMSI and properly perfect by filing in the inventory before the debtor receives the inventory and give the first secured creditor notice. If not, then they take second to the first secured creditor in priority.

In this case, Bank had a perfected security interest in future accounts, inventory and equipment of Sam. When Sam purchased the paint (inventory) and the mixing machine (equipment) from PaintCo., the collateral is within Bank's financing statement. However, PaintCo. took a PMSI in the paint (inventory) and filed properly to perfect before Sam received the inventory. However, PaintCo. and Sam both failed to notify Bank. Therefore, Bank still has a perfected security interest in the paint (inventory) and PaintCo. takes second to Bank in priority.

Equipment - Like inventory, when a second secured creditor takes a PMSI in the equipment and properly perfects, the second secured creditor only must properly perfect within 20 days after the debtor receives the goods.

In this case, the mixing machine (equipment) is within Bank's original security agreement properly perfected; however, PaintCo. took a PMSI in the equipment when they signed and filed, thus perfecting their interest in the machine (equipment) and because they filed (perfected) before Sam got the equipment, PaintCo. has priority over Bank. No notice is required with equipment.

2. Sam can access the interest charge on the customer because the two parties were merchants and under UCC 2-207, the interest charge became part of the contract.

UCC 2-207 - Battle of the forms - Between merchants, forms passed between them concerning a contract or a memo memorializing an oral agreement with additional terms allows the additional terms to become part of the contract so long as the terms do not materially alter the contract, acceptance is not based on acceptance of the terms and the party not adding the additional terms does not object. If any of these are not met, the contract is valid but without the additional terms, however, if all are met, the contract is valid with the terms.

In this case, Sam is a merchant because he is the owner of a construction supply business, so he is in the business of selling goods of this kind (i.e. paint). Also, the new customer is a

merchant because he wishes to sell the paint to his retail customers. The memo Sam prepared was a memorialization of an oral phone conversation and included an additional term, the interest charge clause. The clause was not discussed previously. The clause, however, was not objected to by customer within a reasonable time of being received, not a material alteration, and not based on acceptance. Therefore, it is part of the contract and can be imposed if customer does not pay within 30 days of delivery.

3. Sam's wife could assert fraud in the inducement to set aside the prenuptial agreement. A prenuptial agreement will be valid if both parties gave full disclosure prior to entering into the contract. Additionally, neither party may commit fraud during the agreement. Such an action would make one party to rely on a unilateral mistake that the other party is aware of. As such, the contract would be void because there was never a meeting of the minds.

Here, Sam told his wife-to-be that the necklace was worth \$25,000. Believing this to be true, the wife-to-be entered into the prenuptial contract. Sam knew the necklace was only worth \$500 and knew that his wife-to-be was relying on the \$25,000 figure to enter into the contract. As such, wife can void the contract because Sam's fraud prevented any meeting of the minds.

4. If the necklace was worth \$25,000, the prenuptial would be valid and enforceable. The parties were represented by separate counsel. They fully disclosed all of their own assets. They agreed that the value of the business was the equivalent of the \$25,000 necklace and they would divide them as necklace to wife and business to Sam. It was fair on its terms as written. The court will enforce it as written unless there was fraud or misrepresentation or other such defenses to contracts. The court will not make a better contract for the parties than they make for themselves.