

**FEBRUARY 2000  
PENNSYLVANIA BAR EXAMINATION**

---

**Model Sample Answers**



**Pennsylvania Board of Law Examiners  
5035 Ritter Road, Suite 1100  
Mechanicsburg, PA 17055  
(717) 795-7270  
<http://www.pable.org>**

### Question No. 1: Model Sample Answer

1. Joe will not receive anything from Frank's estate because the specific bequest was adeemed and the remainder of the estate minus other specific bequests was left to charity (church).

A bequest is adeemed if it is a specific bequest which is sold or otherwise disposed of prior to the time for disbursement.

In this fact scenario, the Sonco stock was specifically left to Joe. However, prior to the death of Frank, and with no new will, the Sonco stock was sold and applied to a bank debt. There was also no language that this was a legacy or bequest to be paid from the sale of Sonco stock.

Accordingly, because the Sonco stock no longer existed at Frank's death and the money was used to pay off the Bank debt, Joe will not take under Frank's will unless he can convince the court that he was intended to have the proceeds in the event the stock was sold.

2. Darlene will get the shares of Newco. Once again, a specific bequest is usually adeemed if the bequest is no longer available at testator's death. In addition to the exceptions mentioned in my answer to #1, another exception to this rule is that when a specific bequest of certain stock has been replaced with comparable shares of another stock, the specific bequest beneficiary will receive that replacement stock. In this case the Lenco stock was replaced (due to merger) with comparable shares of Newco. Therefore, Darlene gets the shares of Newco.

3. Frank owned shares of Sonco stock which were sold for \$150,000. Frank had a basis in these shares of \$50,000. When Bank sold the stock to apply to Frank's debt, this was an involuntary conversion, which triggered the realization of gain in the amount of \$100,000. It does not matter that Frank did not consent, participate, or desire his stock to be sold. He still clearly received the benefit of the proceeds, such proceeds being used to satisfy a debt owed by him. The IRS would classify this as a capital gain transaction, and Frank would be taxed on the \$100,000 realization. Depending on how long Frank has held the Sonco stock, his tax rate will be the short term or long term capital gains rate. The short term rate will be higher than the long term rate. The facts are silent as to how long Frank has held the Sonco stock.

4. Frank should be able to deduct the payment under his personal guarantee as a business loss. The loss will be allowed if it is found to be a business loss, rather than a personal loss. It appears that Frank was the sole owner/operator of Franco Inc. Since this is a closely held corporation, the shareholder, Frank, is permitted to operate the day to day business of Franco, Inc. Frank's guarantee on the loan is as a result of his business involvement. Since this was a business related loss and Frank's claim against Franco for indemnity is worthless, he should be able to deduct this from his gross income.

5. Able's conduct on Saturday morning with respect to Frank violated the Pennsylvania Rules of Professional Conduct ("RPC").

Under the RPC, an attorney may communicate directly with an adverse party who is not represented by counsel. However, the attorney must not give the appearance or impression that he is impartial, and must not purport to give any advice to the unrepresented party, except for the advice to obtain independent counsel. Furthermore, the attorney must take reasonable measures to clear up any misunderstandings about his role and who he is representing.

Able communicated directly with Frank, an unrepresented party, when Able went to Frank's house and encouraged him to accept Bill's offer in writing. Able was representing Bank and Bill and not Frank. Able made it clear to Frank that he did not represent Frank. However, instead of advising Frank to obtain independent counsel, Able proceeded to give Frank advice by telling him that if he didn't accept Bill's proposal, he would run the risk of incurring a deficiency. Able violated the rules of professional conduct by failing to advise Frank to obtain independent counsel and by giving Frank advice.

Under the RPC, when a lawyer communicates with an unrepresented party, he must refrain from conduct that constitutes duress or undue influence or harassment. Although Able's conduct in urging Frank to sign the contract with Bill probably would not rise to the level of duress, Able may have violated the RPC by influencing Able to enter into the contract reluctantly and against his will.

### **Question No. 2: Model Sample Answer**

1. The first issue is whether Don can assert a shareholder right of appraisal in this situation.

Right of appraisal is when shareholder wants to sell his shares of stock in a merger/consolidation or transferring all of asset situation.

In order for a shareholder to have such right of appraisal, he must make demand in writing to board; abstain from voting or vote against proposal and shares cannot be on national exchange or more than 2000 shareholders. Shareholders rights of appraisal in merger/consolidation situation for both companies and in transferring all assets only for selling company.

In this situation, Don might wish to sell his shares of stock by exercising his right of appraisal. First there must be a resolution and notice to shareholders. Second, there must be a vote. Third, there must be notice to Department of State. And finally, Don must abstain from voting or make his dissension known through written objection to board. Although Don might wish to exercise right of appraisal, Don would not be successful since he is not a shareholder of selling company.

In conclusion, Don would not be successful in right of appraisal since rights given to only the selling company and not the buying company in a situation in which all of the assets are transferred.

The second issue is whether Don can assert a shareholder derivative suit against Edna and ECCO.

A shareholder derivative suit is a suit brought by a shareholder against a wrongdoer on behalf of the corporation. In order to be able to bring a derivative suit, the shareholder must assert the claim on behalf of the corporation, and must have stock interest in the corporation at the time of the suit. In Pennsylvania, must have made a demand on the board prior to bringing action on behalf of the corporation. Courts will scrutinize because interested board members will shoot down the demand to bring suit against the wrongdoer. Also, if the shareholder wins, recovery will go to the corporation. If the shareholder loses, the shareholder could be held liable to corporation for wasting of corporations monies.

In this situation, Don expressed his dissatisfaction with the merger of ECCO and Sweet Tooth. Don could take his dissension to the board of directors and demand that a shareholder derivative suit be brought against Edna for her actions in this matter, but since Edna is an interested director, action would probably not do him much good. Therefore, he can assert a shareholder derivative suit against Edna. If he wins, recovery goes to corporation. If he loses, he could be held liable to corporation. In this situation, Don might be able to assert shareholder derivative suit but probably without much success.

In conclusion, Don can assert a shareholder derivative suit against Edna on behalf of corporation but probably not with much success.

2. Kay has a purchase money security interest (PMSI) in ECCO's equipment. Under Article 9 of the UCC, equipment is anything used or consumed in a business. Here, the ingredients and utensils are used and consumed. A security interest attaches (i.e. is good against the debtor) when 1) the creditor gives value, 2) there is a valid security agreement signed by the debtor and describing the collateral and 3) the debtor has rights in the collateral. Here, all three are clearly met, so Kay's security interest in the equipment is valid against ECCO. The fact that no financing statement has been filed is of no consequence here. Filing a financing statement perfects a security interest against others. Here, we are only concerned with ECCO. My advise to ECCO is that they should pay off the debt. Otherwise Kay can repossess the equipment.

3. The court should rule in favor of Tom and should treat Sam as an unsecured creditor.

A security interest in inventory may be perfected by filing a financing statement. However, in order for the filing of a financing statement to be effective to give notice to other secured creditors and lien holders, the financing statement must correctly identify the debtor. When a proper financing statement is filed, a security interest becomes perfected, and a prior

perfected security interest usually prevails over a lien that subsequently attaches. Lien creditors include the trustee in bankruptcy.

Normally, Sam's prior perfected security interest in ECCO's inventory would prevail over the interest of the trustee in bankruptcy. However, the financing statement filed by Sam was ineffective to give notice to Tom, because it identified the debtor as "Kay's Pennsylvania Chocolate Kitchen," and not as ECCO. This name would not give other creditors notice that ECCO was the debtor, because ECCO had never changed its name, even though it had registered as a franchise under the name of Kay's Pennsylvania Chocolate Kitchen.

4. I would advise Henry that he can raise two defenses against Sam. First, as a guarantor or surety, Henry can raise suretyship defenses against Sam. One of these defenses is discharge to the extent of loss caused by impairment of collateral. One type of impairment of collateral occurs when the creditor fails to perfect or properly file a financing statement. By failing to properly perfect his security interest, Sam impaired the collateral. Therefore, Henry should be relieved of paying the debt.

Also, under the terms of the security agreement, payment was guaranteed by Henry. This means that Henry would only have to pay if Sam first made a reasonable effort to recover its indebtedness from the sale of debtor's inventory. Sam was unable to sell ECCO's inventory as a result of his own negligence in failing to properly file a financing statement with the correct name of the debtor. Therefore, Sam's actions were unreasonable and he should not be able to recover against Henry.

### **Question No. 3: Model Sample Answer**

1. Killdare should assert a legal theory of implied or quasi contract to support his bill to Pat, with a strong likelihood for success.

The law generally imposes no duty to act on behalf or in aid of another person absent some special relationship. In the instant case, Pat had a seizure and collapsed in the classroom. None of those present had a special relationship to Pat so no one was under a legal obligation to extend aid to him.

This leads finally to the doctor. While under no legal duty to act, he made the moral decision to help Pat. As someone who begins to aid, he must act reasonably and follow through with the aid. He did so, as Pat made a complete recovery, due at least in part, to doctor's actions and medical care.

This finally takes us to the issue of whether Pat must pay for Killdare's services. He must. Although the elements of contract do not exist here, (offer, acceptance, mutual assent, consideration), the court will imply the reasonable value of services to avoid unjust enrichment. Where a party has acted for the benefit of another and absent an express agreement, the court will not allow a party to become unjustly enriched where he knew of the benefit and did not deny it.

Pat was in a position of needing medical assistance. Doctor was under no duty to give it to him. Pat obviously would not have turned it down in his precarious position. He therefore, accepted the doctor's offer of help and is liable for the reasonable value of the services.

2. Killdare should argue that he is not negligent under the Pennsylvania Good Samaritan Law. Under the Pennsylvania Good Samaritan law, if an individual helps a person in need of emergency help, then that person who helps is not liable for negligence but can be liable for gross negligence. Here, Killdare would argue that he was not negligent but that even if he were that he would not be liable because he acted in an emergency situation to help a person (Pat) in need of medical help. Pat would try to counter that Killdare was grossly negligent but due to the fact that negligence was the action and gross negligence was not specifically pled in the complaint he would lose. Pat will lose because of the Pennsylvania Good Samaritan law.

3. Killdare could bring a civil action against Pat for misuse or wrongful use of judicial proceedings. Killdare may succeed.

Under wrongful use or abuse of judicial proceedings, the plaintiff must show that a judicial proceeding was brought recklessly or maliciously, there was no merit to the case, and that the case was dismissed because there was no merit to the claim.

In the instant case, Pat filed a negligence lawsuit against Killdare to retaliate against Killdare for billing Pat for medical services rendered and to solve Pat's financial problems. Also, Pat knew he did not have any merit to his claim because he was not injured and four separate attorneys told him that he did not have a viable claim, but Pat filed suit anyway. Also, the court dismissed Pat's claim in Killdare's favor, so it recognized that Pat had no viable claim. Therefore, if Killdare suffered a pecuniary loss due to Pat's abuse of judicial proceedings, then Killdare may recover damages in the amount of the cost of litigation.

4. Terry could sue Chris under a civil assault theory (no spousal immunity) and maybe she should at a later time, but before she does that she should seek a protection from abuse order (PFA). A court will grant such an order whenever a spouse (or someone you are living with) has harmed or threatened physical harm. Here, Terry was clearly threatened with physical harm. If the order is granted, the court will require Chris to surrender his gun. I would also seek a no-contact order and ask the court to remove Chris from the home. If the court doesn't have him removed, then I would advise Terry to find a safe place to live.

#### **Question No. 4: Model Sample Answer**

1.(a). Larry will be charged with, and most likely guilty of, statutory rape.

The issue is whether Larry's act of having intercourse with Mattie was a criminal offense. In Pennsylvania, sexual intercourse between an adult, i.e. someone of majority, and anyone under the age of 16, where there are four or more years difference in their ages is a felony

offense. Larry is 19, Mattie is 14½. The age difference clearly violates the statute and Larry should therefore be found guilty.

Larry could be charged with aggravated sexual assault. His sexual intercourse with a 14 year old, given that he is 19 years old, would be an element of this crime. This is a strict liability offense and consent is no defense.

Indecent assault occurs when there is sexual contact with the sexual organs of another.

1.(b). Larry will try to raise the defense that Mattie consented and that Larry was mistaken as to Mattie's age. Larry and Mattie were talking and the facts indicate that Larry did not forcibly rape Mattie. However, consent is not going to be a successful defense because the law makes it illegal to engage in sex with a minor regardless of consent.

Larry will also try to raise mistake as to fact. Larry may have been reasonable in assuming that Mattie was the same age as his 17 year old sister because Mattie looked older than 14 and was friends with Larry's sister who was 17. However, this mistake while possibly reasonable, is not sufficient to make Larry not liable. Statutory rape is a strict liability offense - meaning there is no mistake of fact that can be a defense.

2. Larry will most likely be charged with and could be found guilty of the crimes of Involuntary Manslaughter and Homicide by Vehicle with regard to Barbara's death.

Involuntary Manslaughter occurs when a death occurs as a result of the actor's gross or criminal negligence or recklessness. Recklessness is the conscious disregard of a substantial and unjustifiable risk, when the disregard of the risk represents a substantial departure or deviation from the standard of conduct that a reasonable person in the actor's situation would observe. Gross negligence is the failure to be aware of a substantial and unjustifiable risk when the failure to perceive the risk represents gross deviation of the standard of conduct that a reasonable person in the actor's situation would observe.

Larry caused Barbara's death by striking her. Larry was a least grossly negligent in driving 30 miles per hour over the speed limit, because a reasonable person in his situation would have been aware of the substantial and unjustifiable risk of driving at this excessive speed. Larry's actions also probably would amount to recklessness because the fact that the speed limit was posted as 25 mph shows that Larry was aware of the risk of speeding, but consciously disregarded it. Larry would probably be convicted of this crime.

Homicide by Vehicle occurs when a person causes the death of another while violating a law regarding the use or operation of a vehicle or the regulation of traffic and death

occurs as a result of the violation. Larry caused Barbara's death while violating the law regarding the speed limit and the violation caused Barbara's death. Therefore, Larry could be convicted of Homicide by Vehicle.

When Barbara was alive, before she died, reckless endangerment would have been proper. However, when she died, this would merge into murder as a lesser of an included crime.

3. I would object to the statement based on hearsay and relevance. To the statement, "Larry is the one who tried to kill me," I would object on the grounds of hearsay. Hearsay is an out of court statement offered to prove the truth of the matter. My objection is likely overruled because the statement falls under the dying declaration exception to hearsay. A dying declaration is a statement made by the declarant when he believes he is about to die and the statement concerns the events surrounding his impending death. Alvin made the statement when he thought he was going to die (he saw blood spurting from his chest and a pool of blood surrounded him). Since Alvin is unavailable (his death), the statement will likely be admitted. The statement "he is also the one who stole the Honda 3 weeks ago" will be objected on basis of hearsay and lack of relevance. As to hearsay, it doesn't fall under dying declaration because it didn't concern the events around Alvin's impending death.

#### **Question No. 5: Model Sample Answer**

1. Bill number 1 is constitutional, therefore as legal counsel, I will advise the governor to sign the bill into law. Generally, the commerce clause permits congress to regulate commerce among he states. Furthermore, states are prohibited from discriminating against commerce from other states. Pennsylvania v. New Jersey. In the New Jersey case, the Supreme Court held that denying or prohibiting the importation of out-of-state goods violated the commerce clause. Where states violate the commerce clause or where states regulate inter-state commerce, the dormant commerce clause is implicated. There are several exceptions where states are permitted to regulate or give preference to intra-state products. The notable exception, which arises in this case, is the market participant case. One Supreme Court case upheld the state of South Dakota giving price discounts when it sold cement to in state customers even though out-of-state customers paid higher prices. The court reasoned that as a market participant, the state can provide benefits to its citizens and the price preferences given in-state customers was upheld. So too here, a state may try to meet its needs by looking first to its residents. This bill is therefore constitutional.

2. Bill #2 may be challenged on the basis of the commerce clause and the equal protection clause of the 14<sup>th</sup> amendment.

Under dormant commerce clause jurisprudence, state laws that discriminate, on their face, against out-of-state interests are subjected to rigorous scrutiny and are generally held invalid, except in the rare circumstance where there is no other way for the state to achieve a compelling state objective.

Under the analysis for facially discriminating state laws discussed above, a court would reason that Bill #2 treats in-state and out-of-state assembly businesses differently, giving more favorable treatment to in-state businesses and is therefore a burden on interstate commerce. The result might be that in-state businesses fared better economically than out-of-state businesses, because they didn't have to carry costly liability insurance and didn't have to risk liability for large treble damages awards. Out-of-state businesses would, by contrast, be forced to expend for insurance and risk large damages awards, leaving them less money for other aspects of their business, thereby making them less competitive. On the other hand, proponents of the bill would argue that consumers in state P would be more likely to purchase an out-of-state assembled computer because they would have greater recourse for breach of warranty, so, in effect, the law might actually favor out-of-state assemblers in the market place.

On the whole, the arguments of the bill's attackers would probably be more successful and the bill should fail as unconstitutional.

Equal Protection Clause. This clause prohibits the state from treating similarly situated classes of people differently. Here, because the Bill is an economic regulation, it will probably be reviewed under the rational basis test, and will likely pass constitutional muster

3. Bill #3 has a 1<sup>st</sup> Amendment free speech problem (applicable to the state through 14<sup>th</sup>). Commercial speech, such as advertising, has a much lower level of protection than ordinary speech, but regulations still must be narrowly tailored to meet a substantial (rather than compelling) government interest. Although the consumer protection here does appear to meet the substantial interest, the bill is not narrowly tailored. A more reasonable approach would be to insist that all advertisements have full disclosure of what prices include. A complete ban on any type of speech will be viewed with great skepticism by the courts. This bill should be vetoed, perhaps giving the legislature some ideas on how to bring it up to constitutional muster. Previously, a statute prohibiting advertisement of liquor prices was found unconstitutional. This appears to have the same problems.

4. Bill #4 offers the closest question of the bunch. There may be a slight free speech question, and appears to be a more serious commerce clause question. Forcing speech (i.e. product labeling) can constitute a 1<sup>st</sup> Amendment violation, but these circumstances do not raise as great of a problem as a ban on advertising. There is a substantial government interest in informing consumers so that they can choose products from their own state and the solution appears fairly narrowly tailored (although there might be a question as to whether it could be not simply on packaging). Bill #4 is probably not unconstitutional on 1<sup>st</sup> Amendment grounds.

The commerce clause may create more of a problem. There might be a real burden on outside manufacturers in having to include assembly locations on the box (especially if there are several locations in which different parts are assembled). Moreover, it might become enough of a burden on the retailers that they would stop carrying outside computers. Although the arguments that Bill #4 is unconstitutional are not strong, they are enough that I would counsel a veto, and ask legislature to rework the proposal.

### Question No. 6: Model Sample Answer

1. Ann should base her action on the legal theory of fraud or intentional misrepresentation and she will probably be successful under this theory.

The elements of fraud are a false statement of material fact, intent to induce reliance, scienter (knowledge of falsity or reckless disregard of truth or falsity), actual reliance (causation), justifiable reliance and damages. If these elements are proven, the remedy is either monetary damages, or rescission of the contract.

Bob made a false statement of material fact when he assured Ann that the house was suitable for use as an apartment building. He made this statement with the intent to induce her to rely on it and to purchase Blackacre. Bob was not familiar with the relevant zoning ordinance, and thus did not have knowledge that the house was not suitable for use as an apartment. However, he did recklessly disregard the truth or falsity of his statement by failing to investigate when he, himself, had used the property as a single family dwelling and the surrounding properties also were, presumably, single family dwellings. Ann actually relied on this statement, because she would not have bought Blackacre if she hadn't been assured it was suitable for use as an apartment. This reliance was also probably reasonable because she had no reason to doubt Bob's statement. However, she should probably have done a title search and investigated whether there were any applicable zoning ordinances before she signed the contract. Ann will probably succeed in this action and will be able to get either money damages, or have the contract rescinded. Her remedy would also include the incidental damages incurred in purchasing the house (the closing costs).

2. Ann will not succeed in her action for lost revenue and punitive damages. A party cannot seek equitable and legal remedies in the same action under these circumstances. If Ann seeks to rescind the purchase agreement, Ann cannot also seek to enforce the contract. Furthermore, to recover lost profits in this case, Bob would have had to make a representation as to whether the property would permit zoning in accordance with Ann's intentions. While Bob did say that multi-family homes were permitted in the area, this falls far short of representing that Blackacre was zoned multi-family. As such, it seems unlikely that Ann will succeed in recovering any lost profits. Furthermore, she could have confirmed whether her and Bob's beliefs were in fact true with a single phone call. The failure to do what is not only reasonable but prudent under the circumstances means that Ann is as much to blame for her lost profits as Bob. With respect to punitive damages, punitive damages are generally awarded where a party's conduct is so egregious that we want to discourage future similar behavior. In this case, Bob's conduct, while not perfect, does not warrant awarding Ann punitive damages. As such, Ann will not recover lost profits or punitive damages.

3. Yes, Nan and Hal can convey valid title to a purchaser because Ann's restriction clause is invalid.

When a person conveys property to another person, the person that received the property, especially in fee simple, has the maximum rights of selling, conveying, dividing, etc. of the property. Any restriction that prevents the new property owner from asserting its legal rights, such as conveying the property to someone else, is a restraint on alienation of rights. A conveyer can restrict equitable rights, but not legal rights.

In the instant case, Ann put a clause in Nan and Hal's deed that "any conveyance of Whiteacre before Nan attains age 35 shall be null and void." That restriction is a restraint on alienation and is invalid. Therefore, Nan and Hal may convey valid title to a purchaser because it is their legal right.

4. Nan's action against Hal will not be successful given that Hal's presence on the property is governed by the separation agreement which did not specify a time limit on Hal's presence.

In the separation agreement, Nan and Hal agreed to defer the sale "until Hal no longer resides on the property." When Nan and Hal divorced, the tenancy by the entirety was destroyed and Nan and Hal became tenants in common. Under property law, Nan could seek to partition the property in a "normal" tenants in common relationship. However, due to the wording of the separation agreement, Hal effectively has a "life estate" and Nan cannot seek to partition the property.

#### **Question No. 7: Model Sample Answer**

1. Able should file a negligence action against High Rise Co. on behalf of Mrs. P. She is likely to win/succeed in her action. To make out the tort of negligence, there are four elements that must be proved: duty, breach, causation and damages. For Mrs. P to win, she must prove all four elements. High Rise owes Mrs. P a duty. In a landlord tenant relationship, a landlord has a duty to maintain common areas. The garage in this case and the gates and doors to it are common areas. Additionally, High Rise held itself out to be a "secure location for elderly citizens" to live. This is one of the reasons why Mrs. P moved there. Additionally, High Rise Co. voluntarily assumed this duty by hiring a security company. One who voluntarily assumes a duty must do so without negligence. Based on these facts, Able can make out the duty element. The next question is whether High Rise Co. breached its duty by violating a standard of care. Able should be able to make out this element as well. High Rise Co. must act as a reasonably prudent person under the circumstances - an objective standard. They did not meet their standard of care in this case. This is evidenced by the fact that the side entrance was "regularly left unguarded and unlocked." High Rise Co. therefore breached its duty of care. Of course, since eyewitness moved to whereabouts unknown, Able must locate other witnesses who can testify that the side entrance is unguarded and unlocked.

High Rise Co. also may have breached its duty of care by negligently hiring the security company. Since the security company is well respected, this is unlikely - also because it is an independent contractor. The next issue is whether High Rise Co.'s breach of its duty was

the factual and legal cause of Mrs. P's damages. Since there are multiple factors at play (unlocked gates, sleeping guard and criminal act) the "but for" test is not as good as the "substantial factor" test for cause in fact. Able certainly has a strong argument that the unlocked and unguarded side entrance was a substantial factor in Mrs. P's damages. As for legal cause (proximate cause), while generally a criminal act that intervenes is not foreseeable, in this case, it is. It is reasonably foreseeable to High Rise Co. that if they don't maintain the side entrance and keep it locked and/or guarded, then someone (a criminal) could attack a tenant in their subterranean garage. Able therefore could probably make out duty, breach, legal and factual cause. Of course, Mrs. P was damaged by the breach of duty and Able should raise the damage element also. It is therefore likely Mrs. P will succeed against High Rise Co. in her negligence action.

2. Defensive Action and Effect. High Rise should assert a third party claim against Security Guards, Inc. ("SGI") for contribution and indemnity. Since the cause of action is not a federal question and all of the parties (plaintiff, High Rise, SGI) are citizens of Pennsylvania, the action would be in the Court of Common Pleas rather than in federal court. In Pennsylvania, a defendant can bring in additional defendants as "new matter" in the responsive pleading, where the third-party claims arise out of the same transaction or occurrence as the primary claim. Here, plaintiff's claim and High Rise's claim both arise out of the injury to plaintiff caused by the attacker and the potential liability in negligence of those who breached a duty to her. Thus, High Rise can implead SGI. Although the statute of limitations on the underlying tort action may have run, that would not apply to a claim for contribution or indemnity from SGI. That claim did not accrue until plaintiff sued High Rise.

Bringing SGI into the case should at least minimize High Rise's liability. Plaintiff could recover against High Rise and/or SGI (without a separate pleading directed by plaintiff to SGI) if both are found liable. Either could have to pay the entire judgment. The one that paid the judgment could then get contribution or, if the other party was principally liable, indemnification from the other.

3. Yes the action can proceed. Actions in tort survive the life of the victim or of the tortfeasor. You can reason this with public policy. You wouldn't want someone engaging in harmful behavior to get away without social retribution because the victim ultimately dies or predeceases the action's culmination.

To preserve her claim, the legal steps that need to be taken are that the case must substitute the estate in for Mrs. P. In other words, Mrs. P's estate will become the plaintiff in the action, no longer Mrs. P. Any recovery that is made will go into Mrs. P's estate. Any expenses will be taken out of the recovery first, leaving what remains to pass by her will or by intestacy if she is without a will.

4. Defense counsel should object on hearsay grounds. Court should sustain objection. An out-of-court (the present trial) statement offered for its truth is inadmissible unless it fits with a hearsay exception. Eyewitness's testimony in this case does not fit within the

former testimony exception to the hearsay rule. Former testimony under oath will generally be admissible pursuant to a hearsay exception if the declarant is unavailable and if the party opposing its offering had a fair and adequate opportunity to cross examine the declarant at the time of the prior testimony. A party with a privity of interest who cross examines the declarant in the former proceeding might also allow the former statement to be admissible. In this case, Eyewitness's testimony does not fit within the exception since Eyewitness was likely cross examined by defendant Attacker's lawyer at the criminal proceeding and wasn't cross examined by High Rise's attorney or a predecessor or successor to High Rise's interest. Because of these reasons, the former testimony is inadmissible. Court should sustain defense counsel's objection.

### **Question No. 8: Model Sample Answer**

1. This is an action to challenge the validity of the devise of real property. Pennsylvania has an interest because Alice was a domicile of Pennsylvania, and generally the validity of a will is determined under the law of the state of the testator's domicile. State Y has an interest because Blackacre is real property located in State Y. Generally, in actions related to interests in real property, the law of the situs of the real property applies. Generally, a will is filed in the state of the domicile's residence (in Pennsylvania, with the Registrar of Wills) and property within that state is administered. For property located out of the state, there must be a separate filing to administer the out of state property (called "ancillary administration"). In this case, although it is a close call, I believe that Pennsylvania will apply the law of State Y solely with respect to the devise of Blackacre. State Y has a substantial public policy interest related to transfers of real property within its state. I believe that Pennsylvania will uphold the provisions of the will, under Pennsylvania law, except for the devise of Blackacre and allow the personal representative of Alice's estate to administer the estate with the exception of Blackacre. It will not uphold the devise of Blackacre applying State Y law, and Blackacre will devolve by operation of the intestacy laws to her estranged son. State Y will have jurisdiction over Blackacre through the ancillary administration of the estate.

2. In representing Alice's son, Able may be in violation of Rule 1.7, Conflict of Interests.

Rule 1.7 states that an attorney cannot represent a client when he had a former client with adverse interests and that those interests would affect the present representation. He may represent the new client however, if it is a different type of transaction and the attorney believes that his former client's interests won't affect the new representation and the new client consents.

Here, it appears that Able's writing Alice's will and Alice being a former client may affect his relationship with Alice's son. Having once written a will, he must now take an entirely opposite position on the matter which he may not be allowed to do due to the conflict of interests.

Additionally, his own interest may be adverse to Alice's sons since he made a mistake in Alice's will. Due to his mistake, he may hide information from Alice's son or advise him adversely to Alice's son's interests, in order to prevent her son from suing him.

3. In order to perfect its security interests in Nick's notes and security agreements, Bank should make sure that the security interest has attached and should take possession of the notes and should either take possession of or file a financing statement with respect to the security agreement.

In order for a security agreement to attach, there must be an agreement to create a security interest, evidenced by the creditor's taking possession of the collateral or by a written security agreement granting the security interest, describing the collateral and signed by the debtor. The debtor must have rights in the collateral and the creditor must give value.

A negotiable instrument can only be perfected by possession. Chattel papers (a security agreement accompanied by a note) can be perfected either by possession or by filing. To perfect its security interest in the notes, the bank should take possession of the notes. If the notes and security agreements together are considered chattel paper, Bank can perfect its security agreement either by taking possession of the security agreements and notes or by filing a financing statement. If it perfects by filing, Bank should also execute a written security agreement with Nick so that the security interest will attach since a security interest cannot be perfected before it attaches.

4. Nick should assert that Wanda violated an express warranty. He will probably be successful.

Wanda asserted that the computer would be capable of running ABC Accounting software. This is an express warranty. While the purchase agreement properly and validly disclaimed all implied warranties, an express warranty cannot be disclaimed.

Wanda, however, has a defense to this assertion. She can claim that the contract was completely formed prior to this warranty. Nick had already paid Wanda in full. There appears to have been a complete contract with offer, acceptance, and consideration. If the court agrees with Wanda that a contract had been completely formed prior to her statement, it will treat her statement as a contract modification. The question specifies that this transaction falls under the UCC. Modifications in good faith and without consideration are binding under the UCC. Thus, even if the court finds this to be a modification, it will still find the statement to be part of the contract.

In conclusion, Nick should assert that Wanda violated an express warranty. Under the UCC, Nick's charge likely will be successful.