

**FEBRUARY 2001  
PENNSYLVANIA BAR EXAMINATION**

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**Model Sample Answers**

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## Question No. 1: Model Sample Answer

1. Section 61 of the Internal Revenue Code is broadly interpreted to include as gross income any economic benefit from whatever source derived. Before arriving at taxable income, a taxpayer may qualify for certain deductions. Some deductions are allowable to all taxpayers (whether they decide to itemize or take the standard deductions). These deductions are subtracted from gross income to arrive at adjusted gross income. One such deduction is for ordinary and necessary business expenses, which it appears is the deduction that Tom used for his unreimbursed business expenses in prior years.

The IRC provides that if a deduction is taken in prior years and is later reacquired by the taxpayer, the taxpayer must include the deduction in the later year as gross income to the extent that he received a tax benefit in the prior year. This is known as the tax benefit rule. The amount to be included in gross income in the later year is the amount of the deduction taken in the previous year. The rationale behind this approach is the convenience of annual accounting.

Here, Tom's recovery of the entertainment expenses must be included in his gross income, assuming that he received a tax benefit as a result of taking the deduction. The amount included should be equal to the amount of the deduction claimed.

2. The asset in Tom's estate which should be used to pay the excess of the claims, expenses and taxes in Tom's estate over the estate's residue is the \$100,000 Certificate of Deposit to his stepson Ed. According to the rules of abatement, when paying off creditors, claimants . . . out of a testator's estate, the residue is depleted first and then you work up to the specific devises. It appears as though the \$100,000 C.D. is a demonstrative legacy, meaning this goes to satisfy the debt before the specific devise of the vacation home. A demonstrative legacy is a gift of value with specific directions on where the money is to come from. Here Ed gets \$100,000 via the C.D. However, even if it is construed to be a specific devise, the \$100,000 C.D. would still be discharged first to satisfy the debt because, under Pa. law when dealing with Abatement such as this, any specific devise granted to a spouse or a child is abated last. In this case, Ed, who is to receive the \$100,000, is merely a stepson. The facts do not say that Tom ever adopted him, in which case Ed would be treated like a natural child. Given this fact, Bill's vacation home would be abated last since he is in fact Tom's biological son. Either way, whether the C.D. is viewed as a demonstrative legacy or a specific devise, it will be abated before the home.

3. Darlene was adopted by Tom and as such should be treated as a natural child. Tom's will was prepared prior to the time that he adopted Darlene, making her a pretermitted child. If a child born after a will is drafted is not mentioned in the will, and there is no indication that she was intentionally omitted from the will after she is born, or, in this case, adopted, she is entitled to take her intestate share of the estate (except to the extent that a spouse takes). In this case, Tom and Wilma have a valid and enforceable prenuptial agreement in which Wilma waived any and all rights to Tom's estate. Prenuptial agreements will be enforced as long as there was full and fair disclosure when they are entered into, and there are no other contract defenses to

them. A spouse may waive her right to an elective share of the estate (approximately 1/3 of the estate) by agreement. One issue is whether or not, by executing the prenuptial agreement, Tom intended to omit Darlene from taking from his estate. Since the prenuptial agreement predated the marriage, and it appears from the facts that he adopted Darlene once he and Wilma were married, it seems reasonable that a court would assume that Tom did not intend to leave Darlene out of his estate and that she should be entitled to her share of the intestate estate. Her share of the intestate estate, since Wilma has waived her right to any share of the estate, would be fifty percent. She and Tom's other child, Bill, would each get half of the estate.

4. An attorney is able to breach the duty of confidentiality where it can prevent a future crime or fraud. Here, Able was trying to do this when he reported the activities to the authorities.

Able had discovered that Tom was unlawfully diverting assets from other clients. The issue is whether this is a "future crime or fraud." Under the Pennsylvania Rules of Professional Conduct an attorney may breach his duty of confidentiality when doing so may prevent a future crime or fraud.

Tom was not Able's client and as such he has no duty to him. But he does have a duty to his client Wilma. Wilma specifically asked Able not to report Tom. As such, Able was under a duty to Wilma not to report Tom. Had the crime been committed by Wilma, Able would be able to report it.

Able breached his duty to Wilma by reporting Tom when she asked him specifically not to.

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

1. Conclusion: for Part (a) is that Earthworm can require immediate cash payment from Alco but in (b) cannot charge Alco increased inventory prices.

Rule: Under UCC Article II, which governs contracts for the sale of goods, insolvency allows a supplier to demand cash payments for the delivery of goods.

Analysis: Since Earthworm ("E") is selling Alco ("A") inventory, the contract is governed by Article II of the UCC. On those facts, E learns that A is insolvent because it cannot pay its obligations to other creditors when due. E can demand immediate cash payments under Article II in such an event.

Rule: Insolvency would not allow E to modify the existing contract with A under Article II.

Analysis: Though E may now ask for immediate cash payments because A is insolvent, E cannot modify the contract as to price under Article II. E must still keep the terms

of the contract as agreed upon by the parties. E may argue that increased risk makes the modification necessary but this is not sufficient under Article II.

Conclusion: E may demand immediate cash payments but may not change the prices of goods sold under the contract.

2. Pat has a right against Alco for the purchase price paid by Pat for the mover. In turn, Alco may have a right to collect from Hank for the purchase price.

A seller gives an implied warranty of good and transferable title when he sells goods. This warranty ensures the buyer that the seller has title of the goods and may sell them. This warranty may be waived but only when it is written and clearly conspicuous on an agreement. Otherwise the warranty is not waived.

The issue here is whether the language in the sales agreement between Alco and Pat waives the implied warranty of good and transferable title. The language states that "there are no warranties express or implied" and the mover is "sold as is." This language is not enough to inform the buyer that the implied warranty of good and transferable title is waived. Courts have held that "as is" language is not enough to waive this type of warranty. The language is not clear and does not conspicuously inform the buyer of the lack of this warranty. The warranty therefore will be enforceable and Alco will have to give Pat the purchase price.

3. Conclusion: Bank is entitled to the landscaping equipment over trustee in bankruptcy.

Issue: Who has priority - Bank or Trustee.

Rule: (1) The given Pennsylvania statute allows for the law of the jurisdiction where debtor is located to prevail. The location of the debtor is its principal place of business, or place of incorporation. (2) A perfected security interest has priority over unperfected security interests and bankruptcy claims. A security interest is perfected when the secured party has an interest in repossessing the goods, and files a financing statement in the proper offices to give notice to any other creditors.

Analysis: Alco's principal place of business is Pittsburgh, so Pennsylvania law will apply. This is so because the equipment which is the subject of Bank's security interest is mobile. Under the given statute, mobile equipment is governed by debtor's location, i.e., Pittsburgh. Bank's security interest is perfected because in giving the equipment on credit to Alco, it created a right of repossession in the movable equipment, i.e., it is attached. In addition to attachment, the Bank filed the financing statement in the proper offices, i.e., Secretary of the Commonwealth, and the prothonotary of Allegheny County. This act, combined with attachment equals a perfected security interest in movable equipment. The bank will take before the trustee in bankruptcy because it gave notice by perfecting and therefore has priority over other creditors.

Conclusion: Bank will get paid before trustee in bankruptcy.

4. Sam should assert a claim of fraud on Cathy and Adam because they both knew there was insufficient funds in the bank account. Fraud is a material misrepresentation of facts or a fact, which induces another to rely on it, and because of relying on it causes damages.

Here, Cathy and Adam should be sued for fraud. They both knew that there were insufficient funds to pay the check but issued it anyway. Adam will be held liable for the fraud but not Cathy. Adam states "he won't deliver without being paid," so he knew that Sam would rely on the check, and that if it was insufficient, that he would be liable. Cathy will not be liable, even though she signed the check. She has a defense that she thought Adam would put funds into the account. Additionally, she was acting at the direction of Adam, her supervisor, to write the check.

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

1. Conclusion: Dale's strongest argument to set aside the prenuptial agreement would be that she signed the agreement under duress. She will not prevail.

Issue: Will a prenuptial agreement ("P.A.") be set aside for duress?

Rule: P.A.'s are contracts and a court will interpret them using contract law.

Rule and Analysis: In Pennsylvania, P.A.'s are governed by contract law and courts will not modify them if there has been full and fair disclosure (except in the case of child support). In this case, there has been full and fair disclosure and Dale had several weeks to review the P.A. In addition, Chip's lawyer suggested that Dale retain counsel and have it signed.

Dale will argue that the P.A. was signed under duress because Chip "screamed" at her to sign it and that she was crying and only thinking of the wedding and the problems of calling everything off. In addition, Dale will argue that Chip threatened not to go through with the wedding unless Dale signed.

Rule: Pennsylvania recognizes duress as a defense to the validity of a contract.

Analysis: Though Pennsylvania recognizes duress as a defense to the validity of a contract, Dale will not be able to void the P.A. with a duress argument. Dale had several weeks to sign and could (and probably should) have called off the marriage. Pursuant to Pennsylvania law, the P.A. is valid and Dale will not prevail. (Conclusion)

2. Child support is determined according to statutory guidelines that primarily relate to the parties' financial assets. Both parents have a duty to support their children until they are emancipated. In Pennsylvania, children are no longer entitled to support after they reach the age of 18 or finish high school (whichever is later). In this case, Morris is 19 years old and under

normal circumstances, Dale would not be able to get child support for him. However, the parents' duty to support their children will extend beyond the age of 18 or graduation from high school if they are disabled in some way. It seems likely that by showing Morris' disability, Dale would be able to get child support payments for him. Dale would be able to get child support payments for Kitty as well since Kitty is under 18.

Another issue that might be raised is the children's status and whether Chip is their father, and as such, responsible for their support. Both of the children are nonmarital children born before Chip and Dale married, and nonmarital children are presumed to be the children of the mother but paternity must be proved. Paternity may be proved in several ways, one of which is for the parents to marry as they did in this case. Another is for the father to hold the children out as his and welcome them into his home or support them. Chip also did this. It is clear from the facts that Chip is their father and liable for child support.

3. Pennsylvania courts favor the "best interests" of the children in such cases. In this case, the facts would seem to give Dale continued custody of the children. Chip moved out nearly seven months ago and the kids have remained with Dale. Furthermore, Dale has been the primary caregiver of the kids. Given Chip's long work schedule, it is difficult to see that Chip would be able and available as a parent with custody. Another factor is that neither Morris nor Kitty wishes to leave Dale. Morris' situation is special. He is over 18 and he would probably not be told by a court where he should live. He favors Dale and would probably stay with her. Kitty, further, wants to remain with him to help with his rehabilitation. Therefore, a court order sending Kitty to Chip would probably split them up. The courts would like to maintain situations and look to the best interests of the child. I think both policies favor them staying with Dale.

4. Dale should elect against Chip's will, thereby increasing the amount she receives under Chip's will. Pursuant to Pennsylvania's Estates and Fiduciary Code, a spouse has the right to elect against the other spouse's will. Dale still retains spousal rights because Dale and Chip were not divorced. The facts show that they had only separated. Divorce cuts off the surviving spouse's rights under the decedent's will, unless a contrary intent appears in the decedent's will. Therefore, Dale should elect against Chip's will.

If Dale elects against Chip's will, Dale will be entitled to a 1/3 share of Chip's augmented estate. Dale's \$1,000 bequest will be subtracted from the share if she retains it. By electing against Chip's will, Dale will receive 1/3 of  $(\$450,000 + \$60,000 + \$60,000 = \$570,000)$  or \$190,000. This represents 1/3 of Chip's augmented estate which includes (1) the office building, (2) the bank account, and (3) Chip's 1/3 undivided interest in the vacation home. The insurance policy goes to Morris.

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

1. The most serious crime for which Howard should be charged with regard to Brian's death is first degree premeditated murder. First degree premeditated murder is the

intentional killing of another person with premeditation and deliberation, without provocation or justification. This is a specific intent crime.

Howard should be charged with first degree murder because he left the deli, loaded the shotgun in the parking lot, and came back into the deli and deliberately shot Brian in the head. These actions constitute premeditation and deliberation about the killing. Three minutes is enough time to deliberate about the killing. Howard was not provoked because Brian said "stop shoving in line and back off." These are not adequate words of provocation. Nor was Howard justified because there was no deadly force threatened against Howard by Brian.

2. The defense would raise intoxication to state that Howard could not have formulated the intent to kill, thereby negating first degree murder. This defense will not succeed. The issue is whether intoxication will negate the specific intent crime of first degree murder.

Intoxication is a defense to a specific intent crime in that the accused could not formulate the necessary mens rea. Here, voluntary intoxication will be asserted because witnesses say he was too drunk to walk or talk after the party. However, other witnesses say that Howard drove 25 miles to the deli in a standard transmission car. This takes a lot of thought process and coordination to drive on a busy freeway. He was not in an accident and for someone who is "too drunk to walk or talk," Howard drove and acted like a person under no intoxication, better yet, he could "hold his liquor."

In addition, Howard was seen loading the gun and no bullets were witnessed dropping. Howard was also not staggering. All those events would lead one to reasonably conclude that although it is possible that Howard was intoxicated when he left the party, his intoxication did not play a significant enough role in his behavior to negate the intent to commit first degree murder.

3. I would tell the officer to also charge robbery.

Robbery is the taking of personal property belonging to another from that person with the intent to permanently deprive them of that property through the use of force or threat of force. The facts show that Howard was looking for new clothing. He had the intent to deprive when he stopped Mark and Lauren. Through a display of force, the fictitious hand gun in the pants, Howard took Mark's top coat. This qualifies as robbery even though Howard had no gun. Mark and Lauren reasonably believed he did and that is enough to constitute threat of force and thus robbery.

4. To impeach a witness, the prosecutor can show evidence of prior convictions involving dishonesty or lying, bad character for truth and veracity, specific instances of deceit or lying, and evidence of bias, interest or motive, and prior inconsistent statements.

In this case, the prosecutor should introduce the evidence of Frank's convictions of filing false police reports five years ago and motor vehicle insurance fraud three years ago. Both convictions are less than 10 years old and are for acts of deceit or dishonesty. The prosecutor should also introduce evidence of Frank's long-time friendship with Howard to show his bias or motive for testifying for Howard. The convictions may be introduced without laying a foundation. The friendship may be shown by asking in cross examination or by introducing extrinsic evidence (such as witnesses) regarding the friendship. The prosecutor could argue based on this evidence that Frank has a history of falseness and dishonesty and that his long-term friendship with Howard makes him a biased witness with a motive to lie to help Howard. The prosecution could also introduce witnesses who saw Howard drive his standard transmission car and load the shotgun in the dark to testify as to whether or not he appeared intoxicated and as evidence that he was not intoxicated. In addition, the prosecution should call the witnesses at the Deli to give their opinions as to whether or not he appeared intoxicated. Lay witness opinion testimony is admissible if it is rationally based on their perception and helpful to understanding their testimony or making a determination. Lay witnesses may opine as to whether a defendant appeared intoxicated.

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

1. The issue is whether GHI may remove the case to federal court. A defendant may remove any case originally filed in state court to the federal district court embracing the state so long as the district court has subject matter jurisdiction over the claim. A district court has subject matter jurisdiction over a claim that involves a federal question.

Here, Victor's claim that his termination was in violation of the due process clause of the 14<sup>th</sup> Amendment is a federal question and as such it can be heard by the federal district court. The breach of contract claim, however, is not a federal question but may still be able to be removed to federal court based on supplemental jurisdiction.

The pendant form of supplemental jurisdiction arises when a plaintiff asserts two claims, one that is a federal question claim and one that is not. As long as the second claim arises from the same transaction or occurrence as the federal question claim, the federal court will have subject matter jurisdiction over that claim.

Here, the breach of contract claim Victor is asserting arises from the same transaction or occurrence, his termination from GHI. However, it could be argued that this cause of action may have arose out of the negotiation or actual time when the contract was formed and thus the federal district court would not have subject matter jurisdiction over the claim.

Thus, if the court finds that the breach of contract claim arose from the same transaction or occurrences as the federal question claim, the federal court will have subject matter jurisdiction over both claims and GHI can remove them to federal court.

2. The next issue is whether GHI is considered a state actor and thus fall under the provisions of the due process clause of the 14<sup>th</sup> Amendment.

The due process clause of the 14<sup>th</sup> Amendment states that no person shall be deprived of life, liberty, or property without due process of the law. In order for the 14<sup>th</sup> Amendment to apply, there must be a governmental entity involved. Even where the entity involved is a private corporation or organization, state action may be found where the organization performs a public function or where the state is significantly involved.

Here, GHI is a private corporation. However, there appears to be significant state involvement. The facts state that nearly 80% of GHI's revenues are derived from its contract with C County. Additionally, the corporate bylaws of GHI provide that at least one of its board of directors must be a C County Commissioner. Also, county officials carefully monitor GHI's performance.

Thus, GHI will likely be found to have significant state involvement and would not be able to use the defense that it is a private corporation. The next issue is whether Victor is being deprived of life, liberty or property. In order to be deprived of a property interest, Victor must show that he is entitled to it and not just a mere expectancy.

Here, the facts state that the agreement between Victor and GHI provided for a month-to-month tenancy with termination without cause upon 30 days notice. Victor was given 30 days notice of his termination. Thus, Victor did not have a claim to any entitlement under the agreement. Thus, GHI may assert that Victor did not have a valid property interest in defense of the claim brought by Victor under the due process clause.

### **Question No. 6: Model Sample Answer**

1.(a). Mike may successfully assert the defense of infancy. What defense should Mike assert? A contract entered into by a minor is voidable and a minor may disaffirm the contract except where the contract was for necessities. Mike may successfully disaffirm the contract because he was a minor when he made the contract. Mike entered into the lease when he was 17 years old, thus making him a minor. Further, the apartment is not a necessity because Mike was not forced to move from his parent's home. In fact, he did so without their consent. Thus, Mike may successfully disaffirm the contract.

(b). Mike is liable under the lease agreement because he affirmed the contract. Is Mike liable under the contract? A contract made by a minor is voidable by that minor; however, if he affirms the contract after he reaches majority, he is liable under its terms. Mike is liable for breach of contract because he affirmed the contract after he reached majority. Mike made a promise to Len to pay past due rent after his 18<sup>th</sup> birthday; thus, he is considered an adult and the obligations under the lease may be enforced against him.

2. Liz should object to Mike's testimony regarding the oral discussion on the grounds that it is prohibited by the parole evidence rule. Under the parole evidence rule, evidence of prior or contemporaneous oral agreements between contracting parties cannot vary the terms of a contract that is a complete and final statement of the parties' understanding. Evidence of prior or contemporaneous agreements is only admissible to show fraud or misrepresentation or mistake, or to explain the terms of the contract.

Here, Mike and Liz orally agreed, prior to entering into the written lease, that Liz would paint the apartment and install new carpet. However, when Liz prepared the lease, she made Mike expressly responsible for the costs of painting and having carpeting installed. Now Mike wants to offer evidence of their oral agreement that Liz was to make and pay for these improvements. In essence, Mike wants to offer evidence of an oral agreement that appears final and complete. Mike could raise mistake to try to get the oral evidence admitted, but he signed the agreement with no objection and likely cannot raise mistake. His oral testimony is just the type of oral evidence the parole evidence rule seeks to exclude.

The Court will likely sustain Liz's objection because the parole evidence rule prevents Mike from offering evidence of a prior agreement to vary the terms of the lease.

3. Mike should raise the common law legal theories of breach of implied warranty of habitability and constructive eviction.

Implied Warranty of Habitability: At common law, there is a warranty of habitability implied in residential leases. The landlord warrants that the leased premises is suitable for basic human habitation. Common breaches of this warranty include failure to provide heat in the winter and failure to provide running water.

Under these facts, Mike was without heat in the premises he leased from Liz during temperatures that often were below freezing. Also, the pipes froze twice in January which means Mike was without water during those times. Mike was forced to stay at a hotel several times in December and January to escape freezing temperatures. Even when Mike gave Liz notice that the furnace was broken, on five separate occasions, Liz failed to take action. Mike likely has a successful claim against Liz for breach of the implied warranty of habitability and has four choices of remedy: he can move out and treat the lease as canceled; he can remain on the premises and sue for damages; he can reduce the rent to the fair market value of the property in its uninhabitable condition; or he can repair the problems and reduce the rent for reimbursement.

Here, Mike did not move out and vacate until February 15. He will likely be successful in his breach of implied warranty of habitability against Liz, but likely owes her a reduced amount of rent for the period he remained in possession in accordance with the fair market value in its uninhabitable condition.

Constructive Eviction: A landlord may constructively evict a tenant if he acts in such a way as to deprive the tenant of his quiet use and enjoyment of the property. To claim

constructive eviction, a tenant must allege substantially impaired condition of the premises, must give the landlord notice and time to repair, and must then move out if the situation is not remedied. Mike will likely be successful on his constructive eviction claim as well because his use of the premises was substantially impaired; he gave notice to Liz but she never repaired; and he eventually moved out to escape the intolerable conditions.

On both the breach of warranty and constructive eviction claims, Mike will be successful and will only have to pay reduced rent for the time he stayed in possession. The remaining time on his lease will be treated as a cancellation of the lease for which he is not liable.

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

1. Patrick should bring a claim for defamation against Delia. To prove defamation, Patrick must demonstrate that Delia used defamatory language, i.e., language injurious to Patrick's reputation, of or about Patrick, published it to a third party, causation, damages and fault (fault is required for all defamation cases in Pennsylvania but not cases of defamation not involving a matter of public interest at common law). By stating that Patrick was a convicted felon, Delia clearly injured Patrick's reputation using defamatory language about Patrick. She published the defamatory language to third parties by sending it to Bigbucks and other companies. In libel cases (written defamation), damages are presumed and this is a libel case. However, even if this were slander, it would qualify as slander per se because it says he's a convicted felon (slander per se in both Pennsylvania and at the common law). The statement also is the direct cause of the damages. Patrick would succeed on this claim.

He could also claim intentional infliction of emotional distress by showing that Delia engaged in extreme and outrageous behavior, outside the bounds of common decency, by sending this letter to all of his potential employers claiming he was a felon and that he suffered severe emotional distress as a result. As he was hospitalized for emotional distress and high blood pressure after finding out about her memo, he would have a good chance of success on claiming that her statement caused him severe emotional distress and that she should be liable. This tort also requires intent or recklessness, and since she knew that Patrick had recently had emotional problems, she would probably be found liable to him for intentional infliction of emotional distress.

2. Negligence. They should assert that Lots negligently constructed the sewage system on their lots prior to sale and therefore the lots were deficient at the time of the sale. Negligence consists of duty, breach of duty, proximate cause, direct cause.

Here, the duty is two-fold. Firstly, Lots was obligated to sell the lots to Homeowner with a working sewage system by state statute. Secondly, Lots was obligated to build the septic system properly for Homeowner as an incident to the lot sales contract.

Breach could happen in two ways. Lots could (and did) deliver the sewage system in a non-functional state, which apparently they did. If this were true then Lots breached its obligations to Homeowner incident to the lot sales contract.

The second possibility is that Lots would be cited by the government for failing to install the sewage system and that they either lose at trial or plead guilty. This effective citation of a breach of the criminal law would put Lots in breach of a statutory duty of a statute designed to protect the public in this situation. Such a breach of statutory duty could lead to Lots being found negligent per se.

Negligence per se would lead to Lots being held liable for the damage to the sewers without Homeowner's ever having to show that Lots owed them any duty. Negligence per se replaces the duty element of negligence which is important in this case.

Direct cause that the failure of the sewer system led to the water build up in the basement.

Proximate cause that Homeowner was a foreseeable defendant who could have been injured by the breach of duty.

Here, causation both proximate and direct is fairly clear since the purchaser of a lot is the one to be injured by the failed sewer system.

Homeowners have an excellent chance of recovery on a negligence per se action, and a good chance of recovery on a straight negligence action, the only possibility of problem being establishing duty. However, if seller listed the lot as "improved" then I think duty should be shown.

3. Homeowner should hold Bigbucks liable on the theory of piercing the corporate veil and will probably succeed. Shareholders are generally not responsible for the debts of the corporation. However, a court will "pierce the corporate veil" and hold such shareholder liable if the privileges of being a corporate entity are abused, formalities are not followed and to avoid injustice and fraud. Courts have pierced the corporate veil when the shareholder uses the corporation as an alter ego, for its own purposes, and for undercapitalization to cover possible liabilities.

Here, Bigbucks had no bylaws or regular meetings of the Board for Lots, therefore, he did not recognize the formalities of the company. Bigbucks hired temporary employees as he needed and never capitalized Lots in the event of covering liabilities. Therefore, Homeowner will be successful in claiming Bigbucks is liable and the court will probably pierce the corporate veil and hold Bigbucks liable.

4. Homeowner's counsel should serve notice on Lot's counsel that she intends to obtain a default judgment, wait 10 days for their response, and then file for a default judgment.

If Lots does not respond within the 10 days, the clerk of courts will enter default judgment and Homeowner's counsel could then ask for a hearing on damages. Ultimately, Homeowner's counsel could then put liens on assets of Lots, and foreclose.

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

1. The owners of Phase I will advance the "common development" scheme theory to attempt to prevent Wendy from using Blackacre for commercial use. They will likely be successful.

The only situation in which an equitable servitude does not have to be in writing is where there is a developer who develops a common plan or scheme with the intent that all of the lots therein will be subject to the same equitable servitude. This results in an implied equitable servitude that allows any members of the subdivision to enforce the servitude. In order for the burden of the equitable servitude to run with the land and be enforceable, the subsequent grantee must have notice of the servitude, it must touch and concern the land, and the original developer must have intended for the whole development to be subject to it.

In this case, the equitable servitude clearly touches and concerns the land, as it has to do with the type of use the land is put to. Wendy certainly has notice that the rest of the subdivision only contains residential properties, so she has inquiry notice. The key question here then becomes what was the intent of the original developer. While this is not clear from the facts, we have a few clues. First, the two phases are adjoining. Second, all of the other lots in Phase II have residences on them. Third, several of the Phase I owners have threatened action (which may mean they know the developers intent was for purely residential use). While none of this is dispositive, together it makes it more likely that there was a common plan or scheme. Evidence to this effect, however, will likely have to be introduced.

2. Able cannot enter into the business relationship with his client, Wendy, under the Pa. Rules of Professional Conduct unless he takes certain steps. Under the Pa. Rules, an attorney is not permitted to take an interest in the subject matter of the litigation so as to have a stake in the outcome. Likewise, an attorney should not enter into a business deal with a client unless he is certain that it will not compromise that relationship, he advises the client to seek independent counsel, the transaction is fair to the client, and client consents after full disclosure in writing. Attorneys are not permitted to advance a loan to a client in any form, except for costs of litigation.

Here, Able arguably obtains an interest in the subject matter of the litigation, i.e. whether a wine facility can be opened on Blackacre, because he obtains a 5% interest in the business. Any problems with this arrangement should be cured so long as Able is certain it will not compromise the relationship with Wendy, Wendy is advised to seek independent legal counsel, the transaction is fair to Wendy and she consents in writing after full disclosure.

Therefore, if Able takes appropriate steps before entering the arrangement, the arrangement should pass muster under the Pa. Rules.

3.(a). Under the UCC, Glenn is within his rights to proceed. Under 2-615, if crops are destroyed through no fault of the farmer (i.e., weather), by wanton conduct the farmer may ration out the crops in proportion to what the Buyer's purchase. Wendy and the other buyers would be entitled to their pro rata share of crops ( $\frac{1}{2}$  their orders). 2-615 permits the farmer to take such action if he gives written notice to the purchaser of the crops under UCC.

3.(b). Wendy's attorney should advise her that she can either (1) reject the whole (250) or (2) accept the 250 bushels with no further claim against Glenn under 2-615. Once she has received notice from Glenn that the crops were destroyed, Wendy has no further recourse under 2-615.