

**JULY 2001  
PENNSYLVANIA BAR EXAMINATION**

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**Essay Questions and Examiners Analyses  
and  
Multistate Performance Test**

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### Question No. 1: Facts and Interrogatories

Frank and Wilma had been happily married for many years, living in their principal residence which was located in Pennsylvania. The week before he married Wilma, Frank had purchased with his own money a \$200,000 Florida vacation home titled in his name. Unfortunately, in early 1999, after a brief separation, they divorced amicably under a full marital/property settlement agreement (“Divorce Agreement”) which was valid and enforceable. They had no prenuptial agreement and obtained their divorce in Pennsylvania.

The Divorce Agreement provided, among other things, that Wilma was entitled to choose between \$500,000 in cash from Frank or clear title and possession to his Florida vacation home (which was then worth approximately \$500,000). Wilma had two (2) years after the date of the divorce decree to choose the cash or the home. Wilma made her decision 14 months after the divorce decree, choosing the vacation home and Frank promptly and properly conveyed it to her. During the divorce negotiations, Frank’s attorney, Abel, had claimed that the current value of the vacation home should remain Frank’s and not be considered in negotiating the terms of the property settlement.

Frank, during his separation from Wilma, became involved with a live-in companion, Pat, in the Pennsylvania home which under the Divorce Agreement was transferred solely to Frank. Frank wanted Pat to live and travel with him. Pat agreed to this arrangement, provided that Frank would leave Pat \$25,000 in his will for each year of the arrangement or that, if the arrangement ended before Frank’s death, Frank would at that time make a gift to Pat of the \$25,000 per year. Frank orally agreed to this in front of his maid, Millie, but Frank never drew a will which provided the bequest to Pat, nor was there any document in writing evidencing this arrangement (the Live-in Agreement).

After two (2) complete years of a successful relationship and living arrangement with Pat, Frank became gravely ill and died. Six weeks before his death, Frank summoned Abel to his house and had Abel draft a will for Frank. The will bequeathed nothing to Pat and left Frank’s entire estate to charity. The will did not mention the Live-in Agreement in any way.

Frank was too weak to sign the will, even by mark. He therefore asked Abel to sign Frank’s name which Abel did at the end of the will. Frank then declared the instrument as his will. Millie and a nurse were present and heard Frank’s request and declaration. They each then signed the will as Frank’s subscribing witnesses.

At his death, Frank never had remarried after Wilma and he had no other surviving heirs or relatives. Pat has claimed \$50,000 from Frank’s estate for having completed two full years of living with Frank under the Live-in Agreement.

1. Assume that you were Wilma’s attorney in her property settlement negotiations with Frank and Abel at the time of her divorce. What would your position have been with respect to Abel’s claim that the current value of Frank’s vacation home should remain his and not be considered in negotiating the terms of the property settlement under the Pennsylvania Divorce Code?
2. Was the transfer of the Florida vacation home by Frank to Wilma taxable to Frank for Federal income tax purposes?
3. At a hearing granted to Pat on the \$50,000 claim against Frank’s estate, Pat’s attorney specifically argued that the Live-in Agreement was a contract enforceable against the estate. Under Pennsylvania’s Probate, Estates and Fiduciaries Code, can Pat establish that a contract exists in support of her claim against the estate?

4. Assume that Frank was competent and not subject to undue influence when he had Abel prepare his will. Is the execution of Frank's will valid?

### Question No. 1: Examiner's Analysis

1. **Only a portion of the value of the vacation home should be considered to be a non-marital asset of Frank's, since under Section 3501(a) of Pennsylvania's Divorce Code (23 Pa. C.S.A. 3501(a)), the increase in value of the vacation home between Frank and Wilma's marriage and their separation would be a marital asset subject to equitable distribution.**

In the above-referenced section of Pennsylvania's Divorce Code (23 Pa. C.S.A. 3501(a)) "marital property" is defined as including the increase in value during the marriage of otherwise non-marital property acquired by a party before the marriage. Being "marital property" means it is subject to "equitable division" between the parties under Section 3502 of the Divorce Code (23 Pa. C.S.A. 3502(a)). Thus, as Wilma's attorney, one would argue that the vacation home increased in value by \$300,000 during the marriage and that this \$300,000 (be it converted to cash or retained in real estate) be equitably divided between the parties.

Frank and Abel were only correct in claiming the value of the Florida home to the extent of its pre-marital value. The facts show that Frank purchased it for \$200,000 of his money immediately before his marriage to Wilma. Under Section 3501(a)(1) of the Divorce Code (23 Pa. C.S.A. 3501(a)(1)), this \$200,000 in value would belong solely to Frank if the applicable court were determining the equitable distribution. Nothing would prevent Frank from using this non-marital property in payment of Wilma's share of the marital property as Frank, in fact, offered Wilma under the facts.

Wilma is entitled to have the \$300,000 of appreciation of the Florida home included in the marital property for equitable distribution. The question does not ask how the marital property once determined should be actually divided and the fact that Frank offered Wilma the vacation home does not mean that she received 100% of the marital property but rather that she received this house as part of her settlement.

Furthermore, the facts state that there was no pre-nuptial agreement, which may have altered the outcome one way or the other under Section 3501(a)(2) of the Divorce Code. Thus there was no foundation under the Divorce Code, nor, under any prenuptial agreement, for Abel's claim that all of the \$500,000 current value of the vacation home should remain Frank's and not be part of the property settlement.

Note that the facts disclose that the dates of the vacation home purchase and marriage were about a week apart so that there probably was no change in value between these dates to consider. Likewise, the separation under the facts was "brief" so that there probably was no change in value between the separation and Divorce Agreement to consider. If these periods of time were greater, Frank and Abel might have claimed and been able to prove increases in value both before the marriage and after the separation which under Section 3501(a) of the Divorce Code (20 Pa.C.S.A. §3501(a)) would have meant more non-marital property allocated to Frank.

2. **A transfer by a spouse to a former spouse within six years of a divorce between them is not taxable for Federal income tax purposes if it is pursuant to a divorce agreement. Internal Revenue Code of 1986 (IRC), 26 U.S.C.A. §1041(a)(2), (c)(2).**

Normally a gain derived from dealings in property would be subject to Federal income tax. IRC §61(a)(3). Thus when Frank transfers a property with a \$200,000 basis to Wilma, Section 61(a)(3) would treat any income to Frank from the transaction as taxable. Since the property is worth \$500,000, and Frank is receiving a marital settlement as a result of the transfer, the question becomes whether Frank is realizing a \$300,000 gain (the excess of the \$500,000 value over his \$200,000 cost basis) which is taxable for Federal income tax purposes.

Under Section 61, all defined income and gains are taxable unless they fall within an exception. There is a part of the Internal Revenue Code setting forth numerous income exceptions (Subtitle A, Chapter 1, Subchapter B, Part III). However, none of these apply.

Other exclusions from income are in the part of the Internal Revenue Code setting forth common, non-taxable gains (Subtitle A, Chapter 1, Subchapter O, Part III). Section 1041 of this Part III is specifically on point. It provides that no gain should be recognized on a transfer of property to a former spouse if the transfer is incident to a divorce. A transfer is incident to a divorce if it occurs within one year of the divorce, or within a longer period if the transfer is "... related to the cessation of the marriage." IRC §1041(c).

In Frank's case, the transfer was according to the facts about 14 months (i.e. more than one year) after the divorce, and thus we must examine whether it falls within the "related to the cessation" exception. This law is not explained further in the Internal Revenue Code, but rather in the regulations thereunder (specifically IRC Reg. 1.1041-1T(b)). This regulation provides that a transfer within six (6) years after the divorce is non-taxable if pursuant to a "... divorce or separation instrument. . . ." as defined in IRC §71(b)(2) (i.e., a divorce decree or a divorce/separation agreement).

Since Frank and Wilma under the facts have such an agreement (i.e., the Divorce Agreement), and since the transfer of the vacation home occurred within six (6) years of the divorce decree, any gain on the transfer is excluded.

**3. An agreement to make a testamentary provision can be enforced as a contractual claim against a decedent's estate only if the agreement is in writing, expressly referenced in the decedent's will, or embodied in the will. 20 Pa. C.S.A. §2701(a).**

Alleged contracts to make a will, or to make a provision in the will, have been a common source of litigation in estate administration. In Pennsylvania, as well as under the Uniform Probate Code, provisions have been made to codify this highly litigated topic. Specifically, 20 Pa. C.S.A. §2701(a) provides the following:

- (a) Establishment of Contract. A contract to die intestate or to make or not to revoke a will or testamentary provision, or an obligation dischargeable only at or after death, can be established in support of a claim against the estate of a decedent only by:
  - (i) provisions of a will of the decedent stating material provisions of the contract;
  - (ii) an express reference in the will of the decedent to a contract and extrinsic evidence providing the terms of the contract; or,
  - (iii) a writing signed by the decedent evidencing the contract.

In Frank's case, it is quite clear that he and Pat made at least an oral agreement regarding a testamentary provision in exchange for Pat's agreeing to live and travel with Frank for what turned out to be the remainder of Frank's life. Pat even had a witness, Millie, but no contract or will provision was ever drawn. To make matters worse, it appeared that Pat had successfully fulfilled Frank's expectations for two (2) years and thus, under the Live-in Agreement, would have been entitled to a \$50,000 bequest. If Frank had failed to make a will or the bequest, as is the case before us, Pat would still have had an enforceable claim in contract against Frank's estate if the contract could be proved.

However, the above-cited statute would deny Pat the right to establish a contractual claim for a bequest. It simply provides that a claim in contract by Pat against the estate for a bequest can only be established by a provision in Frank's will (which provision does not exist), by a reference to the Live-in Agreement in Frank's will (which reference does not exist) or some sort of writing signed by Frank indicating that the Live-in Agreement exists (which writing does not exist). Thus, Pat's claim fails under all three of the alternate and exclusive statutory means by which a contractual claim for a bequest can be successfully asserted. As such, Pat's

contractual claim fails and there is no way to enforce it. Whether or not Pat could recover in equity or promissory estoppel is not part of this question (which was whether a contract could be established under Pennsylvania's Probate Code).

**4. The execution of a will which is signed for the testator by a person other than the testator, but on behalf of and at the express direction of the testator, is valid provided the testator declares the instrument as his will in front of two subscribing witnesses. 20 Pa. C.S.A. §2502(3).**

The question before us is whether the execution of Frank's will is valid.

Pennsylvania statutes address the form and execution of a will in 20 Pa. C.S.A. §2502. Wills must be in writing, which Frank's will was. §2502 provides that wills must be signed at the end thereof by the Testator, unless signed by mark (§2502(2)) or unless signed by another person (§2502(3)). Specifically, if signed by another, the statute provides:

Signature by Another. If the testator is unable to sign his name or make his mark for any reason, a will to which his name is subscribed in his presence and by his express direction shall be as valid as though he had signed his name thereto; Provided, That he declares the instrument to be his will in the presence of two witnesses who sign their names to it in his presence.

The facts indicate that these specific procedures were technically followed. First, Frank was unable to sign his will and asked that it be signed for him. The statute refers to his inability to sign as being for "any" reason. Applicable case law has interpreted this to mean that actual inability to sign is not even required. A Testator could choose to have another person sign for him. See Rosato's Estate, 322 Pa. 229, 85 A.197 (1936). Here, however, the facts indicate that Frank had good reason to have someone else sign his will, given his physical condition.

The facts state that Frank expressly asked Abel to sign for him. The facts state that this was done in front of two witnesses (Millie and a nurse). They were present and they subscribed their name to the will.

Finally, the facts show that Frank declared the instrument to be his will in their presence. All of this occurred prior to Millie's and the nurse's subscribing their name to Frank's will and in their presence.

Thus, every component of the statutory requirements regarding execution was met and embodied in the will, making the execution of Frank's will valid.

## Question No. 2: Facts and Interrogatories

In 1999, Don patented a new, safer air bag. Pursuant to an agreement with his financial backers, Don would form Don's Airbag Co. ("Daco") under the Pennsylvania Business Corporation Law (BCL), to which he would assign his patent. Prior to incorporation, American Car Co. ("Amcar") approached Don to purchase air bags. After negotiating the price and quantity, Don executed a contract with Amcar which stated that the contract was executed "on behalf of Daco, a corporation to be formed." Daco was incorporated shortly thereafter.

At the organizational meeting of Daco's board of directors following incorporation, Don, a minority shareholder and one of Daco's five directors, was elected president and Tom, treasurer. Don then presented the Amcar contract to the board. The board rejected it, believing the price to be too low.

1. Can Amcar enforce the contract against Daco?

Later in 1999, Daco renegotiated the contract with Amcar and then subcontracted with Sam to supply Daco with gas cylinders, a necessary component of air bags. In early 2001, Daco sent Sam a special \$1 million order for gas cylinders for an unusually large air bag order from Amcar. Sam then applied to Credit for financing and Credit agreed to lend Sam \$750,000 if Daco would execute a note for the special order which would be indorsed to Credit as security. Sam explained this to Don, and contrary to Daco's policy, Don signed the following note, had his signature attested by Tom, and delivered it to Sam who simultaneously executed the contract for the special order:

April 2, 2001

In consideration of the special \$1 million order today accepted by Sam and in payment thereof, Daco promises to pay to the order of Sam the sum of \$1 million on July 10, 2001.

Daco

By: Don, President

Attest: Tom, Treasurer

Sam signed a note and security agreement on Credit's forms and then indorsed the Daco note and delivered it to Credit as security for its \$750,000 loan.

With the Credit financing, Sam completed the special order and shipped the gas cylinders to Daco. Sam then filed in bankruptcy, hopelessly insolvent.

2. Both the Bankruptcy Trustee and Credit have demanded payment of \$1 million from Daco. Daco has responded by denying liability under the note because of its corporate policy. What is Daco's liability, if any, to the Trustee and Credit?

For the purposes of questions 3 and 4 below, assume the gas cylinders Sam sent to Daco were all defective and are worthless, and Daco has raised lack of consideration as a defense to payment.

3. What is Daco's liability, if any, to the Bankruptcy Trustee and Credit?
4. What liability, if any, does Don have to Daco?

## Question No. 2: Examiner's Analysis

### 1. Amcar has no recourse against Daco.

To bind his principal to a contract, the agent must have some kind of authority. When the principal does not yet exist, there is no way by which the agent has any authority. The contract Don signed with Amcar clearly states that Daco has not yet been formed, and Amcar is bound by its knowledge of this fact. Amcar was dealing with a promoter acting for a principal not yet in existence, which principal could not yet have authorized Don to act on its behalf. Since immediately upon being incorporated Daco rejected the contract with Amcar, and had not yet committed any act of adoption nor accepted any benefits, Daco is not bound. 18 Am Jur 2<sup>nd</sup>; Corporations, Sections 120-121. See also O'Rourke v. Geary, 207 Pa. 240, 56 A.541 (1903); RKO-Stanley Warner Theatres v. Graziano, 467 Pa. 220, 355 A.2d 830 (1976).

### 2. Daco owes \$1 million for the special order and should pay \$750,000 to Credit and \$250,000 to the Bankruptcy Trustee.

Although Don violated Daco's policy in executing the note to Sam, the note was executed by both the president and treasurer of Daco. Under BCL Section 1506 [15 Pa. C.S.A. Section 1506], this binds Daco to the terms of the note. Although it is a stretch to say that Section 1506 incorporates the agency rule of apparent authority, an argument can be made that Tom's attestation is an attestation by a high officer to Don's authority. Daco's liability to pay for the goods under the special order is \$1 million. This obligation is incorporated into the negotiable note dated April 2, 2001, in the amount of \$1 million and due on July 10, 2001.

The note was a promise to pay a sum certain (\$1 million) to the order of Sam, at a definite time (July 10, 2001) and does not contain any conditions upon payment, and thus is a negotiable instrument under U.C.C. Section 3-104 [13 Pa. C.S.A. Section 3104]. The reference to the underlying special order does not affect negotiability. U.C.C. Section 3-106 [13 Pa. C.S.A. Section 3106].

Credit is a holder under U.C.C. Section 1-201(20) [13 Pa. C.S.A. Section 1201] since it is in possession and, with Sam's endorsement, the note is payable to it. See also U.C.C. Section 3-204(c) [13 Pa. C.S.A. Section 3204(c)]. Since Credit held the Daco note as security for repayment of the \$750,000 it lent to Sam, under U.C.C. Section 9-203 [13 Pa. C.S.A. Section 9203], its security interest has attached, and under U.C.C. Sections 9-303 and 9-305 [13 Pa. C.S.A. Sections 9303 and 9305] Credit's security interest is perfected. The status of the bankruptcy trustee is that of a lien creditor, and therefore, under U.C.C. Section 9-301 [13 Pa. C.S.A. Section 9301], Credit has priority over the bankruptcy trustee because Credit perfected its security interest prior to Sam's bankruptcy filing.

U.C.C. Section 3-310 [13 Pa. C.S.A. Section 3310] provides that when a note is given for an obligation, the obligation itself is suspended pending either payment or dishonor of the note. If the note is paid, the obligation is then discharged. Since Daco received the goods and has raised no objection to them, Daco must pay the \$1 million due. U.C.C. Section 3-412 [13 Pa. C.S.A. Section 3412]. As noted above, when this note was indorsed by Sam and delivered to Credit as security for its \$750,000 credit advance to Sam, Credit's security interest became perfected giving Credit priority. Credit was entitled to the \$750,000 but no excess. The excess balance is due Sam's bankruptcy estate. U.C.C. Sections 9-502(2) [13 Pa. C.S.A. Section 9502(b)].

### 3. Daco must pay \$750,000 to Credit, a holder in due course in this amount, but has the defense of failure of consideration for the balance.

With the cylinders being defective, Daco has a defense to payment, i.e. the consideration has failed. Under U.C.C. Sections 2-601 and 2-602 [13 Pa. C.S.A. Sections 2601 and 2602] Daco can reject the cylinders and under U.C.C. Section 2-711 [13 Pa. C.S.A. Section 2711] Daco can then cancel the contract and refuse to pay the \$1 million purchase price. This defense is good against any holder, except a holder in due course.

As discussed in the second issue above, Credit is a holder of a negotiable instrument. Credit is also a holder in due course under U.C.C. Section 3-302 [13 Pa. C.S.A. Section 3302], since the note is authentic, and Credit:

- (i) took for value (lent Sam \$750,000);
- (ii) in good faith; and without notice:
- (iii) of it being overdue (it was not) or of any default or dishonor (there was none at that time); or
- (iv) that the note was unauthorized; or
- (v) that there was any claim or rights to it; or
- (vi) that there was a defense to it.

At the time Credit took the note, the only problem was that Don violated Daco's policy in issuing it, but Credit had no way of knowing this. Even Sam did not know of it. As shown in issue 2 above, BCL Section 1506 provides that Daco is bound by the note when executed by its president and treasurer.

U.C.C. Section 3-302(e) [13 Pa. C.S.A. Section 3302(e)] provides that when Credit, who is entitled to enforce the note, has only a security interest in it and Daco has a defense, Credit may enforce the note only in the amount of its loan, that is, \$750,000.

Under U.C.C. Section 3-305 [13 Pa. C.S.A. Section 3305], Credit being a holder in due course, is subject only to defenses of infancy, duress, lack of capacity, illegality, fraud that induced Daco to sign not knowing its terms, and discharge in insolvency. None of these apply.

Daco must pay Credit the \$750,000 but Daco's defense is good against Sam's bankruptcy estate which is not a holder in due course. The trustee asserts Sam's rights and Sam gave no value due to the cylinders being worthless. Therefore, Sam's bankruptcy trustee is subject to Daco's defense (or claim) regarding the defective cylinders.

**4. Because Don's violation of Daco's policy resulted in Daco's \$750,000 liability under the note, Don is liable to Daco in this amount.**

As shown in issue 3, above, Daco could not defend against Credit even though Daco had the legitimate defense of failure of consideration. If there had been no note, and thus no holder in due course, Daco would not have had to pay at all. Daco would have returned the worthless cylinders and there would not have been any account payable to Sam. Because Don violated Daco's policy, Daco has suffered a \$750,000 loss.

BCL Section 1712(c) [15 Pa. C.S.A. Section 1712(c)] provides that officers must perform their duties in good faith, in the best interests of the corporation, and with the care, skill and diligence an ordinary prudent person would exercise. With corporate policy not permitting the officers to execute notes binding Daco, to do so would be failure to use care and diligence. To give a negotiable instrument as payment in advance for cylinders not yet in production would not be exercising care and prudence. It would be taking not only an unnecessary risk, but a risk corporate policy has prohibited. The corporation, by its policy has already defined the care to be exercised in this situation. Don has failed to adhere to this standard by violating the policy. Therefore, Don failed to exercise the care, skill and diligence standards of BCL Section 1712(c) and is liable to Daco for the \$750,000 loss he has caused.

### Question No. 3: Facts and Interrogatories

Elizabeth and Brandon are married and reside in “X” County, Pennsylvania. One afternoon, they were driving on a two-lane roadway with a double yellow dividing line in “Y” County, Pennsylvania. Brandon was driving his car and Elizabeth was following behind him in her car.

Rachel, a resident of “Z” County, Pennsylvania, was approaching Brandon in the opposing lane of travel when she crossed the double yellow line, struck Brandon’s vehicle and forced him off the road and into a tree. Elizabeth stopped her vehicle and rushed towards her husband’s mangled vehicle. Upon observing her husband’s near completely severed leg she immediately went into shock.

Police and ambulance personnel arrived soon after the accident. One of the officers interviewed John, a witness who was standing nearby. Another officer, Officer Sniff, approached Rachel who was injured and still seated in her heavily damaged and immobile vehicle on the berm of the roadway. As Officer Sniff was assisting Rachel out of her vehicle, he observed that she had teary eyes and that there was a pack of cigarettes on the floor. He also smelled a burnt substance emanating from her car, which he thought was similar to the smell of marijuana, although he was not sure. Rachel was immediately taken to the local hospital for treatment of her injuries.

While Rachel was being treated at the hospital, Officer Sniff decided to try to substantiate his suspicion that Rachel was possibly in possession of and smoking marijuana before the accident. He opened the passenger door of Rachel’s car, reached inside and picked up a jacket on the passenger seat. Under the jacket, he observed a bag of a substance that he believed to be marijuana, which he took for testing.

The ambulance personnel rushed Brandon to the hospital. Brandon’s leg could not be saved by the surgeon. As a result, Brandon is now permanently disabled, unable to perform his job as a telephone lineman, and unable to help around the house or assist in raising the couple’s children. Further, the intimate relations between Brandon and his wife have been drastically reduced.

Elizabeth, as a result of observing her husband’s accident and resulting injuries, came under the care of a psychiatrist for the treatment of severe depression, anxiety and continuing nightmares. The psychiatrist has indicated that her treatment will continue into the indefinite future.

Elizabeth and Brandon approach Attorney Litigator to represent them in connection with the accident with Rachel.

1. What cause(s) of action, other than for property damage, could Attorney Litigator bring on behalf of Elizabeth against Rachel arising out of the accident and with what likelihood of success?

Attorney Litigator takes the case for Elizabeth and Brandon, timely files suit in “X” County, Pennsylvania and properly serves Rachel at her residence. Rachel’s insurance company retains you to represent Rachel fifteen days after being served with the Complaint and tells you it would prefer not having the matter litigated in “X” County.

2. What action can you take to attempt to ensure that the action is not heard in “X” County and with what result?

After suit is filed, Attorney Litigator deposes John who states that Rachel crossed the double yellow line immediately prior to the accident. Rachel's counsel also asks him exhaustive questions about this statement. However, when John is subpoenaed by Attorney Litigator to testify at trial, John tells the Judge that he will not testify and the Judge holds him in contempt of Court and incarcerates him. Attorney Litigator decides that he will attempt to prove Rachel's negligence by introducing John's deposition testimony that Rachel crossed the double yellow line.

3. What objection should Attorney Litigator anticipate from Rachel's counsel and how should he respond to that objection?

Test results of the substance recovered from under the jacket confirm that the substance was marijuana. Rachel is charged in state court with possession of marijuana, a controlled substance.

4. As Rachel's defense lawyer, what arguments should you raise in your omnibus pretrial motion to attempt to suppress the marijuana taken from Rachel's vehicle and with what likelihood of success?

### **Question No. 3: Examiner's Analysis**

- 1. Attorney Litigator could initiate causes of action for negligent infliction of emotional distress and loss of consortium against Rachel and likely be successful on both claims.**

Elizabeth will have a cause of action against Rachel for negligent infliction of emotional distress. The basis of recovery for a claim of negligent infliction of emotional distress under the bystander rule is the traumatic impact of viewing the negligent injury of a close relative. Love v. Cramer, 414 Pa. Super. 231, 606 A.2d 1175 (1992). In Turner v. Medical Center, Beaver, PA, Inc., 454 Pa. Super. 645, 686 A.2d 830 (1996), the Court, in relying on Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979), made clear that such a cause of action for negligent infliction of emotional distress must be addressed in terms of foreseeability. To determine whether the plaintiff's injury was reasonably foreseeable, the following three-part test should be applied:

(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship. Id. at 685.

The requirement of contemporary observation of the accident has even been satisfied where one's wife was aware of the setting of the accident and hears the sound of the impact and arrives at the scene seconds later. Neff v. Lasso, 382 Pa. Super. 487, 555 A.2d 1304 (1989).

Recovery is limited in a negligent infliction of emotional distress case by the requirement that the person seeking the damages must suffer physical injury as a result of actually witnessing the harm to the close relative. Physical manifestations of emotional suffering such as depression, anxiety, stress, and nightmares will qualify as physical injuries. See Love, supra and Mazzagatti v. Everingham by Everingham, 512 Pa. 266, 516 A.2d 672 (1986).

In this case, the accident was caused by Rachel's negligence in that she crossed the double yellow line and forced Brandon off the road. It is clear that Elizabeth both personally witnessed the accident and the devastating injuries sustained by her husband and that her observations were contemporaneous as she was following directly behind him when she saw the accident unfold in front of her eyes. As husband and wife, they will be deemed to be "closely related." The physical injury requirement will also be met due to the fact that Elizabeth continues to suffer from severe depression, anxiety and continuing nightmares, all of which require the continuing care of a psychiatrist. Thus, Elizabeth should be able to recover for the emotional distress which she has suffered, and continues to suffer, as a result of Rachel's negligence.

Elizabeth should also be advised that she has a cause of action for loss of consortium. Consortium is a right growing out of the marriage relationship, and any interference with the right of consortium by the negligent injury to one spouse affords the other spouse a legal cause of action to recover damages for that interference. Novelli v. Johns-Manville Corp., 395 Pa. Super. 144, 148, 576 A.2d 1085, 1087 (1990). A loss of consortium claim is grounded on the loss of a spouse's services after injury. Jackson v. Travelers Ins. Co., 414 Pa. Super. 336, 606 A.2d 1384 (1992). It is the right growing out of the marriage relationship, which the husband and wife have to the society, companionship and affection of each other. Daughen v. Fox, 372 Pa. Super. 405, 539 A.2d 858 (1988). A loss of consortium claim is derivative of the injured spouse's claim and it arises from the bodily injury of the other spouse. Barchfield v. Nunley, 395 Pa. Super. 517, 577 A.2d 910 (1990).

Here, the facts indicate that Brandon can no longer help around the house or assist in raising the children. In addition, the intimate relations between the couple have been drastically reduced. Because these losses to Elizabeth directly flow from Rachel negligently injuring her husband, Elizabeth will be entitled to pursue a cause of action for loss of consortium to attempt to recover for these losses and she will likely be successful.

**2. Rachel's counsel should file a preliminary objection on the grounds of improper venue and the action will be transferred to either "Y" or "Z" County.**

An action against an individual may be brought in and only in a county in which the individual may be served or in which the cause of action arose. Pa. R.C.P. No. 1006(a). Improper venue shall be raised by preliminary objection and, if not raised, shall be waived. If a preliminary objection to venue is sustained and there is a county of proper venue within the state, the action shall not be dismissed but shall be transferred to the appropriate court of that county. Pa. R.C.P. No. 1006(e). A preliminary objection may be filed by any party, to any pleading on various grounds, including improper venue. Pa. R.C.P. No. 1028(a)(1).

As applied here, the action has been filed in "X" County, Pennsylvania where both of the plaintiffs reside. The accident occurred in "Y" County and Rachel resides in "Z" County. Proper venue would be in "Y" County where the cause of action arose (Rachel's negligent driving took place here) or in "Z" County where Rachel resides and can be served. There is no indication that Rachel could be properly served in "X" County.

Counsel for Rachel should file a Preliminary Objection on the ground of improper venue under Pa. R.C.P. No. 1028(a)(1) within twenty days of his client being served with the Complaint and ask that the matter be transferred to either "Y" or "Z" County pursuant to Pa. R.C.P. No.1006 (e). It is important that venue be objected to in a timely manner or the objection will be waived pursuant to Pa. R.C.P. No.1006 (e). Rachel's counsel should be successful in having the action transferred to either "Y" or "Z" County.

**3. Attorney Litigator should anticipate that Rachel’s counsel will object to the deposition testimony on the grounds that it is hearsay. However, he should argue that the testimony is admissible under the former testimony exception to the hearsay rule since the declarant, John, is unavailable as a witness.**

John’s statement at the deposition that Rachel crossed the double yellow line immediately prior to the impact with Brandon would be deemed to be a hearsay statement. Under Pa. R. E. 801, John would be deemed to be a “declarant” as he is a person who made a “statement” (an oral assertion) as to how the accident occurred. If Attorney Litigator wants to introduce this statement at trial, it will be deemed to be hearsay as it is a statement, other than one made by the declarant while testifying at the trial, offered into evidence to prove the truth of the matter asserted. It is clear from the facts that John will not be testifying at trial because he has refused to do so and has been incarcerated because of that refusal. In addition, it is clear that Attorney Litigator is offering the statement for the truth of the matter asserted, as he wants to prove that Rachel was negligent in crossing the double yellow line. Under Pa. R.E. 802, John’s hearsay statement will not be admissible unless it falls within an exception to the hearsay rule or some other rule prescribed by the Pennsylvania Supreme Court or by statute.

Since John has refused to testify about Rachel crossing the double yellow line despite being subpoenaed to provide such testimony and being directed by the Court to do so, he would be determined to be “unavailable” under Pa. R.E. 804(a)(2). Since John is “unavailable,” Attorney Litigator should argue that his statement would not be excluded by the hearsay rule pursuant to Pa. R.E. 804(b)(1), known as the Former Testimony Exception, which provides as follows:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an adequate opportunity and similar motive to develop the testimony by direct, cross or re-direct examination. (Emphasis supplied.)

As applied to this case, it is clear that both Attorney Litigator and Rachel’s counsel questioned John at the deposition about Rachel crossing the double yellow line. Both attorneys were motivated to develop this testimony as it went to the very heart of the negligence claim. Thus, despite a potential hearsay objection from Rachel’s counsel, John’s deposition testimony will be admissible under the Former Testimony Hearsay Exception since John is unavailable as a witness at trial and Rachel’s counsel had an adequate opportunity, which he took advantage of, to develop the subject testimony at the prior deposition.<sup>1</sup>

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<sup>1</sup>John’s deposition testimony would also be admissible pursuant to Pa. R. C. P. No. 4020.

**4. Defense counsel should argue that the search of Rachel’s vehicle violated her rights under Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution. Defense counsel will probably be successful with these arguments.**

The Fourth Amendment of the United States Constitution protects “the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures...”. Article I, Section 8 of the Pennsylvania Constitution similarly provides, in part: “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures...”. Commonwealth v. Lewis, 535 Pa. 501, 636 A.2d 619 (1994); Commonwealth v. Matos, 543 Pa. 449, 672 A.2d 769 (1996).<sup>2</sup> Under both the Federal and State Constitution, a warrantless search and seizure is unreasonable and therefore prohibited except for a few exceptions. Commonwealth v. Williams, 547 Pa. 577, 692 A.2d 1031 (1997). A potential exception on these facts would be the vehicle exception.

Under the Pennsylvania Constitution, the police may search a vehicle without a warrant where: (1) there is probable cause to believe that an automobile contains evidence of criminal activity; (2) unless the car is searched or impounded, the occupants of the automobile are likely to drive away and contents of the automobile may never again be located by police; and (3) police have obtained this information in such a way that they could not have secured a warrant for the search, i.e., there are exigent circumstances. Thus, both probable cause and exigent circumstances are required to justify a warrantless search of an automobile. Commonwealth v. Gelineau, 696 A.2d 188 (1997) citing Commonwealth v. White, 543 Pa. 45, 669 A.2d 896 (1995).

Probable cause exists where the facts and circumstances within the knowledge of the officer are reasonably trustworthy and sufficient to warrant a person of reasonable caution in believing that the person has committed the offense. Commonwealth v. Zook, 532 Pa. 79, 89, 615 A.2d 1, 6 (1992).

When Officer Sniff approached the vehicle, he observed Rachel’s teary eyes, detected the smell of a burnt substance, possibly marijuana, coming from the vehicle, and saw a package of cigarettes on the floor. Although an argument to the contrary can be made, it is unlikely that these observations would be sufficient to supply the officer with probable cause to believe that Rachel had been smoking, and therefore possessed marijuana. Her eyes could have been teary as a result of the emotional trauma from the accident or her injuries, and Officer Sniff was not even sure that he smelled marijuana. The fact that a package of cigarettes was on the floor could explain the smell of the burnt substance, which he could not identify with certainty.

Even if probable cause existed, there were no exigent circumstances that would justify a warrantless search of the vehicle. Rachel had been removed from the vehicle and was at the local hospital being treated. She no longer had immediate control of the vehicle. There was no discernable danger that the vehicle, and its contents, would be immediately moved. In fact, the vehicle was heavily damaged and immobile. There is no

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<sup>2</sup>Under the principles set forth in Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991), an independent analysis of the Pennsylvania Constitution is required which could result in greater protection being afforded than is available under the Federal Constitution.

indication that the police even attempted to secure a warrant. Even if the police had attempted to secure a warrant, it is highly unlikely that there was enough evidence to support the issuance of a search warrant based solely on the fact that Officer Sniff suspected, but was not sure, that he smelled marijuana emanating from the vehicle.

The Defense could also argue that the marijuana should be suppressed under the Fourth Amendment of the U.S. Constitution. In Wyoming v. Houghton, 526 U.S. 291, 301, 119 S. Ct. 1297 (1999), the U.S. Supreme Court indicated that under the Fourth Amendment, probable cause is all that is necessary to justify the search of a lawfully stopped vehicle and that there is no exigent circumstance requirement as has been promulgated by the Pennsylvania Supreme Court under the Pennsylvania Constitution. Even under this less-stringent requirement, it is unlikely that the search would have been valid due to the fact that the police had insufficient probable cause as discussed above.

#### Question No. 4: Facts and Interrogatories

Teacher's Association ("TA") is a union representing teachers employed by the S Public School District ("District") located in State P. In June, 2001, just prior to the State P primary election, TA published a special edition of its monthly newsletter which identified those candidates for public office which TA and other teacher organizations had endorsed. Paul, TA's President, placed copies of the newsletters within a literature rack in the teacher's lounge of the District high school. The literature rack has been regularly used to hold written informational announcements from the District, school organizations, local charities and civic organizations concerning school and community affairs. The literature rack has not been used by TA or other groups for distribution of political literature.

Teacher Ted is not a member of TA. State P law authorizes collective bargaining agreements between unions and school districts to require teachers who are non-members to pay a monthly "service fee" to the union in an amount equivalent to monthly union dues as a condition of their continued employment as a teacher. The collective bargaining agreement between the District and TA contains such a clause and thus Ted is required to pay a monthly service fee in order to maintain his employment.

Shortly after Paul placed the newsletter in the literature rack, Ted removed a copy in order to examine the contents. As he did so, Ted discovered an undated handwritten note among the copies which contained the following text:

"Amy - pay the costs for the newsletter from the union general fund – Paul"

TA's treasurer is named Amy, and TA's general fund contains revenues received from dues and service fees. Ted has now complained to the union about its newsletter and objected to any use of service fees for that purpose.

The District quickly removed the TA newsletter from the literature rack in the teacher's lounge because it was "political advocacy" by the union rather than "informational material."

1. TA has asserted that it has a right under the First Amendment to the United States Constitution to use the literature rack for distribution of the newsletter. How is a court likely to rule on such a claim?
2. Assume for the purpose of this question only that Ted could establish that service fees from non-members were utilized to pay for the special edition of the TA newsletter. What claim or claims should Ted assert under the United States Constitution challenging the use of those funds and with what likelihood of success?

Ted filed suit against TA in the United States District Court for State P, asserting that non-member service fees were used to pay for the newsletter, and that use of service fees for this purpose was unconstitutional. After filing an answer to Ted's complaint denying these averments, TA has filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and in support thereof filed an affidavit by Paul stating that no service fees were used to pay for the newsletter. Ted opposed the motion for summary judgment, and filed an affidavit by Ted stating: "Upon information and belief, TA used non-member service fees to pay for the newsletter supporting political candidates."

3. How should the District Court rule on the motion for summary judgment?

Assume for the following question only that the motion for summary judgment was not granted. At the trial of Ted versus TA, Ted was called as a witness for purposes of offering the handwritten note into evidence. Ted testified that the note was found among the newsletters, and that TA's president was named Paul and

secretary was named Amy. Ted could not identify the handwriting or provide any other information concerning the note.

4. Other than hearsay, on what basis should TA object to the admission of the note as evidence and with what result?

#### **Question No. 4: Examiner's Analysis**

**1. TA's assertion that the removal of the political newsletter from the literature rack violated the Free Speech Clause of the First Amendment will likely be unsuccessful.**

The validity of the district's removal of the TA's political newsletter from the literature rack will turn on the nature of the literature rack itself as a forum for expression. The Supreme Court has employed a forum analysis to evaluate the nature of the property in question and the corresponding permissible governmental limitations on expressive activity. Generally, school district facilities are considered non-public forums, and may be deemed to be public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public for expressive activity. Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 at 47, 103 S. Ct. 948 at 956 (1983). In non-public fora, the government may limit expressive activity if the limitation is reasonable and not based upon the speaker's viewpoint. International Society for Krishna Consciousness v. Lee, 505 U.S. 672 at 679, 112 S. Ct. 2701 at 2705 (1992).

The Supreme Court has noted, however, that the government may create a limited forum which is confined to the specific and legitimate purposes for which it was created. Rosenberger v. University of Virginia, 515 U.S. 819, 829, 115 S. Ct. 2510, 2516 (1995). In that instance, content-based restrictions would be permissible in order to preserve the limited nature of the forum, so long as the restrictions are viewpoint neutral and reasonable in light of the purposes to be served by the forum. Id., 515 U.S. at 829-30, 115 S. Ct. at 2517. See Lamb's Chapel v. Center Moriches Union Free School, 508 U.S. 384, 113 S. Ct. 2141 (1993).

Here, it would seem that the literature rack is not a traditional public forum, open to any expressive activity and subject only to time, place and manner limitations. Rather, by allowing the use of the literature rack for announcements from the school district, school organizations, local charities and civic organizations, the district would appear to have created a limited forum. Accordingly, the question will be whether it is constitutionally permissible to allow use of that forum for expression concerning school and community affairs, while denying use of the forum for political expression.

In a limited forum, restrictions on access can be based on subject matter so long as the distinctions drawn are reasonable in light of the purpose served by the forum and all the surrounding circumstances. Here, it seems reasonable that the district could restrict use of the literature rack to exclude political expression. It would be important that public property used for educational purposes not be utilized instead for advancing political candidates; having allowed TA's brochure, the district could well be required to make the rack available to all candidates for all political purposes. In a school setting, it seems reasonable to limit use of the literature rack to informational items involving school and community affairs. See Lehman v. Shaker Heights, 418 U.S. 298, 94 S. Ct. 2714 (1984). Thus, TA would likely be unsuccessful in a First Amendment challenge to the action of the district in removing its political newsletter.

**2. Ted should assert that use of non-member service fees to pay for a political newsletter violates the Free Speech and Association Clauses of the First Amendment by compelling him to support speech with which he disagrees.**

In Abood v. Detroit Board of Education, 431 U.S. 209, 97 S. Ct. 1782 (1977), the Supreme Court considered the constitutionality of a statutorily authorized collective bargaining agreement requiring employees who were not members of union to make a financial contribution to the union as condition of public employment. The Court held that such a provision did not violate the First Amendment on its face, but that use of such funds

contributed by non-members to subsidize ideological activities of the union could violate the First Amendment by virtue of compelling a non-member to support speech or activity with which the non-member disagrees. The Court distinguished between union expenditures on behalf of legitimate collective bargaining matters and expenditures related to the support of ideological matters, including legislative lobbying, union organizing and political activities, holding that a non-member could properly object on First Amendment grounds to the use of mandatory fees for the latter category of expenditures. *Id.*, 431 U.S. at 235-236, 97 S. Ct. at 1799-1800. The requisite governmental action could be based upon the action of the public employer or the fact that a statute was the source of authority by which a private party infringed upon a constitutional right. *Id.*, 431 U.S. at 226, 97 S. Ct. at 1795.

In *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 111 S. Ct. 1950 (1991), the Supreme Court applied the principles derived from *Abood* to examine specific objections to various types of expenditures. The Court held that union expenditures in general support of public education, expenses of litigation unrelated to the employees' collective bargaining unit, and general public relations expenditures supporting union activities could not be funded through mandatory fees of objecting employees. On the other hand, expenditures concerning professional development, job opportunities and award programs of the union were deemed appropriate as beneficial to all members and the collective bargaining process. 500 U.S. 527-530, 111 S. Ct. 1963-64.

Here, expenditures in support of a newsletter which is devoted to support of political candidates seems to be precisely the kind of ideological expenditure which could not properly be charged to fees collected from non-members. Such compelled speech would violate the First Amendment rights of Ted and thus be improper.

**3. Summary judgment may be granted if there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. Ted's affidavit is insufficient to establish a disputed issue of material fact and therefore summary judgment could be entered in favor of TA.**

Rule 56 of the Federal Rules of Civil Procedure provides for a motion for summary judgment, which may be granted “. . . if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(e) further provides that when a motion for summary judgment is made and supported as provided by the Rule, “an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.” Assuming that the defending party responds by affidavits or otherwise, the Court must read the record in the light most favorable to the defending party and take the defending party's allegations as true. *See Bishop v. Wood*, 426 U.S. 341, 347, 96 S. Ct. 2074, 2079 (1976).

TA has supported its motion for summary judgment with an affidavit by Paul stating that no service fees were used to pay for the newsletter. As required by Rule 56(e), Ted filed an affidavit, which contains a contrary assertion of fact. The fact at issue - whether service fees were used to pay for the newsletter - is clearly material to the legal issue in the case and is perhaps the single most essential issue of fact to be determined. If Ted's affidavit is deemed sufficient, a grant of summary judgment would be improper because a material fact is in dispute.

However, a contrary conclusion results if the Court would conclude that Ted's affidavit is insufficient. Rule 56(e) requires that “supporting and opposing affidavits shall be made on personal knowledge” (emphasis supplied). It has been held, therefore, that an affidavit made simply upon information and belief does not comply with Rule 56(e). *Automatic Radio Manufacturing Company v. Hazeltine Research, Inc.*, 339 U.S. 827, 831, 70 S.Ct. 894, 896 (1950). Thus, because the affidavit is not in conformance with the requirements of Rule 56(e), it could not be relied upon to establish a disputed issue of material fact and the Court would be free to enter judgment in favor of TA as a matter of law if otherwise warranted.

**4. TA should object to admission of the note as evidence on the basis that it has not been properly authenticated, and the objection should be sustained.**

In order to be admitted into evidence, a document must be authenticated and identified. Rule 901(a) of the Federal Rules of Evidence provides: “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”

In this instance, Ted is proffering the handwritten note to demonstrate that the cost of the newsletter was paid from the union general funds, which in turn would have included expenditure of the service fees from non-members. Thus, he must assert that it was a document authored by Paul as the union President and which tends to prove that union general funds were used for the newsletter.

Ted’s only testimony, however, is that he found the note amidst copies of the newsletter and that the names appearing on the handwritten note are also the names of the union President and treasurer. Nothing more has been shown by Ted. The question, therefore, is whether this information is sufficient to support a finding that “the matter in question,” i.e., the document, is what Ted claims it to be. In Threadgill v. Armstrong World Industries, Inc., 928 F.2d 1366, at 1375 (3<sup>rd</sup> Cir. 1991) the Court of Appeals noted the following standard with respect to Rule 901(a):

“The showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions governing admissibility. Rather, there need be only a *prima facie* showing, to the Court, of authenticity, not a full argument on admissibility. Once a *prima facie* case is made, the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence. The only requirement is that there has been substantial evidence from which they could infer that the document was authentic.”

Here, it seems doubtful substantial evidence that the document is authentic has been provided. Ted can point only to the location of the document (within the newsletters) and the names on the note as circumstantial factors relating to the origin and purpose of the communication. He cannot identify the handwriting as being Paul’s, nor provide any other information relating to the authorship or source of the note. Thus, Ted cannot demonstrate that the document is what he claims it to be; that is, a communication from the union president to the union treasurer about payment from union funds. Under these circumstances, Ted cannot authenticate the document under the standards of Rule 901(a). Note also that none of the methods of authentication identified in Rule 901(b) would operate to authenticate the handwritten note.

Accordingly, the document would be inadmissible on this basis alone.

### Question No. 5: Facts and Interrogatories

Al and Bob received title to Blackacre, located in C County, Pennsylvania, by a properly executed and recorded deed to them as joint tenants with right of survivorship. Al borrowed \$50,000 from Carol. On January 4, 2000, Al executed a five-year mortgage on Blackacre for \$50,000 in favor of Carol as collateral for the loan. Bob did not know about the mortgage. Al made timely payments until he died on November 1, 2000. Al's will devised all of his "right, title and interest in Blackacre" to his son, Tim, who moved onto Blackacre on November 5, 2000.

On December 1, 2000, Bob conveyed all of his "right, title and interest in Blackacre" to his girlfriend, Eve, by a properly executed deed. Bob handed the deed to Eve, but the deed was never recorded. Shortly thereafter, Bob and Eve had a disagreement and Bob decided to gift Blackacre to his new girlfriend, Fran. Bob's attorney prepared the deed conveying his interest in Blackacre to Fran. Bob properly executed the deed on February 1, 2001, and gave it to Fran, who immediately recorded it.

On December 20, 2000, Val, who was a friend of both Eve and Bob, was murdered. Bob and Eve had gone to a late movie that same night and Bob noticed that Eve was upset and Bob knew that Eve had argued with Val earlier that day. When Bob took Eve home, he saw blood on Eve's carpet. When Bob heard that Val had been killed that afternoon, he suspected Eve of the crime. Two homicide detectives came to Bob's home the next day to question him and Bob thought that the detectives suspected him of the crime. He gave the detectives Eve's name, address and phone number and suggested that they call Eve because she would know more about Val than he did. The next day, Bob saw a notice on television that Val's brother was offering a \$10,000 reward for information leading to the arrest and conviction of Val's murderer. Bob thought: "I don't want the police to investigate me for homicide. I will give them Eve's name so they will leave me alone." He then called the detectives and told them about Eve, the blood on her carpet and Eve's argument with Val on the day of the murder. Acting on the information provided by Bob, the police interviewed Eve, searched her home, and subsequently arrested her.

With Eve's consent, her father, Ed, retained Attorney Ann to represent Eve. Ed suspected that Eve might be guilty of Val's murder but he hoped that she was not. He had not seen Eve at all in the year 2000. Ann agreed to represent Eve only if Ed would testify that Eve was with him at the time of the murder.

Ed paid Ann a \$5,000 retainer and agreed to pay the balance of \$20,000 at the conclusion of the trial. Ann prepared a written retainer agreement, which they both signed. At trial, upon Ann's questioning, Ed testified that Eve was with him at the time of the murder. Eve was convicted of the murder of Val.

1. On November 6, 2000, Bob filed an action in ejectment against Tim. What is Bob's likelihood of success?
2. As of February 2, 2001, who owned Blackacre?
3. When Bob made a claim for the reward, Val's brother refused and Bob filed an action for breach of contract against Val's brother. What is Bob's likelihood of success?

4. After Eve was convicted, Ed refused to pay Ann the outstanding balance. Ann sued Ed for \$20,000 and Ed counterclaimed for the return of the \$5,000 retainer.
  - a. What contractual defense can Ed raise to Ann's action and with what likelihood of success?
  - b. What is Ed's likelihood of success in his counterclaim?

#### **Question No. 5: Examiner's Analysis**

**1. Under Pennsylvania law, Bob's action in ejectment will not be successful, because the joint tenancy with right of survivorship was severed by Al's mortgage and Al and Bob became tenants in common.**

Al and Bob were joint tenants with right of survivorship. Each joint tenant holds an undivided share of the whole estate. A joint tenancy with the right of survivorship is created by the co-existence of four unities: unity of interest; unity of title; unity of time; and unity of possession. Yannopoulos v. Sophos, 243 Pa. Super. 454, 365 A.2d 1312 (1976). A joint tenancy is severable by the action, voluntary or involuntary, of either one of the tenants, which destroys one of the four required unities. Id., 365 A.2d at 1314. Upon severance of the joint tenancy, it becomes a tenancy in common. In re Larendon's Estate, 439 Pa. 535, 266 A.2d 763 (1970).

The Pennsylvania view is that while a mortgage may only be a security for a debt as to third parties, as to the mortgagor and mortgagee, a mortgage is a conveyance of the land. Randal v. Jersey Mortg. Inv. Co., 306 Pa. 1, 158 A. 865 (1932). Thus, when Al delivered the mortgage to Carol, he conveyed title to his interest to her and the joint tenancy with right of survivorship was severed. General Credit Co. v. Cleck, 415 Pa. Super. 338, 609 A.2d 553 (1992). The joint tenancy became a tenancy in common where Al and Bob each hold an undivided one-half interest in Blackacre and each tenant in common may convey or devise his undivided interest. As a tenant in common, Al could devise his share to Tim by will. Tim will take as a tenant in common with Bob. Under the Pennsylvania view, Bob will not be successful in the action in ejectment.

The majority of jurisdictions, as well as the Restatement (Third) of Property - Mortgages (1996), however, adhere to the "lien" theory of mortgages by which a mortgage creates only a lien on the mortgagor's title, and does not convey title of any kind to the mortgagee. Under the majority view, Al's mortgage was not a conveyance and does not operate to sever the joint tenancy. In such a jurisdiction, Bob's action in ejectment would be successful.

The minority view is that a mortgage is a conveyance of title for all purposes. Under this "title" theory of mortgages, Al's mortgage would sever the joint tenancy and Al could devise his share to Tim by will. Under the minority view, Tim would take as a tenant in common with Bob and Bob would not be successful in the ejectment action. Pennsylvania's view of mortgages is considered an "intermediate" view but reaches the same result as the minority view.

**2. Eve has title to Blackacre as a tenant in common with Tim.**

As a tenant in common with Tim following the severance of the joint tenancy, Bob can convey his interest to Eve. The facts state that the deed was properly executed and delivered but not recorded. Failure to record the deed does not render it void under all circumstances. An unrecorded deed is valid against the grantor

himself, his heirs, devisees or a subsequent grantee to whom the real estate is conveyed without consideration. Land v. Commonwealth of Pennsylvania Housing Finance Agency, 101 Pa. Cmwlt. 179, 515 A.2d 1024 (1986). An unrecorded deed is void as to any subsequent bona fide purchaser for value without actual or constructive notice. Roberts v. Pursley, 718 A.2d 837 (Pa. Super. 1998).

There are no facts to indicate that Fran had actual notice or could be charged with constructive notice of the prior deed from Bob to Eve. However, Fran received the deed as a gift and not as a bona fide purchaser for value and is therefore not protected by the Pennsylvania recording statute. Eve has title to Blackacre as against Fran.

### **3. Bob will probably recover in a breach of contract action against Val's brother.**

An offer is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Restatement (2nd) of Contracts, §24. A general offer of a reward requesting the performance of some non-promissory act such as the giving of information may result in an enforceable contract if the offer is accepted by the rendering of the requested performance.

An offeree cannot accept an offer unless he or she has knowledge of the offer. An act that has begun without knowledge of the offer but is completed with knowledge of the offer may constitute a valid acceptance. In this situation, it can be said that knowledge of the offer after part performance can induce the offeree to complete performance and since part performance may be valueless to the offeror, there may be a reasonable inference that the offeror intends to create a power of acceptance in a party who has yet to complete the performance required by the offer. Murray on Contracts, Section 44; Restatement (2d) of Contracts §51, Comment B.

In the context of an offer which is accepted by performance, the offeree may have several motivations. Because an offeree performs an act with more than one motivation, which may include a motivation superior to that of accepting an offer, he is not necessarily precluded from an effective exercise of the power of acceptance.

The Restatement (2d) of Contracts §53(3) provides:

Where an offer of a promise invites acceptance by performance. . . , the rendering of the invited performance does not constitute acceptance if before the offeror performs his promise, the offeree manifests an intention not to accept.

The issue becomes whether the offeree manifests an intention not to accept the offer. When the act, requested by the offer is performed by a party who has knowledge of the offer, the presumption is very strong that he or she acted with some reference to the offer even though he may have had one or more superior motivations for a performance of the requested act. Absent a clear manifestation of the lack of intention to accept the offer, the performance is evidence of an acceptance of the offer. Murray on Contracts, §44(c).

The Restatement (2d) of Contracts §53, Comment C, states that inquiry into the motives of the offeree is unnecessary. Although Bob's motivation appears to be based on several factors, including his desire to avoid further police questioning, his providing of the information to the detectives with knowledge of the offer of the reward probably constitutes acceptance of the offer. There are no facts to suggest that Bob manifested an intention not to accept the offer made by Val's brother. Bob would probably prevail in a breach of contract action under these circumstances.

**4.(a). Ed may successfully raise the defense of illegality of the contract and Ann will not prevail in her action.**

A contract is illegal if either its formation or its performance is criminal. O'Brien v. O'Brien Steel Construction Co., 440 Pa. 375, 271 A.2d 254 (1970). Generally, a court will not enforce such an agreement and "will leave the parties just in the condition in which it finds them." Pittsburgh v. Goshorn, 230 Pa. 212, 227, 79 A. 505, 510 (1911). Courts refuse to enforce illegal contracts or contracts made in violation of public policy in order to prevent a wrongdoer from recovering. Rothberg v. Rosenblum, 628 F. Supp. 746 (E.D. Pa. 1986).

The performance of Ann's agreement with Ed involved Ed committing perjury. Ann advised Ed to testify as to facts which were false. Clearly, a court will not enforce the contract and allow Ann to profit from her wrongdoing. Ann will not prevail in her action.

**4.(b) Ed will probably recover the retainer fee paid to Ann.**

The general rule that the court will leave the parties where it found them in an action involving an illegal contract is subject to the exception that when the parties are not in equal fault or are not in pari delicto, and when there are elements of public policy more outraged by the conduct of one than the other, then relief may be granted to the less guilty party. Peyton v. Margiotti, 398 Pa. 86, 156 A.2d 865, 868 (1959) citing Berman v. Coakley, 243 Mass. 348, 137 N.E. 667 (1923). In Peyton, the Pennsylvania Supreme Court held that a fee agreement between an attorney and client providing that the attorney's right to a fee was contingent upon the success of obtaining a pardon for a convicted criminal was an invalid contract and against public policy. The Supreme Court, however, held that the client was entitled to the return of the fee paid to the attorney because the attorney and client did not deal with each other at arm's length. Because the defendant in Peyton was an attorney who was an officer of the court sworn to aid in the administration of justice, the Pennsylvania Supreme Court held that despite the invalidity of the fee agreement, the law should favor the plaintiffs because of the circumstances.

If the court relies on the doctrine of in pari delicto, and follows the analysis of Peyton v. Margiotti, supra., it would probably find that because an attorney and client are not considered to deal at arm's length and because the attorney is an officer of the court sworn to act with fidelity to both his clients and the court, the attorney may not take advantage of the client and retain the fee obtained from the illegal contract. Id. 156 A.2d at 868. The court would most probably find that Ed's conduct, while acting upon Ann's advice, was not equally in the wrong with that of Ann, and the parties were not in equal fault. See Restatement (2d) of Contracts §198(b). Accordingly, Ann would be required to return \$5,000 to Ed.

In Feld & Sons v. Pechner, Dorfman, Wolfee et al., 312 Pa. Super. 125, 458 A.2d 545 (1983), clients who had committed perjury, falsified exhibits and offered to bribe a potential witness allegedly on the advice of counsel, sought to recover compensatory and punitive damages against their attorneys for alleged professional malpractice, infliction of emotional distress, deceit and breach of contract. The Pennsylvania Superior Court did not rely on the specific doctrine of in pari delicto but upon the general principle that no court will aid a party who grounds his action upon an immoral or illegal act and held that the clients were precluded from recovering compensatory and punitive damages against their attorneys but were not barred from recovering fees paid to the attorneys. Id. 458 A.2d at 552. The court did not compare the clients' fault or wrongdoing with that of the attorney under a traditional in pari delicto analysis, but found that an attorney may not keep money obtained from a client in violation of the lawyer's professional obligations. The court held that "when a lawyer has by immoral or illegal conduct violated his professional obligations to his client, an action by the client to recover the lawyer's fee will not be barred on the lawyer's plea that the client also engaged in immoral or illegal conduct." Id. 458 A.2d at 554.

Here, Ann clearly violated her professional obligations and both Ann and Ed acted illegally. Under the analysis of Feld & Sons, Id., a court would find that it does not wish to aid either of them but would not allow Ann to retain fees obtained as a result of illegal or immoral conduct.

### Question No. 6: Facts and Interrogatories

Bill is the owner of Bill's Bicycles ("Bill's"). Bill fabricates, for retail sale, a line of high-end trail bicycles. Bill recently met with Paul, the owner of Printing Corporation ("Printco") about having Printco print bicycle trail maps for Bill to sell to his customers. Bill explained that the maps would need to be waterproof so his customers could use them even if riding in the rain.

While at Printco, Bill asked to see a sample of the paper the maps would be printed on having advised Paul that he also wanted the maps to be bright white. Paul pulled a piece of bright white paper from a shelf and handed it to Bill.

Later that day, Bill forwarded a purchase order to Paul for 1,000 maps at a price of \$4.00 per map. About ten days later, and two (2) days before delivery of the maps, Bill received a confirming memo from Paul. The memo further included new and additional language in bold print stating "the implied warranties of merchantability and fitness for particular purpose are hereby disclaimed." Bill read the memo and filed it away.

When the maps were delivered, they were waterproof, but were gray in color and unacceptable to Bill. Bill contacted his attorney, Able, and related the foregoing facts to Able. Able advised that he knew Printco's counsel and would immediately advise Printco's counsel that Bill intended to file suit because of the discolored maps. He further advised Bill that he would be seeing Printco's production manager and vice president at a health spa they attended and would "quiz him" about Bill's map order. Able asked Bill to accompany him to the health spa. When Able spoke to Printco's manager, the manager told Able, in Bill's presence, that they had two orders come in at the same time, both of which required bright white paper; and that they did not have enough bright white paper to complete both orders so they decided to fill the larger order using bright white paper and substitute gray paper for Bill's smaller order.

1. Will the disclaimer set forth in Printco's confirming memo bar claims for implied warranty of merchantability or fitness for particular purpose?
2. Assuming for this question that the disclaimer of implied warranties is effective, may Bill assert any other warranty claims against Printco under the Uniform Commercial Code?
3. Under the Pennsylvania Rules of Professional Conduct, was it appropriate for Able to discuss Bill's order with Printco's production manager in the manner in which he did?
4. Assume for the purpose of this question only that under the Pennsylvania Rules of Professional Conduct, it was appropriate for Able to obtain the statement from Printco's manager in the manner in which he did, and that at trial Able asks Bill to testify about the content of the statement Printco's manager had previously made to Able in Bill's presence. What objection to admissibility of the statement should be made by Printco's counsel, how should Able respond to the objection and with what likelihood of success?

### Question No. 6: Examiner's Analysis

1. **The disclaimer set forth in Printco's confirming memo will not be effective under Section 2207 of the Uniform Commercial Code, which provides that between merchants additional terms become part of the contract unless they materially alter the contract. The addition of a term negating all implied warranties would be a material alteration to the contract.**

The exchange of forms between Bill and Printco, and the effectiveness of the additional provisions in the second form would be governed by Section 2207 of the Uniform Commercial Code (the "Code"). This Section provides:

- A. General Rule. – A definite and seasonable expression of acceptance or a written confirmation, which is sent within a reasonable time, operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
- B. Effect on Contract. – The additional terms are construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless.
  - 1. The offer expressly limits acceptance to the terms of the offer;
  - 2. They materially alter it; or
  - 3. Notification of objection to them has already been given or is given within a reasonable time after notice of them is received. 13 PA C.S.A. §2207.

Under the facts, the confirming memo is either a seasonable expression of acceptance or a confirmation of the oral acceptance that was previously expressed by the buyer. This acceptance, or confirmation thereof, is effective even though it contains an additional term; i.e., the disclaimer of implied warranties.

The next issue that should be addressed is whether or not Bill and Printco are merchants under the Code. If they are not, under Section 2207 the additional term is considered a proposal for inclusion in the contract. If they are merchants, the additional term may become a part of the contract pursuant to the operative provisions of Section 2207(b).

Section 2104 of the Code defines a merchant as “a person who deals in goods of the kind; or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. . . .” See, 13 Pa. C.S.A. §2104. Given the fact that both Printco and Bill manufacture or fabricate for sale to the general public, it is easy to conclude that they deal in goods of the kind generated by their respective businesses and, accordingly, they are merchants under the Code.

The facts indicate that the purchase order was silent with regard to warranties, express or implied. Under the implied warranty sections of the Code, the potential exists for an implied warranty of merchantability to arise as well as an implied warranty of fitness for particular purpose. See 13 Pa. C.S.A. §§2314 and 2315. Accordingly, a clause in a confirming memo that is sent two days prior to delivery attempting to negate all implied warranties would have to be analyzed under Code Section 2207(b) to determine if it becomes a part of the contract under one of the merchant provisions set forth in that subsection. Clearly subparts 1 and 3 are not applicable. The issue then becomes whether or not the disclaimer of warranty would be considered a material alteration of the original contract as set forth in the purchase order. If so, the disclaimer of warranty would not become part of the contract between Printco and Bill. Comment 4 to Section 2207 of the Code lists, among examples of typical clauses which would normally “materially alter” a contract, those clauses “negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches.” The clause contained in Printco’s confirming memo is just such a clause. Therefore, the attempted disclaimer of the implied warranties is ineffective and not a part of the contract between Bill and Printco.

**2. Bill should assert a claim of breach of express warranty under Section 2313 of the Code based upon the sample of bright white paper that was provided to him by Printco prior to his placing the order for the maps.**

The question assumes that the disclaimer of implied warranties was effective. Under Section 2316 of the Code it is possible to disclaim implied warranties and be found to have made an express warranty regarding a good that has been sold. See Anderson, Uniform Commercial Code, Vol. 3A Section 2-316:91 (3<sup>rd</sup> Ed. 1983); and Quinn’s Uniform Commercial Code Commentary and Law Digest, Vol. 1, 2d Ed., Section 2-316(a)(4).

Express warranties are addressed by Section 2313 of the Code. The pertinent subpart of Section 2313 is subpart (a)(3). It provides, “express warranties by the seller are created as follows: (3) Any sample or model

which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.” Subpart (b) of Section 2313 is also instructive in that it provides “it is not necessary to create an express warranty that the seller used formal words such as ‘warrant’ or ‘guaranty’ or that he have a specific intention to make a warranty. . . .” 13 Pa. C.S.A. §2313(a) and (b).

Bill specifically asked to see a sample of the paper that would be used in printing his maps. Paul pulled a sheet of bright white paper from the shelf and handed it to Bill in response to Bill’s request. Having seen the sample of the paper that Bill believed would be used, he placed his purchase order for 1,000 maps with Printco. Comment 6 to Section 2313 states “in general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain. . . . If the sample has been drawn from an existing bulk, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility.”

When a buyer was shown a sample of white newsprint to be used in books which he ordered, and the completed books had gray pages, the goods did not conform to the sample and accordingly there was a breach of express warranty. See, White and Summers, Uniform Commercial Code 4<sup>th</sup> Ed. §9-6 (1995).

Bill obviously asked to see a sample of the paper on which the maps would be printed because he had told Printco that he required bright white maps. When Paul drew a sample sheet in response to Bill’s question, Paul clearly was offering a sample that he intended to be a part of the basis of the bargain. Accordingly, Bill should have a valid claim for breach of express warranty under Section 2313 of the Code.

**3. Able has violated Pennsylvania Rule of Professional Conduct 4.2 by communicating with a party Able knew was represented by counsel.**

Pennsylvania Rule of Professional Conduct 4.2 states the following:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. Pa. R.P.C. 4.2

In determining whether or not Able’s actions are violative of this Rule, a number of inquiries must be made. First, it must be determined whether or not Able’s discussion with Printco’s employee was about the subject of the representation. Second, it must be determined whether or not the Printco employee constitutes a “represented party” or person under the meaning of Rule 4.2.

It appears quite clear that Able’s discussion with Printco’s employee was directed specifically at the subject of the potential litigation between Bill and Printco. Able specifically asked the Printco employee whether or not he knew anything about the change that was made by Printco from white paper to gray paper on the maps that Bill had ordered. This is clearly “the subject of the representation”.

The second issue that must be resolved is whether or not Printco’s employee is a “party” within the meaning of that term as set forth in Rule 4.2 and the Comments to that Rule. The Comment to Rule 4.2 states:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

The employee with whom Able spoke is clearly one having managerial responsibility as he is the production manager for Printco and is further identified as the vice president within the organization. Additionally, it is possible that the statements made by Printco’s employee, if proven to be true, may constitute an

admission that Printco breached its contract with Bill. Therefore, Able should not have engaged in discussions with Printco's employee regarding this matter.

**4. Printco's counsel should object to the admission of testimony of the statement made by Printco's production manager on the basis of hearsay but the statement should be admissible as an admission by a party-opponent under Pennsylvania Rule of Evidence 803.**

Bill's testimony regarding the statement by Printco's production manager to Able as to the reason why Printco did not use bright white paper for Bill's order is hearsay. The statement was an oral assertion other than one made by the declarant while testifying at trial, which was offered to prove the truth of the matter asserted. Pa. R.E. 801. Hearsay is inadmissible except as provided by the Rules of Evidence or other rules prescribed by the Supreme Court or statute. Pa. R.E. 802.

Section 803 of the Pennsylvania Rules of Evidence contains two subsections that would allow the statement to be admitted as an admission of a party opponent. Section 803(25)(D), which is clearly applicable and easy to establish under the facts, indicates that a statement is not excluded by the hearsay rule and is admissible as an admission by a party-opponent if "the statement is offered against a party and is... (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship..." In their treatise on Pennsylvania evidence Pakel and Poulin state:

Under the Pennsylvania Rule of Evidence 803(25)(D), the party offering the statement need only prove that the speaker was an agent or servant of the party against whom it was offered, that the statement concerned a matter within the scope of the speaker's agency or employment, and that the statement was made while the speaker was still an agent or servant of the party against whom the statement is offered. The party offering the statement need not prove that the speaker was authorized to speak on behalf of the party against whom the statement is offered.

*Pakel and Poulin*, Pennsylvania Evidence 2<sup>nd</sup> Ed. §803(25)(D)-1 (1999). Clearly, the manager was an agent of Printco both when the paper change was made and when he discussed the matter with Able in Bill's presence. He was discussing a matter that related to his employment and made the statement while he was still an employee of Printco. Given these factors Subsection (D) applies and the statement would be admissible as an admission of a party opponent.

The statement is likewise probably admissible under Section 803(25)(C) which provides an exception if "... the statement is offered against a party and is . . . (C) a statement by a person authorized by the party to make a statement concerning the subject . . ." Subsection (C) is somewhat more difficult to find applicable because the party asserting its application must argue and establish that the person that made the statement was authorized to do so by the party against whom the statement is offered. In this case, it should be argued that since the employee was a manager and an officer of the corporation that he would have authority to make statements such as the one in question. Pakel and Poulin address this issue with the following comments: "it would seem that the rule for corporate officers should be that authorization to speak will be inferred absent evidence to the contrary. For other corporate agents, the traditional rules seem to require some proof of authorization beyond mere employment." See also, *DiFrancesco v. Western Pennsylvania Water Company*, 329 Pa. Super 508, 478 A2d, 1295 (1984). Accordingly, given the status of the employee as manager and officer one could infer his authority to speak on behalf of the corporation and allow the statement as an admission of a party opponent.

Under Rule 803, it appears that very strong arguments could be made in favor of the admissibility of the statements made by Printco's employee to Able and Bill. Therefore, the statement should be admissible at trial.

## Grading Guidelines

### Question No. 1

#### 1. **Equitable Division of Property Under Divorce Code**

- \$ Marital property does not include separate property acquired before the marriage.
- Marital property does include the increase in value during the marriage (but prior to separation) of non-marital property. Only marital property is subject to equitable division upon divorce.
- A valid pre-nuptial agreement can alter the applicability and/or effect of the Divorce Code.

5 points

Comments: Applicants are expected to recognize that the increase in value of Frank's vacation home under the facts during the marriage and prior to a final separation is marital property subject to equitable division under the Divorce Code. This is to be distinguished from the value of the home before the marriage, which is not marital property, and any increase in value after a final separation which also is not marital property.

#### 2. **Taxability of Transfers Between Spouses**

- All income and gains from whatever source are taxable unless specifically excluded.
- Gains between spouses are specifically excluded under IRC §1041 when realized as part of a divorce settlement.
- Specifically, a gain realized within six years of the divorce, is not taxable for Federal income tax purposes if it is pursuant to a divorce agreement. IRC §1041(c)(2).

5 points

Comments: Applicants are expected to recognize that a capital gain is normally taxable unless specifically excluded and that there is a specific exclusion for gains incurred in a divorce settlement. Any gain within one year of divorce is automatically excluded and any gain within one to six years of divorce is excluded if related to the cessation of the marriage under a divorce decree or separation agreement.

#### 3. **Contract for a Bequest**

- An agreement for a testamentary bequest or for a payment due at death is only enforceable if supported by a writing, pursuant to a specific statutory provision.
- An enforceable agreement for a testamentary provision or payment dischargeable only at or after death must be established in the provisions of a will stating the material provisions of the agreement, an express reference in the will of the decedent to the agreement (with extrinsic evidence to prove same being available) or a written contract signed by the decedent evidencing the agreement.

5 points

Comments: Applicants are expected to know that contracts for a beneficiary to be included in a will or to be paid only on or after death must follow a specific statutory format. The contract can be set forth in the will, an express

reference to the contract can be made in the will (if there is additional extrinsic evidence to prove the terms of the contract) or the contract must be in writing and signed by the decedent.

4. **Will Signed by Another**

- A will can be signed for the testator in his presence by another person at the testator's express request, if the testator is unable to sign for any reason.
- The testator of such a will must, for it to be valid, declare the instrument as his will in front of two witnesses who subscribe their names to it in the testator's presence.

5 points

Comments: Applicants are expected to recognize that the execution of a will can be valid even when the will is signed for the testator by another if done so at his express direction and discuss the requirements that the testator must declare such a will as his in front of two witnesses who subscribe their names in his presence.

**Question No. 2**

1. **Corporation's Liability on Promoter's Contract**

- No agency/authority in promoter or agent prior to incorporation, before principal exists.
- After incorporation, the corporation is bound only if it adopts the contract or accepts benefits, neither of which happened.

3 points

Comments: Applicants are expected to recognize that a promoter lacks authority to bind a corporation prior to incorporation and, that a corporation is bound only if it adopts the contract or accepts the benefits and apply these principles to the facts in reaching a well-reasoned conclusion.

2. **Corporation's Liability on Note Signed by its President and Treasurer;  
Priority of Security Interest in Negotiable Instrument**

- Execution by President and Treasurer binds corporation to a contract, note, etc. regardless of actual authority, and may also indicate apparent authority.
- Note is negotiable as it is a promise to pay a sum certain to Sam's order at a definite time.
- Underlying obligation is suspended pending payment of, or dishonor of, the note.
- Credit as holder indorsee of the note has a perfected security interest in it to the extent of its loan to Sam.
- Bankruptcy Trustee is a lien creditor standing in the shoes of Sam and receives any amount due in excess of Credit's loan.

8 points

Comments: Applicants are expected to recognize that Daco is liable on the note signed by its President and Treasurer notwithstanding its policy. Applicants should discuss the principles applicable to apportionment of

liability between Credit, which has a perfected security interest in the note and the bankruptcy trustee, which is a lien creditor, in reaching a well-reasoned conclusion.

3. **Holder in Due Course**

- Credit is a holder in due course having taken for value, in good faith and without notice of any defenses, claims, or irregularities.
- Daco has valid defense of failure of consideration.
- However, this defense cannot be raised against the holder in due course, so Daco must pay Credit the loan balance, but nothing more.

5 points

Comments: Applicants are expected to recognize that Credit is a holder in due course, and that the defense of failure of consideration is not applicable to a holder in due course. Applicants should apply these principles to the facts in reaching a well-reasoned conclusion that Daco is liable to Credit for the loan balance but has a valid defense against the bankruptcy trustee.

4. **Officer's Liability to Corporation**

- Officer owes corporation a duty of care – to use such care and skill as would a person of ordinary prudence.
- Daco's policy regarding giving notes defines the standard of care expected of Don.
- Don violated his duty of care by disregarding Daco's policy and is liable for Daco's loss resulting from its defense not being good against the holder in due course.

4 points

Comments: Applicants are expected to discuss the duty of care that an officer owes a corporation, and recognize that Don's violation of Daco's policy violated the duty of care. Applicants should also recognize that Don is liable since his violation of Daco's policy resulted in Daco's liability since its defense was not valid against a holder in due course.

**Question No. 3**

1. **Negligent Infliction of Emotional Distress**

- Shock results from direct emotional impact on plaintiff from the sensory and contemporaneous observance of negligent injury of close relative.
- Plaintiff must suffer physical injury (physical manifestation of emotional injuries).

**Loss of Consortium**

- Interference with right growing out of marriage relationship which husband and wife have to the society, companionship, services and affection of each other.

6 points

Comments: Applicants are expected to identify causes of action for negligent infliction of emotional distress and loss of consortium, discuss the applicable legal principles and apply these principles to the facts in reaching a well-reasoned conclusion.

2. **Preliminary Objection to Venue**

- Venue is not proper in X County.
- Improper venue should be raised by preliminary objection.
- Venue is proper where cause of action arose or where defendant may be served (resides).
- Case should be transferred to where venue is proper.

5 points

Comments: Applicants are expected to recognize and discuss the appropriate rule governing proper venue; identify the proper method for raising improper venue and to apply these principles to the facts in reaching a well-reasoned conclusion.

3. **Hearsay**

- Statement concerning Rachael crossing the yellow line is hearsay because it is an out of court statement offered for the truth of the matter asserted.
- Former testimony exception to hearsay rule of exclusion exists where declarant is unavailable and has given testimony as a witness in a deposition.
- Party against whom the statement is offered must have had an adequate opportunity and similar motive to develop the testimony.

4 points

Comments: Applicants are expected to recognize that John's statement is hearsay but that it will not be excluded based on the former testimony exception since John is unavailable under the facts presented and had given the testimony sought to be admitted in a deposition.

4. **Automobile Search**

- Search warrant is generally required to conduct a search.
- Vehicle exception exists to the warrant requirement if there is probable cause to believe the vehicle contains evidence of criminal activity.
- Exigent circumstances must also exist in order for the vehicle search to be valid under the Pennsylvania Constitution.

5 points

Comments: Applicants are expected to identify the rules governing vehicle searches under the Pennsylvania and federal Constitutions and apply these rules to the facts in reaching a well-reasoned conclusion.

#### **Question No. 4**

##### **1. First Amendment – Restriction on Speech - Limited Public Forum**

- Government may create limited public forum, which is confined to the specific and legitimate purpose for which it was created.
- Content-based restrictions are permissible in limited public forum to preserve limited nature of forum if the restrictions are viewpoint neutral and reasonable in light of purposes served by the forum.

5 points

Comments: Applicants are expected to analyze the type of forum that exists, recognize the fact that a content-based distinction has occurred and apply the appropriate test relating to restrictions on speech in reaching a well-reasoned conclusion.

##### **2. First Amendment – Compelled Speech**

- Use of required contributions by non-union members to subsidize ideological activities of union could violate First Amendment by compelling non-member to support speech or activity with which he disagrees.
- Use of expenditures from non-union members for newsletter, which supports political candidates, is compelled speech.

5 points

Comments: Applicants are expected to recognize the applicability of the Free Speech or Association clauses of the First Amendment, analyze the compelled speech component of the use of membership fees and apply these principles to the facts in reaching a well-reasoned conclusion.

##### **3. Summary Judgment**

- Summary judgment may be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.
- The fact as to whether service fees were used to pay for the newsletter is material to the legal issue.
- Opposing affidavit must be based on personal knowledge to support a factual dispute.

5 points

Comments: Applicants are expected to discuss the standard for granting summary judgment and recognize the fact that an affidavit not based on personal knowledge cannot be relied upon to contest a motion for summary judgment, and apply these principles to the facts in reaching a well-reasoned conclusion.

##### **4. Authentication of Documents**

- Document must be authenticated in order to be admitted into evidence, by evidence sufficient to show the document is what its proponent claims it to be.

- Information identifying the handwriting or relating to the authorship or source of the note is necessary for authentication.

5 points

Comments: Applicants are expected to recognize the need for proper identification in order to have a document admitted into evidence, discuss methods of identification and reason to a conclusion as to the admissibility of the note on the basis of authentication.

### Question No. 5

#### 1. Severance of a Joint Tenancy

- Joint tenancy with right of survivorship is severable by action of either joint tenant which destroys one of the four required unities: interest, title, time and possession.
- Under Pennsylvania view, Al's mortgage on Blackacre severed the joint tenancy with right of survivorship.
- Severance of joint tenancy with right of survivorship results in a tenancy in common.
- Tenant in common may devise his interest in tenancy in common.
- Under the Pennsylvania rule, Bob will not be successful in his action in ejectment because Tim and Bob hold title to Blackacre as tenants in common.
- Under the majority rule, the execution of a mortgage by one joint tenant creates a lien on the property and does not sever the joint tenancy.
- A minority of jurisdictions adhere to the "title" theory of mortgages by which the mortgage is considered a conveyance of title and a severance of the joint tenancy.

5 points

Comments: Applicants are expected to recognize and discuss the severance of title issue and its effect on a joint tenancy. Applicants should also analyze both the "title" and "lien" theory of mortgages or the Pennsylvania view that a mortgage by one joint tenant severs the joint tenancy and creates a tenancy in common.

#### 2. Effect of Failure to Record a Deed

- Failure to record a properly executed and delivered deed does not render it void under all circumstances.
- An unrecorded deed is valid against a subsequent grantee to whom real estate is conveyed without consideration.
- Fran, as subsequent donee, is not protected by the Pennsylvania Recording Statute.
- Eve has title to Blackacre.

5 points

Comments: Applicants are expected to recognize that an unrecorded deed is valid against a subsequent grantee to whom the property is conveyed without consideration. Applicants are expected to apply the law to the facts and reach the correct conclusion. It is not necessary for an applicant to rely on the conclusion regarding the joint tenancy reached in the previous question to receive full credit for the correct conclusion that Eve has title to Blackacre as against Fran.

3. **Offer Accepted by Performance**

- An offer may be accepted by performance.
- Knowledge of an offer obtained after part performance may induce complete performance by offeree and constitute acceptance.
- Offer may be accepted by performance even though offeree acts with more than one motivation.
- Performance is evidence of acceptance of offer absent a showing of lack of intention to accept the offer.
- Bob will prevail in a breach of contract action against Val's brother although his sole purpose in performance was not acceptance of the offer.

5 points

Comments: Applicants are expected to recognize that an offer of a reward may be accepted by performance; that knowledge and motivation are factors in analyzing the existence of acceptance and apply the facts to the law in reaching a well-reasoned conclusion.

4. **Illegality of Contract as a Defense**

- Contract is illegal if formation or performance is criminal.
- Courts refuse to enforce illegal contract.
- Ann will not prevail if Ed raises the defense of illegality.
- Doctrine of in pari delicto may allow relief to less guilty party when parties are not in equal fault.
- Attorney, as officer of the court, may not retain fee obtained from illegal contract.
- Under doctrine of in pari delicto or principle that an attorney who violates professional duties to court and client may not retain fees so obtained, Ed will succeed in his counterclaim.

5 points

Comments: Applicants are expected to recognize that a contract is void if its formation or performance is illegal and to apply the facts to this principle in concluding that a court would refuse to enforce Ann's contract with Ed. Applicants should compare fault of the parties or conclude that a court would not allow Ann, as an officer of the court, to retain the benefit of the fee obtained as a result of an illegal contract in reaching the conclusion that Ed will succeed in his counterclaim.

## Question No. 6

### 1. **Confirming Memo**

- A confirming memo between merchants, which contains additional terms, operates as an acceptance.
- Additional terms become part of the contract between merchants unless they materially alter the contract.
- Clauses which negate warranties of merchantability or fitness for particular purpose, materially alter contract where such warranties normally attach.

5 points

Comments: Applicants are expected to recognize this is a “battle of the forms” issue and discuss the rules of Section 2207 as they relate to the inclusion of a term that materially alters the contract that is included in a confirming memo. Applicants should conclude that the additional term that excludes implied warranties would be a material alteration to the contract.

### 2. **Express Warranty**

- Express warranty can be created by a sample, which is made a part of basis of the bargain.
- Express warranty requires that the whole of the goods conform to the sample.

5 points

Comments: Applicants are expected to recognize and discuss the express warranty that arises, despite the disclaimer of implied warranties, as a result of the sample that was presented to the buyer by the seller.

### 3. **Attorney Communications with Party Represented by Counsel**

- Lawyer cannot communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer without consent of the other lawyer.
- Where an organization is a party, the lawyer is prohibited from communicating with persons having managerial responsibility on behalf of the corporation or with persons whose act or omission in connection with the matter may be imputed to the organization or constitute an admission by the organization.

5 points

Comments: Applicants are expected to recognize this as a professional responsibility issue and discuss the impropriety of Able's contact with the employee of Printco knowing that Printco was represented by counsel.

4. **Admission Exception to Hearsay Rule of Exclusion**

- Bill's testimony is hearsay, since it was an oral assertion, other than one made by the declarant while testifying at trial, offered to prove the truth of the matter asserted.
- Admission of party opponent is exception to hearsay rule of exclusion.
- Admission includes statement by party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship.
- Admission includes statement made by employee authorized by the party to make a statement concerning the subject.

5 points

Comments: Applicants are expected to recognize that the statement sought to be introduced is hearsay and discuss the exception, or exceptions, to the hearsay rule that would make the statement admissible as an admission by a party opponent.

## **MULTISTATE PERFORMANCE TEST**

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### **STATE v. WHITE**

#### **I. SYNOPSIS PREPARED BY NCBE**

Applicants are attorneys in the Public Defender's Office, which represents James White, who is being prosecuted for homicide for killing his brother with a knife. Less than a year before the homicide, White attacked the same brother with a knife and was charged with aggravated assault. The Public Defender's Office also represents White on the assault charge, which remains pending.

A Public Defender staff social worker interviewed White after his arrest for the assault. During that interview, White made admissions, denials, and related statements about the assault and his feelings toward his brother. He also complained to the social worker about his mental health problems and treatment history. The staff social worker wrote a report based on her interview and gave it to White's public defender, who relied on the information in the report to get White released to a treatment facility. The prosecutor has now subpoenaed the social worker's report in the hope of using White's statements about the assault to support an indictment for homicide.

Applicants are instructed to write an in camera brief in support of a motion to quash the subpoena arguing that the communications between White and the social worker are privileged under the social worker-client and/or attorney-client provisions of the Franklin Evidence Code. The File includes a memorandum on how to write persuasive briefs, the subpoena, the motion to quash, the attorney's notes, and the social worker's report. The Library contains two cases and portions of the Franklin Evidence Code.

#### **II. PENNSYLVANIA GRADING GUIDELINES**

##### **A. FORMAT**

The applicant has been assigned the task of writing a brief that persuades a judge that the contents of the social worker's report are confidential and should not be provided to the prosecutor. The document prepared should be identified as a Brief in Support of Defendant's Motion to Quash, and both the lawyer-client privilege and the social worker privilege that have been raised in the Motion to Quash should be addressed by the applicant. The brief should include a Statement of Facts that is intended to persuade the judge that the facts support the client's position, separate argument headings which are **Aa** specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle<sup>®</sup>, and an Argument section which identifies and analyzes applicable legal authority and applies the facts to the law in persuasively arguing in support of the client's position.

3 points

Comments: Applicants are expected to follow the directions and perform the specific task requested in the manner directed.

#### B. STATEMENT OF FACTS

- Defendant, James White was arrested 10 months ago for aggravated assault for allegedly attacking his brother with a knife and the Office of Public Defender was assigned to represent him.
- The Office of Public Defender referred the defendant to a licensed social worker on its staff for an evaluation in order to have him released on his own recognizance and admitted for treatment. A report was prepared by the social worker, and disclosure of this report is at issue.
- Defendant made statements which are included in social worker's report. The statements at issue which Defendant made to social worker include a reference to an earlier attempt to poison his brother and statements that "He is lucky I didn't kill him" and "I hope these things I've done to him have taught him a lesson."
- The Defendant has been charged with the murder of his brother and the social worker's report was subpoenaed by the District Attorney. Objections to release of the report based on privilege exist and have been raised in a Motion to Quash Subpoena. This brief is submitted in support thereof.

5 points

Comments: Applicants are expected to state the key facts in informing the court about the nature and essential features of the case and the essence of the dispute.

#### C. SOCIAL WORKER PRIVILEGE

- Section 835 prohibits a licensed social worker from disclosing information obtained in a professional capacity. The social worker privilege would extend to the report since Peterson is unavailable.
- Section 835 applies to the report prepared by Peterson since she was a licensed social worker who was dealing with White in a professional capacity as part of her job with the Rehabilitation Services Division of the Office of the Public Defender.
- Unless one of the exceptions found in Section 835 exists the communications from White to Peterson which are found in the report are protected from disclosure.
- An exception to the privilege against disclosure is found in Section 835(b) for communications that reveal the contemplation or commission of a crime or a harmful act. Under Guthrie the exception is narrowly interpreted and only applies where the communication relates directly to the fact or immediate circumstances of a crime.

- Most of the information in the report, which concerns White's military and psychiatric history, is clearly privileged because it has nothing to do with the commission of a crime or harmful act. The statements that his brother is lucky that he didn't kill him and that he hopes he taught him a lesson do not relate directly to the fact or commission of a crime because they do not constitute admissions that he assaulted his brother but could merely show his state of mind or a consciousness of guilt. Consequently, these statements are not subject to disclosure.
- The social worker was not sure that the statement made by White that he tried to poison his brother was truthful, and under the rationale of Guthrie, false statements to a social worker do not reveal the commission of a crime and are not subject to disclosure.
- An exception to the privilege against disclosure is found in Section 835(c) where the social worker determines that there is a substantial risk of imminent physical injury by the person to the person or others, and the person refuses explicitly to voluntarily accept further appropriate treatment. This exception does not apply because there is no longer a risk of physical injury since White's brother is dead and because White has voluntarily accepted treatment.

7 points

Comments: Applicants are expected to identify Section 835, explain its applicability in light of the facts and identify and discuss the arguable exceptions found in (b) and (c). The applicant should discuss the relevant legal principles set forth in Guthrie and apply these principles to the statements at issue in the report including the rat poison incident and conclude that the statements do not relate to the contemplation or commission of a crime. The applicant should also discuss the risk of physical injury/refusal of treatment exception and apply the facts to this principle and conclude that it is inapplicable.

#### D. ATTORNEY-CLIENT PRIVILEGE

- Under Section 953 a privilege against disclosure exists for a communication between a client and lawyer where the communication is made in confidence in the course of the relationship.
- Under Shea a communication to a person other than the lawyer, which is reasonably necessary for the transmission of information to the lawyer or for accomplishment of the purpose for which the lawyer is consulted is viewed as a communication to the lawyer under Section 953. The communication to the social worker was reasonably necessary for the transmission of information to the lawyer. Peterson was an intermediate agent for the lawyer and provided the evaluation report which was necessary so the lawyer could accomplish the purpose for which he was hired.
- White intended the communication to be confidential since he had already been advised by his Public Defender of attorney-client confidentiality and was not likely to have disclosed the information without this protection.
- The entire report would be protected from disclosure unless the attorney-client privilege was waived by White or by putting the condition of White's mental capacity at issue. White's mental capacity has not been placed in issue because White was not admitted to the hospital based on the contents of the social worker's report. Therefore, there was no waiver and the entire report is protected under the attorney-client privilege and cannot be disclosed.

5 points

Comments: Applicants are expected to identify the attorney-client privilege, discuss its applicability in light of the facts, analyze the relevant principles set forth in Shea and apply these principles to the facts in reaching a conclusion that the report would be protected from disclosure under the attorney client privilege. Applicants should also discuss the issue that under these facts, no waiver of the privilege has occurred.