

**JULY 2001  
PENNSYLVANIA BAR EXAMINATION**

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**Model Sample Answers**

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### Question No. 1: Model Sample Answer

1. My position would be that any increase in value of Frank's vacation home during the marriage is marital property, and therefore must be considered when distributing the marital estate. The issue here is whether the current value of Frank's vacation house may be considered in negotiating the terms of the property settlement.

Only marital property is subject to equitable distribution upon divorce. Marital property is presumed to include all property acquired by either spouse during the marriage, including any increase in value of non-marital property, regardless of how title is held. Thus, even property acquired prior to marriage may be considered marital property, to the extent of any increase in value of such property.

Here, Frank bought the vacation home prior to marrying Wilma for \$200,000 and in his own name. At the time of divorce, this home was worth \$500,000, which translates into a \$300,000 increase in value over the course of the marriage. As such, this increase in value must be considered in negotiating the settlement, regardless of how title is held, because the increase to its current value is marital property.

2. The transfer of the vacation home was most likely a nontaxable event to Frank since it was transferred incident to a valid divorce.

A transfer of property incident to a divorce is typically a nontaxable event to both spouses. The receiving spouse will take the donor's basis in the property as well, known as substituted basis.

In this particular case, Frank and Wilma had a valid divorce agreement. Pursuant to that agreement, the vacation house was transferred to Wilma. Thus, it constitutes a transfer of property incident to divorce and will be nontaxable. Wilma will receive a basis of \$200,000 in the property, since she takes the donor spouse's basis in such property.

Since the divorce agreement was valid, and since this transfer was incident to it, (although it didn't happen until 14 months after, I will assume the transfer is still incident to the divorce), there will be no tax to Frank due to the transfer.

3. Pat will not be able to establish that a contract exists in support of her claim because the contract is subject to the statute of frauds and the actual will had no reflection of the contract.

In order for a contract of this type to be valid, it must be in writing. The statute of frauds makes void oral agreements in certain situations. One such situation is an agreement that is made

by an executor to dispose of property. Unless such an agreement is in writing, the agreement will be invalid.

Here, Frank agreed orally to provide for Pat in his will a sum of \$25,000 per year she spent with him. Since this is a transfer of property in a will by the testator, it will most likely be invalid by the statute of frauds. As such, there is no way to tell, upon his death, whether Frank made the agreement since he is dead and cannot testify. In order to avoid this, the agreement must be in writing.

Furthermore, Frank executed his will after the oral promise to Pat. If Frank had intended the transfer to Pat, he would have provided for it in his will. When a person executes a will in contemplation of such a matter, the words of the will will govern. Pat is not the wife of Frank and cannot assert any of a spouse's rights.

Therefore, since the oral agreement was invalidated by the Statute of Frauds, and since the will did not specify the gift to Pat, it should be unenforceable and Pat will most likely fail to establish a valid contract.

4. The will executed by Frank is valid. In order to have a valid will, the testator must be at least 18, he must actually dispose of property in a will, which he intends and he must sign at the logical bottom. If he is unable to sign the will, he may do so by mark or have another sign for him.

In order for the signature of another to be valid, it must be at the testator's request, in his presence, and witnessed by two witnesses.

Here, Frank was unable to sign, so Abel signed at Frank's direction, in his presence, with both Millie and his nurse present.

While Frank did not declare his writing to be his will or otherwise communicate his intent before the will was signed, this will not be fatal to him as he did declare it was his intent for the most part, contemporaneous with the signing and in the presence of the witnesses. Frank's will is valid under Pennsylvania law.

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

1. Amcar probably cannot enforce the contract against Daco because Don lacked the authority to bind Daco to a contract. Had the board ratified the contract, it would have been bound by the terms.

Because Don was not yet president of Daco, and would only be a minority shareholder, he lacks the authority to bind Daco to a contract. If the contract would have been negotiated after

incorporation, but prior to the selection of the board of directors, Don may have had the authority necessary, but the facts do not support such a result.

2. Daco is liable to Credit on the note to the extent of its security interest and Daco is liable to the Bankruptcy Trustee for the remainder of the note.

The issue is whether the note was a negotiable instrument. A negotiable instrument is an unconditional promise or order to pay a certain amount of money that is payable to order or bearer at a definite time or on demand without any unauthorized instructions by the promisor. Such an instrument can be negotiated to other parties by signing it (if order paper) and delivering possession of the instrument. The person who acquires the instrument then becomes a holder and can enforce the instrument.

Here, Don executed a note. All of the terms required for a negotiable instrument were present: it was unconditional, it stated that Daco “promised to pay” and it was payable to “the order of Sam.” The amount of \$1,000,000 was a certain amount and a definite time – July 10, 2001 – was stated. Thus, the instrument was negotiable.

When a representative of an entity signs on behalf of that entity, the entity becomes liable on the instrument. Here, Don signed “Daco” and signed his name underneath, indicative that he was signing under his capacity as President. Thus, Daco is liable under the instrument.

The next issue is whether Credit can enforce the note. A holder can enforce the obligation to pay on the negotiable instrument. However, when a holder possesses the instrument as security for the obligation of the one who transferred the instrument to the holder, the holder, or secured party, can only enforce the instrument to the extent of the security interest.

Here, Credit is holding the note as security for Sam’s debt. The debt is for \$750,000. Thus, Credit can only collect that amount on the note. The remaining amount due under the note will go to Sam. Since Sam is in Bankruptcy, the Bankruptcy Trustee stands in Sam’s place and can collect the remaining \$250,000 due on the note. Thus, Daco must pay on the negotiable instrument.

3. Daco is liable to Credit for the \$750,000 as Credit is a Holder in Due Course (“HDC”) but probably would not be liable to Trustee.

Credit would be deemed a HDC because the \$1 million note was an unconditional, negotiable note which had been signed, attested and delivered to Sam by Don, Daco’s president and Tom, Daco’s treasurer. The note was unconditional, even though it said “in consideration of the special \$1 million order” because it did not say “subject to” said order. The note was then properly endorsed

by Sam and delivered to Credit. Credit took the note for value (\$750,000) and the facts do not indicate any bad faith or other claims to the note. As such, Credit would be an HDC.

As such, it took the note free from any personal defenses. Lack of consideration is a personal defense. Therefore, Daco would still be liable for the \$750,000 owed to Credit. Trustee is subject to the same defenses Sam would be subject to. Since lack of consideration is a valid defense against paying the contract made between Sam and Daco, Trustee would not be able to get any money from Daco. Therefore, if the court deems there was a lack of consideration, Daco would not be liable to trustee for any money.

4. Don may be liable to Daco for breaching the duty of care and loyalty that officers and directors owe their corporations. A director (and officer) must discharge his duties in good faith and in the reasonable belief that he is acting in the best interest of the corporation; he must act with that degree of care that a prudent person would use in regard to his/her own business. Don is both a Director and Officer (President) of Daco. He owes Daco the duty of care and loyalty. Don executed a promissory note to Sam for \$1 million. Don knew this was against Daco's policy, yet did it anyway. Now, the cylinders provided by Sam are worthless and Daco still must pay the money because Credit is a holder in due course. This breach has cost Daco \$1 million – clearly this is a substantial loss to a corporation that has only been in existence for two years. Don may try to rely on the Business Judgment Rule as a defense, but will be unsuccessful. The Business Judgment Rule protects directors from liability if they can prove they acted in good faith, reasonably, and under a well-informed basis. Don did not act in good faith or reasonably under the circumstances because he knowingly disregarded Daco's policy and issued a promissory note to Sam.

In conclusion, because Don breached the duty of care and loyalty he owed as a Director and officer to Daco, Don may be held liable for the \$1 million loss Daco took as a result of the promissory note issued to Sam.

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

1. Elizabeth has a good probability of success against Rachel for Negligent Infliction of Emotional Distress and Loss of Consortium. The important question is whether the elements are met for Negligent Infliction of Emotional Distress (NIED) and Loss of Consortium. The Rule for NIED is as follows: (1) reckless conduct; (2) produces extreme distress in individual; and (3) they suffer physical manifestations in addition to the distress. A third party can experience NIED if they are a close relative such as spouse, child, parent, etc. They have to be within the zone of danger and cannot be too far removed from where the accident occurs.

In this case, Rachel was exhibiting reckless conduct by crossing the center line into Brandon and Elizabeth's lane of traffic. After the accident, Elizabeth immediately ran to her husband's aid and when she saw his leg almost completely severed, she suffered from extreme distress, which sent her into shock. Shock is the physical manifestation of the emotional distress for which she then was treated. Furthermore, she is under continued care from the distress of the accident for depression, anxiety and nightmares. Elizabeth can recover as a third party for NIED because the accident occurred with her husband, which is a close family relationship.

Additionally, since Elizabeth was driving in the car directly behind her husband's when he was hit, and she ran to his aid immediately after the accident puts her within the appropriate zone of danger in order to sue for NIED.

Loss of consortium is brought by the uninjured spouse. It's based on the premise that, as a result of the injury, the uninjured spouse will be damaged in the sense that there will be a loss of services, which includes intimate relations as well.

As a result of the injury caused by Rachel, Brandon is permanently disabled, unable to perform his job, unable to help around the house, nor can he assist in raising their children. Additionally, their intimate relations have been drastically reduced, thus Elizabeth will be successful on this cause of action.

In light of the facts, Elizabeth has a more than probable likelihood of success in collecting for both the NIED and the loss of consortium.

2. Rachel will be successful in not having this matter litigated in X County. Whether Rachel is successful depends on whether she may change venue.

In Pennsylvania, all preliminary objections must be brought at one time and before a party files an answer. Here, venue to X County should be objected to in a preliminary objection, or it will be waived. Venue is satisfied where a defendant can be personally served, where the cause of action arose, or where a substantial portion of the transactions/occurrences took place out of the cause of action.

Here, the accident occurred in Y County. All known transactions/occurrences out of this action also occurred in Y County. Rachel is a resident of Z County, and as such cannot likely be served in X County because she would be personally served at her residence by a sheriff. The fact that the plaintiffs reside in X County is irrelevant. Thus, Rachel will be successful in having improper venue established in X County. The court will not dismiss the case but transfer it to the appropriate county. Also, Forum Non Conveniens is not appropriate here because venue is improper; proper venue is a prerequisite to using Forum Non Conveniens.

3. Rachel's counsel will raise a hearsay objection, but the court will overrule the objection. Hearsay is an out-of-court statement offered for the truth of the matter asserted. Under Pennsylvania Rules of Evidence, hearsay is inadmissible unless it falls under an exception to the hearsay rule. One such exception is for former testimony. This exception only applies if the hearsay declarant is unavailable. This exception admits testimony that was given under oath, under penalty for perjury, at a prior proceeding provided the side the testimony is being offered against at trial had an adequate and similar motive and opportunity to cross-examine the hearsay declarant. John was deposed in this action against Rachel. A deposition is under oath. John was cross-examined extensively by Rachel's attorney. John is now unavailable because he is in jail for contempt. Rachel's counsel had adequate/similar motive and opportunity to cross-examine John at his deposition, where he claimed Rachel was negligent by crossing the line, so his testimony will come into court under the former testimony exception to the hearsay rule. John's testimony is clearly relevant as to the issue of whether Rachel was negligent. Relevant evidence is evidence with a tendency to make existence of a material fact more or less probable than it would be without the evidence.

4. The substance obtained in Rachel's car was seized pursuant to an illegal search and seizure under the 4<sup>th</sup> Amendment of the U.S. Constitution and the Pennsylvania Constitution, is the argument Rachel's attorney will raise. The motion will be denied in regards to the U.S. Constitution, but granted under Pennsylvania's Constitution.

The issue in this case is the automobile exception to the warrant requirement of the 4<sup>th</sup> Amendment of both Constitutions. The rule under the Federal Constitution is that the police may search a car or containers within cars when they have probable cause to believe contraband or evidence of illegal activity are within the car. Under these facts, the officer, upon smelling the marijuana, seeing Rachel's eyes, probably had probable cause to search the entire car for what he had probable cause to believe was inside.

However, under the Pennsylvania Constitution, the automobile exception to the warrant requirement is more restrictive. The police must not only have probable cause to search the vehicle, but exigent circumstances must exist to justify the warrantless search. Here, no such circumstances appear to exist. The officer could have remained at the scene to be sure the evidence was not removed while a warrant was obtained. There are no facts that show any danger to anyone if the search wasn't conducted immediately, nor is there any evidence that the evidence would be destroyed or lost. Therefore, the evidence will be excluded as an unlawful search.

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

1. TA does not have a right to use the literature rack to distribute its newsletter because the school is a nonpublic forum.

The First Amendment guarantees everyone the right to free speech. The government cannot infringe upon this right without a compelling governmental interest. Speech is, for the most part, protected. However, depending on the forum where the speech is made, it may be subject to certain limitations. In a public forum, the government regulations must be content-neutral, but regulations relating to the time, place and manner are valid as long as they are not unduly burdensome. With a nonpublic forum, the government can have content-based restrictions. However, if any speech is allowed, regulations must be viewpoint-neutral and must be related to an important government interest. Generally, parks, sidewalks and streets are considered public forums. Public schools, however, are nonpublic.

Here, the school maintained a literature rack in the teachers' lounge. This rack contained informational announcements from different organizations. When the TA placed its newsletter in the rack, that contained political literature, and states who TA endorses for certain public offices, the school was within its rights to remove this literature, as long as it was not based on which side of a political issue the TA was endorsing. The school can have content-based speech regulation that serves an important government interest. Here, the school did not want any political literature, probably because it could serve to create tension and foster bad feelings among teachers and administration. Thus, it was justified in removing the literature. TA would lose on its constitutional challenge.

2. Ted could claim that the use of his mandatory fees to publish a newsletter violated the First Amendment by violating his right not to speak.

The First Amendment protects the right to speak as well as not to speak. If the state forces a person to make a statement against their will that is a violation of the First Amendment. Here, Ted was required by a state law to pay a "service fee" to the union in order to keep his job. The authorization in state law is clearly state action.

The money that Ted pays to the service fees is included in the general fund. The president of the union directed that the costs of printing the newsletter be paid out of the general fund. Therefore, Ted is helping to pay for a newsletter and statements that he opposes.

Ted should be successful in challenging the use of his money for the newsletter because it violates his First Amendment right not to speak.

3. The District Court should grant TA's motion for summary judgment. Under the FRCP, a summary judgment motion will be granted if: (1) there is no genuine issue of material fact, and (2) the moving party is entitled to judgment as a matter of law. If an issue of material fact is in dispute, the motion will be denied. Here, the issue of material fact is whether service fees were used to pay for the TA newsletter. TA's motion is supported with an affidavit by Paul, stating that they were not. Under

the FRCP, summary judgment motions must be supported by affidavits, or other evidence by the moving party. If the non-moving party does not respond in opposition with evidence and affidavits, the motion for summary judgment will be granted.

Hearsay evidence is admissible under the FRCP to support a summary judgment motion. Thus, the note from Paul to Amy found by Ted can be attached under the FRCP. An affidavit by the plaintiff swearing “on information and belief” is unlikely to constitute evidence substantial enough to withstand a summary judgment motion, as Ted has not proven that a material fact is at issue. TA’s motion for summary judgment is likely to be granted.

In Pennsylvania, unlike the FRCP, summary judgment motions will not be granted based on unopposed affidavits. This is the Nanty-Glo rule.

4. The grounds most likely not to admit this handwritten note is the issue in this particular question. The general rule is that a writing that has not been authenticated cannot be offered into evidence. There are several ways to authenticate a writing. The first method of authentication is to call the witness who purportedly wrote the note and ask him or her if she did indeed make the writing. In this case, Ted is testifying as to a note, which he himself did not sign, nor did he witness as someone with whose handwriting he was familiar. Therefore, he could not testify to its authenticity. In addition, he did not witness the signature.

Secondly, authentication can be proven by a handwriting expert. There is no evidence in this case that an expert was present. The note will not be admitted into evidence unless it can be shown that the note is what it is purported to be. This authentication must come from the signer, an expert, or witness familiar with the signer’s handwriting.

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

1. Bob will not succeed in an ejectment action against Tim. As joint tenants, Al and Bob had right to possession of the whole and the right of survivorship. There are four unities required for a joint tenancy: time, title, interest and possession. These unities can be severed by one of the joint tenants selling, partitioning or mortgaging his interests.

Here, the mortgage that Al executed severed the joint tenancy unities, which results in Al and Bob becoming tenants in common. As a result, Bob no longer had a right of survivorship, and Al, as a tenant in common with Bob, could devise his interest in Blackacre to Tim. Consequently, Tim had a right to possession of Blackacre along with Bob.

2. Assuming Tim was not properly ejected from Blackacre, Eve and Tim are the owners of Blackacre on 2/2/01. The issue is whether Bob's prior conveyance of Blackacre to Eve defeats or precedes Fran's claims.

Pennsylvania is a race-notice recording state. Under such a recording scheme, the first bona fide purchaser for value who records first and without notice is the owner of the property. Here, neither Eve nor Fran is a bona fide purchaser (BFP) because, from the facts, it appears Bob simply gifted Blackacre to each of them. Thus, both are donees and recording statutes do not exist to protect donees, only BFP's and mortgages. Thus, Fran's act of recording is irrelevant because Blackacre was gifted to her. Bob's prior transfer to Eve was lawfully executed and delivered, by way of deed. When Bob sought to gift Blackacre to Fran, he had no such interest to convey.

Because the recording statute does not apply, Eve is the owner, having received a properly executed deed first.

3. Bob has a good chance of winning his suit, unless it can be proven that his intention for giving the information to the detectives was not for the reward but for getting the police to leave him alone.

A reward is a unique type of unilateral contract. In order for there to be an enforceable contract, the performing party must know about the reward prior to performance and the party must perform in accordance with the reward specifications.

Bob seems to meet the requirements as he knew of the reward prior to telling the police all of the details about Eve in connection to Val's murder. However, Bob had given the detectives Eve's name, number and address prior to finding out about the reward. He had given them that information because he wanted them to leave him alone. Even after finding out about the reward, the facts indicate that he gave the detectives more information just so they would leave him alone. If it could be proven, which would be hard, that Bob was not acting in order to perform under the reward "contract" but solely for other reasons, then his action for breach of contract may be denied. Otherwise, he should win his suit and get the reward.

4. a. Ed can raise the defense of illegality in the substance of his underlying contract with Ann, and will likely succeed.

Ann's agreement with Ed is contractually unenforceable since it was procured by illegal conduct. It is illegal for Ann to induce Ed to provide false testimony in a trial as a condition for her agreeing to represent Eve. Furthermore, many ethical rules have been violated by this arrangement, including the violation of an attorney's duty of loyalty to her client.

b. Ed will probably succeed in recovering his retainer. Ann will not be allowed to financially benefit from her blatantly illegal and professionally unethical conduct. The contract between the two was null and void and thus the \$5,000 will be returned to Ed.

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

1. Printco's disclaimers will not bar claims for the implied warranty of merchantability and fitness for a particular purpose because they are additional terms that materially alter the contract.

The implied warranty of merchantability is given by a merchant who sells goods of a particular kind. This warranty warrants that the goods are fit for their general purpose and are free from any defects that impair their use for their general purpose. A merchant can only disclaim this warranty by using the word "merchantability" in the disclaimer and making the disclaimer clear and obvious to the consumer.

The implied warranty for a particular purpose is a warranty given by any seller. This warrants that the goods are fit for a particular purpose that was expressed by the buyer to the seller and the buyer relied on the seller's skill and knowledge in selecting the particular goods. This warranty can be disclaimed with obvious conspicuous language. Both warranties can be disclaimed with such language as "as is" or "with all faults."

Here, Printco was in the business of printing and selling maps. Thus, it is a merchant. Therefore, by selling Bill the maps, it impliedly warranted that the maps were generally fit for use as maps. However, in Printco's confirming letter, it disclaimed this warranty in bold print and included the word "merchantability." Bill did not object. The same was true for the implied warranty of fitness for particular purpose.

Also, Printco's confirming memo was an acceptance which contained additional terms. When additional terms are contained in an acceptance, under the UCC provision involving a sale of goods, a contract is formed and if the contract is between merchants, the additional terms are included, unless they materially alter the offer or the other party seasonably objects.

Since Printco and Bill were both merchants, the additional terms in Printco's memo regarding the warranty disclaimers did not destroy the contract. Further, Bill did not object to the new terms. However, by disclaiming the warranties, Printco is attempting to limit its liability. This is a material alteration of the terms of the offer. As such, the additional terms are not part of the contract and the warranties are still in place.

2. Bill can also claim that Printco breached an express warranty.

Express warranties are made by a statement of fact given by the seller, either expressly through words, or impliedly through models or samples that the buyer relies on and which form the basis of the bargain between the buyer and the seller. Such warranties can only be disclaimed if such a disclaimer is made in a manner that is not inconsistent with the express warranty. This is almost impossible to do.

Here, Bill asked to see a sample of the paper that Printco would use to print the maps. Paul gave him a piece of bright white paper. Bill believed this was the paper that would be used. If Bill can show that he believed the paper Paul showed him was the paper Printco would use and that this belief formed the basis of the bargain, Bill will recover under an express warranty.

3. Under the Pennsylvania Rules of Professional Conduct, it was not appropriate for Able to discuss Bill's order with Printco's production manager in the manner that he did.

According to the Pennsylvania Rules of Professional Conduct, an attorney may not speak to a party he knows to be represented concerning a client's matter unless the attorney for the party consents. In the case of corporate parties, an attorney may not speak to any employee of a corporation without the attorney of the corporation's consent if the employee's statements may be imputed to the corporation.

In the case at hand, Able spoke to Printco's manager concerning a matter of his client, Bill. As Printco's production manager, this individual would make statements that could be imputed to his corporation employer, a represented party. As such, it was not appropriate for Able to speak to him without Printco's counsel's consent, which was not obtained here.

4. Printco's attorney would object on grounds of hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted. Able is seeking to introduce Printco's manager's statement to prove its contents. Although this would ordinarily be hearsay, admissions by a party opponent are excluded from hearsay. This includes any admissions by persons who are agents of the party opponent at the time of the statement, and the statement concerns a matter within the scope of that agency.

Printco's production manager's statements were made while an agent of Printco, concerning the scope of that agency and were an admission of its fault in the current matter.

The statement is excluded from hearsay as an admission and is admissible. Bill can testify.

**MPT Question: Model Sample Answer**

## STATEMENT OF FACTS

On September 27, 2000, James White (Defendant) allegedly stabbed his brother, Stephen, with a knife. According to the Defendant, he does not remember this fight or any previous encounters. Mr. James White appears to be a very disturbed individual. After Mr. White was arraigned on the charge of aggravated assault, Carlos Espinoza, Assistant Public Defender, met with him to discuss his case.

James White currently receives disability compensation from the Veteran's Administration (VA) because of a mental condition acquired during the Gulf War. He admitted to Mr. Espinoza that he drinks rather heavily and has periods of blackouts. Upon suggestion of Mr. Espinoza, Mr. James White agreed to meet with our social worker, Ms. Grace Peterson, who has been a member of our staff for quite a while. This meeting, according to Mr. Espinoza's notes, was to prepare for a bail reduction motion to get Mr. White released. Ms. Peterson agreed to meet Mr. White the following morning.

During Ms. Peterson's psychiatric evaluation of Mr. White, Mr. White indicated the following facts which are protected under the Franklin Evidence Code:

1. He does not feel like himself [when taking head pills].
2. "[Stephen]" is lucky I didn't kill him. He makes me so mad. Why does he get control of my life and my money. I wanted to teach him a lesson to convince him to let me live as I want to, to make my own decisions.
3. "I hope these things I have done teach him a lesson."

In addition, Mr. White evidenced a previous wish to poison his brother but it is unclear whether he was telling the truth or not. Ms. Peterson then recommended further tests of a psychiatric nature. She also recommended getting him out of jail as soon as possible for these treatments before returning him to his current living arrangements.

Currently before this Court is the subpoena duces tecum issued to the Public Defender's office to produce the report of Ms. Peterson, a licensed social worker in the State of Franklin. The Public Defender's office has filed a Motion to Quash and this Persuasive Brief is in support thereof.

## ARGUMENT

- A. Grace Peterson, having been referred to Mr. White by his lawyer, Mr. Espinoza, was acting as an intermediate agent for communications between Mr. White and his attorney and, therefore, Mr. White may invoke the lawyer/client privilege under §953 of the Evidence Code.

Because Mr. White intended his communications with Ms. Peterson to be confidential, and because Ms. Peterson acted as an intermediate agent for Mr. White's attorney, Carlos Espinoza, Mr. White may invoke the lawyer/client privilege. Although the precise wording of §953 only extends protection to confidential communications with the lawyer, the lawyer's secretary, stenographer, or clerk, the privilege has been expanded to include a client's communications with other intermediate agents of the lawyer.

For example, in Shea Cargo Company v. Wilson, the Franklin Court of Appeals extended the privilege to include communications between a client and a doctor retained for the sole purpose of preparing for litigation, and who forwarded the communications between himself and the client on to the lawyer. The court declined to recognize a physician/patient privilege in such a situation. Rather, the court found the communications privileged because the doctor was merely an intermediary between the client and the lawyer. The reasoning was that had the client simply described his condition to the lawyer himself, there would no doubt be a privilege. It is no less the client's communication to the lawyer when it is given by the client to an agent for transmission to the lawyer.

Similar to the situation in Shea Cargo, Ms. Peterson was merely acting as an intermediary agent between the client, Mr. White, and his attorney, Mr. Espinoza. Mr. Espinoza referred Mr. White to Ms. Peterson with the intention of her providing an evaluation for purpose of preparing a bail reduction motion and disposition. During the course of this interview, Mr. White made numerous statements to Ms. Peterson. However, the fact that they were made to Ms. Peterson does not remove them from the privilege. Had Mr. White simply made the statements to Mr. Espinoza, they would surely fall within the ambit of the privilege because the information was obtained within the scope of the relationship and was intended to be kept in confidence.

As such, because Ms. Peterson was acting as an intermediary agent between Mr. White and his attorney, Mr. White's statements relating to his relationship with his brother, his anger towards him, and any other admissions made to Ms. Peterson must be considered to be privileged.

B. Since Mr. White's conversation with a licensed social worker is protected under §835 of the Franklin Evidence Code and does not fall within any of its five exceptions, this communication is privileged.

Section 835 states that "no licensed social worker may disclose any information acquired from persons consulting the social worker in a professional capacity." Here, Grace Peterson was a state licensed social worker. She was consulted by James White, at the direction of his attorney in her professional capacity. The communications between James and the social worker are privileged if they do not fit into any exception.

The conversations between James White and the social worker do not “reveal” the commission of a crime and should not be admitted as an exception under §835(b). There are several provisions that provide exceptions to the general privilege of §835.

The relevant provision on these facts is subsection (b). It states, “a social worker shall not be required to treat as confidential a communication that reveals the contemplation or commission of a crime or harmful act.”

This exception was explored in Guthrie where the court held that the exception in (b) “should be narrowly construed to require disclosure by a social worker of subpoenaed communications that relate directly to the fact or immediate circumstances of a crime.” The court explicitly stated that the exception does not include all information that might be relevant, denials of wrongdoing, and false statements to the social worker. Denials showing a consciousness of guilt are not covered by the exception. Here, the statements made by James White “do not reveal” the commission of a crime.

The report contains information about his psychiatric history and speculations about possible diagnoses. These are clearly not within the exception. The denials are clearly excluded under Guthrie. There are no admissions of guilt in his statements other than an unrelated claim that he tried once to poison his brother. This is not at issue in the case, and the social worker doubted its truth. False statements are excluded under Guthrie.

James did say several things that may indicate consciousness of guilt – “He is lucky I didn’t kill him,” “I wanted to teach him a lesson,” “I hope these things I’ve done to him have taught him a lesson.” While these statements may show a consciousness of guilt, there is no admission and the statements do not “reveal the defendant’s admissions of criminal activity.” The narrow interpretation is preferred to preserve the privilege and here the facts do not call for the exception.