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PENNSYLVANIA BAR EXAMINATION

**Essay Questions and Examiners Analysis
and
Performance Test**



Pennsylvania Board of Law Examiners
5070A Ritter Road, Suite 300
Mechanicsburg, PA 17055
(717) 795-7270
www.pabarexam.org

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Question No. 1: Facts and Interrogatories

Frank solely owned FranCo, a plastics molding plant with a combined tool and die shop. FranCo had the capacity to design and make molds for small plastic parts, and to manufacture the parts using injection molding machines. FranCo was the largest employer in Frank's hometown, Small City, PA.

FranCo lacked qualified tool and die designers and makers, and further lacked reliable and skilled operators of highly technical and expensive molding machines. In response to this situation, Frank convinced nearby Small City College (SCC) to establish a two-year Associate Degree in Plastics Engineering (the Degree). SCC offered other associate degrees, as well as fully accredited four-year bachelor's degrees. Frank also convinced SCC to grant partial scholarships for the Degree under which qualified students would receive one-third of their tuition. Neither Frank nor FranCo funded or controlled the granting of these scholarships.

Frank also had FranCo offer a program (the Degree Program) whereby it paid directly to SCC one-third of the SCC tuition for any new or existing FranCo employee who was admitted to SCC for the Degree provided they worked a night shift at FranCo for regular pay while pursuing the Degree. Any such employee in FranCo's Degree Program had to pay any remaining tuition from other sources. Holding or enrollment for the Degree was not required of employees at FranCo and many of its molders and toolmakers had no education beyond high school.

Frank had contacted his attorney, Abel, about any legal and Federal income tax consequences to FranCo of its Degree Program. Abel explained all these consequences to Frank, documented the Degree Program with SCC and provided employment agreements for FranCo's use with its employees in the Degree Program. Abel billed and FranCo promptly paid Abel's reasonable bill for these services.

While the Degree Program was a great success for SCC, FranCo and the entire Small City community, it and the other stressful responsibilities of Frank contributed to his experiencing advanced heart disease. Knowing that his prognosis was poor, Frank intensified a prior and repeated prodding of Abel to prepare and draft documents for an appropriate estate plan. Abel had not addressed the matter or reported back to Frank because he was busy and complex estate plans were not a priority with him. A few months thereafter, Frank died of a heart attack approximately three weeks after his last of several oral requests to Abel for a response and a will. Abel had, in the meantime, finally decided to consult with an attorney concentrating in estate planning and had almost referred Frank to that attorney, but he never reported back to Frank on the status of the matter before it was too late.

Frank was survived by only a wife, an adult daughter by her, and two adult grandchildren of a deceased son by a prior marriage. There were no deceased grandchildren and there was no will.

1. For Federal income tax purposes, are any scholarships received from SCC by FranCo's employees taxable to them?
2. For Federal income tax purposes, are FranCo's legal expenses with Abel for establishing its Degree Program deductible by FranCo?

3. Did Abel violate any Pennsylvania Rule or Rules of Professional Conduct under the above facts?
4. Who will inherit Frank's estate?

Question No. 1: Examiner's Analysis

1. Any Scholarships from SCC received by FranCo employees are not taxable to them because scholarships from qualified institutions, which are used for tuition, are generally not taxable to their recipients.

Under §117(a) of the Internal Revenue Code of 1986, as amended, (IRC) (26 U.S.C.A. 117(a)), gross income does not include any amount received as a qualified scholarship by an individual who is a candidate for a degree at an accredited college provided that under §117(c) the scholarship is not for work to be performed by the student at the college.

IRC §170(b)(1)(A)(ii) describes the type of school at which there can be a qualified scholarship as "... an educational organization which normally maintains a regular faculty and curriculum, and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on...." Presumably Small City College is such an institution, or at least the facts suggest that it is. Thus, SCC appears to be an accredited college qualifying for the tax-free treatment under §117.

The FranCo employees at Small City College are, according to the facts, candidates for an associate degree at Small City College and thus meet this requirement under §117 for tax-free treatment of their scholarships.

Furthermore, the scholarships in question are funded by Small City College, not Franco, and thus could not be said to be some form of compensation by Franco, which may or may not have been taxable under IRC §127, covering tuition plans for employers.

Further yet, §117(b) requires that a tax free qualified scholarship be used for tuition and related costs. The SCC scholarships were used for tuition according to the facts. Therefore, the SCC scholarships meet this third requirement for tax-free status.

Finally, the facts do not indicate that the Degree candidates from FranCo were performing work at SCC to earn their scholarships and, thus, they would not run afoul of §117(c). Therefore, the scholarships from SCC would be tax free to their recipients who worked at FranCo.

2. FranCo's legal expenses for establishing the Degree Program are deductible as an ordinary and necessary business expense.

FranCo's legal expenses are deductible under IRC §162 as a trade or business expense. IRC Reg. §1.162 delineates some of the types of deductible trade or business expenses. Legal expenses are not specifically addressed. Thus, to be deductible they must qualify under the general IRC Reg. §1.162 requirement that they be (1) ordinary and necessary, (2) paid or incurred by a taxpayer in conducting a trade or business, and (3) reasonable in amount. Consideration will be given these three factors in the order presented.

First, it appears that FranCo's legal expenses through Abel in establishing the Degree Program were ordinary and necessary. Many, if not most, businesses conduct some sort of training, continuing education and/or betterment-type of programs. For FranCo, it was experiencing a shortage of qualified employees. It took recruiting types of steps to share tuition costs, promote scholarships, and otherwise help existing and prospective employees obtain a degree at a local accredited college which would both better the student and reap rewards for FranCo. Accordingly, the type of legal expenditure at issue (i.e., compensation for legal services to create such a program) is ordinary in the sense that other employers make similar expenditures to create training and education programs; and also necessary in that FranCo had to do something to develop a larger and better employee pool.

Second, with respect to whether FranCo incurred the expenses in carrying on a trade or business, there would be no doubt that it did. The tax issue is simply whether the taxpayer seeking a deduction is in fact in a for-profit business as distinguished from some sort of hobby or recreation. FranCo is clearly in the tool and die business, as well as the injection molding business for profit. It is unlikely that FranCo would be incurring such legal expenses if it were not in a trade or business.

Third and finally, to be deductible, the expense must be reasonable in amount. The facts indicate that this was the case. Abel's bill was reasonable and FranCo promptly paid it. Abel's bill for establishing the Degree Program should therefore be deductible when paid by FranCo (if it is on the cash basis) or when incurred by FranCo (if it is on the accrual basis of accounting).

3. Abel violated the PA Rules of Professional Conduct (Pa. R.P.C.) requiring diligence and proper communication.

First, Abel violated Pa. R.P.C. Rule 1.3 – Diligence, which provides:

A lawyer shall act with reasonable diligence and promptness in representing a client.

Abel should have pursued the important matter of Frank's estate plan in a reasonably prompt manner, especially in light of Frank's deteriorating health. The facts do not indicate that Abel had any reasonable excuse for his delay. Regardless of any such excuse, Abel owed a duty to be diligent and prompt. Whatever obstacles Abel might have faced, he should have either timely performed the necessary services, sought help from any associate or partner he had, or referred Frank out of his firm. Instead, the facts show that even after Frank made repeated requests to Abel for an estate plan over a several month period (including a final three week period after a final series of requests), Abel still did not produce a plan or document. Clearly he was not diligent or prompt as required by Rule 1.3.

Abel also violated Pa. R.P.C. Rule 1.4 – Communication, which provides:

- (a) A lawyer shall keep a client informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation.

Here, the facts show that Abel not only did not complete an estate plan, he did not communicate with Frank and keep him informed about the status of the plan. Specifically, he

simply procrastinated as distinguished from explaining to Frank that he really did not want to handle the matter, and that he was arranging a referral to another attorney. This behavior violated Subsection (a) of Rule 1.4.

Abel also violated Subsection (b) by not communicating with Frank and informing him of Abel's situation in such a manner as to enable Frank to make an informed decision about whether to go elsewhere or otherwise resolve the problem through Abel.

The successful representation of any client on almost any matter requires compliance with these very rules, which Abel violated (i.e., the duties to be diligent and to communicate effectively with the client on the status of the matter).

Note that the issue of competency and Rule 1.1 thereon is not present because the facts don't indicate incompetence by Abel as contrasted with tardiness and lack of communication.

4. Frank's estate will pass one-half to his widow, one-quarter to his daughter and one-quarter in equal parts to his deceased son's two adult children.

Chapter 21 of the Pennsylvania Probate Estates and Fiduciaries Code (PEF) (20 Pa. C.S.A. 2101 et seq.) provides a scheme of intestate succession which is applicable to Frank's estate. The facts show that Frank did not have a will, and thus his estate must pass under the rules of intestate succession. 20 Pa. C.S.A. §2101.

Chapter 21 of PEF first provides for the share of a surviving spouse. The facts indicate that Frank left a surviving spouse. Specifically, the share of a spouse, if the deceased leaves issue by a prior spouse, is one-half of the estate. 20 Pa. C.S.A. 2102(4). Since the facts show that Frank left issue by a prior spouse, Frank's widow will be limited to one-half of his estate. If Frank's issue had been through children only of his surviving spouse, she would have received \$30,000 plus one-half of the balance of Frank's estate.

Chapter 21, after providing for the surviving spouse, directs the remaining one-half of Frank's estate to those other than his surviving spouse. The first eligible recipients are Frank's issue (as distinguished from parents, siblings, aunts and uncles, etc.). 20 Pa. C.S.A. 2103(1).

How, then, does the non-spousal half of Frank's estate exactly pass to his children and grandchildren? §2104 covers the Rules of Succession. Subsection (1) therein (entitled Taking in Different Degrees), provides how the non-spousal half is divided in this instance between Frank's living child and the children of his deceased child. First, the living child shares equally with the deceased child. The deceased child's share then passes in equal parts to his children. In Frank's estate, these children all survived him and were adults. Therefore, the non-spousal half of Frank's estate passes one-half (or 1/4 of the whole estate) to his surviving daughter and one-fourth (or 1/8 of the whole estate) to each of the surviving two grandchildren of his deceased son. Because the grandchildren were adults, there will be no need for a guardian to hold the inheritances of minors.

The above split could be altered if Frank's widow elected against his estate and thereby took a one-third share rather than one-half share under 20 Pa.C.S.A. Sec. 2303(a)(1). The facts don't give enough information to determine whether such an election might be advantageous considering how the election would not just be against Frank's intestate estate but also against certain non-probate and other properties which Frank may have had at or before death.

Question No. 2: Facts and Interrogatories

Ted and Bob, both 18-year old seniors at Big City High School (BCHS), a public high school located in Pennsylvania, were close friends. Ted plans to enroll at Big City College (BCC), a private institution, in September 2002, however his grades are well below the minimum acceptance standard.

Ted and Bob had several discussions about Ted's desire to go to BCC and his poor grade average. Bob worked as a volunteer at the BCHS business office performing a variety of functions. Bob agreed with Ted to prepare a transcript, which changed some of Ted's grades and increased Ted's overall academic record from a 2.5 to a 3.7 grade point average. During his normal hours of work in the school's business office, Bob made the agreed upon changes to Ted's academic record on a transcript he prepared, and upon which he signed the principal's name and imprinted the school seal. Bob placed the transcript in Ted's official file. BCHS submitted the transcript prepared by Bob to BCC and Ted was ultimately accepted as a freshman at BCC just as both Ted and Bob had discussed.

1. With what criminal offenses, if any, should Ted be charged?

The guidance counselor at BCHS became suspicious when she heard Ted was accepted at BCC and checked the transcripts in Ted's file against her personal file, and found the difference in Ted's grades and overall grade point average. School authorities called the police, who proceeded to the school for the purpose of an investigation, including interviews with all student volunteers who worked in the school business office. While the police were interviewing the student volunteers, the principal and other school officials opened and searched the school lockers of all student volunteers, including Bob's. The lockers were secured by a combination lock provided by the school and the school maintained a master key for all locks. The search of Bob's locker yielded nothing relevant to the investigation but the principal did find his gold antique watch, which had been missing for several days, in the locker.

When the police interviewed Bob concerning Ted's transcript, they felt he was a suspect since he was a good friend of Ted's. Bob's interview by the police took place in a school office after the police told Bob he was a suspect and not free to leave the office. Bob then gave a full statement detailing his involvement in the changing of Ted's transcript and told the police he had a copy of the transcript in a desk at his home. Using Bob's statement as probable cause, the police obtained a search warrant for the desk in Bob's home. The police were not aware that the school officials searched the lockers or found the watch until after they obtained the search warrant for Bob's house. The search at Bob's home yielded a copy of Ted's transcript together with a baggie of a substance that the police believed to be marijuana, which were found on the top of the desk. Subsequent testing confirmed that the substance was marijuana. Bob was criminally charged with respect to his involvement with the transcript and possession of the stolen watch and marijuana.

2. Bob's attorney filed a Pre-Trial Motion seeking to suppress all of the evidence obtained by the police and school officials. What arguments under the Federal Constitution should Bob's attorney make in support of this Motion and how should the Court rule as to:
 - a. The locker search and seizure of the watch;
 - b. Bob's statement about the transcript;

- c. The transcript and marijuana found at Bob's home.

Assume a judge denied the Motion to Suppress the watch found in Bob's locker as evidence. At the trial on the possession of the stolen watch charge, Bob proposed to call Sally as a witness to testify that she heard Carl say he had the combination to Bob's locker and that when he observed the search taking place by school officials he placed the watch in Bob's locker in order to avoid being found with the principal's watch. Bob further proposes to call Ann as a witness to state she saw Carl at Bob's locker shortly before the search of Bob's locker and that the locker was open at the time. Unfortunately, Carl tragically died in a car accident one (1) week before Bob's trial.

3. What objection to Sally's testimony would be made by the prosecutor, what response should be made by Bob's attorney and what is the likely result?

Question No. 2: Examiner's Analysis

1. Ted should be charged with the offenses of criminal conspiracy and forgery.

At 18 Pa. C. S. A. section 903, Criminal Conspiracy is defined as follows:

(a) **Definition of conspiracy.** – a person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

- (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
- (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

In Pennsylvania Criminal Conspiracy requires not only the unlawful agreement but the commission of an overt act in furtherance of such conspiracy by either or both of the co-conspirators. Commonwealth v. Hennigan, _____ Pa. Super._____, 753 A.2d 245 (2000). The law further states that a co-conspirator is not relieved of liability because he or she is not physically present when the crime occurs. A co-conspirator bears full responsibility and is criminally liable for all of the natural and probable consequences of acts committed by a fellow conspirator that are done in furtherance of the purpose of the conspiracy. Commonwealth v. Eiland, 450 Pa. 566, 301 A.2d 651 (1973).

In this situation, Bob and Ted entered into an agreement whereby Bob would alter Ted's academic transcript at BCHS. The parties agreed that Bob was to commit acts that constituted the offense of forgery. (18 Pa. C. S. A. section 4101). Bob's action in altering Ted's academic record constituted the overt act required as an element of conspiracy. Thus, both an agreement to commit a crime and an overt act exist.

The fact that Bob actually committed the alteration in the transcript without Ted being present is of no consequence since Bob's actions were done pursuant to his agreement with Ted and in furtherance of the object of the conspiracy. The conspiracy was to take action necessary to alter Ted's BCHS transcript and to use the altered transcript to increase Ted's chance of admission to BCC.

Ted would also be guilty of forgery since he is criminally responsible for the actions of his co-conspirators in the furtherance of the conspiracy. Commonwealth v. Johnson, _____ Pa. Super. _____, 719 A. 2d 778 (1998).

The crime of forgery is defined at 18 Pa. C. S. A. section 4101 as follows:

Forgery

(a) **Offense defined.** – a person is guilty of forgery if, with the intent to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:

- (1) Alters any writing of another without his authority;
- (2) Makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize the act, or to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed; or
- (3) Utters any writing which he knows to be forged in a manner specified in paragraphs (1) or (2) of this subsection.

(b) **Definition.** – As used in this section the word “writing” includes printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trademarks and any other symbols of value, right, privilege, or identification.

In this situation Bob, who was a volunteer at the BCHS business office changed Ted’s grades and the overall academic record from a 2.5 to a 3.7 grade point average. Bob had no authority to do so and obviously knew that his action was not authorized. Additionally, Bob placed the school seal on the altered transcript, without authority and signed the principal’s name. The alteration of the transcript itself is a forgery since Bob knew that he did not have authority to make the changes in the transcript and that others would rely upon these alterations. Further, Bob had no authority to place the school seal on the transcript, which authenticated the altered document, and he had no permission or authority to sign the principal’s name to the altered transcript.

Clearly, Bob’s actions fall within 18 Pa. C. S. A. section 4101 for the above reasons. See Commonwealth v. Sneddon, _____ Pa. Super. _____, 738 A. 2d 1026 (1999) and Commonwealth v. Seang, 2001 WL 1654782. (Pa. Super. 2001). Ted is legally responsible for the forgery, since it was committed by a co-conspirator within the scope of the conspiracy.

Ted may also be charged with the offense of tampering with records or identification (18 Pa.C.S. section 4104(a)). Since BCHS is a public high school, Ted may also be charged with the offense of tampering with public records (18 Pa.C.S. section 4911(b)).

2.a. Bob's attorney should argue that the locker search violated the Fourth Amendment to the United States Constitution because reasonable suspicion did not exist to justify the search of Bob's locker and therefore the watch should be suppressed as evidence.

The first issue deals with whether the search of Bob's locker was in violation of the Fourth Amendment to the United States Constitution which provides a right to be free from unreasonable searches and seizures.

The Fourth Amendment prohibition on unreasonable searches and seizures applies to school searches conducted by public school officials. New Jersey v. TLO, 469 U.S. 325, 105 S.Ct. 733 (1985). The search of the locker was conducted by the principal and school officials who had a master key to enter the lockers. The combination locks were provided to students by the school. Federal Law permits the in school search of students by school officials where the search is reasonable under the circumstances; probable cause is not needed for such searches. New Jersey v. TLO, *supra*. The privacy concerns applicable to the in school search of a student should be considered equally applicable to the search of a student's locker. See, In The Interest of Dumas, 357 Pa. Super. 294, 515 A.2d 984 (1986).

The higher probable cause standard that generally applies under the Fourth Amendment is not required in school locker searches conducted by school officials because of the student's limited expectation of privacy. An analysis must be conducted as to whether it was reasonable for the school authorities to search only the lockers of student volunteers. It would appear that the only information that school officials had was that there appeared to be an alteration of Ted's transcripts and that Bob, who was a friend of Ted's, worked in the school business office. To be reasonable, a search must be justified at inception (i.e. there must be reasonable grounds for suspecting that the search will turn up evidence that the student has violated either the law or the rules of the school. New Jersey v. TLO, *supra*).

In this case, school authorities did not have reasonable grounds to believe that one of their school student volunteers may be involved in the alteration of Ted's transcript. There are no facts to give rise to the belief that any of the student volunteers actually committed the alteration or that they had any evidence of the alteration in their locker. The student volunteers were not the only possible suspects. Teachers, employees, outside parties and/or honest mistake or error as well as student volunteers were all possible suspects. Additionally, there was no basis for a reasonable belief that evidence of the forgery would be found in the lockers. A court should find that the search of Bob's locker was not reasonable under the circumstances and as a result the principal's watch should be suppressed as evidence.

2.b. Bob's attorney should argue that the custodial interrogation was a seizure without probable cause in violation of the Fourth Amendment to the United States Constitution and that the police failed to Mirandize Bob during the custodial interrogation; thus the statement should be suppressed as evidence.

Counsel for Bob should argue that the statement obtained by the police in the school office was obtained in violation of Bob's constitutional protections and thus should be suppressed as evidence. The first argument put forth by Bob's counsel should be that compelling Bob to go into the school office and be subjected to questioning by the police constituted an improper seizure. A seizure occurs under the Fourth Amendment, if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. U.S. v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870 (1980). Bob's detention in the

school office and specifically his being advised that he was not free to leave, at a minimum constituted an investigatory detention which requires reasonable suspicion to exist to substantiate the restraint of Bob's freedom, but arguably could have constituted an arrest requiring probable cause.

A seizure in the nature of a brief investigatory detention must be supported by reasonable suspicion rather than probable cause in order to be valid under the Fourth Amendment. United States v. Brigoni-Price, 422 U.S. 873, 95 S. Ct. 2574 (1975). The investigatory detention must be temporary and be no longer than necessary to effectuate the purpose of the stop. Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319 (1983). Police may not seek to verify their suspicions by means that approach the conditions of an arrest; and a custodial interrogation, even where the interrogation is investigative, must be supported by probable cause. Dunaway v. New York, 422 U.S. 200, 99 S. Ct. 2248 (1979).

The police were clearly conducting an investigation and detained Bob in the school office for questioning. The police had no factual basis to believe that Bob was involved with an alteration of Ted's transcripts. The police had essentially the same information as did the school authorities, which falls well below reasonable suspicion standards. Thus, even if the seizure constituted an investigative detention, it was improper under the Fourth Amendment since the police lacked reasonable suspicion.

If the detention constituted an arrest, probable cause, which requires a higher standard of proof than reasonable suspicion, would be required. Since Bob was detained in the school office for questioning by the police, it can be argued that this was more than an investigatory detention because an investigatory detention subjects an individual to a short period of detention and does not contain the coercive conditions so as to constitute an arrest. In either event, whether a court would determine this to be an arrest or an investigatory detention, Bob's counsel should prevail and the statement should be suppressed as being improperly obtained as a result of the illegal seizure.

Secondly, Bob's counsel should argue that the statement given by Bob was given in violation of Bob's right to Miranda warnings, which are required to be given prior to a custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966). Clearly Bob's detention in the school office constituted a custodial interrogation since Bob would reasonably have believed that his freedom of action was restricted and the questioning was initiated by law enforcement officers in order to elicit a response. See Commonwealth v. Chacko, 500 Pa. 571, 459 A.2d 311 (1983), citing Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682 (1980) and Commonwealth v. Williams, 539 Pa. 61, 650 A.2d 420 (1994). Miranda warnings should have been given to Bob prior to his interrogation by the police. Since the police failed to give Bob Miranda warnings, advising him that he had a right to remain silent, that anything he said could be used against him in court, that he had a right to an attorney and that if he could not afford an attorney, one would be provided for him free of charge, the statement must be suppressed as evidence in that it was obtained before he was informed of his constitutional protections against self incrimination and of his right to have counsel.

2.c. Bob's attorney should argue that the search warrant for the house relies upon suppressed evidence, the statement, and therefore the search of the house yielded items that are to be suppressed as fruit of the poisonous tree.

Bob's counsel should argue that the search warrant obtained for Bob's home used the illegally obtained statement to establish probable cause. But for Bob's statement, the search warrant could not have been obtained in that there is no independent factual basis to justify the issuance of a search warrant for Bob's home. The search warrant is tainted because the evidence establishing probable cause will likely be suppressed and therefore the search warrant is the fruit of the illegality, the tainted statement. Both the transcript and the marijuana, which was seized at Bob's home, are fruits of the poisonous tree and therefore should be suppressed as evidence. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L. Ed. 2d 441 (1963). The taint of the original illegality of Bob's statement, has not been purged nor was the probable cause in the search warrant obtained on non-tainted evidence. Therefore, the Court should suppress as evidence the transcript and the marijuana found at Bob's home.

3. The prosecutor should object to proposed testimony from Sally as hearsay. However the testimony fits within the statement against interest exception and therefore is admissible as evidence.

Obviously, the testimony from Sally is highly important to Bob's defense on the possession of the stolen watch charge. Bob would like to show that he did not place the watch in the locker. Since the locker was secured by a lock, the testimony of Sally is very important.

Sally will testify to a statement made by Carl, that he had the combination for Bob's lock, that he did enter Bob's locker and that he placed the watch in Bob's locker. As the facts state, Carl is now deceased and therefore unavailable to testify. The prosecutor will object on the grounds of hearsay, but Bob's attorney will counter with Pennsylvania Rule of Evidence 804 (b)(3) which permits statements against penal interest as an exception to the hearsay rule where the declarant is unavailable. It is clear that Bob desires to present Sally's testimony for the truth of the matter; to show that Carl placed the watch in Bob's locker. The statement is against Carl's penal interest. Further, the facts tell you that Carl is unavailable because he is deceased.

The comments to Rule 804 (b)(3), consistent with existing caselaw, state that in criminal cases, a statement against penal interest must be corroborated by circumstances to indicate the trustworthiness of the statements. Ann's testimony is especially important since she adds independent corroboration that places Carl at the locker shortly before the search and indicates that the locker was open. Thus, there is sufficient corroboration to assure trustworthiness to permit the use of Sally's testimony. See Commonwealth v. Statum, _____ Pa. Super. _____, 769 A.2d 476 (2001), and Commonwealth v. Williams, 537 Pa. 1, 640 A.2d 1251 (1994).

Although the proposed testimony offered by Sally is hearsay, and thus would lead to objection by the prosecutor, the defense attorney should raise Rule 804 (b)(3) as an exception and the Court should rule in favor of the defense and permit the statement into evidence.

Question No. 3: Facts and Interrogatories

During the early hours of January 1, 1999, Jill went to the Market, a small retail grocery store located in X County, Pennsylvania. Jill liked to shop early since the Market was generally not busy. As she was walking through the Market's vestibule area, Jill saw a friend on the opposite end of the vestibule. Jill, who was now completely focused on her friend and not paying attention to where she was walking, slipped and fell to the floor. After she landed on the floor, Jill observed that her clothes were wet and she saw a broken bottle of ABC soda on the floor where she fell. As a result of her fall, Jill sustained serious personal injuries.

After Jill's fall, the Market hired P.I. to investigate the fall. P.I. learned that the manager of the Market had inspected the vestibule area ten minutes before Jill's fall and there was no broken soda bottle on the floor. P.I. also located three customers who had walked through the vestibule area about five minutes before Jill's fall who all clearly saw the broken soda bottle and walked around it. One of these witnesses saw Jill talking to her friend and not watching where she was walking. P.I. found two other witnesses who saw a young man in an ABC Soda Co. (ABC) uniform, bearing the name Brian on his name tag, pushing a hand truck through the vestibule area between five and ten minutes before Jill's fall who also saw an ABC soda bottle fall from the hand truck. These two witnesses observed that Brian clearly saw the bottle fall and break and, after mumbling something to himself, continued to his ABC delivery truck and drove away. P.I. also learned that ABC is well known for training and supervising its employees. None of the witnesses located by P.I. reported their observations to any of the Market's employees until after Jill had fallen.

Assume that Jill's counsel filed a Complaint in Common Pleas Court in X County, Pennsylvania on June 10, 2000 against the Market alleging one count of negligence and properly served the Complaint on the Market two days later. You are retained on June 16, 2000 by the Market's insurance company and you are provided with the results of P.I.'s investigation as outlined in the preceding paragraph. The claims representative (Thrifty) for the insurance company asks you to advise her on the following:

1. Identify and explain the operation of any affirmative defenses which you should be prepared to argue regarding Jill's negligence claim.
2. Upon what theory can you argue that ABC is liable for the negligence of Brian and what procedural steps should be taken to attempt to hold ABC liable?

After the pleadings are closed, the parties exchanged discovery, which includes disclosure to the Plaintiff of P.I.'s investigative results. The Plaintiff's attorney does not dispute the results of the investigation and there is no other evidence regarding the alleged negligence of the Market. Neither party intends to call an expert on the issue of liability. Discovery is now complete and the case has been certified ready for trial.

3. Advise Thrifty what Jill's counsel must prove at trial to establish negligence against the Market and with what likelihood of success.

At the time of her fall at the Market, Jill was married to Fred. One year after she filed her lawsuit against the Market, and shortly before the couple separated and Fred filed for divorce, Jill settled her lawsuit against the Market for \$450,000. The divorce is about to be finalized and it has been determined that \$375,000 of her personal injury settlement is attributable to her loss

of earning capacity for the period of time after the date of the couple's separation with the remaining \$75,000 being attributable to pre-separation damages.

4. What portion, if any, of Jill's personal injury settlement is subject to equitable distribution in the divorce proceeding?

Question No. 3: Examiner's Analysis

1. The defenses of comparative and contributory negligence should be raised and will limit or bar Jill's recovery based on the percentage of her contributory negligence.

42 Pa. C.S.A. Section 7102 entitled Comparative Negligence provides in pertinent part as follows:

(a) General Rule. – In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

Contributory negligence is neglect of the duty imposed upon a person to exercise ordinary care for his own protection and safety which is a legally contributing cause of an injury. Trayer v. King, 241 Pa.Super. 86, 359 A.2d 800 (1976). The contributory negligence of a plaintiff, like the negligence of a defendant, is lack of due care under the circumstances. Argo v. Goodstein, 438 Pa. 468, 265 A.2d 783 (1970). Contributory negligence is an affirmative defense. Smith v. Port Authority Transit, 257 Pa.Super. 66, 390 A.2d 249 (1978). While the Comparative Negligence Act modifies contributory negligence as a defense, it does not eliminate it or change the basic rules relating to the type of conduct that constitutes contributory negligence. Pa. Trial Guide, Feldman, Section 30.42 (1991).

Under Pennsylvania law, it is well settled that a plaintiff has a duty to look where he or she is going. Villano v. Security Savings Assoc., 268 Pa.Super. 67, 407 A.2d 440 (1979). In this regard, a plaintiff cannot walk blindly or carelessly into a clearly visible object and recover for injuries which result from his or her own negligence. See, Pewatts v. J.C. Penney Co., 356 F.2d 586 (3d Cir. 1966). A plaintiff is guilty of contributory negligence with respect to injuries which are received as a result of a failure on his or her part to observe and avoid an obvious condition which ordinary care for her safety would have disclosed. Skalos v. Higgins, 303 Pa.Super. 107, 449 A.2d 601 (1982).

The facts make clear that Jill was seriously injured as a result of her fall at the Market and that her counsel has initiated a negligence claim on her behalf. Although it appears that there was a dangerous condition in the vestibule area of the store which caused Jill's fall, it was a condition which was clearly obvious as three other customers were able to see the dangerous condition and navigate around it without any difficulty. In addition, one of the witnesses saw Jill talking to her friend and not paying attention to where she was going. Based upon these facts, it should be argued that Jill was contributorily negligent and that the recovery, if any, for her injuries should be diminished in accordance with her share of contributory negligence in accordance with the provisions of the Comparative Negligence Act. If Jill's contributory

negligence exceeds the combined negligence of all defendants in the case, she will not be able to recover for her injuries. See 42 Pa. C.S.A. Section 7102(a).

2. ABC is vicariously liable for Brian's negligence and should be joined as an additional defendant in the lawsuit.

The facts indicate that two witnesses saw a young man in an ABC Soda Co. uniform, with a name tag bearing the name Brian, pushing a hand truck through the vestibule area between five and ten minutes before Jill's fall and they witnessed the ABC soda bottle fall from the hand truck. The witnesses observed Brian see the bottle fall to the floor and break and heard Brian mumble something to himself before he continued to his ABC delivery truck and drive away. Based upon the fact that there is no evidence that he took steps to clean up the dangerous condition, which he created, or warn others of the dangerous condition, it appears that Brian's actions and/or inactions created the dangerous condition which caused Jill's fall and resulting serious personal injuries.

A master is generally liable for the negligence of his servant that occurs within the scope of his employment. Mamalis v. Atlas Van Lines, Inc., 364 Pa.Super. 360, 528 A.2d 198 (1987). Vicarious liability for such negligence exists where the master is not himself negligent and despite the fact that the master has done all he can to prevent the servant's negligence. Commonwealth Dept. of Public Welfare v. Hickey, 136 Pa. Cmwlth.223, 582 A.2d 734 (1990). The employer is given great incentive to be careful in the selection, instruction and supervision of its employees and to take every precaution to see that his enterprise is conducted safely. Guffey v. Logan, 563 F.Supp. 951 (E.D. Pa. 1983).

It should be argued that Brian was an employee of ABC acting within the scope of his employment based upon the facts that he was wearing ABC's uniform, hauling its product through the vestibule area of the store, and utilizing ABC's delivery truck. Even if ABC properly trained and supervised Brian in accordance with their reputation for doing so, ABC can still be held liable for Brian's negligence in not cleaning up the dangerous condition which he created. In short, ABC should be held vicariously liable for Jill's injuries based upon the negligence of its employee, Brian.

In order to preserve the claim against ABC, the bottling company should be joined as an additional defendant in the lawsuit. Under Pa. R.C.P. No. 2252(a), any defendant may join as an additional defendant any person, whether or not a party to the action, who may be: (1) solely liable on the plaintiff's cause of action, or (2) liable over to the joining party on the plaintiff's cause of action, or (3) jointly or severally liable with the joining party on the plaintiff's cause of action. Subsection (b) of Rule 2252 provides that if the person sought to be joined is not a party to the action, then the joining party may file as of course a praecipe for a writ or a complaint. Pa. R.C.P. No. 2253 provides that the praecipe for a writ to join an additional defendant, or a complaint if the joinder is commenced by complaint, shall be filed by the original defendant not later than sixty (60) days after the service upon the original defendant of the initial pleading, unless such filing is allowed by the court upon cause shown. Thus, a praecipe for a writ or a complaint should be filed within sixty (60) days of June 12, 2000, the date of service upon the Market of the Plaintiff's Complaint, so as to avoid the necessity of having to apply to the court for leave to join ABC as an additional defendant. When the joinder complaint is filed, it should be argued that ABC should be solely liable on the plaintiff's cause of action, or liable over to the Market on the plaintiff's cause of action, or jointly and severally liable with the Market on the plaintiff's cause of action.

3. **Since Jill will be classified as a business invitee, her counsel will have to show that the Market either created the dangerous condition which caused Jill's injuries, or that the Market knew or should have known of the condition and did not correct it. Jill's counsel will not likely be successful in this regard.**

In the recent Superior Court decision of Swift v. Northeastern Hospital of Phila., 456 Pa. Super. 330, 690 A.2d 719 (1997), the Court conducted an exhaustive examination of the current law in Pennsylvania governing business invitees as follows:

The mere fact that an accident occurred does not give rise to an inference that the injured person was the victim of negligence. McDonald v. Aliquippa Hospital, 414 Pa. Super. 317, 321, 606 A.2d 1218, 1220 (1992). Pennsylvania law places the burden on the plaintiff to establish the existence of negligence on the part of the defendant by proving four elements: (1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual damages. Pittsburgh National Bank v. Perr, 431 Pa. Super. 580, 584, 637 A.2d 334, 336 (1994). Thus establishing a breach of a legal duty is a condition precedent to a finding of negligence. Shaw v. Kirschbaum, 439 Pa. Super. 24, 29, 653 A.2d 12, 15 (1994).

The nature of the duty which is owed in any given situation hinges primarily upon the relationship between the parties at the time of the plaintiff's injury. Pittsburgh National Bank v. Perr, *supra*. The standard of care that a possessor of land owes to one who enters upon the land depends upon whether the entrant is a trespasser, a licensee or an invitee. Carrender v. Fitterer, 503 Pa. 178, 184, 469 A.2d 120, 123 (1983). Here, Appellants have pled facts which establish that Decedent was a business invitee. A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. Palange v. City of Philadelphia Law Department, 433 Pa. Super. 373, 378, 640 A.2d 1305, 1308 (1994). As such, Decedent was entitled to the highest duty of care. Beary v. Pennsylvania Electric Co., 322 Pa. Super. 52, 59, 469 A.2d 176, 178 (1983). Applying section 343 of the Restatement (Second) of Torts, this court has explained that a party is subject to liability for physical harm caused to an invitee only if:

he knows of or reasonably should have known of the condition and the condition involves an unreasonable risk of harm, he should expect that the invitee will not realize it or will fail to protect themselves against it, and the party fails to exercise reasonable care to protect the invitees against the danger.

Blackman v. Federal Realty Investment Trust, 444 Pa. Super. 411, 415, 664 A.2d 139, 142 (1995).

An invitee must prove either the proprietor of the land had a hand in creating the harmful condition, or he had actual or constructive notice of such condition. Moultrey v. Great Atlantic & Pacific Tea Co., 281 Pa. Super. 525, 535, 422 A.2d 593, 598 (1980).

As applied to this case, it appears that Jill would be classified as a business invitee as she was going to the store to purchase food which the store made available for retail sale. This was a purpose directly related to the business dealings of the Market. Thus, Jill, as a business invitee, must prove that the Market either had a hand in creating the harmful condition or had actual or constructive notice of such condition.

The results of the investigation, which are not in dispute, make clear that it was ABC's employee, and not an employee of the Market, who created the harmful condition. There is no evidence that any of the Market's personnel had a hand in creating the dangerous condition.

There is also no evidence to suggest that the Market had actual notice of the dangerous condition before Jill fell. Although there were three customers who saw the dangerous condition about five minutes prior to Jill's fall, none of them reported it to the Market's employees. In addition, the two witnesses who saw the bottle fall from Brian's hand truck did not report the resulting dangerous condition until after Jill had already fallen. Accordingly, there is no evidence whatsoever that the store had actual notice of this condition. The remaining question is whether the Market's personnel had constructive notice of the dangerous condition.

An invitee can satisfy its burden of proof against a proprietor by showing that the proprietor had constructive notice of a harmful condition. Zito v. Merit Outlet Stores, 436 Pa.Super. 213, 647 A.2d 573 (1994). What constitutes constructive notice must depend on the circumstances of each case, but one of the most important factors to be taken into consideration is the time elapsing between the origin of the defect or hazardous condition and the accident. Rogers v. Horn & Hardart Baking Co., 183 Pa.Super. 83, 127 A.2d 762, 764 (1956). What will amount to constructive notice of a defective or dangerous condition existing upon the defendant's premises varies under the circumstances of each case. Some of the factors affecting the question, in addition to the time elapsing between the origin of the defect and the accident, are the size and physical condition of the premises, the nature of the business conducted thereon, the number of persons using the premises and the frequency of such use, the nature of the defect and its location on the premises, its probable cause and the opportunity which defendant, as a reasonably prudent person, had to remedy it. Lanni v. Pennsylvania.R.Co., 371 Pa. 106, 88 A.2d 887 (1952).

As applied here, it is undisputed that the Market's manager inspected the vestibule area ten minutes prior to Jill's fall and there was no broken soda bottle on the floor. The Market is described in the facts as a small retail grocery store which was generally not busy at the time of day in question. Since the store was not busy, there would be relatively few customers passing through the vestibule area. In fact, there is no evidence that any other customers passed through that area other than the five mentioned in the facts, none of which reported the dangerous condition until after the fall. The nature of the defect was transitory, not permanent. In other words, it wasn't like a broken floor tile or raised floor drain which would have been present for an extended period of time thereby making it more likely that the Market would have notice of the dangerous condition. In short, the store will not likely be found to have had constructive notice of the dangerous condition.

The facts support a strong argument that Jill will not be able to legally substantiate her claim against the Market because Jill will not be able to prove that the Market breached its duty to her.

4. All of the settlement proceeds will be subject to equitable distribution as all of it will be classified as marital property.

Under 23 Pa. C.S.A. Section 3501(a) of the Pennsylvania Divorce Code, marital property is defined as all property acquired by either party during the marriage unless it falls within one of the enumerated exceptions set forth in Section 3501(a). Timing, rather than the method of obtaining the property, controls what is marital property under the Code and the statute presumes

that property acquired during the marriage is marital. Drake v. Drake, 555 Pa. 481, 725 A.2d 717 (1999) citing 23 Pa. C.S.A. Section 3501(b). The focus is on when the right to receive the asset accrues. Nuhfer v. Nuhfer, 410 Pa. Super. 380, 599 A.2d 1348 (1991). Where the proceeds of a tort settlement and the underlying injury both occur during a party's marriage, the settlement proceeds are considered to be marital property unless an exception set forth in Section 3501(a) applies. Drake, supra.

As applied to this case, it is clear that Jill's cause of action for her personal injuries accrued during the marriage. Thus the \$450,000 of settlement proceeds which she received would be presumed to be marital property. None of the exceptions enumerated in Section 3501(a) would apply which would exempt the property from being classified as marital property. It does not matter that a portion of the settlement was attributable to post-separation earning capacity as the personal injury claim accrued during the marriage and none of the exceptions under 3501(a) would rebut the presumption that all of the settlement proceeds would be marital property and therefore potentially available for distribution.

Jill's lawyer could attempt to argue that the portion of the settlement attributable to post-separation employment earnings would be non-marital property on the theory that any property acquired after separation is non-marital property. However, this argument will likely be unsuccessful. In Drake, supra, a similar argument was considered by the Pennsylvania Supreme Court in a worker's compensation case. In that case, the husband received a worker's compensation commutation award which covered benefits attributable to time periods both during and after the marriage. However, the Court concluded that because the award was received during the marriage, it was classified as marital property under the Pennsylvania scheme of equitable distribution and all of the proceeds would be subject to distribution. The dissenting opinion in Drake pointed out that a spouse has no right to the other spouse's earnings after the marriage ends, and, therefore, the spouse should have no right to a worker's compensation commutation award that is intended as a substitute for those future earnings. It appears that Jill's argument would be very similar to the argument addressed by the dissent in Drake and would likewise be unsuccessful.

Question No. 4: Facts and Interrogatories

Mary owns a small highway paving and maintenance business as a sole proprietor. She operates the business from her home, which is located in Pennsylvania near the border with State M. The business has 30 employees; about half of whom are residents of State M and the balance are residents of Pennsylvania. Mary contracts with various government entities to perform highway paving and maintenance in both State M and Pennsylvania.

Pennsylvania recently enacted legislation (“Act 5”), which requires that workers employed by a contractor in the performance of contracts for construction or repair of highways entered into by the state, county or municipality be residents of the Commonwealth for at least 90 days prior to their employment on the project. The stated purpose of this legislation is to alleviate unemployment in the construction industry in Pennsylvania. When this legislation becomes effective on September 1, 2002, Mary’s ability to adequately staff jobs in Pennsylvania will be adversely impacted, and she may be required to lay off some or all of her workers who reside in State M in order to hire residents of Pennsylvania.

Mary is currently doing a roadway-paving project under a contract with C County, Pennsylvania. In protest of Act 5, Mary placed posters critical of the legislation, and legislators who had voted to adopt it, on her paving equipment and trucks working at the C County project. Larry Legislator, who strongly supported Act 5 and campaigned for office based upon its passage, happened to observe the signs as he drove by the paving project several weeks ago. He immediately complained to Carol, the C County employee who was responsible for managing the contract with Mary. Carol directed Mary to remove the posters. When Mary refused, Carol terminated her contract because of Mary’s refusal to follow the directive. Mary was in full compliance with all the terms of the contract, although the contract was silent on the matter of signs or posters on equipment used at the job site.

1. Is the residency requirement set forth in Act 5 valid under the United States Constitution?
2. What claim or claims based upon the United States Constitution should be asserted by Mary with respect to the termination of her contract with C County and with what likely result?

Earlier this year Mary had decided to terminate Ned, one of her employees who resides in State M, because she concluded he had stolen some tools from the business which were used in a construction site in State M. Mary sent Ned a written notice of termination, stating that theft of business property was the cause for termination. In addition, Mary sent a copy of this letter to Ned’s probation officer in State M (Ned was then on probation resulting from a conviction in State M for possessing unlawful drugs). Unfortunately, Mary’s conclusion was incorrect; it was later discovered that the tools were stolen by the occupant of a house near the construction site.

Ned has now filed a complaint in the United States District Court in Pennsylvania, asserting a defamation claim against Mary based upon the above facts. Assume that the requirements for jurisdiction based upon diversity of citizenship are satisfied. Under the law of State M, an absolute privilege would attach to the written communications sent by Mary as Ned’s employer to both Ned and the probation officer; under Pennsylvania law, however, such communications would not be privileged.

3. In what responsive motion or pleading could Mary's counsel raise the defense of absolute privilege?
4. What state's law should the District Court apply when determining whether Mary's communications were privileged?

Question No. 4: Examiner's Analysis

1. The residency requirement set forth in Act 5 is invalid because it violates the Privileges and Immunities Clause of the United States Constitution.

The Privileges and Immunities Clause, Article IV, §2 of the United States Constitution provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in several states." As the Supreme Court has noted, the "...object of the Clause...is to place the citizens of each state upon the same footing with citizens of other states, so far as advantages resulting from citizenship in those states is concerned." Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 380, 98 S.Ct. 1852, 1858 (1978). See, Hughes v. Oklahoma, 441 U.S. 322, 325-26, 99 S.Ct. 1727, 1731 (1979).

The Supreme Court has adopted a three-prong test to analyze claims under the Privileges and Immunities Clause. First, does the restriction burden one of the privileges and immunities protected under the Clause; second, does the government have a "substantial reason" for the difference in treatment between residents of different states and are the nonresidents shown to be the "peculiar source" of the problem to be solved by the regulation; third, does the discriminatory treatment bear a "substantial relationship" to the government's objectives. See, United Bldg. & Constr. Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, 465 U.S. 208, 218, 104 S.Ct. 1020 (1984). Here, the provisions of Act 5 discriminate against non-residents of Pennsylvania who would seek to be employed in the performance of contracts for construction or repair of highways in the Commonwealth. Only employees who are residents of the Commonwealth for 90 days prior to their employment on the contract would be eligible to work on such projects. The discriminatory provision, therefore, affects the right to employment, where the employee is hired by a private employer, which receives a governmental contract to work on a public project. This right is one of the privileges and immunities protected by the Clause. See, United Bldg., 465 U.S. at 221, 104 S.Ct. at 1029.

The second prong of the test requires an examination of the reason advanced by the state for the discriminatory treatment of non-residents. Here, the reason asserted in Act 5 is to alleviate unemployment in the construction industry in Pennsylvania. Not only must this be deemed a valid reason for disparate treatment of non-residents, but the state must as well show that non-residents are a "peculiar source of evil at which the statute is aimed." Toomer v. Whitsell, 334 U.S. 385 at 399, 68 S.Ct. 1156 at 1163 (1948). Alleviating unemployment may perhaps be a substantial reason to motivate state legislation, but there is no indication either on these facts or logically that non-resident employees constitute a "peculiar source" of high unemployment in the construction industry in Pennsylvania. There is nothing inherent about out-of-state construction workers, which would render them responsible for the unemployment rate in Pennsylvania. Accordingly, absent the existence of additional facts, there is no substantial justification for the difference in treatment created by Act 5 between resident and non-resident workers on governmental construction projects. Without such substantial justification, there is no need to inquire whether the discriminatory treatment would bear a substantial relationship to the objectives of the Commonwealth in adopting Act 5. See, A.L. Blades & Sons, Inc. v.

Yerusalim, 121 F. 3d 865, (3rd Cir. 1997). Accordingly, it is likely that Act 5 violates the Privileges and Immunities Clause.

A durational residency requirement which conditions eligibility for benefits on a minimum period of prior residency, can under certain circumstances be subject to challenge based upon the Privileges and Immunities Clause of the Fourteenth Amendment, which provides in pertinent part: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” In Saenz v. Roe, 526 U.S. 489, 119 S.Ct. 1518 (1999), the Supreme Court applied this clause of the Fourteenth Amendment to invalidate a California statute which conditioned eligibility for full payment of welfare benefits to residents who had resided in the state for at least one year. The Court noted that the standard of review applied to the durational residency requirement, which affected the right of a newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same state, would be “no less strict” than the compelling interest standard applied in Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322 (1969). Id., 526 U.S. at 504, 119 S.Ct. at 1527. Under this analysis, therefore, the result would be the same as a challenge predicated on the Privileges and Immunities Clause of Article IV, Section 2.

Although it could be argued that Act 5 may also implicate the Commerce Clause because it imposes a restriction on the movement of labor between the states, in this instance the provisions of Act 5 relate only to how the state conducts its own business with contractors. As such, it is acting as a market participant rather than a market regulator and the regulation would therefore be valid under the Commerce Clause. White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 210, 103 S.Ct. 1042, 1046 (1983).

2. The termination of Mary’s contract with C County would violate the Free Speech Clause of the First Amendment of the United States Constitution, and Mary would likely be successful in this claim.

It is clear from the facts that the motive for termination of Mary’s contract with C County was her placement of posters critical of Act 5, as well as legislators who supported Act 5, on equipment and machinery operating at the job site. These statements concerning public issues and political candidates represented by these posters is core speech protected by the Free Speech Clause of the First Amendment. Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976). Mary was, in effect, punished for engaging in this protected activity through the termination of her contract. In all other respects she was in compliance with the terms of the contract; moreover, there was no contract clause which would have prohibited placement of posters on the vehicle.

Public employees are entitled to First Amendment protection for speech that is a matter of public concern, provided that the employee’s interest in expressing a view on the subject outweighs the harm to the public employer that can result when an employee engages in such speech. Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983); Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1988).

The United States Supreme Court has held that similar to public employees, independent contractors hired by the government are protected under the First Amendment from retaliatory government action as a result of speech on a matter of public concern. Board of County Commissioners, Wabaunsee County v. Umbehr, 518 U.S. 668, 116 S.Ct. 2342 (1996). The extent of the protection is determined by balancing the government’s interest as a contractor in

promoting the efficiency of the services it performs and the interests of the independent contractor in commenting upon matters of public concern. Id.

As in the public employee context, the First Amendment will provide protection where the independent contractor's interest in expressing a view on a matter of public concern outweighs the harm to a government contractor that can result from such speech. Here, there is no evidence of any legitimate government interest being harmed by the speech, which would outweigh the free speech interest at stake with respect to Act 5. Accordingly, Mary would likely be successful in the claim asserting a violation of the First Amendment resulting from termination of her contract.

3. Mary's counsel should raise the defense of absolute privilege by means of an affirmative defense in the Answer to the Complaint. It is possible that Mary could also raise this defense by means of a Motion under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Mary's counsel could properly raise the defense of absolute privilege as part of an Answer filed pursuant to Rule 8(b) of the Federal Rules of Civil Procedure. Rule 8(c) specifically provides that in pleading to a preceding pleading, a party shall set forth any matter constituting an avoidance or affirmative defense. The absolute privilege accorded under State M law to the communications by Mary would be a matter constituting an avoidance or affirmative defense, and therefore should be raised in the Answer filed by Mary in response to the Complaint.

It is possible under certain circumstances to assert an affirmative defense through a Rule 12(b)(6) Motion to Dismiss for failure to assert a claim upon which relief may be granted. If the Complaint sets forth sufficient facts to demonstrate, on its face, that an affirmative defense exists, which would bar relief, the defendant may raise the affirmative defense by the Rule 12(b)(6) Motion and the Court may appropriately dismiss the Complaint. See, Federal Practice and Procedure, Wright and Miller, Section 1357. Without the entire Complaint, of course, there are insufficient facts presented to determine if Mary could assert the defense in this instance by means of a Rule 12(b)(6) Motion.

4. The Court should apply Pennsylvania choice of law rules, and would likely conclude that the law of State M would apply to the action.

The outcome of Ned's claim will turn on the law to be applied. That is, should State M law be deemed to apply, the absolute privilege would attach to Mary's communication and Mary would therefore prevail; if, on the other hand, Pennsylvania law applies, there is no privilege that would attach and Ned would be able to proceed with his defamation claim.

In order to determine the substantive state law that is to govern a federal court's decision in a diversity case, the District Court looks to the conflict of law rules of the forum state, which in this instance is Pennsylvania. Klaxon v. Stentor Electrical Manufacturing Co., 313 U.S. 487, 61 S.Ct. 1020 (1941); Kirschbaum v. WRGSB Associates, 243 F.3d 145 (3rd Cir. 2001).

As established in Griffith v. United Airlines, Inc., 416 Pa. 1, 203 A.2d 796 (1964), Pennsylvania has adopted a more flexible rule to resolve conflict of law issues, which permits analysis of the policies and interests underlying the particular issue before the Court. As recently stated:

“In cases where the substantive laws of Pennsylvania conflict with those of a sister state in a civil context, Pennsylvania courts are to take a flexible approach which permits analysis of the policies and interests underlying the particular issue before the court. This approach gives the state having the most interest in the question paramount control over the legal issues arising from a particular factual context, thereby allowing the forum to apply the policy of the jurisdiction most intimately concerned with the outcome.”

Larrison v. Larrison, 750 A.2d 895, 898 (Pa. Super. 2000).

Initially, this is not a “false conflict,” in which only one state’s interest would be impaired by application of the other’s state’s law. Applying State M’s law would impair Pennsylvania’s interest in allowing a remedy for defamatory statements. On the other hand, applying Pennsylvania law would impair State M’s interest in protecting the free flow of communication from an employer to an employee or a governmental representative. See, LeJeune v. Bliss-Salem, Inc., 85 F.3d 1069 (3rd Cir. 1996). Thus, it is appropriate to assess which state has the paramount interest in having its law applied to Ned’s claim.

Here, Ned is a State M resident complaining of Mary’s communication about him, which was directed to a State M probation officer located in State M. The recipient of the communication was a State M resident and the injury occurring from the communication occurred in State M. The only connection to Pennsylvania is that the author of the communication is a Pennsylvania resident. It is reasonable to conclude, therefore, that State M would have the paramount interest in the legal issues arising from this factual context. If State M has seen fit to extend an absolute privilege to communications of this nature if occurring wholly within the state, then it would seem that communications by a non-resident directed to State M residents and officials should be protected as well. Pennsylvania, on the other hand, has no real interest in granting its residents less protection than would be afforded a similarly situated State M defendant. Accordingly, the District Court should apply State M law and find that the absolute privilege protects Mary from liability.

Question No. 5: Facts and Interrogatories

John Doe (Dr. Doe) is a surgeon who signed a two (2) year employment contract with a Medical Clinic (MED) in C County, Pennsylvania on February 1, 2000. In addition to setting forth Dr. Doe's salary of \$150,000 per year and other terms of employment, the agreement provided that Dr. Doe would not practice medicine anywhere else within ten (10) miles of MED for a period of two (2) years from the date of termination or expiration of the contract. The contract also provided that in the event that Dr. Doe violated the provision, the "Parties agree that Dr. Doe shall pay to MED, as damages to compensate it for the breach, the sum of \$50,000." C County is a metropolitan area which has a medical school, teaching hospitals and several large medical centers. Dr. Doe became quite successful as a surgeon and decided to open his own office where he could see new patients as well as those established patients whom he treated at MED. He left MED on February 1, 2002 and opened his own office nine (9) miles away from MED shortly thereafter.

Prior to entering medical school, Dr. Doe was engaged to marry Eve. In 1995, Dr. Doe and Eve purchased real estate in C County, Pennsylvania known as Blackacre by a properly executed deed to "Eve and John Doe as tenants by the entirety with right of survivorship." Eve immediately moved onto Blackacre and resided there without objection from Dr. Doe. When Dr. Doe completed medical school, he terminated his relationship with Eve and married Fran. Eve subsequently died on March 1, 2001 and Ed was duly appointed Executor of Eve's estate. Dr. Doe now proposes to sell Blackacre to Pat, but has been advised by Ed that Eve's estate intends to claim an interest in Blackacre.

1. Dr. Doe consults attorney Able and asks him if the clause in the agreement prohibiting him from practicing medicine within ten (10) miles of MED for two (2) years is valid and enforceable by MED. How should Able advise Dr. Doe?
2. Dr. Doe also asks Able if the clause in the agreement providing for his payment of damages of \$50,000 in the event of his breach of the agreement is valid and enforceable by MED. How should Able advise Dr. Doe?
3. Dr. Doe brings an action to quiet title to Blackacre against Ed, as Executor of Eve's estate. How should the court rule?

Prior to the Court's decision in the action to quiet title, Dr. Doe became impatient to sell Blackacre and prepared a deed by which he proposed to convey Blackacre to Pat. The deed stated that Dr. Doe "does hereby release and quitclaim" Blackacre to Pat. No other words of grant were used by Dr. Doe. The deed properly described Blackacre by metes and bounds.

4. Pat was aware of the pending action to quiet title and consults you as her attorney regarding the deed. She asks you what the legal effect of the deed is and if she will have any legal remedy against Dr. Doe if she accepts the deed and he does not own sole title to Blackacre. How should you advise her?

Question No. 5: Examiner's Analysis

1. Able should advise Dr. Doe that the covenant not to compete in Dr. Doe's employment contract is probably valid and enforceable by MED.

Generally, courts examine three factors when determining the enforceability of a covenant not to compete: (1) the covenant must be ancillary to the contract for employment and supported by adequate consideration; (2) the covenant must be reasonable with respect to both duration of time and geographic area; and (3) the restrictions must be reasonably necessary for the protection of the employer. Davis and Warde, Inc. v. Tripodi, 420 Pa. Super. 450, 616 A.2d 1384, 1386-1387 (1992). Geisinger Clinic v. DiCuccio, 414 Pa. Super. 85, 103, 606 A.2d 509, 518 (1992).

A restrictive covenant that is part of a contract of employment rather than a later imposed additional restriction is generally upheld as being ancillary to the employment contract and thus supported by consideration. Id. 414 Pa. Super. at 103, 606 A.2d at 518. The restrictive covenant was part of Dr. Doe's employment contract and the consideration is the employment itself.

To be enforceable, the restrictive covenant must be reasonably limited in both duration of time and geographic area. A covenant not to compete is reasonably limited if it is within the time and territory that is reasonably necessary for the protection of the employer and does not impose an undue hardship on the employee. Sidco Paper Company v. Aaron, 465 Pa.586, 351 A.2d 250 (1976). Pennsylvania courts have consistently upheld restrictive covenants of up to three years after termination of employment. See: West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d 295 (Pa. Super. 1999) (term of contract and 1 year afterward against physician); John G. Bryant Co., Inc. v. Sling Testing and Repair, Inc., 471 Pa. 1, 369 A.2d 1164 (1977) (3 years); Geisinger Clinic v. DiCuccio, *supra*. (2 years against a physician); Hayes v. Altman, 424 Pa. 23, 225 A.2d 670 (1967) (3 years against an optometrist). Here, a two-year restrictive covenant is probably reasonable under the circumstances.

Courts examine the area of the employer's market or patient base to determine the reasonableness of a geographic restriction. In a metropolitan area with a medical school, teaching hospitals and a large medical center, a ten mile limitation would be considered reasonable if such an area reflects MED's patient base. A ten-mile restriction imposed on a physician in similar circumstances was upheld in West Penn Speciality MSO, Inc. v. Nolan, *supra*. Dr. Doe would not be unduly burdened by complying with the restrictive covenant because he could practice medicine anywhere beyond the restricted ten mile radius. A court would, therefore, most likely find the covenant not to compete in Dr. Doe's employment contract with MED enforceable and Able should so advise Dr. Doe.

2. Able should advise Dr. Doe that the liquidated damages clause in the agreement is valid and will be enforceable by MED.

Parties to a contract may agree that a specified amount will be paid to the aggrieved party in the event of a breach. Such agreements fixing damages in advance of a breach will be found valid if: (1) the computation of actual damages would be speculative; and (2) the amount stipulated is a reasonable approximation of the expected loss rather than a penalty. Carlos R. Leffler, Inc., v. Hutter, 696 A.2d 157, 162 (Pa. Super. 1997).

If damages may be readily predicted with reasonable certainty, a liquidated damages provision would not be necessary. Courts and commentators have noted that a contract containing a restrictive covenant is precisely the type of promise which, if breached, does not lend itself to an easy or accurate measure of actual loss. John Murray, Murray on Contracts, § 125 (3rd Ed. 1990); Raymundo v. Hammond Clinic Association, 449 N.E.2d 276, 283-284 (Ind. 1983). The injury caused by the violation of a covenant not to compete is particularly difficult to quantify.

In Geisinger, *supra*, the Pennsylvania Superior Court found a liquidated damages provision in a restrictive covenant clause in an employment agreement between a physician and a clinic to be enforceable. The court examined the intent of the parties and the special circumstances of the case and concluded that the physician's departure from the clinic for the purpose of establishing a medical practice in competition with the clinic would result in unquantifiable business losses to the clinic. Geisinger Clinic v. DiCuccio, *supra*, at 102-103, 606 A.2d at 518. The court recognized that the clinic's losses would include such uncertain amounts as that spent in the development and maintenance of the departing physician's practice as well as the additional time and effort which would be required to re-establish the practice which the physician left. Here, MED will incur additional losses if Dr. Doe continues to treat the patients who were previously established patients at MED and will incur unquantifiable damages for the loss of new patients who will now go to Dr. Doe.

When the liquidated damages provision is intended as a form of punishment and the purpose is to secure compliance, the principles of compensation are subordinated and the provision must fail as an unenforceable penalty. Hanrahan v. Audubon Builders, Inc., 418 Pa.Super. 497, 502, 614 A.2d 748, 750 (1992). To be enforceable, the amount of damages agreed upon by the parties at the time they formed the contract must be a reasonable forecast of actual damages in light of the anticipated harm. Where the amount fixed in advance is highly disproportionate to the amount of probable loss in the event of a breach, it is considered a penalty and not compensation.

Courts look to the intent of the parties at the time of the contract to determine whether the liquidated damages provision is a penalty or an estimate of probable actual damages. As the Pennsylvania Superior Court stated in Hanrahan v. Audobon Builders, Inc., *Id.*:

The question [of whether stipulation is a penalty or a valid liquidated damages provision] ... is to be determined by the intention of the parties, drawn from the words of the whole contract, examined in the light of its subject matter and its surroundings; and in this examination we must consider the relation which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach in damages, and such other matters as are legally or necessarily inherent in the transaction. *Id.* at 502, 614 A.2d at 750, (quoting Commonwealth v. Musser Forests, Inc., 394 Pa. 205, 146 A.2d 714, 717 (1959)).

Here, there will most likely be a significant pecuniary loss to MED as a result of Dr. Doe's departure. At the time the contract was entered into, MED likely anticipated financial gain from Dr. Doe's employment. Further, MED will probably lose revenues and incur new costs pending the replacement of Dr. Doe. Just as importantly, patients who previously received services at MED and paid MED for the services as well as potential new patients may now be

treated by Dr. Doe resulting in a loss of additional income to MED. These amounts will be difficult to ascertain particularly in light of the continuing violation. A court would probably find that the agreed upon sum of \$50,000 was reasonable in the circumstances and was not disproportionate to the injury to MED. MED will probably be successful in recovering \$50,000 in liquidated damages.

3. The court will probably rule that Dr. Doe owns Blackacre by right of survivorship and he will prevail in the action to quiet title to Blackacre.

Dr. Doe and Eve could not hold title to Blackacre as tenants by the entireties despite the language in the deed. Ownership as tenant by the entireties is limited to parties who are husband and wife. Maxwell v. Saylor, 359 Pa. 94, 58 A.2d 355 (1948). Five unities are essential in the creation of a tenancy by the entireties: (1) time; (2) title; (3) interest; (4) possession; and (5) person. The fifth unity is based on the common law concept of unity of person in husband and wife. Masgai v. Masgai, 460 Pa. 453, 457, 333 A.2d 861, 863 (1975).

The deed to Dr. Doe and Eve, however, is not totally invalid. When presented with this issue, the Pennsylvania Supreme Court stated that while the deed was ineffective to convey a tenancy by the entireties, there was no reason why the grantees could not take title in a form of joint ownership appropriate under the circumstances. Maxwell v. Saylor, *supra.* at 96, 58 A.2d at 356. The appropriate form of tenancy is to be determined by the intention of the parties, the traditional guideline for interpreting all deeds. Riccelli v. Forcinito, 407 Pa.Super. 629, 634, 595 A.2d 1322, 1325 (1991). The intent of the parties is determined by examining the language of the deed. *Id.* at 635, 595 A.2d at 1325.

In Maxwell v. Saylor, *supra.* an unmarried couple purchased property and designated themselves as husband and wife in the deed and took title as "tenants by the entireties." The Pennsylvania Supreme Court held that while the deed was ineffective to create a tenancy by the entireties, the language of the deed indicated that the grantees desired to establish a right of survivorship.

(J)oint tenancy with the right of survivorship best effectuates their intention to the extent legally permissible, that being the form of tenancy for unmarried persons most nearly resembling the tenancy by the entireties enjoyed by husband and wife, since in both instances the survivor takes the whole.

359 Pa. at 96, 58 A.2d at 356.

Similarly, in Riccelli v. Forcinito, *supra.*, two unmarried individuals purchased property as "tenants by the entireties." The Pennsylvania Superior Court, following the guidelines set forth in Maxwell v. Saylor, *supra.* held that the language in the deed, which specified "tenants by the entireties," was sufficiently specific to create a survivorship right. Richelli v. Forcinito, *supra.* at 636, 595 A.2d at 1326.

In Pennsylvania, as well as many other jurisdictions, there is a statutory presumption against a right of survivorship. 68 P.S. §110. Survivorship as an incident of an estate held by joint tenants will be established where the intent of the parties is expressed by language in the deed showing an intent to create a survivorship interest. Estate of Reigle, 438 Pa.Super. 361, 652A.2d 853 (1995). Thus, when a deed recites that the unmarried grantees take title as tenants

by the entirety, Pennsylvania appellate courts interpret the deed as entailing the element of survivorship and give effect to the intent of the parties by declaring that the grantees take as joint tenants with right of survivorship. Estate of Regal, Id; Riccelli v. Forcinito, supra.; Maxwell v. Saylor, supra. The intent to create a right of survivorship in this case is further bolstered by inclusion of the words "with right to survivorship" in the deed.

Dr. Doe's later marriage to Fran had no effect on the title to the property. Upon Eve's death, Dr. Doe owned Blackacre by right of survivorship and he will prevail in an action to quiet title to Blackacre.

4. You should advise Pat that the proposed deed is a quitclaim deed and that she will have no legal remedy against Dr. Doe if he does not convey good title to Blackacre to her.

The proposed deed from Dr. Doe to Pat is a quitclaim deed. A quitclaim deed contains no warranties of any kind and transfers or releases whatever title or interest the grantor may have. Ladner, Conveyancing in Pennsylvania, Section 9.02 (4th Ed. 1979). It transfers only the title or interest of the grantor rather than the property itself. Greek Catholic Congregation v. Plummer, 338 Pa. 373, 12 A.2d 435 (1940). Thus, under a quitclaim deed, the grantee can acquire no better title than the grantor had. Such a deed is used for the transfer or release of an interest in real property which the grantor has or may think he has, but does not warrant any title. Ladner, supra.; 21 P.S. § 7.

A quitclaim deed differs from a general warranty deed and a special warranty deed because it does not contain any warranties. Both a general warranty deed and a special warranty deed contain covenants of warranty. A general warranty deed warrants all defects in title, whether they arose before or after the grantor took title. 21 P.S. § 5. A special warranty deed contains warranties only against the grantor's own acts but not the acts of others. 21 P.S. § 6. See: Dukeminier and Krier, Property 3rd Ed. (1993) page 627.

Unlike the grantee under a general warranty deed, a grantee under a conveyance by a quitclaim deed such as Pat takes nothing if the grantor has no interest or title to the property conveyed. The grantee of a quitclaim deed has no protection as to title and has no cause of action against the grantor for breach of the warranty of title or quiet enjoyment. No such warranties are contained in the deed. If Dr. Doe does not have sole title to Blackacre, Pat would have no cause of action against him and you should so advise her.

Question No. 6: Facts and Interrogatories

Big Erectors, Inc. (“Big”) is a successful, and financially sound, Pennsylvania business corporation. Big’s primary business activity is the erection of structural steel in commercial and industrial building projects. Big has five shareholders each owning one-fifth of Big’s stock. Big’s five shareholders also serve as its board of directors.

Donna, a Big shareholder, currently serves as corporate president and chair of Big’s board of directors. Attorney Able, a sole practitioner, is Big’s general corporate counsel (having been appointed as such by Big’s board) and has been Big’s only counsel since its incorporation. Able does not represent, and has not represented, any of Big’s shareholders on an individual basis.

Big recently purchased a used crane from Steel Fab & Equipment, Inc. (“Steel”), a corporation, from which Big regularly purchases pre-fabricated steel products and new and used equipment. Big has experienced one problem after another with the used crane and has complained to Paul, the President of Steel. In an effort to appease Big, Paul invited Donna and Able to lunch to discuss the crane problem. Paul pointed out to Donna that his company had made no representations regarding the quality of the crane. The sales agreement for the crane, which was signed by Donna on behalf of Big, included on its first page in bold print in capital letters the following: **“THIS CRANE IS SOLD AS IS AND WITH ALL FAULTS.”** After hearing Paul, Donna recalled these words from the contract.

In further discussion, Paul told Donna and Able that Steel’s owners desire to sell Steel and feel Big would be a suitable buyer. Donna indicated that she had recently recommended to Big’s board that Big develop a steel fabrication division. The board had agreed with Donna’s recommendation. She suggested to Paul that Big definitely had an interest in exploring a purchase of Steel.

A few days later, in a follow-up telephone call from Paul, Able learns that Donna now intends to quietly form a new corporation on her own and have the new corporation buy Steel without disclosing Paul’s offer to Big’s board. You are a law clerk working for Able. After providing you with all of the facts recited above, Able has asked you to respond in writing to the following questions identified by Able as issues to be addressed by Able in preparation for his next meeting with Donna.

1. With respect to the problem crane, what implied warranties are potentially applicable under the Uniform Commercial Code and could Big successfully sue Steel for breach of these implied warranty(s)?
2. Under corporate law, what substantive argument, if any, could Big assert to challenge Donna’s actions if she forms a new corporation and buys Steel on her own?
3. In such a challenge, what remedy(s) might Big seek?
4. Under the Pennsylvania Rules of Professional Conduct, what responsibilities does Able have and what actions should be taken by Able relative to Donna and Big regarding Donna’s proposed plan to buy Steel?

Question No. 6: Examiner's Analysis

1. **Big might assert implied warranties of merchantability and fitness for particular purpose. Big would be unsuccessful in a suit against Steel claiming breach of the implied warranties of merchantability and fitness for particular purpose due to the “as is and with all faults” language contained in the agreement of sale that has the effect of disclaiming these implied warranties.**

Generally, there are two implied warranties that might be asserted in connection with the sale of the crane described in the facts under the Uniform Commercial Code (the “Code”). First, Section 2314 imposes an implied warranty of merchantability. 13 Pa. C.S.A. §2314. Second, Section 2315 imposes, under certain circumstances, an implied warranty that a good is fit for the particular purpose for which the buyer purchased the good. 13 Pa. C.S.A. §2315.

The merchantability warranty arises when a merchant sells a good, which was not “merchantable” at the time of the sale, giving rise to damages to the buyer that are made known to the seller by the buyer. See, White and Summers, Uniform Commercial Code, 4th Ed., §9-7. Steel is a “merchant” in that it is an entity that deals in goods of the kind sold to Big. 13 Pa. C.S.A. §2104. Goods are generally not “merchantable” if they are not fit for the ordinary purposes for which they are purchased. See, White and Summers, Uniform Commercial Code, 4th Ed., §9-8; 13 Pa. C.S.A. §2314(b)(3). If Big is having significant problems in using the crane, as is suggested by the facts, this warranty might be applicable.

The fitness for particular purpose warranty generally arises if the seller knew of the buyer’s particular purpose for buying the good, further knew that the buyer was relying on the seller’s skill or judgment to furnish an appropriate good and the buyer, in fact, relied upon the seller’s skill or judgment in buying the good. See, White and Summers, Uniform Commercial Code, 4th Ed., §9-10; 13 Pa. C.S.A. §2315. One is unable to make a determination based upon the facts given as to whether or not there is a basis to assert this warranty in connection with the sale and purchase of the crane.

Assuming, arguendo, however, that either or both of the implied warranties could apply, the warranty claims should be barred by the disclaimer that appeared in the sales agreement. Section 2316 of the Code provides, inter alia:

- (b) Implied warranties of merchantability and fitness.—Subject to subsection (c), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”
- (c) Implied warranties in general.—Notwithstanding subsection (b):
 - (1) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is,” “with all faults” or other language which in common understanding calls the attention of the buyer to the exclusion of warranties and makes plain that there is no implied warranty.

13 Pa. C.S.A. §2316. The sales agreement clearly and conspicuously stated that the crane was being sold “as is and with all faults.” Absent circumstances that would indicate otherwise (none appear to be present), these words should adequately protect the seller from a claim under either implied warranty section. It has been noted that terms such as those included in this contract “are understood to mean that the buyer takes the entire risk as to the quality of the goods involved.” Quinn, Uniform Commercial Code Commentary and Law Digest, 2d Ed., §2-316[A][3][c]. Accordingly, claims based upon implied warranties under the Code are likely to fail based upon the disclaimer language contained in the sales agreement.

2. Big could assert that Donna has breached her duty of loyalty to the corporation and has taken advantage of a corporate opportunity to the detriment of the corporation.

The Pennsylvania Business Corporation Law of 1988, as amended, (the “BCL”) states “[a] director of a business corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director . . . in good faith, in a manner he reasonably believes to be in the best interest of the corporation” 15 Pa. C.S.A. §1712(a). This is sometimes referred to as the duty of loyalty to the corporation. (Under Section 1712(c) of BCL an officer is likewise charged with a duty of loyalty to a corporation in which he is employed). The directors of a corporation have been analogized to trustees of a trust with the shareholders of the corporation being the beneficiaries of the trust. See, Sell, Pennsylvania Business Corporations, Rev. 2d Ed. §1712.2. In this position of “trust” a director “acting in good faith will not put herself in a position where her personal interests conflict with her duty to the corporation” Id. at §1712.4.

The action proposed by Donna presents a classic “corporate opportunity” situation. “The law has long recognized the doctrine of corporate opportunity which prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence.” Fletcher Cyc. Corp., (Perm. Ed.) §861.10. A corporate opportunity exists “when a proposed activity is reasonably incident to the corporation’s present or prospective business and is one in which the corporation has the capacity to engage.” Id. Thus, directors “must devote themselves to the corporate affairs with a view to promote the common interests and not their own, and they cannot, either directly or indirectly, utilize their position to obtain any personal profit or advantage other than that enjoyed also by their fellow shareholders.” Seaboard Industries, Inc. v. Monaco, 442 Pa. 256, 261, 276 A.2d 305, 309 (1971). The Seaboard court further stated:

In short, there is demanded of the officer or director of a corporation that he furnish to it his undivided loyalty; if there is presented to him a business opportunity which is within the scope of its own activities and of present or potential advantage to it, the law will not permit him to seize the opportunity for himself; if he does so, the corporation may elect to claim all of the benefits of the transaction.

Id. at 262, 309.

A director presented with an opportunity has a duty to disclose to the corporation his knowledge of the opportunity. This duty to disclose includes “the obligation of a director to reveal an opportunity of interest to him personally which is also available to the corporation.”

Sell, Pennsylvania Business Corporations, Rev. 2d Ed. §1712.6. If the corporation, after full and fair disclosure of all pertinent facts chooses not to avail itself of the opportunity, then the director may be free, assuming no other conflict exists, to pursue the opportunity for his own gain.

“Thus, the appropriate method to determine whether or not a corporate opportunity exists is to let the corporation decide at the time the opportunity is presented.” Fletcher Cyc. Corp., (Perm. Ed.) §861.10.

Donna has recently recommended that Big develop a steel fabrication division. Presumably, then, she believes that having a steel fabrication division is in the best interest of Big. Action by Donna to usurp this opportunity without first presenting it to the corporation flies directly in the face of duty of loyalty to the corporation. Donna cannot take advantage of this opportunity unless she first fully discloses the opportunity to the Big board and then only after the opportunity is rejected by the Big board. If Donna proceeds without disclosure to Big’s board she may well face a legal challenge based on breach of duty of loyalty.

3. The remedies most frequently sought upon discovery of the usurpation of a corporate opportunity are the imposition of a constructive trust and an accounting.

“The corporate opportunity doctrine rests upon the broad foundation of public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.” Fletcher Cyc. Corp., (Perm. Ed.) §861.50. In other words, the corporate opportunity doctrine will not allow benefit to a director who, charged with a duty of loyalty to the corporation he serves, breaches that duty by usurping an opportunity the benefit and operation of which would have benefited the corporation.

The remedy for a breach of a fiduciary duty, e.g., the usurpation of a corporate opportunity, will generally lie in equity. See, Sell, Pennsylvania Business Corporations, Rev. 2d Ed. §1712.3. The traditional remedy imposed by courts upon a finding of a misappropriation of corporate opportunity is the imposition of a constructive trust in favor of the harmed corporation against the property or opportunity. See, Fletcher Cyc. Corp., (Perm. Ed.) §861.50. Courts have also required the breaching director to file an accounting setting forth his profits derived as a result of the usurpation of the opportunity and to pay over those profits to the corporation harmed. See, Seaboard Industries, Inc. v. Monaco, 442 Pa. 256, 276 A.2d 305 (1971).

If Donna proceeds with her plan to acquire Steel without the consent of Big, Big might seek to have a constructive trust imposed upon the acquisition or could potentially seek redress, via monetary damages, to be determined by a court compelled accounting of the profits realized by Donna.

4. Under the Pennsylvania Rules of Professional Conduct Able’s client is Big and not Donna. Able should clearly advise Donna that Big is his client and not Donna. Able should further ask Donna to reconsider her plan of action. If Donna fails to reconsider, Able should advise the Big board of Donna’s plans.

Rule 1.13 of the Pennsylvania Rules of Professional Conduct, provides guidance regarding the situation in which Able now finds himself. This rule provides, inter alia:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization . . . the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

Pa. R.C.P. 1.13 ("Rule 1.13"). (The Pennsylvania rule tracks ABA Model Rule 1.13 and is consistent with the treatment given to this subject by §96 of the Restatement of Law Governing Lawyers).

The first issue to be resolved is identification of the client. Rule 1.13 adopts the so-called entity theory of representation. Under this theory "a lawyer who represents an entity client does not thereby, *as a matter of course and without more*, become the lawyer for any of the entity's members, agents, officers, or other 'constituents,' such as directors, employees, shareholders, or others with an interest in the organization." Hazard and Hodes, *The Law of Lawyering*, 3d. Ed. §17.3. Section (d) of Rule 1.13 indicates that when dealing with an organization's directors, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the director with whom the lawyer is dealing. Able is general counsel for Big. Able does not represent any shareholder of Big personally. Thus, in dealing with the situation created by Donna, Able should clearly communicate to Donna that his client is Big and not Donna.

Able has a reasonable basis to believe that the proposed plan of action by Donna will not be in the best interest of Big. Donna has previously recommended to the Big's board that it develop a fabrication division. Donna expressed to Paul that Big had an interest in exploring the purchase of Steel. Under the duty of loyalty discussed above, Donna has a duty to disclose this opportunity to Big. Donna is acting in a manner (as related by Paul to Able) suggesting that she does not intend to disclose the opportunity.

Having learned of Donna's proposed actions and perceiving the harm that may inure to the corporation if Donna proceeds as planned, Able is obligated to take intramural action to

protect the interests of Big. Under Rule 1.13, Able should inform Donna that her proposed course of action is improper from Big's point of view and ask her to reconsider. He should suggest that she obtain a separate legal opinion regarding her planned usurpation of corporate opportunity. If Donna fails to reconsider and Able believes that she intends to proceed as reported by Paul, Able should advise the board of Big of her plans. See, Hazard and Hodes, *The Law of Lawyering*, 3d. Ed. §17.5. When considering informing the board, Able should take into consideration the manner in which to proceed keeping in mind that his first duty is to protect the interests of the corporation. He should provide this information in a manner that will be least disruptive to the corporation and most likely to avoid the information coming to the knowledge of third parties outside of the corporation.

Grading Guidelines

Question No. 1

1. Taxability of Scholarships

- Taxable income does not include qualified scholarships for tuition at an accredited school when the recipient is a candidate for a degree so long as the scholarship is not a payment by the school to the student for services to the school, which are a condition for receiving the scholarship.

5 points

Comments: Applicants are expected to recognize and discuss the applicability of the above general tax rule to the SCC Scholarship received by FranCo employees.

2. Deductibility of Legal Expenses

- Legal expenses by a company in its trade or business, which are ordinary and necessary and which are reasonable, are deductible by the company when it pays or incurs them depending on its accounting method.

5 points

Comments: Applicants are expected to recognize and discuss the applicability of the above general tax rule to FranCo's legal expenses.

3. Diligence and Communication

- A lawyer shall act with reasonable diligence and promptness in representing a client.
- A lawyer shall keep a client informed, promptly comply with requests for information and properly explain matters so that the client can make informed decisions.

5 points

Comments: Applicants are expected to recognize that the attorney at issue when not timely preparing an estate plan and properly communicating with his client violated the foregoing rules of conduct requiring diligence and timely communication.

4. Intestacy

- A person who dies without a will dies intestate and Pennsylvania statutes applicable thereto provide for a scheme of distribution of the person's estate.
- The share of a surviving spouse of an intestate decedent with issue surviving from more than one marriage is one-half of the estate.

- The share of a surviving child of an intestate decedent who has a surviving spouse is an equal share of the non-spousal share with other surviving children and deceased children with issue surviving them.
- The share of grandchildren of an intestate deceased who are the children of a deceased child of the deceased is the share of the deceased child to be split equally between said grandchildren.

5 points

Comments: Applicants are expected to recognize that Frank died intestate, that his widow, therefore, is entitled to one-half of his estate (because Frank left children by two marriages), that Frank's daughter and deceased son equally split the other half of Frank's estate, and that the children of the deceased son equally split the share of the deceased son. A discussion of the widow's elective rights against Frank's estate is not expected or necessary.

Question No. 2

1. Conspiracy and Forgery

- Conspiracy requires agreement by two or more persons to commit criminal act and the commission of an overt act by one of the co-conspirators in furtherance of the conspiracy.
- Forgery occurs if, with an intent to defraud someone, a person makes, executes or authenticates a writing so that it purports to be the act of another who did not authorize the act.
- A person is criminally responsible for the actions of his co-conspirators in furtherance of the conspiracy.

6 points

Comments: Applicants are expected to recognize that Bob and Ted entered into a criminal conspiracy to commit forgery, and to discuss the elements of both crimes. Applicants should also discuss the fact that Ted is guilty of both conspiracy and forgery as a co-conspirator since Ted is responsible for Bob's actions in furtherance of the conspiracy.

2.a. Locker Search

- Under the Fourth Amendment, a search of student lockers by school officials must be reasonable under the circumstances (i.e., there must be reasonable grounds for suspecting the search will turn up evidence that the student has violated the law or the rules of the school).
- Probable cause is not required because of students' limited expectations of privacy.

4 points

Comments: Applicants are expected to recognize that although a school student has a limited expectation of privacy in a school locker, the Federal Constitution requires that the search be reasonable. Applicants should apply the facts to this standard in reaching a conclusion as to the reasonableness of the search.

2.b. Bob's Statement

- Bob was subjected to a custodial interrogation and thus seized without probable cause.
- The custodial nature of this interrogation required Miranda warnings.
- The statement was improperly obtained as a result of the illegal seizure and failure to give Miranda warnings and should be suppressed.

4 points

Comments: Applicants should discuss the police action as both being an improper seizure of Bob and a Miranda violation and reach a conclusion that the statement should be suppressed on both grounds.

2.c. House Search

- The probable cause for the search, Bob's statement, has been suppressed.
- The search warrant is "fruit of the poisonous tree" and the transcript and marijuana should be suppressed.
- No independent grounds exist to validate the search.

2 points

Comments: Applicants should be able to identify and apply the "fruit of the poisonous tree" doctrine and conclude that the transcript and the marijuana should be suppressed.

3. Statement Against Intent

- Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.
- A statement against penal interest is an exception to the hearsay rule.
- In a criminal matter, the statement against interest exception requires corroboration.

4 points

Comments: Applicants must identify the hearsay objection and the declaration against penal interest exception found in Pennsylvania Rule of Evidence 804(b)(3) and discuss why this is an exception to the hearsay rule.

Question No. 3

1. Comparative and Contributory Negligence

- Contributory negligence is an affirmative defense.
- Contributory negligence is the neglect of the duty imposed on a person to exercise ordinary care for his own protection and safety, which is a legally contributing cause of an injury.
- A plaintiff is guilty of contributory negligence with respect to injuries which are received as a result of a failure on her part to observe and avoid an obvious condition, which ordinary care for her safety would have disclosed.
- Under the comparative negligence statute, the fact that a plaintiff was guilty of contributory negligence does not bar recovery by plaintiff where such negligence was not greater than the causal negligence of the defendants against whom recovery is sought; however, damages sustained by plaintiff are diminished in proportion to the amount of negligence attributed to plaintiff.

4 points

Comments: Applicants are expected to identify and discuss the defenses of comparative and contributory negligence and apply the pertinent facts to these defenses.

2. Vicarious Liability and Joinder of Additional Defendant

- Under principles of vicarious liability, an employer is generally liable for the negligence of its servant that occurs within the scope of his employment.
- Liability exists even when the employer is not negligent.
- The facts establish that Brian's actions created a dangerous condition that caused the injuries to Jill and that he was acting within the scope of his employment when he dropped the soda bottle.
- To preserve a claim against ABC for vicarious liability for Brian's negligence, ABC should be joined as an additional defendant on the theory that it is either solely liable on plaintiff's cause of action, liable over to Market on plaintiff's cause of action, or jointly and severally liable on plaintiff's cause of action.

6 points

Comments: Applicants are expected to identify the theory of vicarious liability and its elements, apply the facts to reach a conclusion that ABC can be held liable for Brian's actions under the

theory of vicarious liability and identify the procedural step necessary to hold ABC accountable by joining ABC as an additional defendant.

3. **Premises Liability**

- Negligence requires proof of duty recognized by law; breach of that duty; and a causal connection between the conduct and the resulting injury and damages.
- Nature of duty owed is based upon the relationship of the parties at the time of injury.
- Business invitee is invited to enter land for purpose directly connected with business dealings of possessor of the land.
- Business invitee must show proprietor created the harmful condition or had actual or constructive knowledge of it.
- Existence of constructive notice depends on circumstances of case, including factors such as the amount of time elapsing between the origin of the hazardous condition, the size of the premises, the number of persons on the premises, and the nature and location of the defect.

7 points

Comments: Applicants are expected to identify and explain the principles of premises liability and the duty owed to a business invitee and apply these principles to the facts of this case in reaching a well reasoned conclusion.

4. **Equitable Distribution of Property**

- Marital property includes all property acquired by either party during the marriage unless it falls within enumerated exception.
- Focus is on when the right to receive the asset accrues.
- Where proceeds of tort settlement and the underlying injury both occur during party's marriage, the settlement proceeds are considered to be marital property.

3 points

Comments: Applicants are expected to identify and explain the pertinent principles of equitable distribution of marital property and apply the relevant facts in reaching a well reasoned conclusion.

Question No. 4

1. **Privilege and Immunities Clause**

- Recognition of the applicability of the Privileges and Immunities Clause of the Constitution.
- Privileges and Immunities Clause protects only designated rights and interests.
- A substantial interest is required to justify discrimination against non-residents.

5 points

Comments: Applicants are expected to recognize that the Privileges and Immunities Clause is applicable, to discuss the elements that are required in analyzing such a claim and to apply these elements to the facts in reaching a well-reasoned conclusion.

2. **First Amendment**

- Recognition of the applicability of the Free Speech Clause of the First Amendment.
- Analysis of a balancing of the interests between the government and contractor.

5 points

Comments: Applicants are expected to recognize that the Free Speech Clause of the First Amendment is applicable, to discuss the elements of a free speech claim brought by independent contractors hired by the government and to apply these elements to the facts in reaching a well-reasoned conclusion.

3. **Raising Affirmative Defense Under the Federal Rules of Civil Procedure**

- In pleading to a preceding pleading, a party shall set forth any matter constituting an avoidance or affirmative defense.
- Defense of absolute privilege may be raised in the answer to the complaint.
- Defense could possibly be raised in a Rule 12(b)(6) motion to dismiss, so long as the facts set forth in the complaint, to be taken as true, provide grounds for the defense.

5 points.

Comments: Applicants are expected to recognize any matter which constitutes an avoidance or an affirmative defense, must be set forth in a pleading which responds to the preceding pleading. Applicants should discuss the fact that the defense of absolute privilege should be raised in the answer or in a motion to dismiss if the facts set forth in the complaint provide grounds for the defense.

4. **Conflicts of Laws**

- Recognition that a choice of law issue is presented by the circumstances presented and that the choice of law would be determinative of the outcome.
- In a diversity case, the Federal Court looks to the conflict of law rules of the forum state to resolve choice of law issues.
- Pennsylvania uses an “interests” approach to resolution of choice of law issues.

5 points.

Comments: Applicants should recognize the choice of laws issue and that in a diversity case, the federal court applies the conflict of laws rule of the forum state. Applicants should identify and apply Pennsylvania’s “interests” approach in reaching a well-reasons conclusion.

Question No. 5

1. **Covenant not to compete in an employment contract**

- Restrictive covenant is enforceable if it is:
 - Ancillary to the employment contract and supported by consideration;
 - Reasonable with respect to duration and geographic area;
 - Reasonably necessary for the protection of the employer.
- Restrictive covenant is ancillary to Dr. Doe’s employment contract and is supported by consideration.
- Two (2) year restriction within a ten (10) mile radius is probably reasonable as to duration and geographic area and necessary for MED’s protection.
- Restrictive covenant in Dr. Doe’s employment contract is enforceable.

6 points

Comments: Applicants are expected to recognize the existence of a covenant not to compete or restrictive covenant in an employment contract and to identify the elements required for it to be enforceable. Applicants are expected to analyze the enforceability of such a covenant and to reach a well-reasoned conclusion regarding Dr. Doe's covenant not to compete.

2. **Liquidated damages**

- Liquidated damages clause is valid if:
 - Computation of actual damages would be speculative;

- Stipulated amount is a reasonable approximation of expected loss.
- Courts look at intent of parties to determine validity of liquidated damages clause.
- \$50,000 is not disproportionate to injury to MED and MED's damages are difficult to determine.
- Liquidated damages clause in Dr. Doe's employment contract is enforceable.

5 points

Comments: Applicants are expected to recognize a liquidated damages clause and the factors used by courts to determine the validity of such a clause. Applicants are also expected to analyze the clause at issue and reach a well-reasoned conclusion as to its validity.

3. **Interpretation of a deed; concurrent estates**

- Ownership of property as tenants by the entirety is limited to parties who are husband and wife.
- Deed to two (2) unmarried individuals as tenants by the entirety is not invalid but does not create tenancy by the entirety.
- Form of tenancy is determined by intention of the parties.
- Where language shows intent to create survivorship interest, courts construe deed to create joint tenancy with right of survivorship.
- Deed to Dr. Doe and Eve will be construed to create a joint tenancy with right of survivorship.
- Dr. Doe owns Blackacre by right of survivorship.

5 points

Comments: Applicants are expected to know that a deed to two unmarried parties cannot create a tenancy by the entirety and that courts look to the intent of the parties to construe a deed. Applicants should determine that the language of the deed shows the intent to create a survivorship interest and conclude that the deed created a joint tenancy with right of survivorship and Dr. Doe owned Blackacre by right of survivorship.

4. **Quitclaim Deed**

- Quitclaim deed transfers whatever title or interest the grantor has.
- A quitclaim deed does not contain any warranties of title.
- Grantee has no protection as to title when she accepts a quitclaim deed.

- If Pat accepts the quitclaim deed, she will have no cause of action against Dr. Doe if he does not have sole title to Blackacre.

4 points

Comments: Applicants are expected to recognize the distinguishing characteristics of a quitclaim deed and to reach the conclusion that if Pat accepts the quitclaim deed, she will have no cause of action against Dr. Doe.

Question No. 6

1. **Disclaimer of Implied Warranties**

- Implied warranty of merchantability requires that at the time of sale, goods be fit for ordinary purpose for which they are purchased.
- Implied warranty of fitness for particular purpose applies where seller knew of buyer's particular purpose for buying the good, knew that the buyer was relying on the seller's skill or judgment to furnish an appropriate good to the buyer and that the buyer relied on the seller's skill and judgment in buying the good.
- Implies warranties can be disclaimed by conspicuous language, which states that the goods are being sold "as is" or "with all faults."

5 points

Comments: Applicants should identify the two implied warranties that might come into play under the Uniform Commercial Code and define each. Applicants should discuss the existence of the conspicuous disclaimer, the acceptability of the "as is" language and the effect of the disclaimer upon any claim for implied warranty.

2. **Duty of Loyalty**

- Director stands in fiduciary relation to the corporation and owes a duty of loyalty to corporation, which in part requires her to act in a manner which she reasonably believes to be in the best interest of the corporation.
- Corporate opportunity doctrine prohibits one who stands in fiduciary relationship to corporation from acquiring, in opposition to the corporation, property in which the corporation has an interest.
- Corporate opportunity exists when a proposed activity is reasonably incident to corporation's present or prospective business and is one in which the corporation has the capacity to engage.
- Director must disclose to the corporation, an opportunity of interest to her personally which is also available to the corporation, and may only pursue the

opportunity if the corporation, after full and fair disclosure, does not avail itself of the opportunity.

5 points.

Comments: Applicants should recognize that the facts present a breach of duty of loyalty issue and, in particular, a corporate opportunity issue. Applicants should discuss the duty under the facts and should conclude that failure to disclose the opportunity will be a breach of the duty of loyalty and that only after disclosure to and rejection by the corporation could Donna proceed with the purchase individually.

3. Remedies for Usurpation of Corporate Opportunity

- Remedy for usurpation of corporate opportunity will be in equity.
- Director who breaches duty of loyalty by usurping corporate opportunity will not be allowed to benefit from his conduct.
- Court may impose constructive trust in favor of the harmed corporation against the property or opportunity that has been usurped.
- Director may be ordered to file an accounting setting forth his profits as a result of usurpation of corporate opportunity and pay such profits to the harmed corporation.

5 points

Comments: Applicants should recognize that a director will not be permitted to profit from usurpation of a corporate opportunity; and should conclude that the remedy will most likely lie in equity and will consist of either the request for a constructive trust and/or an accounting to recover any profits made by Donna.

4. Attorney's Duties to Corporation/Directors

- Lawyer retained by corporation represents the corporation and does not as a matter of course and without more represent the corporation's agents, officers and directors.
- Lawyer has duty to explain the identity of corporate client when it is apparent that the corporation's interests are adverse to the interests of a director with whom the lawyer is dealing.
- Where lawyer discovers that an officer or director intends to act in a manner that is in violation of a legal obligation to the corporation, the lawyer shall proceed as is reasonably necessary in the best interest of the corporation.
- Lawyer should ask the director to reconsider taking the action contemplated, and if the director persists, the lawyer should refer the matter to a higher authority in the corporation.

5 points

Comments: Applicants should recognize and discuss the client identity issue, the lawyers obligation when there is a conflict to proceed as is reasonably necessary in the best interest of the corporation, and then discuss the steps that should be taken by Able in dealing with the situation.



Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination

PERFORMANCE TEST

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FILE

SMITH, KANE & JORDAN

Attorneys at Law

MEMORANDUM

To: Applicant
From: Robert Smith, Esquire
Re: Practice of Mediation

Recently, I completed family and divorce mediation training and would like to begin a part-time mediation practice in partnership with Dr. Kathy Jones, who has a doctorate in psychology. Dr. Jones, who is not a lawyer, is a therapist as well as a newly trained family mediator. I plan to continue my family law practice as a partner at Smith, Kane & Jordan, but will not be seeing my law firm clients in my mediation practice. While I am eager to start mediating, I have some underlying concerns about how to legally and ethically reconcile my respective roles as a lawyer within a firm of 40 lawyers and a divorce mediator who works in partnership with Dr. Jones. I need to know if there are any issues or concerns raised by the provisions of the lease or partnership agreements with respect to the functioning of the mediation practice.

I have included the lease and partnership agreements in the File along with an article from a law review journal to give you some background. You should assume that the information contained in the article is both legally and factually accurate. In addition, I have included a Library, which includes the only legal principles and authorities that you should consider in completing the assigned task.

Please prepare a memorandum to me that discusses each numbered provision in the lease and partnership agreement and addresses any potential issues or concerns, which are raised thereby for Dr. Jones, the law firm of Smith, Kane & Jordan, and/or me with respect to this new mediation venture. Do *not* discuss general contract, landlord-tenant or partnership concerns or rewrite any of the documents.

Part I of your memorandum should consist of your analysis of the lease and Part II of your memorandum should consist of your analysis of the partnership agreement. As you prepare the memorandum, please number your comments to correspond with the numbered paragraphs in the lease and partnership agreements. You should state whether or not each numbered provision in the lease and partnership agreements raises any potential issues or concerns that need to be evaluated. If so, identify the potential issue or concern, cite the ethical rule, statute or rule of law implicated, and reach a conclusion as to whether the provision is problematic by applying the facts to the legal principles that you identified. If you find that a provision is problematic, please advise me if the provision must be deleted or if there are any steps that we can take to address the concerns and retain the provision as written.

LEASE AGREEMENT

Intending to be legally bound thereby, Robert Smith, Esquire and Kathy Jones, Ph.D., through the partnership of SMITH & JONES, which was formed for the purpose of conducting a divorce mediation practice (hereinafter “Tenant”), and Smith, Kane & Jordan (hereinafter “Landlord”), a Professional Corporation organized and existing according to the law of the Commonwealth of Pennsylvania, hereby agree to the following terms and conditions:

1. **PREMISES/SIGN.** Landlord shall at all times have available for use by Tenant for the purpose of conducting Tenant’s mediation practice one of the conference rooms on the 10th floor in Landlord’s law office, which is located on floors 9 through 14 at 1 Main Street, Anytown, Pennsylvania. Landlord shall also provide space on Landlord’s law firm directory in the lobby of 1 Main Street and shall have printed thereon: “Robert Smith, Esquire & Kathy Jones, Ph.D.- Mediators-10th Floor.”

2. **SERVICES.** Landlord shall permit Tenant to use Landlord’s business equipment, including a photocopier and FAX machine.

3. **CONSIDERATION/RENT.** Tenant shall pay to Landlord one-third of the payments received from Tenant’s mediation clients for the above listed services. Tenant shall pay the one-third amount to Landlord within a week of the receipt of payment by Tenant. In addition, Tenant shall recommend its mediation clients, who are in need of legal services with respect to matters relating to the divorce, to Landlord’s law firm.

This lease shall continue until either Landlord or Tenant terminates the lease agreement with two weeks prior written notice to the other party.

BY:

Smith & Jones

Smith, Kane & Jordan

PARTNERSHIP AGREEMENT

1. Robert Smith, Esquire (“SMITH”) and Kathy Jones Ph.D. (“JONES”) agree to enter into a business relationship with each other as equal and general partners of SMITH & JONES for the purpose of conducting family and divorce mediation and agree to share equally all expenses of SMITH & JONES and split equally all profits earned by SMITH & JONES.

2. SMITH and JONES agree that SMITH shall teach and familiarize JONES with Pennsylvania statutory provisions, caselaw and rules regarding equitable distribution, support, alimony and custody so that JONES will be able to competently provide advice and instruction to divorce mediation clients on divorce and custody matters, as well as explain and apply the support guidelines.

3. SMITH and JONES shall share equally the responsibility for drafting documents, which summarize the contents of any decisions made by the parties in mediation.

This Partnership Agreement shall continue in force until terminated in writing by either party.

Robert Smith

Kathy Jones, Ph.D.

***DIVORCE MEDIATION GAINS IN POPULARITY;
OFFERS OUTCOMES BY CHOICE, NOT CHANCE***

Divorce Mediation is gaining in popularity as a process for resolving issues in connection with divorce, including the division of property, financial responsibility such as child and spousal support, and custody. Mediation, according to Tim Cruz, who recently participated in the conflict resolution process, provided an opportunity to do some “hands-on planning@ for the future and allowed Tim and his wife to “take some control over the decision-making process in connection with their divorce.”

Mediation is the use of a neutral 3rd person, a mediator, to help parties resolve conflict in a non-adversarial manner. The mediator does not make a decision for the parties or determine the outcome of a controversy. Rather, the mediator helps the parties gain a better understanding of the conflict, clarify and share perspectives, ask questions of the other party, and talk about possible solutions.

Pennsylvania does not have any specific certification or licensing requirements for divorce mediators at this

time. Divorce mediators have diverse educational backgrounds and experience. Because the role of the mediator is that of a facilitator and not a lawyer or a therapist, it is not necessary for a divorce mediator to have either a law degree or a degree in social work or psychology. Consumers looking for a divorce mediator should check to make sure that the mediator has substantial divorce mediation experience, ask whether the mediator has completed a 40-hour divorce mediation training program and is a member of a recognized professional organization, and talk with others who have mediated for recommendations. Some mediators may offer services in addition to mediation, such as providing advice on equitable distribution, support or visitation and preparing separation/marriage termination agreements, which services are considered to constitute the practice of law according to an opinion issued by the Unauthorized Practice of Law Committee of the Pennsylvania Bar Association.

While mediation may not always reduce the cost of reaching a final agreement in a divorce case, it often results in more positive and direct communication between the parties. “We would prefer to make the choices that impact our children, our homes and our finances ourselves rather than have

a third party make those decisions for us,” Cruz observed. “Mediation provided the process, the privacy and the opportunity to talk about the issues and construct a workable solution together.” Divorce mediation just seems to make dollars and sense.

LIBRARY

PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT

Rule 1.7. Conflict of Interest: General Rule

* * *

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after full disclosure and consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.10. Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though a plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

* * *

Rule 5.5. Unauthorized Practice of Law

A lawyer shall not:

- (a) aid a non-lawyer in the unauthorized practice of law; or
- (b) practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

Rule 5.7. Responsibilities Regarding Nonlegal Services

* * *

(c) A lawyer who is an owner, controlling party, employee, agent or is otherwise affiliated with an entity providing nonlegal services to a recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(d) Paragraph . . . (c) does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising the recipient that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient.

42 Pa. C.S.A. Section 2524. Penalty for unauthorized practice of law

(a) General rule. **B** any person, including, but not limited to, a paralegal or legal assistant, who within this Commonwealth shall practice law or who shall hold himself out to the public as being entitled to practice law, or use or advertise the title of lawyer, attorney at law, attorney and counselor at law, counselor, or the equivalent in any language, in such a manner as to convey the impression that he is a practitioner of the law of any jurisdiction, without being an attorney at law commits a misdemeanor of the third degree upon a first violation. A second or subsequent violation of this subsection constitutes a misdemeanor of the first degree.

(c) Injunction.- In addition to criminal prosecution, unauthorized practice of law may be enjoined in any county court of common pleas having personal jurisdiction over the defendant. The party obtaining such an injunction may be awarded costs and expenses incurred, including reasonable attorney fees, against the enjoined party...

Supreme Court of Pennsylvania

Shortz, et al.

v.

Farrell

193 A.20, 327 Pa. 81 (1937)

Plaintiffs, members of a committee of the Wilkes-Barre Law and Library Association of the Luzerne County Bar, brought a bill in equity in the court below to enjoin defendant from the unauthorized practice of law. Defendant is not an attorney at law but is employed as a claim adjuster for the Globe Indemnity Company, and prepares and files pleadings in workmen's compensation cases in which that company is a party defendant; he also, on its behalf, appears at hearings before the referees, examines and cross-examines witnesses, and there, in general, conducts the litigation.=

The chancellor, in a decree nisi, enjoined defendant: (a) from preparing and filing pleadings in Workmen's

Compensation cases; (b) from examining and cross examining witnesses in any proceeding before Compensation Referees and (c) from acting as counsel for any party or insurance carrier in any proceeding before such Referees.= The court in banc dismissed defendant's exceptions and entered a final decree, from which defendant appeals.

The Act of April 28, 1899, P.L 117, Section 1, as amended by the acts of April 17, 1913 ... provides that it shall not be lawful for any person*** in any county in the State of Pennsylvania, to practice law*** without having first been duly and regularly admitted to practice law in a court of record of any county in this Commonwealth in accordance with the regularly established rules governing such admissions.....

There is no need for present purposes to venture upon a comprehensive survey of the boundaries **B** necessarily somewhat obscure **B** which limit the practice of law. An attempt to formulate a precise definition would be more likely to invite criticism than

to achieve clarity. We know, however, that when a lawyer has, through patient years of study, acquired an understanding of the law and obtained a license to engage in its practice, he applies his knowledge in three principal domains of professional activity:

1. He instructs and advises clients in regard to the law, so that they may properly pursue their affairs and be informed as to their rights and obligations.

2. He prepares for clients documents requiring familiarity with legal principles beyond the ken of the ordinary layman—for example, wills, and such contracts as are not of a routine nature.

3. He appears for clients before public tribunals to whom is committed the function of determining rights of life, liberty, and property according to the law of the land, in order that he may assist the deciding official in the proper interpretation and enforcement of the law. Since, in order to determine such rights, it is necessary first to establish the pertinent facts, which are frequently uncertain, controverted, and best ascertainable, as experience has

demonstrated, by the application of rules of evidence tested by centuries of usage, a lawyer, being technically fitted for the purpose, examines and cross-examines witnesses, and presents arguments to jurymen to guide them to a proper determination of the facts. As ancillary to participation in trials and in legal argumentation, he prepares pleadings and other documents incidental to the proceedings.

In considering the scope of the practice of law mere nomenclature is unimportant, as, for example, whether or not the tribunal is called a court, or the controversy litigation. Where the application of legal knowledge and technique is required, the activity constitutes such practice even if conducted before a so-called administrative board or commission. It is the character of the act, and not the place where it is performed, which is the decisive factor.

Shortz v. Farrell, 193 A.20, 327 Pa. 81 (1937)

In one respect the decree of the court below should be modified. It enjoins defendant from preparing and filing pleadings in workmen's compensation cases. Such 'pleadings' however, are so uniformly simple that it cannot fairly be said that legal skill is required in their preparation. They are executed on forms prepared by the board, are elementary in character, and do

not rise to the dignity of pleadings as that term is understood in other judicial proceedings. It is only when a hearing is begun before a referee that the representation of a party constitutes the practice of law.

The decree of the court below is modified by striking out clause (a), ...As thus modified the decree is affirmed.

Performance Test Question: Examiner's Analysis and Grading Guidelines

OVERVIEW

The intended format for this task is a two-part memorandum. Part I should contain a discussion of the Lease provisions and Part II should contain a discussion of the Partnership provisions. The discussion should be numbered to correspond with the particular paragraph in the document. Following directions is a critical part of the Performance Test.

For each provision, applicants should identify any potential issues or concerns that are raised, cite the proper legal authorities that are implicated, and reach a conclusion as to whether the provision is problematic by applying the facts to the legal principles that were identified. For those provisions that are found to be problematic, applicants should identify any steps that can be taken to address the concerns and retain the provision as written. One point is allocated for the overall quality of the response.

I. LEASE

Comments: Applicants should address each specific lease provision, determine whether a potential issue or concern exists, and if so, identify and discuss the issue and apply the appropriate ethical rules, statutes or law to the facts in reaching a conclusion as to whether the provision is problematic. Applicants' comments should be clear and organized and should include, if appropriate, any steps that can be taken to avoid the potential problem. – **9 points**

1. PREMISES & SIGN

- Provision #1 of the lease agreement provides that Smith, Kane & Jordan will make one of the conference rooms on the 10th floor available to Smith & Jones for conducting its mediation practice; and that the entry, "Robert Smith, Esquire & Kathy Jones, Ph.D. – Mediators" will be listed in the law firm directory located in the lobby of the building where the law office of Smith, Kane & Jordan is located.
- The law firm occupies the 9th through the 14th floors of the building and the words "one of the conference rooms on the 10th floor" indicates that the space on the 10th floor will be shared by the law firm and the mediation practice.
- The use of common premises for the mediation practice and law office may lead to some confusion on the part of the mediation clients in that it may not be clear to the mediation clients that they were not receiving the advice of a lawyer and the benefits of the client-lawyer relationship. This confusion creates a potential issue or concern because, if such confusion reasonably could exist, **Rule of Professional Conduct (RPC) 5.7(c)** will be triggered and as a result, all of the RPC will be applicable to the entire mediation practice.
- The sign for the mediation practice likewise raises a concern that the Rules of Professional Conduct will be applicable to the mediation practice because the mediation practice appears to be a part of the law firm by including the designation, "Robert Smith,

Esquire & Kathy Jones, Ph.D. – Mediators – 10th Floor” within the law firm directory in the lobby of its office building.

- The directory listing, coupled with the use of “Esquire” after your name in the designation, may tend to create confusion insofar as the mediation clients may think that they have the protection of the attorney-client relationship and that the relationship is generally that of a lawyer and client.
- Confusion over whether certain protections exist may be even more “acute” when a lawyer renders two different kinds of services, as is the case where you would maintain your family practice and conduct a divorce mediation practice out of the same law office facilities.
- Based on the facts, confusion about the existence of the attorney/client relationship may reasonably exist, and as a result, all of the RPC will apply to the delivery of non-legal services in the mediation practice.
- This provision is problematic since you will be responsible for ensuring that the mediation practice is operated within the Rules of Professional Conduct and will be responsible for any violations of the RPC.
- The provision can be retained if pursuant to **RPC 5.7(d)**, you make reasonable efforts to avoid any misunderstanding by the recipient receiving the mediation services, including advising the recipient that the mediation services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to such services.

2. SERVICES

- Provision #2 of the lease permits the mediation practice to use the law firm’s business equipment, including a photocopier and FAX.
- The use of the business equipment by the mediation practice does not appear to raise any issues.

3. CONSIDERATION/RENT

- Provision #3 of the lease requires the mediation practice to recommend its mediation clients, who are in need of legal services relating to the divorce, to Landlord’s law firm.
- This provision creates an ethical issue for the law firm of Smith, Kane & Jordan since the law firm would not be able to represent the clients that were referred to it due to a conflict of interest.
- A lawyer is precluded by **RPC 1.7(b)** from representing a client when such representation may be materially limited by the lawyer’s responsibilities to a third person or by the lawyer’s own interest.

- Since your providing legal services relating to the divorce to one of the mediation parties would be materially limited by your responsibilities to the other mediation party as part of the mediation process and by your own interests in the successful mediation, you cannot provide legal services to one of the parties.
- The exception that exists under **RPC 1.7(b)** would not be applicable because you could not reasonably believe that the legal representation would not be adversely affected by your mediation responsibilities.
- Because you are associated with the law firm of Smith, Kane & Jordan as an attorney, there would be an imputed disqualification under **RPC 1.10** for the entire law firm.
- This provision is problematic since the idea of referrals from the mediation practice to the law firm is fraught with conflicts which should disqualify an attorney in the law firm from representing your mediation clients in any domestic relations capacity. This provision should be deleted.

II. PARTNERSHIP AGREEMENT

Comments: Applicants should address each specific partnership agreement provision, determine whether a potential issue or concern exists, and if so, identify and discuss the issue and apply the appropriate ethical rules, statutes or law to the facts in reaching a conclusion as to whether the provision is problematic. Applicants' comments should be clear and organized and should include, if appropriate, any steps that can be taken to avoid the potential problem. – **10 points**

PROVISION #1

- Provision #1 provides that Smith and Jones will enter into a partnership for the practice of family and divorce mediation and that they will share equally in all expenses and profits of the partnership.
- This provision raises an issue as to whether you, as a lawyer, can enter into a partnership with Jones, a non-lawyer, to provide mediation services and whether you may share fees with a non-lawyer.
- **RPC 5.4(b)** provides that a lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.
- The Law Review Journal article by Aliza Rabinowitz, Esquire, makes it clear that mediation is considered non-legal service.
- In this circumstance, since mediation is a non-legal service and not considered the practice of law, as long as neither you nor Jones engage in providing legal services as part of the mediation practice, the partnership would be permitted.
- **RPC 5.4(a)** prohibits a lawyer from sharing legal fees with a non-lawyer, except in certain circumstances, which are not applicable here.

- Since mediation is a non-legal service, the fees earned in the mediation practice would not be legal fees.
- Therefore, this provision is not problematic since you are not precluded from working with a non-lawyer in a mediation practice and splitting fees with the non-lawyer, as long as none of the services provided are legal services.

PROVISION #2

- Provision #2 provides that you will teach Jones about basic statutory provisions, caselaw and rules regarding family law issues, such as equitable distribution, support, alimony and custody, so that Jones will be able to competently provide advice and instruction to divorce mediation clients.
- This provision raises a concern that in performing such functions, both Jones and the mediation practice will be performing legal services, thereby implicating both criminal and ethical provisions.
- Jones should not be giving legal “advice” and “instruction” as part of your mediation practice. If this happens, the mediation would not be considered a “non-legal” service but would be considered to be the practice of law.
- **Shortz** defines the practice of law as instructing and advising clients in regard to the law, so that they may properly pursue their affairs and be informed as to their rights and obligations, preparing documents, and appearing for clients before public tribunals. **Shortz v. Farrell**, 327 Pa. 81, 193 A.2d 20 (1937).
- Providing advice on equitable distribution, support, alimony and custody would likely fit within the definition of the practice of law as set forth in **Shortz**.
- The Law Review Journal article by Rabinowitz notes that in the opinion of the Unauthorized Practice of Law Committee of the Pennsylvania Bar Association, services such as those contemplated by Provision #2 require licensure as an attorney.
- Since these functions of the mediation practice would be considered to be the practice of law, the mediation partnership could not continue with Jones pursuant to **RPC 5.4(b)**.
- Because Jones is not a lawyer, when she performs the functions set forth in this provision, she would be engaged in the practice of law, and she would be subject to criminal sanctions for the unauthorized practice of law pursuant to **42 Pa.C.S.A. Section 2524**. The penalty for the first violation of the unauthorized practice of law statute is a misdemeanor of the third degree.
- Injunctive relief is also available, and the party who obtains the injunction may be entitled to attorney costs.
- **RPC 5.5** provides that a lawyer shall not aid a non-lawyer in the unauthorized practice of law.

- Since Jones would be engaged in the unauthorized practice of law by providing advice and instruction to mediation clients, you would violate **RPC 5.5** by providing instruction to her so that she can provide this service to her mediation clients.
- This provision is problematic because it fosters the unauthorized practice of law by Jones and also because you are assisting her in this unauthorized practice of law. As a result, this provision should be deleted.

PROVISION #3

- Provision #3 provides that you and Jones will share the responsibility for the drafting of documents summarizing the contents of decisions reached in mediation.
- This provision is a concern because neither you nor Jones may engage in the drafting of legal documents while acting as divorce mediators.
- The court in **Shortz** noted that the drafting of agreements that are not routine in nature is considered to be the practice of law.
- Documents that reflect the understanding of the parties with respect to issues, such as equitable distribution, support, alimony and custody, might not be considered to be routine in nature. Thus, the drafting of such agreements would be considered to be the practice of law.
- However, where, as here, the document is merely intended to reflect a summary of the contents of the decisions reached in mediation, rather than the actual separation/marriage termination agreement, such a routine function would not necessarily constitute a legal service. However, the document should clearly show that it is not intended as a legal document.
- Since the mere summarization of the decisions reached is not a legal function, the provision is not problematic and would not have to be deleted. As a precaution, I would suggest that you label any notes, memos or summaries as a “memorandum” and include a written provision that states that the document is not intended to be a legal document.