

JULY 2002

PENNSYLVANIA BAR EXAMINATION

Model Sample Answers



Pennsylvania Board of Law Examiners
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Question No. 1: Model Sample Answer

1. FranCo's employees do not receive taxable income for the SCC scholarships. The IRC provision exempts from income scholarships received for a degree seeking program, at an accredited school and when the scholarship funds go only to accepted academic expenses such as tuition and books but not living expenses. The employees would receive a 1/3 scholarship for their tuition at a presumably accredited college to achieve a degree. This is exempt from income.

A possible issue is Frank's pressure on SCC to provide the scholarships. This could be construed as Frank implicitly providing compensation to his employees through the College, except that Frank does not fund the scholarships, nor does he decide who gets it. As a result, anyone, not just FranCo's employees, can get it and the community is apparently better off for it.

2. FranCo's legal expenses in establishing the Degree Program are deductible by FranCo as ordinary and necessary business expenses. A deduction exists for ordinary and necessary business expenses. This is an above-the-line deduction that enables employers to deduct costs associated with a business as ordinary and necessary business expenses. This includes taxes, interest, legal fees, salaries, and rents incurred by the business.

Here, FranCo consulted Abel for a business issue. FranCo set up a degree program to help generate qualified employees. While this may be a unique program, it is still an ordinary and necessary business expense. Without such a program, FranCo was lacking qualified employees. As such, the legal fees incurred were associated with an ordinary and necessary business expense. Because the scholarship program can be deemed an ordinary and necessary business expense, the legal fees associated with it are deductible by FranCo.

3. It is likely that Abel violated the Rules of Conduct based on these facts. The issue is whether Able violated his duty regarding Competence, Diligence and Communication. An attorney owes a client a duty of competence to act with a reasonable degree of professionalism and skill in advising his clients. Included within this duty, an attorney owes a client a duty of diligence to act promptly and in the clients' best interest. An attorney must reasonably communicate and inform the client so that a client may be well informed as to matters relating to representation at all times.

In this case, Abel failed to exercise a degree of competence required by not acting with promptness and by failing to communicate to Frank concerning his will. Abel failed to draft the will, or make arrangements for Frank's will, despite Frank's condition citing he was too busy and the will was not a priority. He further failed to notify and inform Frank that he could associate with another attorney regarding the will and failed to inform him that Abel had not acted at all with regard to his representation of Frank.

As a result of Abel's inaction, he will be in violation of the Rules regarding Competence, Diligence and Duty to Communicate.

4. Frank's wife, daughter, and grandchildren will all inherit part of his estate according to the Pennsylvania intestacy laws. In Pennsylvania, if a person dies intestate, their estate will be distributed according to statute. If a person is survived by a spouse and issue from that spouse, the spouse gets the first \$30,000 of the estate, as well as 1/2 of the remainder of the estate. If the decedent is survived by a spouse and children not of that marriage, the spouse gets 1/2 of the estate. The remainder

of the estate passes to the issue per stirpes, or by right of representation. Issue includes born children and grandchildren.

Here, Frank died intestate. Frank was survived by a wife, a daughter by her, and grandchildren from a prior marriage. Because he was survived by a spouse and issue of a different marriage, his spouse will get $\frac{1}{2}$ of the estate and the daughter and grandchildren will take per stirpes. This means the adult daughter will take $\frac{1}{4}$ of the estate and the two grandchildren will each take $\frac{1}{8}$ of the estate.

Because Frank died intestate survived by a wife, a daughter of that marriage and grandchildren of another marriage, the wife gets $\frac{1}{2}$, the daughter gets $\frac{1}{4}$, and the grandkids each get $\frac{1}{8}$.

Question No. 2: Model Sample Answer

1. Ted should be charged with conspiracy and forgery. Ted, although he did not commit any of the acts, is liable for conspiring with Bob to commit the acts and for all subsequent crimes Bob committed in furtherance of the conspiracy.

Conspiracy requires (i) an agreement between two or more persons, (ii) to engage in a criminal enterprise, (iii) made with the intent to make the agreement, and (iv) an overt act in furtherance of the conspiracy. Under the facts presented, Ted and Bob agreed that Bob would alter Ted's transcript in an effort to get him into BCC. This was an agreement to engage in criminal conduct. Their knowledge of its criminality is not relevant. Mistake of law is no defense. Both appeared to have agreed to Bob's plan to change the transcript and Bob followed through with the plan, satisfying the overt act requirement. Thus, Ted is liable for the conspiracy and all subsequent foreseeable crimes Bob committed in furtherance of the conspiracy.

Ted is liable for Bob's forgery. Forgery is a crime that involves creating, altering or falsely representing a document as authentic when it is not with the purpose to deceive. Here, Bob made changes to the transcript, forged the principal's name and attached the school's seal. He then placed it in Ted's file, representing it as an original. The intent was to deceive BCC so it would admit Ted. As such, Bob, and thus Ted via the conspiracy, are guilty of forgery. In conclusion, Ted should be charged with conspiracy and forgery.

2.a. Bob's attorney should make the argument in support of his pretrial motion that the police and school officials violated Bob's 4th Amendment and 5th Amendment rights under the Federal Constitution.

The 4th Amendment of the constitution states that "all persons shall be free in the place, persons, home against unreasonable searches and seizures." Unreasonable searches and seizures are per se unlawful unless a warrant is supplied or the search falls within a recognized exception.

In the present case, the Supreme Court has held that a school official can search a student's locker on a reasonable suspicion that the student has committed a crime. Although this standard is below the probable cause standard for a warrant, the Supreme Court has held that the school has an important interest in protecting its students and invasion of the student's privacy is minimal when balanced against the school's interests.

In the present case, the school officials searched “all” the students’ lockers, without a reasonable belief as to which volunteer may have altered Ted’s grades. Thus, their search of Bob’s locker without reasonable belief as to a crime would violate Bob’s 4th Amendment rights and thus, the seizure of the watch would be suppressed.

2.b. Bob should assert his 5th Amendment right to Miranda warnings before custodial interrogation by the police. Custody requires sufficient curtailment of movement such that a reasonable person would feel they have been arrested. Interrogation requires any question reasonably calculated to elicit a response.

Here, Bob was taken to the school office by the police and told he was a suspect and not free to leave. Therefore, it is reasonable to expect Bob to feel arrested and in custody of the police. Second, the facts state that Bob was interviewed. Therefore, Bob’s confession was elicited through interrogation. The court should bar the confession as a violation of his 5th Amendment rights.

2.c. Under the Fruit of the Poisonous Tree doctrine, a court would suppress the contraband found at Bob’s home, unless the state can successfully argue that the contraband would have been found by independent means.

The Fruit of the Poisonous Tree doctrine holds that evidence obtained because of a Miranda, or 4th, 5th, or 6th Amendment right violation is inadmissible. Here, the police officer’s action in violation of Bob’s Miranda rights would cause a court to rule that the subsequent warrant was invalid and therefore, the evidence obtained therefrom is inadmissible. However, under the independent source exception to the Fruit of the Poisonous Tree doctrine, the evidence would be admissible if it could have been obtained by sources independent of the violation.

3. The prosecutor should object to the testimony as hearsay and Bob’s attorney should respond that it meets the statement against interest exception. Evidence to be admissible must be relevant. Relevant evidence is that which tends to make a fact more or less probable. Here, Sally’s statement is relevant as it tends to show Carl, not Bob, stole the watch and placed it in Bob’s locker. If true, this would exonerate Bob.

The prosecutor will claim the testimony by Sally is hearsay. Hearsay is an out of court statement offered for its truth. This statement by Sally is clearly hearsay as it was made by Carl out of the court and is being introduced for its truth (that Carl said it and did what he said).

Bob’s attorney should respond by stating that this statement fits within the statement against interest exception. The exception allows in hearsay made by someone that at the time was against his/her penal/financial/legal interest and the declarant is unavailable to testify. Here, Carl is unavailable to testify, as he is dead. The statement that he placed the watch in Bob’s locker is clearly against his penal interest.

Bob’s attorney should point to Ann as corroborating evidence. The prosecutor will likely challenge the admission saying that the exception is not valid on its own to exculpate a defendant without evidence, corroborating the hearsay. It would be tempting to lie, and say someone else did the crime who was unavailable to testify. Corroborating evidence solves this problem and Ann’s evidence is admissible as her own perception. Thus, Sally’s statement is likely to be admitted.

Question No. 3: Model Sample Answer

1. The first affirmative defense will be contributory negligence. Contributory negligence responds to a plaintiff's allegation of negligence by alleging that plaintiff's injury was due at least in part to plaintiff's own negligence. In a state in which contributory negligence is an absolute bar to plaintiff's recovery, plaintiff's suit cannot proceed.

Pennsylvania permits suits to proceed under the rubric of comparative negligence, an affirmative defense that only acts as a complete bar where plaintiff's comparative negligence being greater than defendant's would prohibit plaintiff's recovery. Thus, Jill's comparative negligence in the Commonwealth would operate to reduce her recovery but would not necessarily be a complete bar.

The facts suggesting that the contributory/comparative negligence argument would be appropriate are those indicating that others saw and avoided the spill in which Jill apparently slipped; i.e., the testimony of other witnesses who saw and avoided, or who saw Jill speaking to her friend rather than watching her step.

2. Market should argue that ABC is liable under a theory of vicarious liability. The issue presented is whether ABC should be held liable for Brian's negligence. In a vicarious liability situation, an employer can be held liable for the actions of her employees if the negligence occurred within the scope of employment. In our case, Brian was seen by witnesses wearing his ABC Co. shirt with the name tag "Brian," pushing a hand truck through the vestibule of the store 10 minutes before Jill fell. Two witnesses also saw the ABC bottle fall from the hand truck and break but Brian did nothing but mumble something and continued to the delivery truck and drove away. These facts make it apparent that Brian, because he was stocking shelves in a grocery store, dressed in his ABC shirt and driving the delivery truck, was acting within the scope of his employment. Therefore, ABC should be held vicariously liable.

To join ABC as an additional defendant, Pennsylvania Civil Procedure requires a party to be either: (1) solely liable; (2) liable over; (3) jointly and severally liable; or (4) liable to the plaintiff on the same transaction/occurrence out of which the plaintiff's cause of action arose. Here, Market can argue that ABC is jointly and severally liable because whatever negligence Market has for allowing spillage to remain for 5-10 minutes on its floor, ABC has liability for it being there in the first place. By filing a third party complaint naming ABC as a defendant, Market can seek contribution from ABC, as a joint tortfeasor, in whatever percentage of fault the jury attributes to ABC.

3. Jill's counsel must prove that Market breached a duty it owed her causing her damages. Negligence requires a showing that the defendant's conduct breached a duty defendant owed the plaintiff proximately and actually causing her injuries. Here, Jill must show that Market breached a duty it owed her. Land occupiers owe a duty to protect invitees (members of the public to whom the property is held open) from concealed hazards the occupier knew or should have known existed. A land occupier is required to inspect its premises regularly to make sure there are no hidden hazards and if there are, to repair the hazard or warn the invitee.

In this case, Jill must prove that Market knew or should have known of the hazard. Jill should show actual knowledge and a failure to warn or repair to prove the breach of duty. Or Jill could argue that 10 minutes between inspections was too long an interval to be reasonable, thus establishing the breach.

Once or if Jill can establish the breach, she must show her injuries were factually caused by the breach (the wet floor) and that such an injury was proximately caused by the breach, or was a foreseeable result. Here, it is clear that Jill was hurt by the wet floor and such a result is foreseeable from a broken bottle spilling its contents.

4. All of Jill's settlement should be considered. Because Jill's claim arose during the marriage, all awards as a result of the claim should be treated as marital property, subject to equitable distribution. Generally, all marital property is subject to equitable distribution while single property is not. Any property received during marriage (though not if in exchange for single property) is considered marital property.

Regarding tort claims, the test is when did the claim arise. If it arose while the person was single, then any reward remains single. If it arose while married, it is marital property.

Here, a good portion is based on her loss of earning capacity after separation. As such, one could argue that such a clear apportioning should only leave \$75,000 for equitable distribution. Nevertheless, because the full amount results from a claim arising while the couple was married, all of it should be subject to equitable distribution as with all marital property.

Question No. 4: Model Sample Answer

1. No, the residency requirement set forth in Act 5 would probably not be valid under the United States Constitution. Pursuant to the Privileges and Immunities Clause of Article IV of the Constitution, "every citizen is guaranteed the rights to the privileges and immunities of each state." The Privileges and Immunities clause guards against states discriminating against residents of other states to protect local interests. However, for the Privileges and Immunities clause to be implicated, a fundamental right must exist.

In the present case, the right to employment is considered a fundamental right and thus, to infringe on an out-of-state resident, State P must show that (1) they had a substantial governmental interest, (ii) the nonresidents were the peculiar source of evil they want to guard against, and (iii) there were not other alternatives.

In the present case, the purpose of Act 5 was to alleviate unemployment. Although alleviating unemployment is a substantial government interest, the residents of State M are not the only contributing factor to such unemployment (i.e., the source of evil) and there are other less restrictive alternatives, such as finding ways to increase businesses to come to the state or other revenue raising mechanics to guard against unemployment. Thus, the residency requirement is invalid.

2. Mary will likely succeed in a claim against C County for violating Mary's Constitutional right to free speech. The First Amendment protects a citizen's fundamental right to free speech from governmental censorship.

Here, Mary is in effect a government employee, even though she is a contractor because she is hired to perform a fundamental task of municipal government and because she is paid and supervised in many ways by the government. Although Mary may not be a direct employee, for all intents and purposes she is an employee at least for the duration of that road paving contract.

When public employees' rights to free speech are impaired by government action, courts apply a balancing test of weighing the employees right to express his ideas that are of public interest, against the harm to the public employer who needs to efficiently run its own operation. Here, Mary's claim will be upheld because Mary's protest was reasonable, and was a matter of public interest that impacted her own and the rights of other US citizens. In addition, the impact on the operations of C County were minimal, if at all. Since Mary worked on the roads, her protests were more like a nuisance to the government than a negative impact. Furthermore, Mary was expressing concerns over state legislation, which relates directly to a citizen's fundamental right to vote. Free political speech is at the heart of US Constitutional protection and as a result, her claim will succeed.

3. Mary's counsel could raise the defense of absolute privilege in Mary's answer, in a 12(b)(6) motion for failure to state a claim upon which relief could be granted, or a 12(c) motion for judgment on the pleadings. An affirmative defense like absolute privilege can be raised either in the defendant's answer or a 12(b)(6) motion for failure to state a claim. A 12(b)(6) motion is appropriate where the defendant wants to assert that even if everything in the complaint is true, the plaintiff is still not entitled to relief. Such a motion can be filed before the answer, and must view the pleadings assuming everything alleged by the plaintiff is true.

Here, even if all that Ned pleads is true, say all the elements of defamation, he may still not be entitled to relief because of the affirmative defense of absolute privilege. A 12(b)(6) motion for failure to state a claim would be appropriate because if the defense is true, then even everything in Ned's complaint would not allow him the right to relief.

Even if Mary's counsel does not want to file this motion, the affirmative defense must be raised in the answer or it is waived. The defense could be raised in the answer, and then Mary's counsel could move for a 12(c) motion on the pleadings. The standard for this motion is the same as that for the 12(b)(6) motion, and the above analysis applies. This motion may be more appropriate, so the judge may consider all the pleadings.

4. State M has the greatest interest and the federal court sitting in diversity should apply M law because a Pennsylvania court would apply M law. When deciding a case in federal court sitting in diversity, the federal court must apply the substantive law of the state in which is sits and federal procedural law (Erie). Under Klaxon, choice of law rules are substantive for Erie purposes, and the federal court must thus apply Pennsylvania choice of law rules.

Pennsylvania uses a hybrid choice of law methodology incorporating the governmental interests analysis with the most significant relationship approach of the 2nd Restatement. As such, the court should evaluate the contacts with the different states as well as the policies underlying each law. Where only one state is interested, that state's law should apply. Here, the Pennsylvania law conflicts with the M law. M protects Mary from a lawsuit while Pennsylvania's law exposes her to such a suit.

The contacts relevant to the issue indicate M law should apply. Although Ned worked in Pennsylvania for Mary, he lived in M and was on probation in M. The State M law is meant to encourage communication with probation officers, so that they can know about their parolees and their actions. In this case, such an important interest will override Ned's interest in holding Mary liable, given Ned's tenuous contacts with Pennsylvania.

Thus, M, the state with the greatest interest, should have its law applied by the Pennsylvania court. The Pennsylvania law is not meant to protect out-of-state residents from

defamation and the M law is meant to protect communications with probation officers. M has the greatest interest.

Question No. 5: Model Sample Answer

1. The clause in Dr. Doe's contract will be enforceable by MED. The clause in the contract is a 'covenant not to compete.' These covenants are usually enforceable if they are ancillary to the primary contract and are both reasonable as to duration and geographic location. Here, the covenant was ancillary to the primary employment contract; however, the question is whether the time and geographic requirements are reasonable. First, as to location not being within 10 miles of MED, the facts state that C County is a metropolitan area, so a 10-mile limitation should not unreasonably interfere with Dr. Doe obtaining employment beyond 10 miles of MED. The second requirement to the term of two years, this might be too great an amount of time. Able should tell Dr. Doe the trend of the courts when enforcing covenants not to compete is usually to enforce the covenant and if there is a problem with one of the limitations, the court may decrease (in Dr. Doe's case) maybe one year from the time requirement. In the overall picture, Able should tell Dr. Doe that this covenant not to compete will be enforced.

2. The liquidated damages clause is enforceable because the damages for violation of the contract are unascertainable and \$50,000 is a reasonable estimate. The issue is whether the \$50,000 liquidated damages clause is enforceable. A liquidated damages clause is enforceable if the damages are unascertainable at the time of entering the contract and the clause is a reasonable estimate of the damages. Penalty clauses will not be enforced.

In the case of a noncompetition clause, damages for breach are unascertainable. If the clause is breached, it is impossible to tell how many clients MED will lose, how quickly it will happen, and how many will leave permanently. Much depends on when Dr. Doe breaches the agreement, where Dr. Doe moves, how aggressive he is in recruiting clients, and how successful a doctor Doe turns out to be. Because of all these variables, a liquidated damages clause is appropriate.

Also, the \$50,000 is a reasonable estimate of the damages. Doe was being paid \$150,000 per year. One third of his salary is not a penalty, but rather a reasonable estimate of the potential damages. In all likelihood, Doe will take \$50,000 worth of clients from MED. Because it is impossible to determine MED's damages at the outset and \$50,000 is a reasonable estimate, the clause will be enforceable against Dr. Doe.

3. The court should rule Dr. Doe is the owner as the survivor of a joint tenancy. A tenancy by the entireties is only capable of creation in a husband and wife. When Dr. Doe and Eve purchased Blackacre, they were not married. Instead, they were only engaged. Thus, there was no tenancy by the entireties. But, when a conveyance fails to be a tenancy by the entireties, yet clearly shows the parties meant to hold the property in survivorship form, there is a joint tenancy with right of survivorship. If the property is acquired in the same title, at the same time, with equal interests, and equal rights of possession, a joint tenancy is created if the parties clearly show they meant to hold the property in survivorship form.

Here, the four unities are satisfied and the conveyance indicates a "right of survivorship" was to be created. Although a tenancy by the entireties could not be created, a joint tenancy was created. The right of survivorship entitles one joint tenant to take the entire property upon the death of the other joint tenant. When Eve died, Dr. Doe became the sole owner of Blackacre. At no point prior to Eve's death was the joint tenancy severed. Eve resided on Blackacre with Doe's permission, even

after he married Fran. So, the joint tenancy was in existence at Eve's death, and Blackacre belongs solely to Doe.

4. She will have no remedy if she accepts the deed because a quitclaim deed makes no warranties and only conveys whatever title in property the grantor has. A quitclaim deed only conveys whatever interest in property the grantor has and warrants nothing. Thus, the legal affect of the deed would be to give Pat any title that Doe may have. Should she take possession and it is determined that Eve's estate has an interest, she would have no cause of action against Doe because he did not warrant any seisen, right to convey or any other warranties that give grantee protection in a general warranty deed. Further, the fact that she is aware of the possible defect in title would preclude her from taking as a bona fide purchaser for value without notice because she is aware of Eve's claim. I would advise not to take a quitclaim deed because the land may be subject to claims by Eve's estate and Doe would warrant nothing and would not have to defend the title.

Question No. 6: Model Sample Answer

1. The implied warranties of merchantability and fitness are potentially applicable in this situation. Big could not sue Steel successfully because these warranties were effectively disclaimed in the contract. An implied warranty of merchantability arises when a seller who ordinarily deals in goods of the kind sold, sells an item to a purchaser. The warranty guarantees that the product will be fit for all ordinary and foreseeable purposes. This guarantee can be disclaimed by conspicuous language.

Here, Steel was a merchant who regularly sold new and used equipment. The corporation had sold equipment to Big on a number of occasions. Because it was a merchant, it warranted that the crane would be fit for ordinary purposes. Big experienced problems with the crane during normal use, so normally this warranty would have been breached by Steel. But, Steel sold the crane with a conspicuous disclaimer: sold as is and with all faults. This language is sufficient to disclaim the implied warranty of merchantability. The disclaimer was printed in large letters on the front page of the sales agreement, and Donna remembers reading these words. As such, it was an effective disclaimer, and Steel will have a defense.

Moreover, the implied warranty of fitness arises when a buyer has a specified purpose for the product, the seller knows of this purpose, and the buyer relies on the seller's selection of a product. This can be given by any seller. But, like the merchantability warranty, it can be disclaimed with valid "as is" language.

Here, Steel knew Big was purchasing a crane to use in its steel business. Steel also knew Big would not have purchased the crane if it were unfit for Big's use in the business. As such, Big was relying on Steel to provide a fit crane. But, as with the other warranty, Steel effectively disclaimed the warranty of fitness with its conspicuous disclaimer. The above analysis applies. Thus, Big may not sue Steel on any implied warranty.

2. Big could assert a duty of loyalty violation claim because Donna usurped a corporate opportunity. Directors, officers, and majority shareholders owe duties to their corporations. They are required to act in good faith and with a reasonable belief that what they do is in the best interests of the corporation. Moreover, they must exercise the degree of care that a reasonably prudent person would exercise in managing their own business. At no time may the officer or director place their own self-interest in front of the corporation's. When raising a duty of loyalty claim, the burden is on the offending officer or director to prove they acted in the corporation's best interest.

One such variety of self-dealing is the usurpation of a corporate opportunity. Although the standard in Pennsylvania is not clear, a corporate opportunity is something a corporation has an interest or expectancy in or is otherwise in the corporation's line of business. A director must first offer the opportunity to the corporation, even if she knows the corporation will turn it down.

Donna will usurp a corporate opportunity by quietly forming her own new corporation to buy Steel. She has been recommending to Big's board that they develop a steel fabrication division. The purchase of Steel provides such an opportunity. Big may or may not be interested in the purchase, but Donna is obligated to allow Big the opportunity to reject it. If she purchases Steel, she may be forced to sell the company to Big or otherwise disgorge her profits. Clearly, purchasing Steel out from under Big is not in Big's best interests. Donna cannot assert that she was acting in good faith and in reasonable belief in Big's best interests. Thus, she would be violating her duty of loyalty to Big if she formed a new corporation and purchased Steel.

3. The appropriate remedies for usurpation of a corporate opportunity are imposition of a constructive trust (an equitable remedy) or disgorgement of profits by the usurping fiduciary. Under the former type of recovery, a trust would be settled with Big as the beneficiary to prevent Donna's profiting from the inappropriately obtained opportunity. The disgorgement remedy would require Donna to pay the corporation (Big) any profits she obtained as a result of the usurped opportunity.

4. Able owes a duty to represent the corporation's interests. He should warn Donna about the ramifications of such a plan and if she persists, notify the Board of Directors. Under the Pennsylvania Rules of Professional Conduct, Able, as Big's counsel, owed the corporation, not its employees or directors, his duty of competent representation and confidentiality. A corporate attorney when he learns of a director engaged in conduct that could hurt the corporation must discuss the director's course of conduct with her, after first reminding her that he represents the corporation and not her interests. If she refuses to discuss the matter, or pursues it, the attorney must inform the board of the director's conduct. Such a disclosure does not violate any duty of confidentiality because the corporate attorney does not represent the director, he only represents the firm. If the board does not take action to prevent the wrongdoing to occur, the attorney may, but does not have to, resign.

Applied to these facts, Able must approach Donna. He must first tell her that he does not represent her and that his duties are to the firm. He may want to stress that their conversation is not privileged. He should then tell her that he knows of her plan and that it would harm the corporation and violate her duties to the corporation. If she refuses to speak with him, or pursues her course, he must inform Big's board. If the board does nothing in response, Able may resign; however, since the Board is made up of all the shareholders, such an action would likely constitute a corporation passing on the opportunity and permit to Donna's deal free of a breach of duty of loyalty.

In conclusion, under the Pennsylvania Rules of Professional Conduct, Able must contact Donna, and if she persists, he must inform Big's board of her plans. His duties are to the corporation, not to Donna.

Performance Test Question: Model Sample Answer

MEMORANDUM

TO: Robert Smith
RE: Proposed Mediation Practice

I. Analysis of Lease Agreement

1. Premises/Sign

This paragraph affords tenant, a partnership of which a partner is a non-lawyer, use of landlord law firm's office space and a listing on landlord's lobby directory. This raises a potential concern in that clients meeting the tenant partnership at the law firm office might reasonably believe that they are dealing with and receiving the protection of a client-lawyer relationship, thus implicating Rule 5.7 of the Pennsylvania Rules of Professional Conduct. Rule 5.7(c) makes a lawyer affiliated with the provision of non-legal services subject to the Rules of Professional Conduct if the lawyer knows or should know that the recipient might believe it is protected by the client-lawyer relationship. However, Rule 5.7(d) provides that the impact of Rule 5.7(c) does not apply if the lawyer takes reasonable steps to avoid any client misunderstanding. In this case, the provision of the lease should be revised to indicate that the partnership tenant is not part of the law firm and that no legal services are rendered by the tenant. A notation to this effect should be included at the offices and the tenant should be removed from the law firm directory and listed separately. When clients enter the law firm to use the conference room, they should also be advised that no client-lawyer relationship is created. Even better, separate office space for tenant should be obtained.

2. Paragraph 2 of the lease does not raise any issues.

3. The phrase "Tenant shall recommend its mediation clients, who are in need of legal services . . . to Landlord's law firm" is prohibited as written by Rule 1.7 and 1.10. Advising clients of the mediation service should be separate and distinct from those of the law firm, and as such would present a conflict of interest if a mediation client uses the services of the law firm for purposes directly or substantially related to the mediation. Such representation by the firm would be prohibited because your affiliation with the mediation imputes to the law firm. While the client can consent after full disclosure and consultation, the relationship is very close and should be avoided. To avoid problems, I would remove this section of the lease, as it presents a conflict of interest.

II. Partnership Agreement

1. The part of this provision which provides that Smith & Jones split equally all profits earned may be a violation of Rule 5.4. Rule 5.4(a) provides that "a lawyer or law firm shall not share legal fees with a non-lawyer." Rule 5.4(b) states 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."

This provision itself is not a problem. As the law review article stated, "the role of a mediator is that of a facilitator and not a lawyer. . ." Therefore, if the practice of Smith & Jones is strictly limited to the practice of mediation then both the formation of the partnership and the sharing of fees will be appropriate. However, if it is determined that the partnership of Smith & Jones is conducting activities that constitute the practice of law, both 5.4(a) and 5.4(b) will be violated.

2. This paragraph raises grave concerns in that it obligates Smith to instruct Jones so that Jones, a non-lawyer, can provide partnership clients with legal advice. Although a precise definition of activities that constitute the practice of law “would be more likely to invite criticism than to achieve clarity,” “where the application of legal knowledge and technique is required, the activity constitutes such practice . . .” Shortz v. Farrell, 193 A.2d 327 (Pa. 1937). Nonetheless, the mere preparation of uniformly simple pleadings may not amount to the practice of law. Id. Rule 5.4(b) prohibits a lawyer from forming a partnership with a non-lawyer if the activities constitute the practice of law. Rule 5.5(a) prohibits a lawyer from aiding a non-lawyer in the unauthorized practice of law. Moreover, criminal penalties attach to the unauthorized practice of law. 42 Pa. C.S.A. Section 2524(a). Likewise, the unauthorized practice of law may be enjoined. 42 Pa. C.S.A. Section 2524(c). In this case, the paragraph clearly contemplates Smith aiding Jones in activities that constitute the unauthorized practice of law. Advising clients on divorce and custody matters and support guidelines constitutes the practice of law according to an opinion of the Unauthorized Practice of Law Committee of the Pennsylvania Bar Association. See Aliza Rabinowitz, Law Review Journal Article. These activities required “the application of legal knowledge and techniques.” Shortz v. Farrell. As such, Smith would violate Rule 5.4 and 5.5 and Jones would be liable under 42 Pa.C.S.A. Section 2524(a) and the partnership could be enjoined. This paragraph must be stricken entirely and Smith and Jones must ensure that the partnership merely counsels clients on relationship issues.

3. Again, drafting documents summarizing the contents of decisions made by the parties may constitute unauthorized practice of law by Jones, in violation of Rule 5.5 (subjecting Smith to liability) and 42 Pa. C.S.A. Section 2524.

In the Shortz case, the Pennsylvania Supreme Court stated that it was unauthorized practice of law to prepare client documents requiring familiarity with legal principles beyond the ken of the ordinary layman. However, the Court did find that the “pleadings” at issue in the case were “so uniformly simple that it cannot be fairly said that legal skill is required in their preparation.” Thus, the non-lawyer was permitted to prepare them.

In this case, the agreement states that Smith & Jones are to prepare documents, which summarize the contents of any decisions made by the parties in mediation. This may or may not be the practice of law, depending on what is discussed in mediation and so on. This provision should be clarified, and Jones should not prepare the documents if they are “beyond the ken of the ordinary layman. “ More likely than not, transcribing the parties ideas will not be the practice of law, but it could be construed as such.