

# FEBRUARY 2004 PENNSYLVANIA BAR EXAMINATION

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## Essay Questions and Examiners' Analyses and Performance Test



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## Question No. 1: Facts and Interrogatories

Frank and Wilma, each lifelong residents of Pennsylvania, have been married four years and lived in a wonderful home with an adjoining business in Pennsylvania both of which Frank had long before acquired and kept in his name. Frank also had built a waterfront home in Florida (Whiteacre) fifteen years ago which has dramatically appreciated in value and is clearly now his most valuable asset. It is also in his name alone. Frank and Wilma do not have a prenuptial agreement nor do either of them have any children.

In the past two years Wilma, much to Frank's displeasure, has spent more and more time without Frank in Florida and last March announced to him that she would never return to Pennsylvania and that she had moved into her own apartment near Whiteacre. She also told Frank that she no longer would do the bookkeeping, which she had done during their marriage, for the business and that she didn't care if Frank divorced her over these issues. Frank needs to live in Pennsylvania to run his business and save for retirement. He is so upset over Wilma's actions that he has retained a Pennsylvania attorney, Abel, for a divorce.

Wilma, sensing that Frank is considering filing for divorce in Pennsylvania, has retained a Pennsylvania divorce lawyer, Larry. Wilma prefers a divorce provided she gets Whiteacre in any property settlement. Wilma can't afford Larry who has demanded a considerable yet reasonable cash retainer. Instead, she has entered into an oral fee agreement with Larry whereby he will receive one month's free use of Whiteacre for five years if he succeeds in getting her a divorce and a deed to Whiteacre whether she or Frank initiates the divorce proceedings.

In the past few months, Frank has contracted a terminal illness causing him to become very anxious to obtain a divorce before his death, while at the same time refusing as a matter of principle any settlement which would deed Whiteacre to Wilma. Abel has advised Frank that Wilma would likely not be awarded Whiteacre outright in any property distribution due to its value far exceeding the amount of marital property available for distribution between Frank and Wilma. Abel also has drawn a new will for Frank, leaving Frank's entire estate to charity in place of his prior will which had left it to Wilma.

1. Assuming that Pennsylvania would be the proper jurisdiction for Frank to file a divorce action, under the above facts on what grounds (other than indignities) and under what time frame would Frank be entitled to a divorce without Wilma's consent if Wilma continues to live in Florida?
2. If Frank dies before he obtains a divorce from Wilma, could she receive any of Frank's estate after his new will to charity? Assume that Frank's new will is valid and that Frank's estate would be probated in Pennsylvania.
3. If before his death, Frank were to transfer Whiteacre to Wilma in a property (as opposed to an alimony or support) settlement so as to obtain the desired divorce:
  - a) What Federal income tax consequences would there be to Frank?
  - b) What Federal income tax consequences would there be to Wilma whenever she might choose to thereafter sell Whiteacre?
4. Whether or not Larry is successful for Wilma, in what ways, if any, does his fee arrangement not comply with the Pennsylvania Rules of Professional Conduct (Pa. R.P.C.) ? Assume that the value of Larry's fee is reasonable under the circumstances.

## Question No. 1: Examiner's Analysis

- 1. Frank may obtain a divorce on the ground of willful and malicious desertion once he can show that Wilma willfully and maliciously deserted him for one year or more; and he can obtain a divorce on the ground of irretrievable breakdown of the marriage after Wilma and he have lived separately for at least two years.**

23 Pa. C.S.A. 3301(a)(1) sets forth desertion grounds as follows:

The court may grant a divorce to the innocent and injured spouse whenever it is judged that the other spouse has:

- (1) Committed willful and malicious desertion, and absence from the habitation of the injured and innocent spouse, without a reasonable cause, for the period of one or more years.

Frank must show that Wilma has maliciously and willfully deserted him without reasonable cause for one year or more and that he is the injured and innocent spouse. There are no facts to suggest that Frank is not innocent and injured. He opposed Wilma's actions and appears to have done nothing to her. Nor do the facts suggest that Wilma had any reason not to live with Frank in Pennsylvania other than her preference for Florida. In this regard, there is specific case law in Pennsylvania which holds that if a spouse provides a reasonable home in good faith, the other spouse's failure to live with him or her in such a home without cause constitutes willful and malicious desertion. Santarsiero v. Santarsiero, 231 Pa. Super. 286, 331 A.2d 868 (1974); Pochiba v. Pochiba, 254 Pa. Super. 134, 385 A.2d 562 (1978). Thus, Wilma's actions constitute desertion under the Pennsylvania Statute and applicable case law in the absence of any other controlling factors (which do not appear in the facts).

Frank's case is further supported by the facts that when Wilma and he married, Frank already had the Pennsylvania home and she resided there with him; and by the fact that Frank reasonably wanted to continue his business in Pennsylvania until such time as he could retire. Furthermore, Wilma also moved out of his Florida home and quit as his bookkeeper. The case law presupposes that a working spouse can expect the nonworking spouse to live with him or her if a reasonable home is provided. Here Wilma has left him, her job with him and won't live with him in either of the homes he had when they married. Willful and malicious desertion is quite clearly established.

In summary of the desertion ground for divorce, it appears that Frank will qualify for a divorce on this ground whenever the desertion amounts to one year or more which will be in March of this year.

Frank could also proceed under an alternate ground of irretrievable breakdown which requires two years of separation. Here, Frank need only allege in a divorce complaint that the marriage is irretrievably broken and provide an affidavit thereof and that Wilma and he have lived separate and apart for at least two years. If Wilma does not deny the allegations, a divorce will be granted. If she does deny it, a hearing will be held but it will be limited to determining whether in fact Frank and Wilma have lived separate and apart for two years (which will occur in March of next year if the separation continues) and whether in fact the marriage is irretrievably broken. 23 Pa.C.S.A. 3301(d). The court may or may not order counseling.

In any event, it is easier to establish that a marriage is irretrievably broken than to establish that a desertion was willful and malicious because Frank would only have to meet the

statutory definition of irretrievable breakdown which is that his marriage suffers from “Estrangement due to marital difficulties with no reasonable prospect of reconciliation”. 23 Pa.C.S.A. §3103; Thomas v. Thomas, 335 Pa. Super. 41, 483 A.2d 945 (1984). The term “separate and apart” is defined as a complete cessation of any and all cohabitation, whether living in the same residence or not. 23 Pa.C.S.A. § 3103. The fact that Frank and Wilma in fact lived in separate homes in separate states, and the fact that Wilma announced to Frank that she intends to do so even if it causes a divorce, should adequately establish the “separate and apart” requirement of the statute as well as the starting point of the two year period. Sinha v. Sinha, 515 Pa. 14, 526 A.2d 765 (1987). The statute does not require that a complaint be filed in order to commence the two year period.

In summary of the irretrievable breakdown ground for divorce, it appears that Frank will qualify for a divorce on this ground whenever the two years of the separation occurs which will be in March of next year.

**2. Wilma would receive one-third (1/3) of Frank’s estate if he died while still married to Wilma and she elected against his will, unless Frank’s estate could show that she willfully and maliciously deserted him for the one year or more prior to his death.**

If Frank dies without a divorce before Wilma has deserted him for a year or more, she will be entitled to make an election against his will and receive one-third (1/3) of his estate as set forth in 20 Pa. C.S.A. 2203(a). However, if Wilma’s desertion continues, she will forfeit her right of election against Frank’s will under 20 Pa. C.S.A. 2208 and 20 Pa. C.S.A. 2106 which specifically provide that a spouse will forfeit her right of election if she for the one year or more prior to his death has willfully and maliciously deserted her spouse.

As discussed above, case law in Pennsylvania holds that the failure of one spouse to live with the other in the home which has been established by the other in good faith and is reasonably necessary for the occupation of the other constitutes desertion for divorce purposes. Case law is the same with respect to desertion for purposes of forfeiting elective rights. In re: Jac’s Estate, 355 Pa. 137, 49 A.2d 360 (1946). Thus, if Frank can survive his terminal illness for at least a year after Wilma’s announcement, Wilma would most likely forfeit her elective rights.

The facts do not disclose any other means by which Wilma would inherit anything at Frank’s death. In addition to forfeiting her elective rights (if in fact the time frame is such that she does so forfeit), Wilma has (according to the facts) been validly written out of Frank’s will and thus would take nothing thereunder. Also, she has no rights under any prenuptial agreement (because the facts state that no prenuptial agreement exists). Furthermore, she has no survivorship rights to his houses and business (because the facts state that they are in his name alone). Wilma might possibly have rights to other assets which are not disclosed or discussed in the facts (such as insurance policies, joint properties, pensions, etc.) depending upon the ownership and/or beneficiary provisions of any such assets.

**3. a) If Frank transfers Whiteacre to Wilma pursuant to a divorce there will be no gain or loss recognized to Frank for Federal income tax purposes.**

Generally, the sale or transfer of capital assets such as a home for valuable consideration in excess of the costs thereof would be a taxable event to the seller/transferor. Internal Revenue Code of 1986 (IRC) Section 1001. The buyer of such an asset would generally receive a tax basis in the asset equal to its purchase amount. IRC Section 1012. As an exception to this general rule, the IRC does not tax transfers of properties incident to a divorce between spouses prior to the divorce or within one year after the divorce. In fact, tax free transfers can be delayed up to six years after a divorce under certain arrangements. IRC Section 1041(a). Thus, Frank

need not worry about an income tax if he were to transfer Whiteacre to Wilma in a divorce settlement. Otherwise, Frank would apparently be concerned that Whiteacre has dramatically increased in value and that therefore there may be a large capital gain represented by the difference between his historic cost and the current high value if he would transfer Whiteacre to Wilma.

**3. b) Wilma will have Frank's basis in Whiteacre for Federal income tax purposes when she computes the gain or loss on any future sale of Whiteacre.**

Wilma should be concerned if she ever planned to sell Whiteacre in a taxable sale because as transferee from Frank in a divorce she would retain his presumably low basis as described in the facts. IRC Section 1041(b). These facts indicate that Frank has enjoyed a dramatic valuation increase in Whiteacre such that if Wilma (or Frank, for that matter) ever sold Whiteacre in a taxable sale, Frank's old and low basis might well result in a high gain. This may be of little concern to Wilma because she apparently would not be selling Whiteacre at the present time, and when she did, she could do it after using it as her principal residence long enough to exempt at least a portion of the gain under IRC Section 121 (being the current version of exemptions and/or deferrals which have long been available in the Internal Revenue Code for gain on the sale of a personal residence).

In summary, the Federal income tax consequences of transferring Whiteacre from Frank to Wilma in any potential divorce settlement would be that there is no gain on this transfer but that Wilma would inherit Frank's low tax basis which would result in a higher potential gain to Wilma than if she received Whiteacre with its current high value as her basis. Basically, Section 1041 of the IRC treats such transfers as a gift which is not taxable for income tax purposes and where the transferee assumes the transferor's tax basis.

**4. Larry's fee arrangement violates Rule 1.5 of the Pa. R.P.C. which prohibits contingent fees in a divorce settlement and which requires contingent fee agreements to be in writing.**

Pa. R.P.C. Rule 1.5(d) provides:

- (d) A lawyer shall not enter into an arrangement for, charge, or collect;
  - (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support; or
  - (2) a contingent fee for representing a defendant in a criminal case.

Furthermore, under Pa. R.P.C. Rule 1.5(c) a contingent fee arrangement shall be in writing and state the method by which the fee is to be calculated, including the impact of costs on the calculation, whether the matter is settled, litigated in trial, or appealed. Upon any conclusion of the matter (successful or not) the attorney must account to the client in writing showing the outcome, costs, and any fee calculations.

In the matter at hand, Larry has agreed to represent Wilma in obtaining a divorce and Whiteacre with his fee being contingent on the success of same. His fee is the free use of what would be Wilma's Florida home rather than a percentage of assets recovered, but it still violates the above-recited Rule because the payment of the fee (as distinguished from the amount of the

fee) is contingent. The Pennsylvania and Model Rule on contingent fees in domestic cases prohibit fees whether the amount is contingent or the payment of a flat fee is contingent. Consequently, even though Larry's fee was not contingent as to amount, it still violates the Rule because the payment itself was contingent.

There is an interesting distinction between the Model Rule and the Pennsylvania Rule in that the Model Rule clearly includes the Marital Property Settlement as a matter which cannot be the subject of a contingent fee while the Pennsylvania Rule above cited only includes the securing of a divorce, alimony and support among the matters which cannot be the subject of a contingent fee. Although interesting, this distinction makes no difference in the above facts because Larry's fee arrangement included both the divorce and the property settlement with the divorce alone being sufficient to invoke the Rule.

The facts also show that Larry failed to comply with the procedural requirement of a written fee agreement. Thus, Larry has violated Pa. R.P.C. in two major respects (Rule 1.5(c) requiring a contingent fee agreement to be in writing and Rule 1.5(d) prohibiting contingent fee agreements for divorces).

## **Question No. 2: Facts and Interrogatories**

In 1995, Jack built and began operating a microbrewery located in a small business area surrounded by farms and large residential estates in Mountain County, Pennsylvania. In 1997, Fast Eddy, a well-known rock and roll star from California, purchased a residential estate (White Acre) bordering Jack's microbrewery. White Acre consisted of twenty wooded acres surrounding the house and auxiliary buildings.

A ten-foot high wall was constructed by Fast Eddy, which surrounded the house and auxiliary buildings. The wall had gates at the front and rear areas of the house. The main gate at the front of Fast Eddy's house always had a guard present to prevent entry by unwelcome visitors. The service delivery entrance located at the rear of the house was kept locked, except for when deliveries were being received. Fast Eddy employed a private security force to patrol White Acre at all times.

The pristine environment surrounding White Acre was the major reason Fast Eddy purchased White Acre as a vacation home. In the spring of 2001, Fast Eddy was released from an alcohol rehabilitation clinic after completing a stay for his alcohol addiction. Upon his release, Fast Eddy banned alcohol from all of his residences and quit associating with anyone who used alcohol in his presence. Fast Eddy spent the summer of 2001 at White Acre and returned to California after Labor Day. Fast Eddy decided to return to White Acre to produce his comeback anti-alcohol CD in October 2001, only to be exposed to the smell from Jack's production of beer for Oktoberfest. The Oktoberfest brew, produced only during the month of October, used a unique combination of grains which created a smell slightly different from the usual smell of the brewing process. Fast Eddy complained to all governmental authorities and to Jack; but to no avail. Fast Eddy then had his attorney e-mail Jack demanding that he cease and desist the production of the Oktoberfest beer.

Jack became irate and decided to confront Fast Eddy by going to White Acre on October 14, 2001. The guard at the main gate on White Acre refused to allow Jack entry. Jack then entered the property at approximately 12:10 p.m. at the service entrance; later claiming the gate was left open although deliveries were not scheduled that day until 4:00 p.m. Jack went to Fast Eddy's house and violently knocked at the door. He then looked in and banged on a window,

intentionally breaking it, while shouting his demand to see Fast Eddy. This action interrupted a recording session for Fast Eddy's comeback CD and so upset him that he was unable to complete the CD. Fast Eddy then drank a fifth of tequila and the next day re-entered an alcohol rehabilitation program.

Red, a roving security officer for White Acre for the last three years, as part of his assigned duties, always checked the service entrance gate every hour on the hour during his shift. Red was called to Fast Eddy's house during the disturbance since he was on duty that day from 9:00 a.m. until 5:00 p.m. Red died several weeks after the incident of natural causes.

On August 15, 2003, within the two-year time limitation, Fast Eddy's attorney filed a civil lawsuit against Jack in the Court of Common Pleas of Mountain County, Pennsylvania.

1. Fast Eddy's lawsuit against Jack included a cause of action for the tort of private nuisance due to the smell from the microbrewery's production of Oktoberfest beer. Will Fast Eddy be successful?
2. Other than assault and the intentional infliction of emotional distress, what causes of action in tort should Fast Eddy have asserted in his lawsuit relating to Jack's behavior at his residence on October 14, 2001?
3. During the discovery process, in documents produced by Jack on January 15, 2004, it is revealed that in March 1998, shortly after Fast Eddy purchased White Acre, Jack crossed the property boundary line, entered White Acre and tore down and removed several small dilapidated storage buildings that were located on a far corner of White Acre bordering Jack's property, which Jack found to be unsightly. Fast Eddy filed a Motion to Amend his Complaint on January 20, 2004, to include a cause of action relating to the entry on his land and removal of the storage buildings. Assume that the statute of limitations for such an offense is two years. How should the Court rule on Fast Eddy's Motion to Amend his Complaint to include the claim for property damage relating to the storage buildings?
4. Assume that Red's supervisor was familiar with Red's practice of checking the service entrance gate and that at trial Fast Eddy attempts to produce testimony from Red's supervisor to establish that during his shifts Red checked the service gate hourly to make sure it was closed. Will such evidence be admissible?

### **Question No. 2: Examiner's Analysis**

- 1. Fast Eddy will be unsuccessful in his cause of action for the tort of private nuisance.**

In Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954), the Supreme Court of Pennsylvania adopted Section 822 of the Restatement of Torts as the law of private nuisance in Pennsylvania. Thereafter, the Pennsylvania Superior Court in Kembel v. Schlegel, 329 Pa. Super. 159, 478 A.2d 11 (1984) held that the substantive difference between the First and Second Restatement of Torts (Section 822), was insignificant and therefore Section 822 of the Second Restatement of Torts would be applied as the law of private nuisance in Pennsylvania.

Section 822 of the Restatement (Second) of Torts provides that:

"One is subject to liability for a private nuisance if, but only if...(their) conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either:

- (a) Intentional and unreasonable, or;
- (b) Unintentional and otherwise actionable under the Rules controlling liability for negligent or reckless conduct or for abnormally dangerous conditions or activities."

The Restatement Section 821F provides that in addition to the above requirements in order for an actor to be liable for a private nuisance significant harm must be caused to the Plaintiff. Significant harm is defined in the comments to Section 821F in part as:

"Significant harm. By significant harm it is meant harm of importance, involving more than slight inconvenience or petty annoyance."

Based upon the facts, the Court should find that the smell from the microbrewery, although intentional, was insignificant and Fast Eddy's objections to the smell are not actionable. There is no indication of other complaints about the smell nor is there any indication that the smell was so overwhelming as to be intolerable, burdensome or excessively invasive for any significant period of time. Simply, the brewing process produced a smell, but one which was not overly powerful. Fast Eddy was merely personally sensitive to the smell of the Oktoberfest beer. The smell was present only during the month of October. In spite of the smell, Fast Eddy decided to continue to record his CD until Jack came to his house. The recording session at White Acre was interrupted by Jack's conduct, not by the smell from the microbrewery.

Jack may argue that the microbrewery was established prior to Fast Eddy's purchase of White Acre and therefore Fast Eddy's "coming to the nuisance" acts as a defense to a private nuisance claim. This argument would be unsuccessful since a preexisting use or "coming to the nuisance" is not recognized as a defense to a private nuisance claim in Pennsylvania. Guarina v. Bogart, 407 Pa. 307, 180 A.2d 557 (1962). The Court may, consider such evidence along with all other evidence in deciding the merits of Fast Eddy's claim. Washchak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954).

Fast Eddy will not be successful in asserting a cause of action for a private nuisance.

**2. The Complaint should include the torts of trespass and invasion of privacy relating to Jack's behavior at Fast Eddy's residence on October 14, 2001.**

**A. Trespass**

"One who intentionally enters land in the possession of another without privilege is liable...to the possessor of the land as a trespasser thereon." Kopka v. Bell Telephone Company of Pennsylvania, 371 Pa. 444, 91 A.2d 232 (1952).

A trespass is any intentional use of another's real property without authorization or privilege by law to do so. Waschak, supra. Thus, Jack's entry into White Acre, which was a private, enclosed residence owned by Fast Eddy constituted a trespass. The action of Jack in entering the property was intentional and without authority. Fast Eddy's right to enjoy full and exclusive possession of his real estate has been affected by Jack's intrusion which was disruptive

to Fast Eddy. Jack would be liable for the damage caused by his trespass including the broken window.

## **B. Invasion of Privacy**

The law of privacy is not one tort but four distinct torts with nothing in common but the theoretical right of a Plaintiff "to be let alone." Prosser and Keeton, Law of Torts, Section 117 Right of Privacy (5<sup>th</sup> edition 1984). One of the four privacy invasion torts is an intrusion upon Plaintiff's physical and mental solitude or seclusion. The invasion of privacy applicable to this case is for the intrusion upon Fast Eddy's solitude and seclusion. The gist of the privacy tort is that invasion of a person's seclusion and of his or her right to be let alone. Bennett v. Norban, 396 Pa. 94, 151 A.2d 476 (1959) citing Hull v. Curtis Publishing Co., 182 Pa. Super. 86, 125 A.2d 644 (1956).

In finding that the Restatement (Second) of Torts §652 B defines the elements of invasion of privacy in Pennsylvania, the Pennsylvania Superior Court in Harris v. Easton Publishing Co., 335 Pa. Super. 141, 483 A.2d 1377 (1984) set forth the following definition:

### “Section 652B. Intrusion Upon Seclusion

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”

The invasion may be by physical intrusion into a place where the plaintiff has secluded himself. Id. at 1383.

Even though Fast Eddy may be classified as a public figure, he still has, in his private residence, an absolute right to be let alone. The invasion of privacy occurred by virtue of the trespass on to his property and the banging on the door and window of his home. The invasion of privacy interfered to a substantial degree with his right to be let alone. The issue regarding privacy has nothing to do with Fast Eddy's position as a rock star since he, like anyone else, has a right to be let alone while inside his private residence. The issue that caused Jack to enter the property owned by Fast Eddy and infringe upon his right to be let alone revolved around the complaint from the smell of the brewing of the Octoberfest beer and had nothing to do with the public status of Fast Eddy. Jack's actions at Fast Eddy's house would be highly offensive to a reasonable person.

Fast Eddy will be successful in including causes of action in tort for trespass to his land and invasion of privacy.

## **3. The Motion to Amend the Complaint should be denied because the statute of limitations has expired.**

Although Pennsylvania liberally permits the amendment to a Complaint, even during the discovery stage, Jack could argue that the allegation of property damage, occurring in 1998, is a new cause of action, requiring different proof. The action was filed in the Court of Common Pleas of Mountain County, Pennsylvania, so the Pennsylvania Rules of Civil Procedure are applicable. Pa.R.C.P. No. 1033 provides that:

A party, either by filed consent of the adverse party or by leave of Court, may at any time change the form of action, correct the name of a party or amend his pleading...

A party may at any time amend his Complaint to assert a new cause of action, defense, transaction or occurrence with the consent of the opposing party or leave of Court. Here there is nothing to indicate that Jack has consented to the amendment. The decision to grant or deny a Motion to Amend the pleading is a matter within the sound discretion of the Court. While the discretion of the court is not unfettered, the policy of Pennsylvania Courts has been to liberally permit the amendment of pleadings to allow cases to be determined on their merits. Gallo v. Yahama Motor Corp., 335 Pa. Super. 311 484 A.2d 148 (1984).

Further Pa.R.C.P. No. 126 provides that the Rules of Civil Procedure should be liberally construed to secure just, speedy and inexpensive determinations of proceedings. Applying the above standards to the facts, the Court should normally grant the amendment to the Complaint.

Here, entry into White Acre and the destruction of the outbuildings interjects a separate and distinct cause of action because it sets forth a different basis for recovery and the operative facts are different from those set forth in the original Complaint. See Matos v. Rivera, 436 Pa. Super 509, 648 A.2d 337 (1994). However, the parties are merely at the discovery stage and thus there appears to be ample time in which to prepare this matter for trial even though other witnesses and further discovery may be necessary. The damage to the outbuildings in 1998 does relate to activities at White Acre. The parties are the same as in the pending tort action, thus a strong argument would normally be made to grant the amendment to the pleading.

The issue that would prohibit amendment arises due to the statute of limitations. Here the statute of limitations is two years from the date of the occurrence. The entry onto White Acre and removal of the buildings occurred in March 1998. The attempt to amend the Complaint occurred in 2004 and thus was beyond the statute of limitations. Pennsylvania law requires that an amendment to pleadings be filed within the statute of limitations where a new cause of action is introduced. Beckner v. Copeland Corporation, 2001 Pa. Super. 290, 785 A.2d 1003 (2001). It would therefore appear that the Motion to Amend the Complaint should be denied by the Court.

**4. The testimony from Red's supervisor concerning Red's habit for checking the gate at the service entrance on an hourly basis is relevant and will be admissible.**

All relevant evidence is admissible except as otherwise provided by law. Pa. R.E. 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Pa. R.E. 401. "Evidence is relevant if it logically tends to establish a material fact in a case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact." Commonwealth v. Drumheller, 570 Pa. 117, 808 A.2d 893 (2002).

Red would be the best person to testify in this lawsuit brought by Fast Eddy against Jack. Red's testimony would be relevant since he would be able to testify that he checked the service entrance approximately ten minutes before Jack entered and the gate was closed. Additionally, testimony would be elicited that deliveries were not expected until 4:00 p.m. that afternoon, thus circumstantially indicating that Jack's entry was through the closed gate and thus relevant to the trespass action. Unfortunately Red is deceased.

However, Pennsylvania has adopted Rule 406 of the Pennsylvania Rules of Evidence which states as follows:

Rule 406. Habit; routine practice:

"Evidence of the habit of a person or the routine practice of an organization, whether corroborated or not and regardless of the presence of eye-witnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

Here, the evidence of Red's habit of checking the service gate on an hourly basis is relevant to prove that his conduct on the day in question was in conformity with his habit. Since his checking of the gate at 12:00 noon would make it more probable than not that the gate was closed at 12:10 p.m. when Jack entered White Acre, such evidence would be relevant.

The Pennsylvania Supreme Court in Baldrige v. Matthews, 378 Pa. 566, 567, 106 A.2d 809, 810 (1954) stated:

"The probative value of a person's habit or custom as showing what was done on a particular occasion, is not open to doubt." See 1 Wigmore on Evidence (3<sup>rd</sup> edition, section 92, page 519, et seq.)

Whether evidence of such usage or habit is admissible to show what occurred in a specific instance depends upon the "invariable regularity, of the usage or habit." To be admissible, the usage must have "sufficient regularity to make it probable that it would be carried on in every instance or in most instances;" Wigmore, LOC. CIT. supra.

Rule 406 would permit testimony regarding Red's habit of checking the gate on the hour. This testimony could be produced through Red's supervisor. The testimony is not that Red did in fact check the gate at noon, since the witnesses would have no knowledge of that fact. Rather, the testimony is that Red's habit was to check the gate on a hourly basis and thus it is probable to conclude that he did so at noon on the date in question.

Rule 406 specifically does not require corroboration and thus it would seem that Red's supervisor, who was familiar with his practice, may testify that it was Red's routine or habit to check the gate once an hour to make sure the service entrance was closed. It should be noted that Red worked as a security guard at White Acre for three years and thus a substantial history of his work habits existed. The evidence would be admissible and considered by the trier of fact to determine Jack's liability for the trespass charge.

The testimony of Red's supervisor to establish that Red had a habit and practice as well as being required as part of his job to check the service gate hourly on the hour would be admissible to show that the service gate was checked at noon and was closed at the time Jack entered White Acre. The fact that no deliveries were expected through the service entrance until 4:00 p.m. that day, together with Red's habit and practice of checking the gate hourly, supports the contention that Jack was trespassing at White Acre. The Court should permit the testimony of Red's supervisor to establish Red's habit or custom in checking the service entrance gate.

### Question No. 3: Facts and Interrogatories

Bonnie and Clarice owned E-Link, a specialty computer business, which they operated as a partnership out of a leased space in one-half of a building in C City, Pennsylvania. The space was leased by E-Link from Howard pursuant to a written three-year lease which was signed by both parties. The lease commenced on January 1, 2001 and required E-Link to pay Howard \$5,000 per month rent. The lease did not address what would happen if the space became damaged or destroyed. E-Link made timely payments until early 2003 when the partners were unable to make their February and March lease payments. E-Link received a letter from Howard on April 1, 2003 which indicated that suit would be filed against E-Link if he did not receive the February and March payments by April 15, 2003.

Unable to deal with the thought of losing E-Link, Bonnie decided to take things into her own hands to try to address the partners' financial dilemma. Without Clarice's knowledge, Bonnie met with her friend, John, on April 5, 2003 to discuss taking \$30,000 from her Uncle Hank's business. Bonnie knew that Hank was miserly and had overheard him saying that he kept \$30,000 in a shoe box in the back room of his business. Bonnie and John agreed that one morning John would break into the business through the back at about 2:00 a.m. because they knew that the business was only open between 9:00 a.m. and 5:00 p.m. and they believed no one would be there.

A few days later John proceeded to the business at 2:00 a.m. and discovered the rear door was slightly ajar. He pushed the door open and reached his arm inside to turn on the light. As the light came on, he was surprised to see a man, later determined to be Hank, sleeping on a couch in the back room. When Hank awakened and saw John standing outside the open door, Hank was startled and fell to the floor where he lay motionless. After John saw Hank fall, he fled without looking for the money. It was later determined that Hank had pre-existing heart problems and that the \$30,000 was not in the premises that night. It is undisputed that Hank died of a heart attack which was caused by the frightening experience of witnessing the unknown intruder (John) just outside his business.

After a month long investigation, the police determined that John was the person who was at Hank's business on the night Hank died. The police approached John, and after properly reading him his Miranda rights and securing a proper waiver, John admitted to the police all of the facts set forth above.

1. Other than conspiracy and criminal trespass, with what crimes would John most likely be charged and found guilty?

On April 15, 2003, the leased space occupied by E-Link was completely destroyed by an accidental fire. Construction experts determined that it would take eighteen months to rebuild the space. E-Link never made any lease payments to Howard after February 1, 2003. On January 31, 2004, Howard's counsel filed a Complaint, with a proper Notice to Defend, in the Court of Common Pleas which encompassed C City, Pennsylvania. The Complaint alleged a breach of contract action against E-Link for the lease payments from February 1, 2003 through December 31, 2003, the last day of the lease term. The Complaint was properly served on E-Link on February 15, 2004.

- 2(a). As counsel for E-Link what defense(s) should you raise to the Complaint concerning the failure to make lease payments and how and when should such defense(s) be raised?

- (b). What is Howard's likelihood of success on his breach of contract claim and what is E-Link's likely monetary exposure regarding Howard's claim excluding interest, legal costs and attorneys' fees?

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

**1. Other than conspiracy and criminal trespass, John would be charged with, and most likely be found guilty of, burglary, criminal attempt and second degree murder.**

A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. 18 Pa.C.S.A. §3502(c). To prove burglary, the Commonwealth must prove that the defendant entered a building, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless, among other things, the defendant was privileged to enter. Commonwealth v. Ford, 539 Pa. 85, 650 A.2d 433 (1994). Lack of privilege to enter a burglarized premises may be proved by surrounding circumstances. Commonwealth v. Gordon, 329 Pa. Super. 42, 477 A.2d 1342 (1984). Evidence that the defendant entered the building when he was not privileged to do so, with intent to commit theft, was sufficient to sustain a conviction for burglary. Commonwealth v. Crocker, 280 Pa. Super. 470, 421 A.2d 818 (1980). The unauthorized entry of any part of the body into the premises is sufficient to constitute burglary. Commonwealth v. Myers, 223 Pa. Super. 75, 297 A.2d 151 (1973).

As applied to this case, John went to Hank's business with the intent to steal Hank's \$30,000 which would constitute the crime of theft. He pushed the slightly ajar door open and reached his arm inside to turn on the light. When John reached his arm into the premises this satisfied the entry element for burglary. At the time of John's entry the business was not open to the public and there is no evidence that John was either licensed or privileged to enter or be on the premises at that time of the day. In fact, the facts make clear that John believed that no one would be at the premises at that hour of the morning and it was his intention to go in anyway. Thus, he could be charged with and probably be found guilty of the crime of burglary.

A person commits an offense of criminal attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime. 18 Pa. C.S.A. § 901(a). The two elements of the crime of criminal attempt are that the actor intended to commit an offense and that the actor takes a substantial step toward completion of the offense. Commonwealth v. Henley, 504 Pa. 408, 474 A.2d 1115 (1984). It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the crime attempted. 18 Pa. C. S. A. § 901 (b). A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof. 18 Pa. C. S. A. § 3921.

As indicated above, John went to Hank's business with the intent to steal \$30,000. He proceeded to the business during the early morning hours to steal the money. He opened the door of the business and turned the light on to illuminate the area where he intended to commit the theft. These acts would likely constitute substantial steps toward the commission of the crime of the theft. The fact that the \$30,000 was no longer at the premises would not constitute a defense to the attempt charge and John would likely be found guilty of criminal attempt.

John would also be charged with second degree murder. A criminal homicide constitutes murder of the second degree when it is committed while the defendant is engaged as a principal or as an accomplice in the perpetration of a felony. 18 Pa.C.S.A. § 2502(b). The perpetration of a felony encompasses acts of a defendant in engaging in the commission of various felony offenses including the crime of burglary. 18 Pa.C.S.A. § 2502(d). The statute defining second degree murder does not require that a homicide be foreseeable; rather, it is only necessary that the accused engage in conduct as a principal or an accomplice in the perpetration of a felony. Commonwealth v. Evans, 343 Pa. Super. 118, 494 A.2d 383 (1985). An accused may not escape criminal liability on the ground that, prior to the criminal act, his victim was not in perfect health. Commonwealth v. Hicks, 466 Pa. 499, 505, 353 A.2d 803, 805 (1979). A defendant can be held criminally responsible for the second degree murder of another where his felonious conduct starts an unbroken chain of causation directly bringing about the death of another. Evans, *supra*.

As applied here, John was in the course of committing a burglary when Hank suffered a heart attack and died. The facts make clear that it is undisputed that the heart attack was caused by the frightening experience of witnessing the unknown intruder just outside his business. Even though John may not have foreseen that Hank would be inside the premises, and that he did not intend to kill him, John would still be charged with and likely found guilty of second degree murder as Hank's death occurred during the commission of the burglary, a felony offense.

**2(a). Counsel for E-Link should raise the defenses of impracticability of performance or frustration of purpose via new matter with the answer.**

Where a contract relates to the use and possession of specific property, the existence of which is necessary to the carrying out of the purpose in view, a condition is implied by law, as though written in the agreement, that the impossibility of performance arising from the destruction of the property, without fault of either party, shall end all contractual obligations relating to the thing destroyed. Albert M. Greenfield & Co. Inc. v. Kolea, 475 Pa. 351, 380 A.2d 758 (1977) citing Greenberg v. Sun Ship Building Co., 277 Pa. 312, 313, 121 A. 63, 64 (1923). The Restatement of Contracts 2d now uses the term impracticability rather than impossibility. Restatement of Contracts 2d § 261, provides:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

When impracticability excuses a party's duty to perform, it ends all contractual obligations under the contract. Lichtenfels v. Bridgeview Coal Co., 366 Pa. Super. 304, 531 A.2d 22 (1987).

The doctrine of frustration of purpose is defined in the Restatement (Second) of Contracts § 265 (1979) as follows:

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Pennsylvania law accepts the principle of frustration of purpose. Alvino v. Carraccio, 400 Pa. 477, 162 A.2d 358 (1960); Madreperla v. The Willard Co., 606 F. Supp. 874 (1985).

As applied to this case, it is clear that E-Link used the leased space in order to run its business. When the accidental fire completely destroyed the leased space and it became clear that the space could not be rebuilt for 18 months, it was obviously impossible for E-Link to have the benefit of the space any longer. Even though the written lease agreement between E-Link and Howard did not address the situation where the space would become damaged or destroyed, this would be a term which would be implied by the Court in accordance with the reasoning set forth in Greenberg v. Sun Ship Building, *supra*. Accordingly, E-Link's counsel should argue that the lease payments due from April 15, 2003 through December 31, 2003 should not be due and payable in light of the fact that there was no space for E-Link to use. Due to this impracticability the contract should be deemed to have been terminated as of April 15, 2003. Alternatively, it can be argued that E-Link's duty to render performance after April 15 has been discharged under the frustration of purpose doctrine. Through no fault of E-Link, the leased space, which was the object of the lease agreement, was destroyed by fire, thus frustrating the principal purpose of the contract which was to provide space for the operation of E-Link's business.

These defenses should be raised as affirmative defenses pursuant to Pennsylvania Rule of Civil Procedure 1030(a) which provides that all affirmative defenses, including but not limited to the defense of impossibility of performance, shall be pleaded in a responsive pleading under the heading "New Matter". The New Matter should be filed within twenty (20) days of February 15, 2004 in accordance with Pennsylvania Rule of Civil Procedure 1026 which requires that every pleading subsequent to the Complaint should be filed within twenty (20) days after service of the preceding pleading provided that the pleading contains a Notice to Defend or is endorsed with a Notice to Plead. Since the Complaint contained a Notice to Defend, the Answer with New Matter would have to be filed within twenty (20) days of February 15, 2004, the date E-Link was served with the Complaint.

**(b). Howard is likely to succeed on his breach of contract claim for the period covering February 1, 2003 through April 15, 2003, and E-Link's likely exposure is \$12,500.**

A lease is in the nature of a contract and is controlled by principles of contract law. Cimina v. Bronich, 517 Pa. 378, 537 A.2d 1355 (1988). Where the language in a lease is clear and unambiguous, the focus of interpretation is upon the terms of the agreement as manifestly expressed. Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385 (1986); Fike Estate, 385 Pa. Super. 627, 561 A.2d 1268 (1989). A party who breaches a contract is liable for the damages caused by his breach. Malin v. Nuss, 234 Pa. Super. 259, 338 A.2d 676 (1975).

In this case, the parties manifested an intent to be bound by the terms of an agreement which they ultimately both signed. Although the agreement failed to address the destruction of the building, as more particularly addressed above, the terms of payment were definite. The agreement clearly required that E-Link pay \$5,000 per month for the leased space and in fact E-Link was making these payments regularly until February 1, 2003. There does not seem to be any question with regard to the amount due per month. The payment of the \$5,000 by E-Link in exchange for Howard's leased space would constitute the consideration necessary in order to make this a binding contract. Thus, it appears that Howard's claim for breach of contract for the period from February 1, 2003 through April 15, 2003, the last day that the partners were able to use the leased premises, would be successful. As indicated above Howard cannot recover for the remaining months due to the destruction of the premises and resulting impracticability of performance.

Since the partners were required to pay \$5,000 per month, and they were in default for a period of two and one-half months, it is likely that their liability exposure on this claim will be \$12,500 exclusive of interest, legal costs and fees.

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

Eric Bright, a psychologist, testified extensively before the Pennsylvania State Legislature about the destructive impact of divorce upon children. As part of his testimony, he reported his own observations and summarized highly regarded research in the field, which included data on how children of divorced, separated or unmarried parents often were precluded from obtaining a college education, regardless of their parents' income, because of the high level of conflict between their parents about financial issues. Children from homes with married parents, research showed, were much more likely to attend college than children whose parents were divorced even where the combined income of the divorced parents was equal to or greater than the income of married parents. After extensive hearings on the frequency of divorce in the Commonwealth and the economic difficulties often faced by prospective college students from divorced families, the State Legislature passed the following statute:

General rule. A child of separated, divorced or unmarried parents, who is accepted and enrolled as a fulltime student at a state university of this Commonwealth in order to acquire an undergraduate college degree, shall be entitled to a \$10,000 reduction in the annual tuition fee. This opportunity shall be available for a maximum of 4 years and shall not be available to individuals otherwise qualified under this statute who have already obtained an undergraduate college degree.

Excited about the impact of his testimony, Eric showed a copy of the new provision to his wife, Jenn, who did not share Eric's enthusiasm. Instead, Jenn said, "Our son Stanley has a hard time paying \$12,000 a year to go to a state university in Pennsylvania, and now you tell me it would be cheaper for him to attend college if we weren't married." Stanley was a very bright young man who was a college sophomore at a state university in Pennsylvania. When he learned of the new law, he was very annoyed that his college education would cost more than the same education would cost his friends whose parents were separated, divorced or unmarried.

1. If Stanley filed a lawsuit in federal court claiming that the statute violated the Equal Protection Clause of the Fourteenth Amendment to the federal constitution, based on the above facts, how would the court analyze this claim and what would be the likely result?

Eric started traveling around lecturing about children of divorce. As a result, Jenn and Eric become estranged and decided to divorce. When they negotiated the issue of child support, Eric and Jenn both earned approximately \$35,000 a year and Jenn was relieved that Eric was not challenging her role as the primary physical custodian of the children. An Order of Support, which they had negotiated and agreed to, was entered by the court. The Support Order did not require Eric to pay a set monthly amount of child support but provided that Eric would pay for activity fees and unreimbursed medical expenses for their children.

A year later, Eric had become a nationally recognized expert on the impact of divorce on children and appeared regularly on talk shows and in magazines. Eric told Jenn that he was still earning the same \$35,000 a year as Jenn was, but Jenn's friend Mary told Jenn that she overheard Eric brag that he signed a lucrative book deal which would pay him a minimum of

\$70,000 annually for 10 years, starting immediately. For Jenn, it was a struggle to provide for their children, Nimrod, 7, and Betty, 10, who have always lived with her, and Stanley, now 18, who was living in a dormitory at college.

2. What is the likelihood of Jenn's success if she now seeks regular monthly child support for Nimrod, Betty and Stanley?
3. At the child support hearing, if Jenn calls Mary to testify about the statement she overheard Eric make, what objection should Eric raise, how should Jenn respond to the objection, and how would the court likely rule?

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

1. **In analyzing the Equal Protection claim, the court would evaluate the nature of the classification involved, apply the appropriate level of scrutiny and would uphold the statute if a rational basis for the classification was found to exist.**

The equal protection clause of the United States Constitution provides that: No state shall...deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S.C.A. Const. Amend. 14. State action, for purposes of the equal protection clause, may emanate from legislative action. Moose Lodge No 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed. 2d 627 (1972). The prohibition against treating people differently under the law, however, is not absolute and a state may establish legislative classifications if they meet Constitutional muster. Heisler v. Thomas Colliery Co., 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237 (1922).

An equal protection analysis begins with a determination of whether a state has created a classification for the unequal distribution of benefits or unequal imposition of burdens. If so, a determination of the nature of the classification is made so that the appropriate level of scrutiny can be applied. A classification that does not affect a suspect class or fundamental right, though discriminatory, is not arbitrary or necessarily invalid in violation of the equal protection clause if any state of facts can be reasonably conceived to sustain that classification. Federal Communications Commission v. Beach Communications, Inc., 508 U.S. 307, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

Classifications which implicate a "suspect" class or a fundamental right are strictly construed to determine if the state adopting the statute has a compelling governmental purpose to justify the classification. Palmore v. Sidoti, 466 U.S. 429 (1984). Because more stringent standards are applied to this first tier of review, it is more likely that the classification or differentiation under review will be found to be violative of equal protection guarantees. Samuel v. University of Pittsburgh, 375 F.Supp. 1119 (W.D. Pa. 1974). Suspect criteria requiring rigid judicial scrutiny have included such categories as race and national origin. Id. Few classifications involving suspect criteria have been found to be constitutionally permissible. Id. Fundamental rights have included such constitutional rights as the right to privacy, marriage, voting, travel, freedom of association, and bail. Id., Hoffman v. United States, 767 F.2d 1431 (9<sup>th</sup> Cir. 1985). Fundamental rights do not include the right to an education. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). Additionally, because an individual does not have an entitlement or right to participate in post-secondary education under State or Federal law, a fundamental right is not implicated under this provision. Curtis v. Kline, 542 Pa. 249, 666 A.2d

265 (1995). Thus, strict scrutiny is not required for the classification reflected in the statute at issue.

If the classification under review implicates a quasi suspect class or a “sensitive” classification, it falls into a second tier or category and a heightened standard of scrutiny is applied requiring a statutory classification to substantially further a purported legislative purpose. Clark v. Jeter, 486 U.S. 456, 108 S. Ct. 1910 (1988); Hoffman v. United States, 767 F.2d 1431 (1985). Legitimacy and gender have been identified as “sensitive” classifications. U.S. v. Virginia, 518 U.S. 515, 116 S.Ct. 2264 (1996); Clark, *supra.*; Robert Rotunda and John Nowak, Treatise on Constitutional Law, Section 18.3 at 223 (3<sup>rd</sup> Edition 1999). While the statute at issue does not necessarily implicate these “sensitive” classifications, it is possible that the court would determine that the provision should be subject to intermediate tier scrutiny.

The statutory classification at issue includes a child of unmarried parents as well as a child of separated or divorced parents. Arguably, the classification is at least partially based upon the nonmarital status of the child’s parents, thus implicating the “legitimacy” status of the child. Even though the classification is a preferential one, the court might view this as a “sensitive” classification and apply a heightened level of scrutiny, requiring the government to prove that this statutory classification substantially furthers a purported legislative purpose. However, it is also possible that the court would conclude that the classification of children based upon the marital status of parents which is affirmative rather than discriminatory does not single out the category of nonmarital children and therefore does not trigger the intermediate level of scrutiny. If the statute is analyzed using intermediate level scrutiny, it is likely that the government will not meet its burden and that Stanley will prevail.

A third tier and lowest level of scrutiny or review is for classifications which do not involve suspect or quasi-suspect classes, including the categories identified above, and do not implicate fundamental rights. When the statutory scheme falls in this third category, the statute is upheld if there is any rational basis for the classification. Clark v. Jeter, 486 U.S. 456, 108 S.Ct. 1910 (1988); Robert Rotunda and John Nowak, Treatise on Constitutional Law, Section 18.3 at 222-224 (3<sup>rd</sup> Edition 1999).

The rational basis or “mere rationality” test provides an appropriate standard by which this classification could be assessed. As part of the rational basis analysis, it must be determined whether the challenged statute seeks to promote any legitimate state interest or public value. Hoffman v. United States, 767 F.2d 1431 (1985). If the statute does promote a legitimate purpose, the next inquiry is whether the classification is reasonably related to accomplishing the state interest or interests. *Id.* To satisfy the second prong of the rational basis test, the court must only find a plausible reason for the legislative action and the burden is on the person challenging the legislative classification to prove that the facts on which the legislature may have relied could not reasonably be conceived to be true by governmental decision makers. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed. 2d 659 (1981), *reh. den.*, 450 U.S. 1027, 101 S. Ct. 1735, 68 L.Ed. 2d 222, citing Vance v. Bradley, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed. 2d 171 (1979).

The statute at issue provides a \$10,000 reduction in tuition at a state university only to children of separated, divorced or unmarried parents, thus classifying the children according to the marital status of their parents. The benefit at issue is a reduced tuition cost at state colleges and this benefit is not available to children from families where the parents are married. It first must be determined whether this statute seeks to promote a legitimate state interest or public value. It appears that the state interest or public value is assisting and encouraging financially disadvantaged children, who would otherwise not have been able to afford to go college, to be

able to attend college. It must next be determined whether the classification adopted by the legislation is reasonably related to accomplish that articulated state interest.

According to the facts, the Legislature heard extensive testimony which included highly regarded research in the field on economic difficulties often faced by prospective college students from divorced families and how children of divorced, separated or unmarried parents, regardless of the parents' income, were often precluded from obtaining a college education because of the high level of conflict between parents about financial issues. The research presented indicated that children from homes with married parents were much more likely to attend college as compared to children of separated, divorced or unmarried parents. Thus, even where separated, divorced or unmarried parents may have income to help with the cost of college, the high level of conflict between parents may preclude a child from having access to those funds for college.

The provision at issue was passed after extensive Legislative hearings on this subject. Therefore, it could be argued that the classification of children based on the marital status of their parents is rationally related to the need for financial assistance for college. Consequently, based on the research considered, the selection of a child whose parents are separated, divorced or unmarried for governmental assistance from a group of similarly situated children whose parents are not divorced, separated or unmarried may be rationally related to a governmental interest of promoting accessibility of post secondary education by providing financial assistance to financially disadvantaged children under this mere rationality standard. The Legislature must only rationally have believed that the classification was related to the expressed legitimate state interest or public value. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed. 2d 659 (1981), reh. den., 450 U.S. 1027, 101 S. Ct. 1735, 68 L.Ed. 2d 222.

The testimony before the Pennsylvania Legislature would provide a plausible reason for the classification and would make it difficult for Stanley to prove that there was no conceivable basis for the classification and it is likely that this provision would pass Constitutional muster if, applying this lowest level of equal protection review, it is found that there exists a rational relationship between the means used and the end sought to be fostered. Samuel v. University of Pittsburgh, 375 F. Supp. 1119 (1974). In order to successfully challenge the provision on equal protection grounds, Stanley would bear the burden of demonstrating that the legislative facts upon which the classification was based could not reasonably be conceived to be true by the Legislature. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed. 2d 659 (1981), reh. den., 450 U.S. 1027, 101 S. Ct. 1735, 68 L.Ed. 2d 222, citing Vance v. Bradley, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed. 2d 171 (1979).

However, it is also possible that a court would reach a different conclusion after applying the rational basis test to this provision. One could argue that factors such as the ability and/or willingness to pay of a child or a parent, regardless of marital status, likely impacts the accessibility of a college education for all children and therefore there is no rational relationship to this legitimate government interest. See, Curtis v. Kline, *supra.*, - law requiring divorced, separated or unmarried parents to pay support for post secondary education found to not be rationally related to legitimate government interest. In the alternative, based on the nature of the classification and interest involved, one could argue for the application of the more demanding rational basis test with bite, which requires a more careful look at the justification for the classification, and conclude that the means used do not justify the goals and the provision fails on Constitutional grounds. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), Logan v. Zimmerman Brush Co., 455 U.S. 422 (1942).

**2. Jenn could file for a modification of child support and would likely be successful in obtaining child support for Nimrod and Betty.**

The obligation to support minor children is nearly absolute. Com. ex. rel. Mexal v. Mexal, 201 Pa. Super. 457, 193 A.2d 680 (1963). Parents cannot waive or bargain away a child's right to support. Meisen v. Frank, 361 Pa. Super. 204, 522 A.2d 85 (1987). Therefore, the fact that Jenn and Eric had negotiated an agreed order of support that required Eric to pay only unreimbursed medical expenses and activity expenses for the children and did not require him to pay any regular monthly child support payments, will not preclude Jenn from filing an action to obtain regular payments. Jenn is entitled to petition for regular child support payments and should file an action to modify the present support order and to obtain regular monthly child support payments from Eric.

Additionally, Jenn could seek to modify the agreed order for support based on a showing of changed circumstances.

Pennsylvania statute specifically provides that support agreements are modifiable: A provision of an agreement regarding child support shall be subject to modification by the court upon a showing of changed circumstances. 23 Pa.C.S.A. 3105(b). A court is free to modify terms of a support agreement upwards or downwards once the terms of the agreement have been incorporated into a support order. Boullianne v. Russo, No. 2018 MDA 2001 (Pa. Super. 2003). Because Eric's annual income will increase by a minimum of \$70,000 for the next ten years, Jenn will clearly be able to demonstrate a change in circumstance as a basis for a modification. However, even without demonstrating a change in circumstance, Jenn, as the primary physical custodian of the children, would be entitled to regular child support payments from Eric.

Jenn would be entitled to obtain child support pursuant to the Statewide guidelines as established by the Pennsylvania Supreme Court. 23 Pa.C.S.A. Section 4322(a). In determining the reasonable needs of a child seeking support and the ability of the obligor to provide support, the guidelines place primary emphasis on the net incomes and earning capacities of the parties. 23 Pa.C.S.A. Section 4322(a).

However, it is likely that only Betty and Nimrod will be entitled to receive child support from Eric because Stanley is 18 years old and living at college.

23 Pa. C.S. Section 4321 provides:

Liability for Support

Subject to the provisions of this chapter:

. . . (2) Parents are liable for the support of their children who are unemancipated and 18 years of age or younger.

Pennsylvania statute provides that a court shall not order either or both parents to pay for the support of a child if the child is emancipated. 23 Pa.C.S.A. Section 4323. Pennsylvania has bestowed adulthood on minor children at age 18. Blue v. Blue, 532 Pa. 521, 616 A.2d 628 (1992). Consequently, the common law duty to support a minor child must by necessity cease at age 18. Id. Pennsylvania has not imposed a legal duty upon parents to provide college educational support for a child no longer considered a minor. A parental duty of support is owed until a child reaches 18 or graduates from high school, whichever occurs later, unless the child is not emancipated. Id.

Therefore, although it is not clear whether Stanley actually graduated from high school, Stanley is 18 years of age, attending college and likely to be found to be emancipated. Therefore, it is very likely that Jenn would not be able to obtain child support from Eric for Stanley.

**3. Eric could raise a hearsay objection to Mary’s testimony, but the objection would likely be overruled because it is an admission by a party opponent exception to hearsay.**

Hearsay is an out of court statement offered in evidence to prove the truth of the matter. Pa.R.E. 801. Eric’s statement was made out of court and would be used to prove the truth of the statement so if Mary testifies as to the statement, Eric could raise a hearsay objection. Hearsay is not admissible unless it falls within an exception. Pa.R.E. 803 includes exceptions to the hearsay rule and includes an exception for an admission of a party opponent. The availability of the declarant, Eric, is immaterial under this exception. In this case, even though it is likely Eric, the declarant, would be in court, the exception is still available. Under the Pennsylvania Rules of Evidence, an admission by a party opponent occurs when the statement is offered against a party and is (A) the party’s own statement in either an individual or representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth. Pa.R.E. 803(25). Jenn would be offering Mary’s testimony about Eric’s own statement as evidence against Eric, and it is likely that the court would admit Mary’s testimony regarding Eric’s statement under the admission of a party opponent exception.

### **Question No. 5: Facts and Interrogatories**

Al owns a night club in C County, Pennsylvania, and hired Barb to sing three evenings a week at the Club. Prior to the execution of their agreement, Barb stated that she was hoping to get a year-long engagement. Al responded: “I like your voice so much that you can work at my place for at least the next year.” Al and Barb entered into a valid, written contract for a term of six months which set forth Barb’s compensation and all of the other terms of their agreement. The contract provided that if for any reason Barb could not appear occasionally, she would arrange for a substitute of equal singing talent. The contract also provided that if Barb’s services, or the services of any substitute provided by Barb, did not meet Al’s personal satisfaction, the contract could be terminated by Al with 10 days notice to Barb.

At least one night each week for the first two months of the contract, Barb did not appear. At Barb’s request, Carol appeared on each of those occasions and received an enthusiastic response from the audience. Music reviews in the local newspaper praised Carol’s performance and Al’s profits did not decrease during those two months. Al was unhappy because he and his wife liked to listen to Barb and they did not care for Carol’s singing. Al told Barb and others of his dissatisfaction. At the end of the eighth week, Al advised Barb that he was unhappy with Carol’s singing and that Barb’s contract would be cancelled in 10 days.

Al also owned Blackacre which consists of a small building and lot in C County, Pennsylvania. He properly conveyed Blackacre to Meg for life with the remainder to Ruth. Meg decided it would be lucrative to lease the building and collect rent. In preparation, Meg, without Ruth’s knowledge, replaced the gravel driveway from the road to the building with a new paved driveway.

Meg entered into a valid, written two year lease of Blackacre with Tom for \$800 per month commencing on January 1, 2002. Tom intended to open a jewelry store on the premises and installed several display cases which were bolted to the floor and track lighting which was attached to the ceiling. Tom became ill in March, 2002 and did not move his business onto Blackacre as he had intended. Hoping that he would later open his business, Tom continued to make timely rental payments to Meg.

Tom did not perform any maintenance on the property. Outdoor wooden steps rotted and collapsed. The water pipes froze and burst during the winter of 2003 causing extensive damage to the floors, walls, ceilings and plumbing. No repairs were made. During this time, neither Tom nor Meg ever visited Blackacre. Meg died on December 31, 2003.

1. Barb filed an action in C County Court against Al for breach of contract. Al defends on the basis of the termination clause in the agreement. Will this defense be successful?
2. At trial, Barb wants to testify regarding Al's statement that Barb could work at the Club for at least one year. What objection, other than hearsay, should Al make to exclude the testimony and how should the Court rule?
- 3a. When Ruth saw Blackacre, she immediately brought an action against Ed, the Executor of Meg's estate, to recover the rental payments paid to Meg and to recover damages for the loss in value of Blackacre during the term of the life estate. Will Ruth succeed in her action?
- 3b. Ed files a counterclaim against Ruth seeking to recover the cost of installing the new driveway, arguing that Ruth will receive the benefit of Meg's expenditures. Will Ed prevail?
4. After the expiration of the lease, Tom requested permission to remove the display cases and track lighting and Ruth refused. Upon what legal basis should Tom argue that the display cases and lighting may be removed by him and will his argument be successful?

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

1. **Al's defense will be successful because the contract includes a provision for termination by Al if Barb or the substitute provided by her does not perform to his personal satisfaction.**

Barb will probably not prevail in her action against Al for breach of contract. Parties to a contract may agree that the performance under the contract by one party must meet the satisfaction of the other party. The question arises of whether the promisor has to be subjectively satisfied or whether the term "satisfaction," as used by the parties, was intended to mean objective satisfaction. Objective satisfaction is determined by whether a reasonable person would be satisfied regardless of whether the promisor was actually satisfied. The objective standard is commonly used when the matter involves commercial value, mechanical utility or operative fitness.

On the other hand, if the language of the contract states clearly that the duty of the party is conditioned on the personal satisfaction of that party, courts apply the subjective test because

that is the intention of the parties. John E. Murrary Jr., Murray on Contracts, 3d ed. § 103. When such a condition of subjective satisfaction is agreed to, the “test for adequate performance is not whether the person for whom the service was rendered ought to be satisfied, but whether he is satisfied, there being, however, this limitation, that any dissatisfaction on his part must be genuine and not prompted by caprice or bad faith.” Burke v. Daughters of the Most Holy Redeemer, Inc., 344 Pa. 579, 581, 26 A.2d 460, 461 (1942).

If the agreement is clear that the contract requires only honest satisfaction and no more, it will be so interpreted and the obligor may terminate the contract if he is honestly, even though unreasonably, dissatisfied. Restatement (Second) of Contracts § 228, cmt. a (1981). The test of the promisor’s satisfaction is his or her own personal judgment with the qualification that the personal judgment must be exercised in good faith. Hood v. Meininger, 377 Pa. 342, 105 A.2d 126 (1954).

The question of whether the termination was based on genuine dissatisfaction is a question for the jury. Stern v. Vic Snyder, Inc., 325 Pa.Super 423, 431, 473 A.2d 139, 143 (1984). There is nothing in the facts to indicate that Al’s dissatisfaction was not sincere. On these facts, a jury would probably find that Al was dissatisfied and, although his dissatisfaction may have seemed unreasonable, it was genuine and not capricious. Al’s defense will probably be successful. See Restatement (Second) of Contracts § 228, illus. 5 (1981).

**2. Al should object that the parol evidence rule bars the admission of his prior statement and the court should sustain his objection.**

If a written agreement is intended by the parties to encompass the entire understanding between the parties, then evidence of prior or contemporaneous expressions to vary or contradict the writing are barred by the parol evidence rule in the absence of fraud, accident or mistake. Dunn v. Orloff, 420 Pa. 492, 218 A.2d 314, 316 (1966).

Although the title implies that it is a rule of evidence, the parol evidence rule is a substantive rule of law. Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 661 (3d Cir. 1990). The rule only applies when the writing is the entire contract between the parties. As the Pennsylvania Superior Court explained:

[I]f the parties to a transaction have embodied that transaction either in whole or in part, in a single memorial, such as a writing or writings, and if they have come to regard that memorial as the final expression of their intentions as a whole, or a part thereof, then all other utterances that have taken place in connection with that transaction, prior to or contemporaneous with the making of the memorial, are immaterial for the purpose of determining what the terms of the transaction are or at least so much of it as is embodied in the memorial.

Friestad v. Travelers Indemnity Co., 260 Pa. Super. 178, 191, 393 A.2d 1212, 1218 (1978) quoting Murray on Contracts, § 105 (Rev. ed. 1974).

Thus, the court must initially determine whether the written contract between Al and Barb was their final, integrated agreement. The agreement set forth the relevant terms of the contract such as length of time, the amount of Barb’s compensation and the condition that Al could terminate the contract if Barb’s services or the services of any substitute provided by Barb

did not meet his personal satisfaction. The writing does not appear to have been anything less than a final agreement.

Courts also examine the earlier agreement or utterance and the later agreement to determine whether the earlier terms come within the area covered by the written contract. This is answered by comparing the earlier terms and determining whether parties, situated as the parties to this contract, would naturally and normally include the term in the final contract. If they relate to the same subject matter and are so interrelated that both would be executed at the same time and in the same contract, the scope of the subsidiary agreement must be taken to be covered by the writing. This question must be determined by the Court. Gianni v. R. Russel and Co., 281 Pa. 320, 126 A. 791 (1924); Mellon Bank Corp. v. First Union Real Estate Equity and Mortg. Investments, 951 F.2d 1399, 1405 (3d Cir. 1991). Here, the written contract specifically sets forth a term of 6 months as well as Al's right to terminate the contract if Barb's performance or the services of a substitute provided by Barb did not meet his personal satisfaction. There is no ambiguity and certainly the scope of the earlier statement regarding the length of time of employment was covered by the written agreement.

There is no evidence in the facts that the contract was not intended to state the entire agreement of Al and Barb. There is also no evidence of fraud, accident or mistake which would preclude the application of the parol evidence rule. The statement that Barb seeks to introduce directly contradicts the words of the contract and is therefore barred by the parol evidence rule.

**3a. Ruth will not recover the rental payments made to Meg, but she will recover damages for the loss in value of Blackacre during the life tenancy.**

Al conveyed a life estate in Blackacre to Meg and the remainder, upon Meg's death, to Ruth. A life estate is a limited interest in property in which the owner holds title only for the duration of a designated person's life. Ladner, Conveyancing in Pennsylvania, § 1.03(b) (4<sup>th</sup> ed. 1979). A life tenant is entitled to possession and enjoyment of the property for the term of her life. She may convey or lease her interest without the consent of the remainderman and is entitled to collect rents and retain the proceeds. See: Estate of Hewitt, 554 Pa. 486, 721 A.2d 1082 (1998); Cronan v. Castle Gas Co., Inc., 354 Pa. Super. 381, 512 A.2d 1 (1986). Ruth will not recover the rental proceeds received by Meg.

It is the duty of a life tenant to keep the property subject to the life estate in repair so as to preserve the property and prevent decay or waste. 51 Am.Jur. 2d Life Tenants and Remainderman § 28. Her use of the premises is limited by the law of waste which means that the life tenant is under a duty to refrain from any act which will diminish the value of the remainder if such an act is, under the circumstances, an unreasonable use of the premises. Cronan v. Castle Gas Co., Inc., *supra.*, 512 A.2d at 5, (Popovich J. concurring), quoting Cornelius J. Moynihan, Introduction to the Law of Real Property 59 (1962).

The life tenant is under a duty to preserve the estate in as good a condition as when it was received, except for natural depreciation. The concept of waste includes what is known as permissive waste, which is the failure of the life tenant to exercise the ordinary care of a prudent man for the preservation and protection of the estate. 78 Am.Jur. 2d, Waste § 5. By allowing the condition of Blackacre to deteriorate, Meg has unreasonably interfered with the expectation of the remainderman, Ruth, to receive Blackacre in substantially the same condition as existed at the time of conveyance of the life estate. By not inspecting the property, Meg has permitted permissive waste in failing to exercise the ordinary care of a prudent person for the preservation of the estate. Ruth will succeed in her action to recover damages from Meg's estate for the loss in value of Blackacre during the life tenancy.

**3b. Ed will not prevail in recovering the cost of the new driveway.**

The general rule is that while a life tenant is responsible for repairs and maintenance, she is not responsible for improvements. The rationale behind the rule is that a life tenant should not be allowed to improve a remainderman out of his estate. Farber's Estate, 70 Pa.Super. 81 (Pa. Super. 1918). Pennsylvania Courts follow this general rule and have held that improvements of a permanent nature without the acquiescence of the remainderman are made at the expense of the life tenant even though the property may be made more valuable. Appeal of Datesman, 127 Pa. 348, 17 A. 1086 (1889).

Because Meg made the permanent improvement to Blackacre by the construction of a new driveway without Ruth's knowledge or consent, it was made Meg's sole liability to pay for the improvement. Ed will not prevail in his claim to recover the money spent by Meg on the driveway.

**4. Tom may successfully argue that the display cases and lighting are trade fixtures and can be removed by him.**

The right to possession of chattels that are attached to leased real estate is determined by the application of the law of fixtures. Clayton v. Lienhard, 312 Pa. 433, 167 A. 321, 322 (1933). A fixture is an article in the nature of personal property "which has been so annexed to the realty that it is regarded as part and parcel of the land." Lehmann v. Keller, 454 Pa. Super. 42, 684 A.2d 618, 621 (1996). As a general rule, items classified as fixtures may not be removed by a tenant during or at the termination of the lease.

There is an exception to the general rule regarding the removability of fixtures for those items that are classified as trade fixtures. The well-settled rule is that where a tenant attaches to real estate fixtures and equipment necessary for the operation of its business, such items become trade fixtures and a presumption arises that the tenant is entitled to remove them during or at the termination of the lease. Cattie v. Joseph P. Cattie & Brothers, Inc., 403 Pa. 161, 168 A.2d 313 (1961). Unless a contrary intent is expressed in an agreement by the parties, the policy of Pennsylvania law favors the tenant in the removal of trade fixtures which the tenant placed on the premises in the course of business. There is a strong presumption that trade fixtures installed by a lessee remain the lessee's personal property. Lehmann v. Keller, *supra.*, 684 A.2d at 621.

There is no evidence in the facts which indicates that Meg and Tom mentioned the display cases and lighting in the lease or any other agreement. The display cases and track lighting were attached to the real estate for the two year duration of the lease. The items were probably necessary to the purpose for which the real estate was leased, the opening of a jewelry store. There are no facts provided which indicate that Meg intended that the items remain on the real estate. There are no facts that would tend to rebut the presumption that Tom was entitled to remove the fixtures at the termination of his lease or within a reasonable time after the termination of the lease. Tom is therefore entitled to remove the display cases and track lighting as trade fixtures.

## Question No. 6: Facts and Interrogatories

Two years ago, a Federal agency (the “Agency”) published a request for proposals (the “RFP”) seeking a contractor to manufacture electronic devices. The successful bidder would receive an initial contract for one year. The Agency could thereafter renew the contract for five additional one-year periods.

Harry reviewed the RFP and decided to bid. Harry met with Phil, Fred, John and Fawn. They formed ABC, Inc. (“ABC”), with each being equal stockholders. Harry, Phil and Fred were elected to the corporation’s board of directors (the “Directors”). Harry was elected president and Phil chief financial officer.

Each shareholder contributed \$1,000 for their stock. ABC was awarded the contract by the Agency. The Directors then closed on a \$150,000 working capital line of credit they had arranged with Big Bank. As collateral, Big Bank obtained a duly perfected first priority security interest in all of ABC’s present and future accounts, equipment and inventory.

Shortly thereafter, ABC purchased computer equipment, for \$20,000, from Computers, Inc. Computers, Inc. financed ABC’s purchase of the computer equipment. Prior to delivering the equipment, Computers, Inc. had ABC sign a note and security agreement and properly perfected its security interest by filing a financing statement describing the computer equipment as collateral for the repayment of the note.

ABC is in its second year of the contract. Early last month Harry was advised that the contract would not be renewed for a third year. While alone with his new wife, Wendy, Harry discussed the non-renewal of the contract but directed Wendy to keep the information confidential. He especially stressed that Wendy could not tell Fawn, her sister, who was an ABC shareholder. Harry also stated that Wendy should keep her mouth shut because this did not concern her anyway given that their prenuptial agreement excludes any claim by Wendy to any of Harry’s business ventures or the cash derived therefrom. Extremely offended, Wendy has left Harry and has filed for a divorce.

At the start of last month, ABC had \$200,000 in cash reserves and was current with all of its creditors. Harry knew the loss of the contract would eliminate 90% of the company’s cash flow. He panicked and felt that he should try to get as much cash out of the business as possible.

At the board meeting on the 25<sup>th</sup> of last month, Harry advised the board that the contract would be renewed for a third year. Phil presented financial statements indicating Big Bank was owed \$100,000 and Computers, Inc. \$15,000, that ABC was doing well and that, with the renewal of the contract, future cash flow would be strong. Harry then made a motion that ABC declare, and immediately pay, a dividend of \$35,000 to each shareholder. Phil and Fred, unaware of the loss of the contract, voted with Harry approving the motion.

Yesterday, Phil learned the contract was not renewed and immediately advised each shareholder. He further advised that given the loss of the contract and the recent dividend, ABC would not be able to pay its debts as they come due.

1. Could ABC successfully sue any or all of the members of the board of directors to recover the dividend that was distributed?
2. Assume a civil suit is filed by ABC to recover the dividend and ABC’s counsel subpoenas Wendy for a deposition to ask her what knowledge Harry had of the

loss of the contract prior to the board meeting. Other than hearsay, what objection(s) should be made by Harry's counsel to prevent her testimony and with what likely result?

3. If ABC defaults on the loans with Big Bank and Computers, Inc., which creditor will have the superior claim to the computer equipment?

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

- 1. ABC would be successful in a suit filed against Harry in obtaining a judgment to recover the dividend that was improperly made by the directors. ABC would be unsuccessful in recovering the dividend from Phil or Fred.**

The Pennsylvania Business Corporation Law of 1988 (the "BCL") provides generally that "Unless otherwise restricted in the bylaws, the board of directors may authorize and a business corporation may make distributions." 15 Pa. C.S.A. §1551(a). "Distributions" is broadly defined to include "transfers of money or other property" which would include a cash dividend. 15 Pa. C.S.A. §1103; see also, SELL AND CLARK, 3 PENNSYLVANIA BUSINESS CORPORATIONS §1551.2 (1997). Generally, therefore, unless otherwise restricted by its bylaws, the board of ABC would be permitted to make a distribution in the form of a dividend.

The BCL does not allow for distributions in all circumstances and provides language limiting the general authorization to make distributions. Section 1551(b) provides:

A distribution may not be made if, after giving effect thereto:

- (1) the corporation would be unable to pay its debts as they become due in the usual course of business; or
- (2) the total assets of the corporation would be less than the sum of its total liabilities plus (unless otherwise provided in the articles) the amount that would be needed, if the corporation were to be dissolved at the time as of which the distribution is measured, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

15 Pa. C.S.A. §1551(b). The two basic limitations on the ability to make distributions set forth in (1) and (2) above are often referred to as the "Equity Insolvency Test" and the "Balance Sheet Test". See, SELL AND CLARK, supra §1551. The facts do not provide enough information to make a definitive determination under the Balance Sheet Test. Clearly, however, the Equity Insolvency Test has been violated.

The Equity Insolvency Test essentially states that the dividend must not have the effect of making the corporation insolvent in the equity sense; i.e., not able to pay its obligations as they become due in the ordinary course of business. ABC's chief financial officer indicates that with the loss of the contract and the declaration and payment of the dividend ABC will not be able to pay its debts as they come due. Accordingly, under the Equity Insolvency Test the board of directors of ABC should not have voted affirmatively to declare and pay the dividend.

The next issue that must be addressed is whether any or all of the directors of ABC have liability to repay the improperly declared dividend to ABC. Section 1553 of the BCL provides, *inter alia*:

- (a) Directors. – Except as otherwise provided pursuant to section 1713 (relating to personal liability of directors), a director who votes for or assents to any dividend or other distribution contrary to the provisions of this subpart or contrary to any restrictions contained in the bylaws shall, if he has not complied with the standard provided in or pursuant to section 1712 (relating to standard of care and justifiable reliance), be liable to the corporation, jointly and severally with all other directors so voting or assenting, for the amount of the dividend that is paid or the value of the other distribution in excess of the amount of the dividend or other distribution that could have been made without a violation of the provisions of this subpart or the restrictions in the bylaws.
- (c) Contribution by other directors.—Any director against whom a claim is asserted under or pursuant to this section shall be entitled to contribution from any other director who voted for or assented to the action upon which the claim is asserted and who did not comply with the standard provided by or pursuant to this subpart for the performance of the duties of directors.

15 Pa. C.S.A. §1553(a)(c). Subsection (a) sets forth the general rule that a director who votes for an improper dividend has personal liability to the corporation to repay that dividend unless excepted under Section 1713, which is not applicable here, or the director has complied with the standard set forth in Section 1712. Under the facts each of ABC’s directors will have this liability jointly and severally with the others unless they can find shelter under Section 1712.

Section 1712 generally states that directors have a fiduciary duty to their corporation. This duty requires that a director perform in good faith and in a manner reasonably believed to be in the best interest of the corporation and includes a duty of reasonable inquiry and prudence. See, *SELL AND CLARK, supra* §1712.3. In exercising this duty Section 1712 allows a director to “rely in good faith on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by any of the following: (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented.” 15 Pa. C.S.A. §1712(a)(1). “In each case, a director’s claim of good faith reliance will be measured by reasonable belief in the completeness and accuracy of information, the reliability and competency of the individual, or the committee’s performance within its designated authority and in a way that the director believes merits confidence.” *SELL AND CLARK, supra* §1712.4. Thus, if a director reasonably believes that the information conveyed to the director is from a reliable source and has no reason to believe that the information is inaccurate the director may rely on the information in making a decision as a director. The BCL presumes that, absent a breach of fiduciary duty, lack of good faith or self-dealing, a director is acting in the best interests of the corporation. 15 Pa. C.S.A. §1715(d).

In the instant case, we have two categories of directors. First, there is Harry, who intentionally withheld information about the non-renewal of the contract from his fellow board members, who knew the loss of the contract would eliminate 90% of ABC’s cash flow and who knowing this moved for the declaration of the dividend. On the other hand, Phil and Fred believed the contract had been renewed, received this information from the president of ABC and had received financial statements that supported the declaration of the dividend. Clearly, Harry cannot avail himself of the protection provided by Section 1712. He intentionally

misrepresented facts to the board and has harmed the corporation by doing so thereby breaching his fiduciary duty to the corporation. ABC should be able to recover the dividend from Harry. Phil and Fred appear to have acted reasonably and should be protected under Section 1712. The information they received about the contract came directly from the president of the corporation. Phil, himself, prepared the financial statements and his projection regarding cash flow was based upon his belief that the contract was renewed. Additionally, Harry will not be able to look to Phil or Fred for contribution.

**2. Under the Pennsylvania Rules of Evidence, Harry’s counsel should object on the grounds (i) that Wendy is incompetent to testify, being Harry’s wife, and (ii) that any communications between Harry and Wendy, as husband and wife, regarding the contract were confidential.**

The Pennsylvania Rules of Evidence generally state that “[e]very person is competent to be a witness except as otherwise provided by statute or in these Rules.” Pa. R.E. 601(a). The Pennsylvania statutes state that, subject to certain enumerated exceptions, “[i]n a civil matter neither husband nor wife shall be competent or permitted to testify against each other.” 42 Pa. C.S.A. §5924(a). The public policy to be advanced by this rule is the preservation of marital harmony and the resultant benefit to society resulting from this harmony. “The statutory disqualification is applicable in any case in which one spouse seeks to give testimony which will affect the property rights of the other spouse, or will reflect adversely on the character or conduct of the other spouse, or will tend to incriminate the other.” 9 Standard Pennsylvania Practice 2d §54:62.

Here, Wendy is being asked about information obtained while married to Harry that could adversely impact Harry. The impact upon Harry would not be remote or contingent but could directly impact the ability of ABC to recover from Harry. Additionally, although Wendy has filed for divorce, the facts do not indicate that a divorce decree has been entered. This is relevant because the statute prohibiting one spouse from testifying against the other is only applicable during the existence of the marriage. See, 9 Standard Pennsylvania Practice 2d §54:65. Thus, it appears that the privilege would apply.

It should be noted, however, that in certain circumstances Pennsylvania recognizes a fraud exception to the spousal privilege. See, 9 Standard Pennsylvania Practice §54:67. The Pennsylvania courts have stated, “The prohibition against the competence of husband and wife to testify against each other operates only within proper bounds. It was not intended in the act to supply the means of protecting another in a fraudulent transaction nor to render husband and wife secure in the enjoyment of the fruits of fraud.” Kine v. Forman, 205 Pa. Super. 305, 310, 209 A.2d 1, 3 (1965). Although, one could argue that Harry’s misrepresentation to the board constituted fraud, the corporation could easily use a government witness to establish the information sought from Wendy, which would eliminate the need for Wendy’s testimony. In the case of a government witness no marital privilege would apply. Although a fraud argument could be made a court most likely would not allow the testimony since application of the privilege would not necessarily result in protecting Harry with respect to any fraud that was committed.

The Pennsylvania statute further states “Except as otherwise provided in this subchapter, in a civil matter neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other, unless this privilege is waived upon the trial.” 42 Pa. C.S.A. §5923. This privilege is to be distinguished from the competency rule set forth above. This privilege extends for all time. The death of a spouse or divorce does not terminate the privilege.

“To be privileged, a communication between spouses must be made in confidence and with the intention that it shall not be disclosed.” 9 Standard Pennsylvania Practice §54:69. It is clear from the facts that Harry made the disclosure when he was alone with Wendy and that he intended it to be confidential. Absent application of the fraud exception discussed above, or a waiver by Harry, a court would rule that Wendy could not testify about her conversation with Harry.

**3. Computers, Inc. has the superior claim to the computer equipment as the holder of a purchase money security interest in the equipment.**

Under the Pennsylvania Uniform Commercial Code (the “Code”) both Big Bank and Computers, Inc. have a security interest in the computer equipment purchased by ABC from Computers, Inc. Computers, Inc. has a security agreement and has filed a financing statement that specifically describes the equipment. Big Bank has a security interest in present and future equipment that would include the computer equipment. (Section 9204 of the code allows for security interests in after acquired property). The issue is which lender has priority via its security interest.

Section 9103 of the Code defines a purchase money security interest as a security interest in goods (goods include equipment) to the extent that the goods are “purchase-money collateral” with respect to the security interest. “Purchase-money collateral” is defined as goods that secure a “purchase-money obligation incurred with respect to that collateral.” A “purchase-money obligation” means an obligation of an obligor “incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.” 13 Pa. C.S.A. §9103. Thus, a purchase-money security interest can arise if the seller of the goods finances the purchase of the goods (the obligation is incurred as the price) and obtains a security interest in the goods sold. Under the facts Computers, Inc. has a purchase money security interest.

In order for Computers, Inc. to have priority over Big Bank in the computer equipment it must have perfected its purchase-money security interest in a timely fashion under the Code. The Code provides that a purchase-money security interest in equipment will have priority over a conflicting security interest if it is perfected when the debtor receives possession of the collateral or within 20 days thereafter. 13 Pa. C.S.A. §9324(a). Computers, Inc. perfected its security interest by filing prior to delivering the equipment. Accordingly, Computers, Inc.’s purchase-money security interest has priority over the security interest of Big Bank.

## Grading Guidelines

### Question No. 1

#### 1. Desertion and Irretrievable Breakdown as Grounds for Divorce.

- Willful and malicious desertion for one year is a ground for divorce. If one spouse provides a reasonable home in good faith for the other and the home is reasonably related to the occupation of the one spouse, the other's failure to live with the first spouse in such a home without cause constitutes willful and malicious desertion.
- A successful allegation of the irretrievable breakdown of a marriage coupled with two years of living separate and apart is a ground for divorce.

5 points

Comments: Applicants are expected to recognize that both desertion and irretrievable breakdown are a ground for divorce under the facts; and that the willful and malicious element of desertion can be met by showing that one spouse has unreasonably refused to live with the other in a reasonable home which has been provided in good faith and is related to the occupation of the other spouse.

#### 2. Election Against Will.

- A wife who for one year prior to her husband's death has willfully and maliciously deserted him forfeits her right to elect against his will to take one-third of his estate.
- The test for "willful and malicious" under the law applicable to a spouse's elective rights is generally the same as the test applicable to the divorce ground of desertion discussed above.
- Whether a surviving spouse, upon her husband's death, receives any assets other than under his will or by electing against his will depends on what assets of the husband exist at his death which do not pass through his estate and how by their ownership and/or beneficiary provision such assets pass at his death.

5 points

Comments: Applicants are expected to recognize that Wilma will forfeit her elective rights against Frank's will if she has willfully and maliciously deserted him for one year prior to his death. Applicants should further know that the basic test for willful and malicious desertion for spousal elective rights is basically the same as for the divorce ground for desertion. Finally, applicants are expected to know that whether Wilma receives any other assets other than through Frank's estate depends on whether Frank left any non-probate assets and how he left them.

#### 3. Taxability of Property Distributions Incident to Divorce.

- Transfers of property between spouses incident to a divorce are free from taxation if made within certain time frames.

- When property is transferred between spouses free of taxation incident to a divorce, the basis of the property received by the transferee spouse is the basis of the property of the transferor spouse.
- When the transferee spouse sells for a consideration higher than the transferred basis there is a taxable gain except to extent it is exempt under specific provisions such as those applicable to the sale of a personal residence.

5 points

Comments: Applicants are expected to recognize that transfers of property between spouses incident to a divorce are free from income taxation and that the transferee spouse receives the tax basis of the transferor spouse. The candidate should know that, in general, the transfers must occur either prior to the divorce or within one year after the divorce. Applicants are further expected to know that if a transfer is related to the cessation of the marriage under a divorce or separation agreement, the transfer can occur up to six years after the date of the marriage and in some cases even longer. Finally, applicants should recognize that if the property is sold by the transferee spouse for more than the transferor spouse's basis, there will be taxable gain to the extent such gain is not exempt under specific provisions such as the personal residence exemptions which might be applicable under the facts.

#### **4. Prohibition Against Contingent Fees for Obtaining a Divorce**

- A lawyer shall not enter into a contingent fee agreement for obtaining a divorce.
- A contingent fee agreement should be in writing.
- Prohibited contingent fee arrangements include payments of flat fees contingent on obtaining a divorce.

5 points

Comments: Applicants are expected to know that contingent fee agreements related to obtaining a divorce are prohibited. Contingent fee agreements related to marital property settlements are not necessarily prohibited but if part of a fee agreement is to obtain a divorce for a contingent fee such an agreement would be prohibited. The contingent fee agreement in this question would also be prohibited because it was not in writing. Finally the payment of a flat fee which is contingent on obtaining a divorce is prohibited.

### **Question No. 2**

#### **1. Private Nuisance**

- Private nuisance occurs if the conduct of a party (Jack) is the legal cause of an invasion of another's interest in the private use and enjoyment of land; and
- The invasion was intentional and unreasonable.

4 points

Comments: The candidate must set forth the elements of a private nuisance, discuss the elements in relation to the facts provided and conclude that although Jack's actions were intentional, they were not unreasonable under the facts.

## **2. Trespass, Invasion of Privacy**

- Identify the torts of trespass and invasion of privacy;
- Trespass is an intentional use of another's real property, without authorization or privilege.
- There is no requirement of harm.
- Invasion of Privacy is an intentional invasion of person's seclusion or right to be left alone;
- Invasion must be highly offensive to a reasonable person.

8 points

Comments: The candidate is expected to identify that a civil action against Jack should include the torts of trespass and invasion of privacy. The elements of each tort should be identified and discussed using the facts of the question to show that the elements of each tort exist.

## **3. Amended Complaint**

- Pennsylvania liberally permits the amendment of Complaints;
- Generally, the decision whether to permit the amendment of a Complaint is left to the sound discretion of the Court;
- Damage to the outbuilding is a separate cause of action from both the incident at Fast Eddy's house and the claim for private nuisance;
- The two year statute of limitations has expired and thus the amendment to the Complaint should not be granted.

4 points

Comments: The candidate is expected to discuss the Pennsylvania policy of liberally permitting amendments to a Complaint and that the decision as to whether to grant the amendment is left to the sound discretion of the Court. The candidate should recognize that since the amendment adds entirely new causes of action and the two year statute of limitations has expired, the amendment request should be denied.

## **4. Habit**

- Evidence of habit is relevant to prove a person acted in conformity with the habit,

- The habit evidence is relevant since the fact that Red checked the service gate on an hourly basis as part of his employment duties tends to make it more likely that the service gate was closed when Jack entered.

4 points

Comments: The candidate is expected to recognize that the testimony from Red's supervisor that he checked the service gate hourly as part of his employment duties is relevant and admissible in Court as habit evidence to prove on this particular day Red acted in conformity with the habit.

### Question No. 3

#### 1. Burglary, Criminal Attempt, Second Degree Murder

- Burglary is the unauthorized entry into a building with the intent to commit a crime therein.
- Criminal Attempt requires an intent to commit an offense and the taking of a substantial step toward the completion of that offense.
- Murder of the Second Degree (or Felony Murder) is committed where a death occurs while the defendant is engaged as a principal or accomplice in the perpetration of a felony.
- The death of an individual does not have to be foreseeable in order to be found responsible for Second Degree Murder.
- John can still be held liable for Hank's death even though Hank had a pre-existing heart condition.

10 points

Comments: Candidates should identify the crimes of burglary, criminal attempt and second degree murder, discuss the elements of each crime and apply the facts to the required elements in reaching a well reasoned conclusion that John would be found guilty of these crimes.

#### 2(a) Impracticability of Performance/Frustration of Purpose

- The defenses of impracticability of performance (impossibility of performance) or frustration of purpose are defenses which should be raised in New Matter.
- Defenses excuse duties to perform or ends contractual obligations.
- Defenses apply because leased premises which were necessary to the purpose of the contract were destroyed without fault of either party.
- No lease payments should be due after April 15, 2003 due to the destruction of the premises by fire.
- Affirmative Defenses should raised in New Matter in Answer.

- The Complaint contained a Notice to Defend which requires that a responsive pleading be filed within 20 days of February 15, 2004.

**2(b) Damages**

- A lease is in the nature of a contract and is controlled by contract principles.
- The partners will be liable for the two and a half months of lease payments from February 1, 2003 through April 15, 2003, because liability for the remainder of the lease was excused by destruction of the premises.
- Their liability exposure will be \$12,500.

10 points

Comments: Candidates should identify and discuss the defenses of impracticability (impossibility) of performance or frustration of purpose, and discuss the effect of these defenses on E-Link's liability. The candidates should recognize that the defenses are affirmative defenses which should be raised in New Matter in the answer which should be filed within 20 days of the service of the complaint.

**Question No. 4**

**1. Equal Protection/14<sup>th</sup> Amendment**

- State legislative action or state university action equals state action for federal purposes.
- Essence of equal protection is that similarly situated people should be treated similarly.
- Type of classification determines level of scrutiny.
- Classifications regarding fundamental rights or suspect class are strictly construed to determine if there is a compelling government purpose to justify the classification.
- When sensitive classifications, such as, arguably, nonmarital children, are implicated, the statute is subject to a heightened standard of scrutiny to determine if the classification substantially furthers the legislative purpose.
- Remaining classifications require a showing of a rational basis for the classification.
- Classification would be valid if under rational basis test a rational relationship to legitimate governmental objective is found but if plaintiff meets the burden of proving that there is no rational basis or if under intermediate scrutiny test, the government fails to meet its burden of proving that the statutory classification substantially furthers a purported legislative purpose, the classification will be found to be invalid.

10 points

Comments: Candidates should identify and discuss the tiers of scrutiny in equal protection analysis, discuss classification and governmental interest applicable to this provision and reach a well reasoned conclusion under either a rational basis analysis or intermediate tier analysis.

## **2. Modification of/Eligibility for Child Support**

- Parents have obligation to support minor children and are liable for the support of their children who are unemancipated and 18 years of age or younger.
- Parents can not bargain away child's right to support
- An order for support is modifiable based on a change of circumstances

5 points.

Comments: Candidate should recognize that minor children have a right to child support until a child reaches the age of 18 or graduates from high school, whichever is later; that a child support order may be modified based on a change of circumstances, and apply the facts to the law to reach the conclusion that Stanley is not eligible for child support but that Nimrod and Betty are entitled to regular child support payments according to the state support guidelines, regardless of any agreement to the contrary.

## **3. Hearsay/Admission of a Party Opponent Exception**

- Hearsay is an out of court statement offered to prove the truth of the matter asserted
- Hearsay is not admissible unless it falls within an exception
- An admission by a party opponent is an exception to hearsay rule of exclusion when the statement is offered against a party and is (A) the party's own statement in either an individual or representative capacity.

5 points

Comments: Candidate should define hearsay, identify hearsay as the basis for Eric's objection to Mary's testimony, identify the admission by a party opponent exception to hearsay under the Pennsylvania Rules of Evidence and conclude that the exception is applicable.

## **Question No. 5**

### **1. Condition of Personal Satisfaction in a Contract**

- Duty of one party to a contract may be conditioned on the personal satisfaction of the other party if both parties so agree.
- Personal satisfaction clause is enforceable in an employment contract.

- When duty of a party is conditioned on personal satisfaction, courts apply subjective test to determine adequate performance.
- Subjective test is based on honest and genuine dissatisfaction; personal judgment must be exercised in good faith.

5 points

Comments: The applicant is expected to recognize that a condition of personal satisfaction in a contract is enforceable and that courts apply a subjective test to determine adequate performance. Applicants are also expected to recognize that the exercise of personal judgment must be in good faith and to apply these principles to the facts in reaching a well reasoned conclusion that Al's defense based on the termination clause will be successful.

## 2. **Parol Evidence Rule**

- Al should object to the admission of his earlier statement on the basis of the parol evidence rule.
- The parol evidence rule bars the admission of prior or contemporaneous oral or written expressions to vary or contradict the terms of a written contract in the absence of fraud, accident or mistake.
- Parol evidence rule applies only to written agreements that are fully integrated; Al and Barb's written contract appears to state their entire agreement.
- Al's statement that Barb seeks to introduce directly contradicts the words of Barb and Al's written agreement.
- Al's objection to the admission of his earlier statement on the basis of the parol evidence rule should be sustained.

5 points

Comments: The applicant is expected to state the parol evidence rule and to apply it to the facts in reaching a well reasoned conclusion.

## 3a. **Duties of Life Tenant**

- As a life tenant, Meg could lease her interest in the property and retain the rental proceeds.
- Under the law of waste, a life tenant is under a duty to refrain from acts which will diminish the value of the remainder interest, except for normal depreciation.
- As a life tenant, Meg had a duty to Ruth to maintain and preserve the property and to keep it in repair.

- Meg's estate is not liable for the rental proceeds but is liable to Ruth for waste because Meg failed to make normal repairs and allowed the condition of Blackacre to deteriorate.

4 points

Comments: An applicant is expected to discuss the rights and responsibilities of a life tenant, specifically the right to lease the property for the period of the life tenancy and retain the rental proceeds. The applicant is also expected to recognize that a life tenant has a duty to refrain from waste and will be liable for damages resulting from the failure to maintain and preserve the property for the remainderman.

### **3b. Life Tenant/Improvements**

- When a life tenant makes permanent improvements to property without the consent of the remainderman, the life tenant is liable for costs of such improvements.
- Ed will not recover the cost of the construction of the new driveway.

2 points

Comments: The applicant is expected to recognize that a life tenant who makes permanent improvements to the estate without the consent of the remainderman bears the cost of the improvements.

### **4. Trade Fixtures**

- A fixture is an article in the nature of personal property which is so annexed to the realty that it is regarded as part of the land.
- Fixtures and equipment necessary for the operation of a business which have been attached by the tenant to the real estate are trade fixtures.
- There is a presumption that trade fixtures installed by a lessee may be removed by the lessee during or at the termination of the lease.
- Tom is entitled to remove the display cases and track lighting as trade fixtures.

4 points

Comments: An applicant is expected to recognize the law of fixtures and that the treatment of the removal of trade fixtures is an exception to the general rule regarding the removability of fixtures.

## **Question No. 6**

### **1. Dividends**

- Directors may make distributions if they do not violate equity insolvency or balance sheet tests.
- Directors are liable for improper distributions unless protected by the business judgment rule.
- There are two categories of directors in this question; i.e., Harry who knowingly voted for an improper dividend and the other directors who relied on the information presented by Harry.
- Harry is liable and the other two directors are not.

10 points

Comments: Candidates should discuss the ability of directors to declare distributions, the limitations on distributions, the liability of directors for improper distributions, the limitation on that liability and the liability of each of the directors.

## **2. Spousal Privilege**

- Spousal privilege exists while married
- Spousal confidential communication privilege protects confidential communications and continues even after divorce
- Possible fraud exception exists to prevent fraud between spouses

5 points

Comments: Candidates should discuss the competency of Wendy, as a wife, to testify against her husband and the privilege of confidentiality.

## **3. Purchase Money Security Interest**

- Finance has a purchase money security interest because it financed the sale of equipment in which it held a security interest.
- To have priority Finance must have filed its financing statement prior to or within 20 days of delivery of equipment.
- Finance met the filing rule and has priority.

5 points

Comments: Candidates should define a purchase money security interest and discuss the requirements for priority over conflicting security interests.

# PT



Supreme Court of Pennsylvania  
Pennsylvania Board of Law Examiners

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**Pennsylvania Bar Examination**  
February 24 and 25, 2004

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**PERFORMANCE TEST**  
February 24, 2004 – 9:00 a.m. to 10:30 a.m.

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*Use GRAY covered book for your answer to the Performance Test.*

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**STRONG & ABLE**  
**Attorneys At Law**

**To:** Applicant  
**From:** I.M. Able, Senior Partner  
**Re:** Newco Company-FMLA Matters

Newco Company ("Newco") has been a client of our firm for many years. I met yesterday with Eval Catbert, Newco's Director of Human Resources, who requested our assistance and advice in dealing with a matter involving Newco's recent termination of one of its employees. The termination implicates the federal Family and Medical Leave Act ("FMLA") and the Act's implementing regulations as promulgated by the Department of Labor.

Newco has received a letter from AI Attorney on behalf of Jane Doe, the Newco employee who was recently terminated. Ms. Doe is claiming that her termination violated her rights under the FMLA. Newco terminated Ms. Doe because of excessive absenteeism.

In order to assist me in advising Mr. Catbert as to whether the termination of Ms. Doe was appropriate in light of the requirements of the FMLA, please prepare an internal legal memorandum, which addresses the following legal issues:

1. Whether Ms. Doe was entitled to any leave under the FMLA in January of 2004 as a result of her hospitalization for a leg fracture?
2. Even if FMLA leave was available to Ms. Doe for January 14<sup>th</sup> and 15<sup>th</sup>, did she forfeit her entitlement to such leave by failing to specifically request it or to provide medical certification as required by Company policy?

Finally, provide your recommendation as to the action(s) Newco should take, if any, in response to AI Attorney's letter, and include the reason(s) for such recommendation.

You should follow the format and guidelines for preparing internal legal memorandum that our firm utilizes, which is set forth in a memorandum in the File. However, based upon my interview with Mr. Catbert I have already prepared the Statement of Facts, which you should simply incorporate by reference in the memorandum that you prepare. You should rely upon the facts stated therein in analyzing the legal issues and should incorporate the relevant facts in your Analysis of the legal issues.

This File contains the Statement of Facts, the letter from Ms. Doe's attorney, a copy of Newco's FMLA Policy and a memorandum outlining the format for internal legal memorandum. I have also included a Library, which includes the only legal authorities you should consider and rely upon in completing this task. You should assume that all of these legal authorities are valid.

**STRONG & ABLE**  
**Attorneys At Law**

Date: January 1, 1995

To: All Associates

Re: Guidelines and Format for Preparation of Internal Legal Memoranda

Use the following guidelines and format in the order listed for preparing all internal legal memoranda:

**HEADING:** the upper left hand corner of the Memorandum should have:

DATE: (date memo created)

TO: (recipient)

FROM: (applicant number)

RE: (subject matter)

**STATEMENT OF FACTS:** state all relevant facts needed to resolve the issues presented as well as any background facts helpful to understanding the issues. If a Statement of Facts has been provided, incorporate that Statement by reference in this section of the memorandum.

**If more than one issue has been assigned, present a separate discussion of each issue using the following headings in the order listed:**

**ISSUE PRESENTED:** state the issue that has been assigned in the form of a question.

**BRIEF CONCLUSION:** state your conclusion to the issue presented in the form of a "yes" or "no" answer. "Probably" or "not likely" may be used if the outcome is uncertain.

**ANALYSIS:** apply the facts to the relevant and controlling legal authorities to demonstrate the reasoning that supports your conclusion on the issue presented. Cite legal authorities relied upon, such as cases, statutes or regulations. If the outcome is uncertain, identify the unresolved question(s) of fact or law which give rise to the uncertainty.

**If you are asked to provide a recommendation to a client that may be a defendant in a lawsuit, you should address the following points in a section entitled "Recommendation" at the end of the memorandum:**

- (1) Assess the client's likelihood of success in defending any lawsuit arising out of the client's act(s) or omission(s).
- (2) If you believe that the client is likely to be subject to an adverse result in a lawsuit, advise the client as to the potential damages, injunctive relief or other remedies that could be awarded. Cite the applicable supporting legal authority.
- (3) If a lawsuit has not yet been filed, assess what action the client could take to resolve the matter without litigation.
- (4) Identify any measures the client could undertake to avoid similar circumstances arising in the future, such as amending policies or procedures.

**Al Attorney & Associates  
Attorneys At Law  
123 South Street  
Northbrook, Pennsylvania**

February 15, 2004

Eval Catbert  
Director of Personnel  
Newco Company  
987 Main Street  
Northbrook, PA

Dear Mr. Catbert:

This law office represents Ms. Jane Doe, who as you know was recently terminated from employment by your company. On January 14 and 15, 2004, Ms. Doe was unable to report for work due to a broken leg, which required overnight hospitalization for treatment. When she attempted to return to work on January 16<sup>th</sup>, you advised her that she was being terminated from her employment because of excessive absenteeism.

Newco's termination of my client's employment was improper because it violated rights guaranteed to her under the Family and Medical Leave Act (FMLA). Although Newco had granted Ms. Doe 12 weeks of FMLA leave following the birth of her son in August 2003, I believe that by using the "calendar year" method for calculating entitlement to leave Ms. Doe was entitled under the FMLA to take additional time off for her recent injury since it occurred in a new calendar year.

The termination of my client's employment was in violation of the FMLA and if not corrected will result in a lawsuit against your company. Please confirm within ten days that Ms. Doe will be reinstated to her position with Newco with full back pay from January 16<sup>th</sup> until the date of her reinstatement.

Very truly yours,

Al Attorney  
Al Attorney, Esquire

## STATEMENT OF FACTS

(based upon interview with Eval Catbert on February 23, 2004)

Eval Catbert, the Director of Human Resources for Newco Company (Newco) has requested our advice concerning the termination of Jane Doe's employment with Newco on January 16, 2004 for excessive absenteeism. Newco, which is in the business of manufacturing widgets, employs 100 people in its plant and is subject to the FMLA.

Newco has a written vacation policy, pursuant to which each employee earns one day of paid vacation for each month worked, beginning with their first day of employment. If an employee has no paid vacation leave available, the employee may take unpaid leave, but all employees are required to notify their supervisor at least two days in advance of the need to take either paid vacation or unpaid leave. Employees are also advised that excessive absenteeism when paid vacation is exhausted will be grounds for termination. Newco also has a written policy regarding employee benefits and obligations under the FMLA.

Ms. Doe began working for Newco on May 1, 2002 and meets all of the requirements for being deemed an eligible employee for purposes of receiving benefits under the FMLA. Although her performance was satisfactory when she came to work, Ms. Doe used her earned vacation day each month that it became available, and often took unpaid leave days. Her absenteeism was well above the company average. In April of 2003, during her annual performance evaluation, she was counseled by her supervisor about her use of unpaid leave and warned that leave abuse would be grounds for termination.

In August of 2003, Ms. Doe had a baby boy and using Newco's FMLA policy, went on 12 weeks of unpaid FMLA leave, which ended in November. She returned to work on November 17<sup>th</sup>, but shortly thereafter used her remaining paid vacation days for the year. Later in December she took four days of unpaid leave, including New Years Eve. On January 14, 2004, she was scheduled to begin work at 8:00 a.m. but did not report to work. She called her supervisor later that day at which time she advised him that she was in the hospital because of a broken leg and would not be able to return to work until January 16<sup>th</sup>. She made no mention of FMLA leave in this conversation and the supervisor asked no questions about the injury.

When Catbert learned of her absence on the 14<sup>th</sup> and 15<sup>th</sup>, he was particularly disturbed. Her unanticipated and unscheduled absence caused severe disruption to the Company's operations on those two days, since she was the only individual capable of operating a complex piece of machinery that was necessary to manufacture a special order of widgets, which were to be delivered to one of Newco's most important customers that week. Catbert decided that this

absence, coupled with Ms. Doe's frequent absences since returning to work in November, warranted Ms. Doe's termination for excessive absenteeism.

Catbert met with Ms. Doe on January 16<sup>th</sup> to inform her that she was terminated. At that meeting her leg was in a cast and Catbert determined that the reason for her absence was a severe fracture of her leg, which required overnight hospitalization for treatment. Catbert did not request any further medical information from Ms. Doe, but it was apparent to Catbert that she could not have performed her duties on the 14<sup>th</sup> and 15<sup>th</sup> because of the hospitalization and treatment for the injury. This did not, however, alter Catbert's conclusion that, overall, Ms. Doe was an unreliable employee who should no longer work for Newco. Ms. Doe did not furnish a medical certification from a physician for her injury at any point prior to her termination.

Although Catbert believes that he acted properly in terminating Ms. Doe for excessive absenteeism, the letter that he received from AI Attorney has caused him some concern. Catbert believes that Ms. Doe was not entitled to leave under the FMLA for her injury because, although she was an eligible employee for purposes of being entitled to receive leave under the FMLA, she had exhausted her entitlement to 12 weeks of FMLA benefits for the period of May 1, 2003 to May 1, 2004 by virtue of the 12 weeks of unpaid leave for childbirth granted pursuant to the Company's FMLA policy. Catbert calculated the one-year period for FMLA purposes using the "anniversary date" method based upon when Ms. Doe commenced employment on May 1<sup>st</sup>, since this anniversary date is used for conducting performance evaluations and determining pay increases and promotions. However, Catbert understands that the "calendar year" method of computing the one year period for use of FMLA leave would be the most beneficial outcome for Ms. Doe.

Catbert also felt that even if Ms. Doe would otherwise have been entitled to FMLA leave in January, 2004, her failure to timely notify Newco that she was requesting leave under the FMLA when she advised her supervisor of her injury, as well as her failure to provide medical certification of the extent of her injury, eliminated any obligation to grant leave under the FMLA because she did not comply with the requirements of Newco's FMLA policy.

## Newco Company Policy

### Family and Medical Leave Under the FMLA

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#### I. POLICY

In accordance with the Family and Medical Leave Act (FMLA) of 1993, it is the policy of Company to grant an eligible employee up to twelve (12) workweeks of unpaid leave within any 12 month period.

#### II. WHEN LEAVE IS AVAILABLE

A. All employees who have worked for Company for a minimum of twelve (12) months and have worked at least 1250 hours during the twelve (12) months prior to the start of the leave are eligible for leave under the FMLA for one or more of the following reasons:

1. For the birth of a son or daughter and to care for the newborn child;
2. For the placement with the employee of a child for adoption or foster care and to care for the newly placed child;
3. To care for the employee's spouse, son or daughter (under age 18 or 18 or older and incapable of self-care because of a mental or physical disability), or parent, who has a serious health condition;
4. For a serious health condition that makes the employee unable to perform his/her job.

B. Employees are entitled to up to twelve calendar weeks of unpaid FMLA leave within any twelve month period.

#### III. PROCEDURE FOR REQUESTING LEAVE

A. An employee must provide his/her manager at least thirty (30) days advance notice before FMLA leave is to begin if the need for leave is foreseeable.

B. If the need for leave is not foreseeable or thirty (30) days notice is not practical due to circumstances, notice should be given as soon as reasonably practicable, ordinarily within one or two business days of when the need for leave becomes known to the employee.

C. The employee must specify at the time notice is given that the request is for FMLA leave, rather than vacation or personal leave provided under other Company policies, and if the employee fails to do so, the absence will not be approved for FMLA leave.

D. If the request for FMLA leave is based upon a serious health condition, the employee must submit a medical certification from a physician at the time FMLA leave is requested. If the medical certification is not furnished at that time, the absence will not be approved for FMLA leave.

#### IV. JOB GUARANTEE/RETURN FROM FMLA

A. When FMLA leave is used because of the employee's own serious health condition, the employee must provide his/her department manager medical documentation from his/her physician confirming the employee's ability to return to work, listing restrictions, if any.

B. An employee returning from FMLA leave will be returned to the same position held when leave commenced or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment.

#### V. FRAUDULENT FMLA LEAVE

An employee who fraudulently obtains FMLA leave is not protected by the FMLA's job restoration or maintenance of health benefits provisions and is subject to disciplinary actions up to and including termination of employment.

## Family and Medical Leave Act

### Subchapter I - General Requirements for Leave

#### 29 U.S.C. § 2612. Leave requirement

- (1) . . . an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
  - (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
  - (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
  - (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
  - (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

#### 29 U.S.C. § 2615. Prohibited acts

- (1) It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

#### 29 U.S.C. § 2617. Enforcement

- (1) Any employer who violates section 2615 of this title shall be liable to any eligible employee affected-
  - (A) for damages equal to-
    - (i) the amount of-
      - (I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation;  

\* \* \*
    - (ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and
    - (iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii),  

\* \* \*
  - (B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.  

\* \* \*

- (3) Fees and costs

The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

**§ 825.100 What is the Family and Medical Leave Act?**

(a) The Family and Medical Leave Act of 1993 (FMLA or Act) allows "eligible" employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months because of the birth of a child, . . . because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job.

\* \* \*

**§ 825.114 What is a "serious health condition" entitling an employee to FMLA leave?**

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), . . .

(2) Continuing treatment by a health care provider.

\* \* \*

**§ 825.200 How much leave may an employee take?**

(a) An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

\* \* \*

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job.

(b) An employer is permitted to choose any one of the following methods for determining the "12-month period" in which the 12 weeks of leave entitlement occurs:

(1) The calendar year;

(2) Any fixed 12-month "leave year," such as a fiscal year, a year required by State law, or a year starting on an employee's "anniversary" date;

(3) The 12-month period measured forward from the date an employee's first FMLA leave begins; or,

(4) A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave (except that such measure may not extend back before August 5, 1993).

\* \* \*

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section provided the alternative chosen is applied consistently and uniformly to all employees.

\* \* \*

(e) If an employer fails to select one of the options in paragraph (b) of this section for measuring the 12-month period, the option that provides the most beneficial outcome for the employee will be used.

\* \* \*

**§ 825.208 Under what circumstances may an employer designate leave . . . as FMLA leave, and as a result, count it against the employee's total FMLA leave entitlement?**

(a) In all circumstances, it is the employer's responsibility to designate leave, . . . as FMLA-qualifying, and to give notice of the designation to the employee . . .

**§ 825.220 How are employees protected who request leave or otherwise assert FMLA rights?**

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights.

\* \* \*

(c) An employer is prohibited from discriminating against employees . . . who have used FMLA leave. . . . Employers cannot use

the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions . . . .

\* \* \*

**§ 825.301 What other notices to employees are required of employers under the FMLA?**

(a)(1) If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the handbook or other document. If an employer provides a handbook, . . . the handbook must incorporate information on FMLA rights and responsibilities, and the employer's policies regarding the FMLA.

\* \* \*

(2) If such an employer does not have written policies, manuals or handbooks describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA.

\* \* \*

**§ 825.303 What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?**

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible.

\* \* \*

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile (“fax”) machine or other electronic means. . . . The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

**§ 825.305 When must an employee provide medical certification to support FMLA leave?**

(a) An employer may require that an employee’s leave to care for the employee’s seriously-ill spouse, son, daughter, or parent, or due to the employee’s own serious health

condition that makes the employee unable to perform one or more of the essential functions of the employee’s position, be supported by a certification issued by the health care provider of the employee. . . . An employer must give notice of a requirement for medical certification each time a certification is required . . . .

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer’s request), unless it is not practicable under the particular circumstances to do so despite the employee’s diligent, good faith efforts.

\* \* \*

(c) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee’s failure to provide adequate certification. . . .

\* \* \*

United States Court of Appeals,  
Ninth Circuit

Penny BACHELDER; Mark Bachelder,  
Plaintiffs - Appellants,

v.

AMERICA WEST AIRLINES, INC.,  
Defendant - Appellee.

259 F.3d 1112

Penny Bachelder claims that her employer, America West Airlines, violated the Family and Medical Leave Act of 1993 ("FMLA" or "the Act") when it terminated her in 1996 for poor attendance. The district court granted partial summary judgment to America West, holding that Bachelder was not entitled to the Act's protection for her 1996 absences.

\* \* \*

This appeal requires us to interpret both the Act and the regulations issued pursuant to it by the Department of Labor.

\* \* \*

. . . the Act entitles covered employees to up to twelve weeks of leave each year for their own serious illnesses or to care for family members, and guarantees them reinstatement after exercising their leave rights. 29 U.S.C.

§§ 2612, 2614(a)(1).

\* \* \*

The twelve-week limitation on employees' protected leave time . . . demonstrates that Congress wanted to ensure that employees' entitlement to leave and reinstatement did not unduly infringe on employers' needs to operate their businesses efficiently and profitably.

The regulations implementing the twelve-week leave provision reflect this concern for employers' administrative efficiency and convenience needs. (citation omitted)

\* \* \*

Consistent with that concern, the regulations provide employers with a menu of choices for how to determine the "twelve-month period" during which an employee is entitled to twelve weeks of FMLA – protected leave:

An employer is permitted to choose any one of the following methods for determining the "12-month period" in which the 12 weeks of leave entitlement occurs:

- (1) The calendar year;
- (2) Any fixed 12-month "leave year," such as a fiscal year, a year required by State law, or a year starting on an employee's "anniversary" date;
- (3) The 12-month period measured forward from the date an employee's first FMLA leave begins; or,

(4) A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

29 C.F.R. § 825.200(b). This "leave year" regulation is at the heart of Bachelder's appeal.

Bachelder began working for America West as a customer service representative in 1988. . . .

From 1994 to 1996, Bachelder was often absent from work for various health and family-related reasons. In 1994, she took five weeks of medical leave to recover from a broken toe, and in mid-1995, she took maternity leave for approximately three months. It is undisputed that these two leaves were covered by, and protected by, the FMLA. In addition to these extended absences, Bachelder also called in sick several times in 1994 and 1995.

On January 14, 1996, one of America West's managers had a "corrective action discussion" with Bachelder regarding her attendance record. Among the absences that concerned the company were several occasions on which Bachelder had called in sick and the 1994 and 1995 FMLA leaves. Bachelder was advised to improve her attendance at work and required to attend pre-scheduled meetings at which her progress would be evaluated.

In February 1996, Bachelder was absent from work again for a total of three weeks.

During that time, she submitted two doctor's notes to America West indicating her diagnosis and when she could return to work. Bachelder's attendance was flawless in March 1996, but in early April, she called in sick for one day to care for her baby, who was ill. Right after that, on April 9, Bachelder was fired. The termination letter her supervisor prepared gave three reasons for the company's decision: (1) Bachelder had been absent from work 16 times since being counseled about her attendance in mid-January; (2) she had failed adequately to carry out her responsibilities . . . and (3) her personal on-time performance . . . was below par.

In due course, Bachelder filed this action, alleging that America West impermissibly considered her use of leave protected by the FMLA in its decision to terminate her. In response, America West maintained that it had not relied on FMLA-protected leave in firing Bachelder, because none of her February 1996 absences were protected by the Act, . . . because the company used the retroactive "rolling" year method-the fourth of the four methods permitted by the leave year regulation-to calculate its employees' eligibility for FMLA leave. If that method was used, Bachelder had exhausted her full annual allotment of FMLA leave as of June 1995, and was entitled, according to the company, to no more such leave until twelve

months had elapsed from the commencement of her 1995 maternity leave. Therefore, America West maintained, Bachelder's February 1996 absences could not have been protected by the Act.

Bachelder countered that according to the regulations implementing the FMLA, she was entitled to have her leave eligibility calculated by the method most favorable to her. Under a calendar year method of calculating leave eligibility, she contended, her February 1996 absences were protected by the FMLA, and America West had violated the Act by relying on those absences in deciding to fire her.

The district court granted America West's motion for summary judgment in part, deciding that none of Bachelder's 1996 absences were protected by the FMLA.

\* \* \*

Congress made it unlawful for an employer to "interfere with . . . any right provided" by the Act. 29 U.S.C. § 2615. The regulations explain that this prohibition encompasses an employers consideration of an employee's use of FMLA-covered leave in making adverse employment decisions . . . 29 C.F.R. § 825.220(c). We find, . . . that this rule is a reasonable interpretation of the statute's prohibition on "interference with" . . . employees rights under the FMLA.

\* \* \*

In order to prevail on her claim . . . Bachelder need only prove . . . that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her.

\* \* \*

Construing the statutory language and the Department of Labor's regulations, the district court held that Bachelder's February 1996 absences were not protected by the FMLA. . . .

The "leave year" regulation, 29 C.F.R. § 825.200, allows employers, at their option, to calculate the twelve-month period in which an employee is limited to twelve weeks of protected leave by one of four methods. Under the two fixed-year methods, the employee could use up to twelve weeks of leave at any time during the twelve-month period selected by the employer. (citation omitted)

\* \* \*

Under the rolling method, "each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months." (citation omitted)

\* \* \*

The FMLA "leave year" regulation, while allowing employers flexibility in deciding how to comply with the Act, also includes

various safeguards for employees. First, the employer must apply its chosen calculating method consistently to all employees. 29 C.F.R. § 825.200(d)(1). Second, if the employer has failed to select a calculating method, the regulations state that the method "that provides the most beneficial outcome for the employee will be used." 29 C.F.R. § 825.200(e).

\* \* \*

The regulations allow employers to choose among four methods for calculating their employees' eligibility for FMLA leave, but they do not specifically state how an employer indicates its choice. America West contends, correctly, that the FMLA's implementing regulations do not expressly embody a requirement that employers inform their employees of their chosen method for calculating leave eligibility. The regulations nonetheless plainly contemplate that the employer's selection of one of the four calculation methods will be an open one, not a secret kept from the employees, the affected individuals.

. . . the regulations require covered employers who provide "any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook," to "incorporate information on FMLA rights and responsibilities *and the*

*employer's policies regarding the FMLA*" therein. 29 C.F.R. § 825.301(a)(1) (emphasis added). Because America West has an employee handbook, it is bound by § 825.301(a)(1).

\* \* \*

The rule allowing employers a choice of calculating methods is one example of the flexibility afforded to employers in complying with the FMLA. Section 825.301(a)(1) requires employers to notify their employees of this choice, just as it requires employers to notify their employees of other policies adopted to comply with the Act.

\* \* \*

The question remains whether America West adequately notified its employees that it had chosen the retroactive rolling "leave year" calculation method. America West contends, and the district court agreed, that, because its employee handbook states that "employees are entitled to up to twelve calendar weeks of unpaid [FMLA] leave within any twelve month period," it provided sufficient notice to its employees that it uses the "rolling method" for calculating leave eligibility. We disagree.

This statement from the America West handbook does nothing more than parrot the language of the Act. *See* 29 U.S.C. § 2612 (providing that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period"). Pursuant to the

authority granted to it by Congress, however, the Labor Department determined that the "rolling method" is not the only system permitted by the statute; the Department interpreted the statutory language to allow for three other calculating methods as well. So, the Department construed the statute's reference to "any 12-month period" to include a variety of differently-calculated 12-month periods, as chosen by the employer, . . . .

\* \* \*

. . . [T]he very fact that the regulation permits employers to use any of four calculating methods is fatal to America West's argument. Because the statute can reasonably be read to allow the four different methods spelled out, merely parroting the statutory language cannot possibly inform employees of the method the employer has chosen. By paraphrasing the statutory language, in other words, America West has done no more than announce its intention to comply with the Act.

Because choosing a calculating method carries with it an obligation to inform employees of that choice and America West has failed to fulfill this obligation, it has "fail[ed] to select" a calculating method. 29 C.F.R. § 825.200(e). Thus, "the option that provides the most beneficial outcome for the employee" must be used to determine whether Bachelder's 1996 absences were covered by the FMLA. *Id.*

The calendar year method provides the most favorable outcome to Bachelder. 29 C.F.R. § 825.200(b)(1). Under this approach, it is immaterial that Bachelder had utilized her full allotment of FMLA-protected leave between April and June 1995. Because she began 1996 with a fresh bank of FMLA-protected leave, Bachelder's February 1996 absences were covered by the Act.

\* \* \*

The question here is . . . whether Bachelder's taking of the 1996 FMLA-protected leave was used as a negative factor in her discharge. We know that the taking of the leave for the period in question was indeed used as a negative factor because America West so announced at the time of the discharge. . . . The regulations clearly prohibit the use of FMLA-protected leave as a negative factor at all.

\* \* \*

. . . we reverse the district court's grant of summary judgment for America West and direct the court to grant Bachelder's cross-motion for summary judgment as to liability. . . .

## Performance Test Question: Grading Guideline

### OVERVIEW

This task requires that the Applicant draft a legal memorandum based upon an assignment received from a senior attorney at the Strong & Able Law Firm. The client, Newco, has requested the Firm's advice and guidance regarding the termination of an employee for excessive absenteeism. Mr. Catbert, Newco's Director of Human Resources, has received a letter from AI Attorney on behalf of the terminated employee alleging that the termination violated her rights under the Family and Medical Leave Act ("FMLA"). The task requires the Applicant to analyze two specific legal issues identified by the senior attorney and provide a recommendation as to the action or actions that Newco should take in response to AI Attorney's letter.

The file includes (i) a memorandum from the senior partner to the Applicant explaining the task; (ii) a Statement of Facts based upon the initial interview with Mr. Catbert; (iii) the letter dated February 15, 2004 from AI Attorney to Mr. Catbert; (iv) Newco's FMLA policy; and (v) Guidelines for Preparation of Internal Legal Memoranda used by the Strong & Able Law Firm.

The library includes the only legal principles and authorities the Applicant should consider and rely upon in completing this task. The Applicant should assume that all of the information in the Statement of Facts is true.

### FORMAT

10%

The Applicant is asked to prepare a legal memorandum in the format utilized by the Strong & Able Law Firm. This format, set forth in the "Guidelines for Preparation of Internal Legal Memoranda," requires: (i) a Heading; (ii) a Statement of Facts; (iii) a Statement of the Issues; (iv) a Brief Conclusion; and (v) Analysis of the facts and legal authorities demonstrating support for the proposed conclusion, which references the legal authorities and facts pertinent to resolution of the issue. However, the Applicant is instructed that the Statement of Facts furnished in the file should be incorporated by reference, so that the Applicant need not restate the facts provided in the text of the memorandum.

The Applicant is also asked to provide a recommendation to Newco as to what action or actions it should take, if any, in response to AI Attorney's letter, including the reason for such recommendations. The Guidelines for Preparation of Legal Memoranda also include guidance on the points that should be addressed by the Applicant in connection with providing such a recommendation.

### ANALYSIS

#### Question 1

30%

*Issue presented:* Whether Ms. Doe was entitled to FMLA leave in January of 2004 as a result of her hospitalization for a leg fracture?

*Brief Conclusion:* Yes

*Analysis:*

- Ms. Doe was an eligible employee for purposes of being entitled to leave under the FMLA.
- Ms. Doe's injury constituted a serious health condition under the FMLA because it required an overnight stay in a hospital for treatment which resulted in an inability to work. Regulation 29 C.F.R. §825.114
- FMLA leave could be utilized for the serious health condition suffered by Ms. Doe if she were otherwise entitled to such leave. Regulation 29 C.F.R. §825.200(a)(4).
- An eligible employee is entitled to up to 12 weeks of FMLA leave during a specified 12 month period for certain reasons. 29 U.S.C. § 2612, Regulation 29 C.F.R. §825.200(a).
- The FMLA regulations allow an employer to choose any one of four methods for determining the 12 month period in which 12 weeks of leave entitlement occurs. Regulation 29 C.F.R. §825.200(b).
- An employer must provide notice to an employee of which method of computing the 12 month period is to be applied. Bachelder v. America West Airlines, 259 F.3d 1112.
- If an employer has written policies concerning employee benefits and leave rights, it must incorporate FMLA policies in the written policies. Bachelder, supra; Regulation 29 C.F.R. §825.301(a).
- If an employer fails to select one of the options for measuring the 12 month period and fails to notify the employee of which option is selected, the option that provides the most beneficial outcome for the employee will be used. Bachelder, supra; Regulation 29 C.F.R. §825.200(e).
- Newco applied the anniversary date fixed year 12 month period method in order to determine that Ms. Doe was ineligible for any further FMLA leave in January of 2004.
- Newco's FMLA policy states only that "employees are entitled to up to 12 calendar weeks of unpaid FMLA leave within any 12 month period." *Newco FMLA Policy §I*.
- As such, by merely parroting the statute, Newco's policy does not in fact select one of the methods authorized by FMLA to calculate the 12 month period. Bachelder, supra.
- As a result, the most favorable method for computing Ms. Doe's entitlement to FMLA leave will be applied, which is the calendar year method.

- Consequently, Ms. Doe was entitled to 12 weeks of FMLA leave commencing January 1, 2004 and therefore was entitled to utilize FMLA leave for her absences on January 14 and 15, 2004.

**Question 2:**

**30%**

*Issue Presented:* Even if FMLA leave was available to Ms. Doe for January 14<sup>th</sup> and 15<sup>th</sup>, did she forfeit her entitlement to FMLA leave by failing to specifically request it or to provide medical certification as required by Company policy?

*Brief Conclusion:* No

*Analysis:*

- Newco's FMLA policy requires that the employee must specify at the time notice is given that the request is for FMLA leave, rather than vacation or personal leave. *Newco FMLA Policy §III C.*
- FMLA regulations require that when the timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts. Regulation 29 C.F.R. §825.303(a).
- It is expected that the employee will give notice to the employer within no more than one or two working days of learning of the need for leave except in extraordinary circumstances. Regulation 29 C.F.R. §825.303(a).
- Employee can provide either written or oral notice by telephone, facsimile machine or in person. Regulation 29 C.F.R. §825.303(b).
- An employee need not expressly assert rights under FMLA or even mention FMLA, but may only state that leave is needed. Regulation 29 C.F.R. §825.303(b).
- Ms. Doe's conversations with her supervisor and Mr. Catbert on January 14<sup>th</sup> and 16<sup>th</sup>, 2004 respectively, provided adequate notice to Newco of her need for leave as a result of her fractured leg.
- Once notice is provided by the employee, the burden is on the employer to ascertain whether the absence actually qualifies for FMLA protection. Regulation 29 C.F.R. §§825.208(a) and 825.303(b).
- Newco's FMLA policy states that an employee requesting FMLA leave for his/her own serious health condition must submit a medical certification from a health care provider at the time leave is requested. *Newco FMLA Policy §III D.*
- An employer may require a medical certification for leave due to a serious health condition, and must give notice of the requirement for medical certification each time a certification is required. Regulation 29 C.F.R. §825.305(a).

- It is not clear that Newco's policy in and of itself was sufficient to comply with the requirement that an employer must give notice of the requirement for medical certification each time a certification is required.
- When it is not possible to furnish medical certification in advance of a leave, the employee must provide the certification within the time frame requested by the employer, which must allow at least 15 days after the employer's request. Regulation 29 C.F.R. §825.305(b).
- Newco's FMLA policy does not allow at least 15 days for Ms. Doe to submit medical certification; instead, it requires that the certification always be presented at the time leave is requested.
- FMLA regulations will supercede the requirement of Newco's FMLA policy that a specific request for FMLA leave be made by an employee, and that the medical certification always be furnished at the time leave is requested.
- Consequently, Ms. Doe did not waive or otherwise relinquish her rights to FMLA leave for her absences on January 14 and 15, 2004 by specifically failing to comply with Newco's FMLA Policy.

**RECOMMENDATION:**

**30%**

(1) As a result of the analysis of the issues, it appears that Ms. Doe was entitled to use FMLA leave for her absences on January 14 and 15, 2004 and did not waive or relinquish that entitlement by virtue of failing to specifically request FMLA leave and furnish medical certification in accordance with the FMLA policy. The termination of Ms. Doe's employment, based in part on absences that were protected by the FMLA, was therefore prohibited by FMLA. Bachelder, supra.; 29 U.S.C. § 2615; Regulation 29 C.F.R. § 825.220. It is unlikely that Newco would be successful in defending a lawsuit arising out of its termination of Ms. Doe.

(2) If Al Attorney were to sue Newco on Ms. Doe's behalf for violation of the FMLA, Newco would potentially be subject to damages in the form of back pay, liquidated damages in an amount equal to back pay, injunctive relief directing her reinstatement to employment, and attorney fees and costs. 29 U.S.C. §2617.

(3) Based upon Al Attorney's letter, it appears that reinstatement, coupled with back pay for the period January 16, 2004 until date of reinstatement, would satisfy the matter without litigation. Newco could also be liable for attorney's fees incurred by Ms. Doe as a result of any litigation, and thus Newco should be prepared to reimburse Al Attorney for his fees incurred to date.

(4) Newco's FMLA policy should be revised to clarify the method by which the 12 month period for determining entitlement to FMLA leave is computed. Newco's FMLA policy should be amended to remove the requirement that the employee must specify that FMLA leave is requested for the absence. Newco's FMLA policy should be amended to provide at least 15 days for an employee to furnish a requested medical certification and to provide that notice of the requirement for medical certification be provided each time a certification is required.