

FEBRUARY 2004
PENNSYLVANIA BAR EXAMINATION

Sample Answers



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

Question No. 1: Sample Answer

1. Grounds under which Frank could obtain a divorce from Wilma.

An injured and innocent spouse can obtain a divorce in PA if s/he can show that his or her spouse willfully and deliberately deserted him or her for a period of at least one year on grounds of desertion. Wilma has been living in Florida, separate and apart from Frank since March of last year. If a Court were to determine that she had deliberately deserted Frank, it could find for him and grant a fault-based divorce on grounds of desertion. Desertion could be established because it seems clear that Frank cannot live anywhere but PA due to the demands of his business, and Wilma has set up her own residence and appears to intend to remain in Florida away from Frank.

Frank could also seek a divorce based on the no-fault ground of irretrievable breakdown. For one party to obtain a divorce based on this ground in PA, s/he must file a Complaint and affidavit alleging an irretrievable breakdown of the marriage and that the spouses have been living separate and apart for 2 years. In order to establish irretrievable breakdown, a party must show a profound estrangement from the marital relationship.

At this point, Frank and Wilma have been living apart for the most part for 2 years and completely since last March. Unless it were clear that Wilma had spent the majority of her time living apart from Frank he would have to wait until March 2005 to be eligible for a divorce on the grounds of irretrievable breakdown.

2. As referenced in the question above, if Wilma deserts or constructively deserts Frank for a period of at least 1 year, she cannot recover as a spouse with an elective share, so she could not recover any of Frank's estate.

The issue is how a current spouse may recover a portion of a deceased spouse's estate if she is not mentioned in a will executed after marriage.

A spouse may recover an elective share or equivalent thereto, even if she is intentionally left out of the will, unless she deserts her spouse.

Although it is clearly Frank's intention that she not be included in the will given their animosity towards each other, she is still entitled to 1/3 of the elective estate of Frank, which is composed of the estate, and certain other property. While a divorce would prevent Wilma from obtaining this share, their animosity and different geographic areas do not, unless there is desertion. Under the PA Fiduciary and Estate Code, a spouse who has deserted the decedent for at least 1 year, before his death, cannot receive a spouse's elective share of his estate. So if Wilma stays in Florida for one more month, as described in question 1, she could not receive any of Frank's estate even if they do not divorce.

- 3a. There are no income tax consequences to Frank upon a transfer of Whiteacre to Wilma. Income is any clearly realized net accession to wealth. In the case of property, income is realized upon sale or disposition of the property. The transfer of property from Frank to Wilma

is not considered a disposition of property, however since it is made in a divorce settlement. The tax code treats it as a non event. Frank will not have to pay tax on any increase in value of Whiteacre when he transfers it to Wilma.

b. As was already stated, income is a clearly realized net accession to wealth. Typically, Wilma would have to report the fair market value of Whiteacre as income, however in a divorce proceeding she will only have a clearly realized net accession to wealth when she sells the property.

One's gain (for purposes of tax) on property is determined by subtracting one's cost basis in the property from the amount received on the sale or disposition of property. Since Wilma did not pay for Whiteacre, we cannot use the typical method of determining cost basis. Because Wilma received Whiteacre in a divorce settlement with Frank, she will get a carry over basis, or, in other words, she will take Frank's basis in the property. This basis will be subtracted from any amount that Wilma sells Whiteacre for in the future. The result of that calculation will be Wilma's gain on which she can be taxed.

If Wilma uses Whiteacre for a certain period of time, before any sale, with the intent to make it her personal residence, she can exclude at least a portion of her gain from her taxes.

4. The issue is whether Larry's fee agreement with Wilma complies with the Rules of Professional Conduct. Generally, a fee agreement will comply with the RPC as long as the fee is reasonable, which the facts provide. In addition, the consideration received for an attorney's service need not be cash or its equivalent. Thus, the payment in the form of the use of Whiteacre would not be problematic.

However, under the facts, Larry and Wilma created a contingent fee agreement, which is one where payment hinges on the success of the case. In order for a contingent fee agreement to comply with the RPC, it must be (1) written (2) clearly state the percentage of the attorney's fee (or equivalent) and (3) indicate whether costs will be taken out before or after the attorney takes his fee. Although the facts here prohibit a clear analysis, it is evident that the agreement fails because it was never written down. Thus, it violates the RPC's rules for contingent fee agreements.

In addition, the RPC strictly prohibits contingent-fee agreements in criminal and certain family law matters including divorce. This also results in a clear violation of the Rules of Professional Conduct.

Question No. 2: Sample Answer

1. Assuming Fast Eddy sues Jack based on the tort of private nuisance, I do not think Eddy will be successful. According to the Restatement (Second) of Torts, which has been adopted in Pennsylvania certain elements must be met to establish a private nuisance. In order for a private nuisance to exist, one must establish an intentional interference with the reasonable use of one's property that results in substantial harm. First, Eddy is basing his nuisance claim on

the smells of microbrewery, which float over his property. Moreover, Eddy might claim the smells were such a nuisance that they interrupted his recording session; thus, he was unable to finish his CD. However, Jack is not intentionally interfering with Eddy's recording sessions. Jack's microbrewery emits certain smells of beer that are natural for such an operation. An influential (although not dispositive) factor is the fact that Jack began operating his microbrewery in 1995, whereas Eddy came to the nuisance by moving into Whiteacre in 1997.

Therefore, Eddy should not be allowed to complain since he came to the nuisance. Second, a nuisance must unreasonably interfere with one's reasonable use of his property. It is reasonable for Eddy to use his own recording studio to make a CD. However, the smell of beer wafting over into Eddy's property is not an unreasonable interference with Eddy's use of his (presumably) interior recording session. The October brew is produced only during the month of October; thus, the smell is of relatively short duration. Finally, Eddy might claim he was substantially harmed because he went back to rehab and failed to finish his CD. However, I would argue this is not substantial harm because Eddy can still record his CD. Also, it was Jack (and not the beer smells) that caused him to drink tequila once again. For all these reasons, Eddy's suit for private nuisance would be unsuccessful.

2. Eddy should have asserted the Tort of Trespass to real property.

Trespass to real property occurs when a person, knowing that he/she is not permitted or licensed to do so enters a property.

In this instance, Eddy living in a walled, and gated property, gave clear notice to Jack that entrance onto the grounds was controlled. Obviously, as a rock star, Eddy needs security, and hired personnel to perform that task as well. Jack entered the property without permission and should be charged with trespass to real property.

In addition Jack may be liable for invasion of privacy. Invasion of privacy can be established when one violates another's rights of seclusion. One has a right to seclusion in ones home and has a right to privacy against invaders. When Jack broke a window, shouted at Eddy and broke his concentration so he could not finish recording, he probably interfered with Eddy's rights to seclusion.

3. As the motion to amend Fast Eddy's complaint contains allegations not arising out of the same or similar transaction and occurrence as the initial complaint, the court should not grant the Motion to Amend.

Amendment Motions are freely given when stipulated to by counsel or in the interests of justice. Further, courts prefer to hear matters on the merits and thus are more likely than not to grant a Motion to Amend. In the present case, however, Fast Eddy's Motion will fail, not by being outside the applicable statute of limitations alone, as the Amendment relates back to the date of filing, but here the offenses claimed do not appear to arise out of the same transaction or occurrence as the complaint. Thus, Fast Eddy's Motion to Amend should be denied both for failure to assert the claim within the applicable statutory period and because the action is a new cause of action from that found in the original complaint. Fast Eddy, may argue that but for

discovery he had no idea the earlier damage now admitted by Jack, had occurred and thus the statute should be tolled. Unfortunately, this argument will likely fail as Fast Eddy should have known by inspection before purchase the items were there and that after he bought the property he had time to investigate the disappearance. Thus, if Jack does not agree to the amended complaint, a court will likely deny Fast Eddy's Motion to Amend.

4. The evidence will be admissible as habit evidence.

All relevant evidence, not otherwise excludable, is admissible if it tends to prove or disprove a fact. The evidence that Red checked the gate hourly to make sure it was closed will be admitted as "habit" evidence. Fast Eddy will use the facts to show that Red checked the gate "every hour on the hour for three years." The court will allow the evidence if it tends to prove or disprove a fact at issue. This constant routine will be considered habit by the court, thus relevant to prove that his conduct was in conformity with his habit.

A witness is allowed to testify as to facts within his personal knowledge and perception. The fact that the statement is coming from Red's supervisor – is allowable, and admissible because he is testifying from his own personal knowledge of Red's activity while on the job. The evidence from Red's supervisor is also allowable as an example of a routine business practice of Red, the security person on the job while the home of Fast Eddy was invaded.

Therefore, the evidence is admissible.

Question No. 3: Sample Answer

1. John would most likely be charged with and found guilty of (a) Burglary, (b) Attempted Theft by Taking (Larceny), and (c) Felony Murder.

(a) Burglary

Under Pennsylvania Law, Burglary is the intentional breaking and entering of a dwelling or occupied structure at any time without privilege or justification when the premises are not open to the public with the specific intent to commit a crime therein.

Here, John was not privileged to enter Uncle Hank's business and Uncle Hank's business was not open to the public at the time. John clearly broke into and entered the premises when he pushed the door open and reached inside to turn on the light. When he did this, he concurrently had a specific intent to commit a crime inside – namely theft of \$30,000 from Uncle Hanks. Thus, the elements of Burglary are satisfied and John should be found guilty.

(b) The issue regarding attempted theft involves whether or not John could be charged with and subsequently convicted of the crime under PA law given the fact that he fled the premises without taking the money.

The rule regarding the crime of attempted theft in PA is that defendant can be found guilty if he specifically intended to commit the trespassory taking and carrying away and he took a substantial step, beyond mere preparation in order to complete the crime.

Under the facts, John definitely intended to commit the theft and did take substantial steps in that direction. John broke into the premises for the purposes of stealing \$30,000 from Hank's shoebox. Therefore he had the specific intent and made a substantial step toward his goal. Further, the theft involved in this case occurs when there is a taking or appropriation of property belonging to another with the intent to permanently deprive the owner. Clearly, John has this intent in mind and was in the premises for that very reason. The fact that John fled without taking the money is of no consequence as far as the charge of attempted theft due to the fact that he took substantial steps toward the completion of the theft. Further, the fact that the \$30,000 was not in the premises that night does not negate John's specific intent to steal. Therefore, it is likely that John could be charged with the crime of attempted theft and found guilty.

(c) Felony murder is an unintended death of another person that occurs during an inherently dangerous felony. Burglary is an inherently dangerous felony because of the risk to person and property and the offense is secretive.

Here, John was surprised to find Hank asleep on the couch at his business. John did not intend to kill or harm Hank but Hank died of a heart attack that was caused by surprise upon discovering John in his business. It does not matter that John did not actually touch Hank, or that Hank had a pre-existing heart problem. John took that risk when he broke in, and John will be guilty of felony murder.

2. E-Link may assert impossibility or frustration of purpose as defenses to the complaint. These defenses should be raised as affirmative defenses in the answer or they will be waived.

Impossibility

When it is impossible to carry on with terms of the contract, the parties may be excused from performance. Here, there was no clause in the lease that specifically addressed the parties remedy if the premises were to be destroyed. As such, the parties are governed by the rule set forth above. Since the property was accidentally destroyed, E-Link is excused from making payments after the destruction.

Frustration of Purpose

Where a supervening act occurs which renders performance impracticable and both know of intended use, then the party whose purpose has been frustrated is excused from performance.

Here, both parties knew that the intended purpose of the lease was furtherance of the E-Link specialty computer business. The accidental fire was a supervening act which now renders the purpose of the lease (to further E-Link) impracticable. Consequently E-Link shall be excused from performance from the date of the fire.

These defenses would be raised in the defendant's (E-Link's) Answer to the complaint under a heading of New Matter. The Answer should be filed within 20 days after the defendant (E-Link) was served with the complaint. Here, the Answer should be filed on or before March 7, 2004.

b. Howard should succeed on his breach of contract action, in part. As stated earlier, Howard should recover rent for February, March and the first two weeks of April. This means E-link will have to pay \$12,500. As stated above, E-Link will not have to pay rent through December 31, 2003 because the premises were destroyed.

Question No. 4: Sample Answer

1. The federal court would analyze this claim under the rational basis test, under the Equal Protection Clause, and hold that the statute is constitutional.

When a federal court analyzes a claim which alleges a violation of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution, the court can analyze the claim based on strict scrutiny, middle tier scrutiny or lower level (rational basis) scrutiny. Under strict scrutiny, the state must show that the statute is necessary to achieve a compelling state interest. Strict scrutiny is usually applicable when there are suspect classifications being discriminated against based on race, alienage or national origin. Under middle-tier scrutiny, the state must show that the statute is substantially related to achieve an important governmental interest. Middle-tier scrutiny mainly applies to gender-based discrimination. Lower level or rational basis test scrutiny requires the plaintiff to prove that the statute is not rationally related to achieve a legitimate government interest. It applies mainly to non-suspect classifications.

Here, because the statute does not apply to any suspect classifications and is purely economic based, the court will analyze the statute under the rational basis test. Based on the testimony provided to the legislature it can be found that the statute is rationally related to achieve a legitimate governmental interest in allowing children of divorced, separated or unmarried parents to obtain a college education.

Therefore, Stanley would lose in his claim under the Equal Protection Clause of the Fourteenth Amendment because the statute is rationally related to achieve a legitimate government interest.

2. Jenn would be successful in her support claim for Nimrod and Betty. She would be unsuccessful in obtaining support for Stanley.

Parents have an obligation to provide support for their children and when the parents divorce, the non-custodial parent is still obligated to provide child support. The custodial parent can seek a modification of support due to a change in circumstances by either party.

Here, Jenn as the custodial parent was taking care of Nimrod and Betty who are minor children. In Pennsylvania, parents must provide support for their children until they are 18 or

graduate from high school, which ever is later. Jenn can seek a modification of child support for Nimrod and Betty due to the change in circumstances of Eric's income which will allegedly increase after he signs a book deal. However, Stanley would not be entitled to support because he is 18 and living in a college dorm. Eric may still be obligated to pay activity fees and unreimbursed medical expenses for the children based on his agreement.

3. Eric would object that his statement is hearsay and thus inadmissible. However, Jenn would respond that it's an admission by a party opponent and therefore, would be admissible.

Hearsay is an out of court statement made by someone other than the declarant, offered into evidence to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception applies. Under Pennsylvania law, an admission by a party opponent is an exception to the hearsay rule and would be admissible.

Here, Mary overheard Eric brag about the book deal which would pay him a minimum of \$70,000 annually for ten years. Such a statement is hearsay because Mary is testifying as to what Eric said. However, it would be admitted as an admission by a party opponent, Eric, as evidence that his income would greatly increase over the years and he could afford to pay child support.

Therefore, the court should rule that the testimony of Mary would be admissible as an admission by a party-opponent which is an exception to the hearsay rule under the Pennsylvania Rules of Evidence.

Question No. 5: Sample Answer

1. Al's defense is likely to be successful on the basis of the termination clause in the agreement.

In Pennsylvania, personal satisfaction clauses are valid. To be successful Barb must show not that Al was being unreasonable but that he is not being honest.

Since the contract stated that Barb's substitute had to meet "Al's personal satisfaction", then his subjective view is the one that will guide the clause.

Barb will argue that the audience liked Carol, but this does not matter because Al's personal satisfaction is what matters. She will also argue the reviews and profits showed Carol was a reasonable substitute. Again, Al's view is what matters.

Finally, Barb will argue that Carol having performed for two months in place of Barb constitutes a waiver on Al's part. Thus he will be Estopped from denying Carol's performance met his personal satisfaction.

While that might be some evidence that Al is not being honest, the contract specifically says he may terminate it at any time if the substitute does not meet his personal satisfaction.

2. Al should object on grounds of the Parol Evidence Rule and he should prevail, if the court finds the written contract to be integrated regarding the employment term.

The parol evidence rule bars the admission of evidence of prior negotiations or agreements to vary or contradict the terms of a written contract that is integrated. A written contract is integrated if the intent of the parties was to reduce the material terms of their agreement in writing.

Here, the facts do not state that the written contract contained an integration clause that would be an express indication of their intent to reduce their terms to writing. Nevertheless the contract appears to be fully integrated. Despite the parties prior discussions, the contract expressly provides an employment term of only 6 months. Furthermore the termination clause allows termination even sooner, and the contract sets forth “all other terms of their agreement.” Under the circumstances the Parol Evidence Rule should apply. Because the oral statements proffered by Barb would contradict the 6 month employment term, the testimony should be excluded.

3a. Ruth, as the remainderman to Al’s conveyance of Blackacre, will probably not succeed in her action against Ed to recover rental payments, but will probably succeed in recovering damages.

Meg was given a life estate in Blackacre. It is not freely alienable or devisable because unlike a fee simple, it is owning an interest in land for their life span. A life tenant does not really owe a duty to the remainderman, but the life tenant must not commit waste – ameliorative, or permissive. In addition, a life tenant must properly maintain the property – repairs, etc.

Here, Meg did not have to notify Ruth that she was leasing Blackacre to Tom. As the life tenant of Blackacre, she could enjoy the benefits arising therefrom without sharing it with the remainderman. Remainderman’s “rights” are not triggered until the death of the life tenant (with the exception of the waste mentioned above).

Meg, however, had a duty to properly maintain the property both as a landlord and as a life tenant. Ed may argue that Meg did not owe Tom any duty to make repairs as his landlord because he did not make requests for repairs or otherwise notify her of any structural problems.

Meg, however, owed Ruth a duty not to commit waste and to maintain the property as her life tenant.

Therefore, Ruth should recover the costs associated with the structural damages to Blackacre, but should not recover the rental payments.

3b. Ed will probably not prevail, and thus not recover the cost Meg expended in improving the driveway because life tenants cannot be refunded for their efforts in making improvements upon the property.

What most weakens Ed's argument is that, at the time Meg improved the driveway, she did not notify or inform Ruth of same. Had Meg notified Ruth, and requested a contribution from her, Ed would have a stronger claim for recovering the costs of the pavement.

Here, however, it appears Meg did not contact Ruth, and therefore Meg's estate has thus "waived" their right to seek recovery.

4. Tom should argue that the cases and lighting may be removed because they are trade fixtures. He should prevail.

A fixture is a piece of chattel annexed to the realty. A trade fixture is such a piece of chattel attached to the realty for purposes of carrying on a business or trade. A tenant generally has the right to remove a trade fixture.

Here, Tom installed the cases and lights for the purpose of operating a jewelry store. Although the store never opened the property still qualifies as a trade fixture because of the intent of Tom in attaching them. A court will allow Tom to enter and remove the fixtures.

Question No. 6: Sample Answer

1. ABC could successfully sue Harry to recover the dividend that was distributed.

The Board of Directors have the discretion to distribute dividends. Dividends may not be distributed if the corporation is insolvent or the distributions of dividends will cause the corporation to become insolvent. Liability for dividends that should not be distributed falls on the Board of Directors if they knew the dividends would cause insolvency or any shareholders who received knowing about the insolvency.

Here, Harry knew that the distributions would lead the corporation towards insolvency (eliminate 90% of the company's cash flow) yet he still made a motion to distribute. Therefore an ABC suit against Harry would be successful.

The suit may not be successful against Phil and Fred if Phil presented the financial statements in good faith with accuracy, prudence and after an investigation and Fred relied upon such financial statements by the chief financial officer in good faith. A suit is not likely to succeed against Fred, however Phil as the chief financial officer may have breached his duty of care if he was not prudent in preparing his financial statement. It does help that he advised each shareholder upon learning of the contract non renewal.

The distribution of dividends were not proper because they caused the corporation to become insolvent. Insolvency is when the corporation assets are less than the corporation

liabilities and the corporation can not pay their bills when they become due. Here, Phil states that due to the loss of the contract and recent dividend, ABC would not be able to pay its debts as they become due. Therefore the corporation fell into insolvency due in part to the distribution of dividends.

2. Harry's counsel could object to the offering of Wendy's testimony under both the marital communication privilege and the spousal immunity privilege.

The marital communication privilege applies to all confidential communications made between a husband and wife during their marriage. The privilege survives marriage and is held by the party against whom the testimony is being offered against – in this case Harry. Therefore since this was a confidential communication – Harry specifically directed Wendy to keep the information confidential – Harry's objection due to the marital communication privilege will be sustained.

The spousal immunity privilege protects a spouse from testimony by another spouse while married. Assuming that Wendy has filed for a divorce, but has not yet obtained one – Harry and Wendy are still married. Therefore, Harry's objection based on spousal immunity will also be sustained.

3. Superiority of Big Bank v. Computers, Inc.

Computers, Inc. will have the superior claim to ABC, Inc.'s remaining assets and will be fully compensated before Big Bank may take.

The priority of the rights of those holding security interests is determined in accordance with UCC Article 9 regarding Secured Transactions. Under these provisions, a creditor with a perfected attached interest will take before any other creditor than a buyer in the ordinary course, such as a consumer.

In this case, the facts indicate that both Big Bank and Computers, Inc. are perfected attached creditors. Usually, their priority would be determined on the first in line, first in right principle: whichever filed first would take priority.

However, when determining the priority of interests of two perfected attached creditors, it is necessary to evaluate the nature of their security interest. Big Bank is an after-acquired collateral financier because it took its security interest in future collateral that ABC Inc. might acquire. Computers, Inc. on the other hand, has a purchase money security interest because it took its security interest in the very computer equipment the purchase of which it financed.

A holder of a purchase money security interest in equipment takes priority over other perfected attached creditors, provided that it properly filed its financing statement with 20 days of when the debtor received possession of the collateral. When the purchase money security interest is in equipment, the holder of the interest need not provide notice of its interest to the after-acquired collateral financier, as a holder of a purchase money security interest in inventory would be required to do.

Computers, Inc. properly filed its financing statement and Computers, Inc.'s claim is superior to that of Big Bank.

Priority creditors receive full satisfaction before creditors with inferior claims may take. Thus Computer, Inc.'s full claim for \$15,000 will be satisfied from ABC, Inc.'s remaining assets of \$25,000 before Big Bank will receive anything. Assuming there are no other creditors or bills that would take priority, and excluding any other expenses ABC Inc. may pay, Big Bank should receive \$10,000 towards satisfaction of the \$100,000 debt ABC Inc. owes it.

Question No. PT: Sample Answer

Memorandum

DATE: February 24, 2004
TO: I.M. Able
FROM: Bar Applicant
RE: Newco Company – FMLA Matters

STATEMENT OF FACTS

Mr. Able's statement of facts is incorporated by reference. Please see it.

DISCUSSION

Issue Presented: Whether Ms. Doe was entitled to leave under the FMLA in January 2004 as a result of her hospitalization for a fractured leg?

Brief Conclusion: Yes, because Newco has not informed employees of the method to be used in calculating FMLA leave and the most favorable method to Doe entitles her to leave.

1. The FMLA applies to Doe's case and controls the outcome.

First it is undisputed from the facts that the FMLA applies to Newco because Newco has more than 100 employees. Further, Ms. Doe is indisputably entitled to protection under the FMLA because of her tenure with the company.

Second, the facts are clear that Doe has no vacation time or other avenue for leave. Thus, if the FMLA does not protect her, she may be terminated for absenteeism.

2. Doe was absent because of a "serious health condition"

The FMLA gives employees a right to leave for the "birth of a child" or a "serious health condition". In this case, Doe's maternity leave obviously qualifies. So does her fractured leg in January, because it required an "overnight" hospital stay. See DOL Regulations § 825.114.

Thus the FMLA applies and both absences may be deemed FMLA leave events. Under DOL Regulations, it is the employers responsibility to designate them as such and give notice of the designation to the employee. Here there is no evidence suggesting that Newco did this with regard to the maternity leave or the fractured leg in January.

3. Newco failed to inform Doe of the method of calculating FMLA leave.

Under the FMLA and regulations the employer may select a method for calculating leave from one of four options. Here, Newco used the “anniversary method,” an acceptable method. However the use of this method will not be allowed because Newco did not adequately inform Doe of its chosen method. Regulations and case law require that the chosen method be expressly and clearly disclosed in any written policy or handbook. See Bachelder. The Newco policy states that employees are entitled to 12 weeks of FMLA leave “within any twelve month period”. However, Bachelder held that similar language – simply parroting the Act – was ineffective to adequately inform an employee of the method to be used.

Because Newco did not adequately inform Doe of any method of calculation under the FMLA in it’s written polices, a court will use the method with the most favorable outcome to Doe, according to Bachelder and the FMLA’s regulations. Using the calendar method, as Al Attorney’s letter states, Mrs. Doe is entitled to additional leave under the FMLA.

Issue Presented: Whether Doe forfeited her entitlement to FMLA leave by failing to request it or provide medical certification?

Brief Conclusion: No to both issues because (1) she did request leave as soon as practical in January and (2) she was not specifically asked to provide a medical certification.

1. Doe requested leave as soon as practicable.

The FMLA requires an advance request for FMLA leave only when the need for leave is foreseeable. When a need for leave is not foreseeable, request for and notice of leave is required “as soon as practicable” under the circumstances, usually within no more than one or two days. Newco’s policy is generally consistent with this.

The Dept. of Labor Regulations specify, however, that an employee may give notice in person or by telephone and that an employee need not expressly assert an FMLA right or mention the FMLA.

Here, Doe’s need – based on a fractured leg – was not foreseeable clearly. Further, she gave notice as soon as practicable – on the day of her absence – immediately following her hospitalization. Thus, she gave timely notice. Doe was not required to mention the FMLA expressly under the Regulations so she almost certainly will not forfeit her rights under the FMLA for failure to mention the FMLA, even though Newco’s policy seems to require her to invoke the FMLA at the time of the request.

2. Doe did not fail to provide any medical certification required by the FMLA.

Newco's policy states that medical certification shall be required in all cases based on a serious health condition and provides that the absence of certification at the time of request will result in denial of FMLA leave.

The FMLA allows an employer to require the medical certification, but it states (1) that certification may be provided after a request for leave in the event of unforeseeable circumstances and (2) that an employer must give notice each time certification is requested.

Thus the FMLA contradicts and preempts Newco's policy. The supervisor did not request medical certification in January in connection with her absence and the company did not give Doe time after the request to provide certification. Under the FMLA, Doe's failure to provide certification will thus be excused based on the lack of request and improper action and Doe will not forfeit her rights.

Recommendations:

1. Doe is likely to prevail based on my analysis above. Newco is likely to lose.
2. Under FMLA 29 USC 2617, Doe appears to be entitled to (1) lost wages, (2) interest on lost wages, and (3) liquidated damages equal to the sum of her lost wages and interest, based on the FMLA and (4) fees and costs. She may also receive equitable relief, most probably in the form of reinstatement.
3. In light of all of the above, I recommend that Newco be advised to settle the case with Doe quickly for reinstatement and lost wages plus interest. She is likely to win and may be willing to forego liquidated damages in order to avoid litigation costs and delay.
4. I recommend that we have Newco change its policy on the FMLA to avoid problems illustrated by Doe's case
 - (a) Newco's policy should expressly state the method of calculating FMLA leave
 - (b) The policy should make clear that an express request for FMLA leave is not required
 - (c) The policy should make clear that supervisors shall request certification each time certification is required.

Each of these changes is needed to avoid problems like Doe's and to conform with FMLA Regulations and case law.