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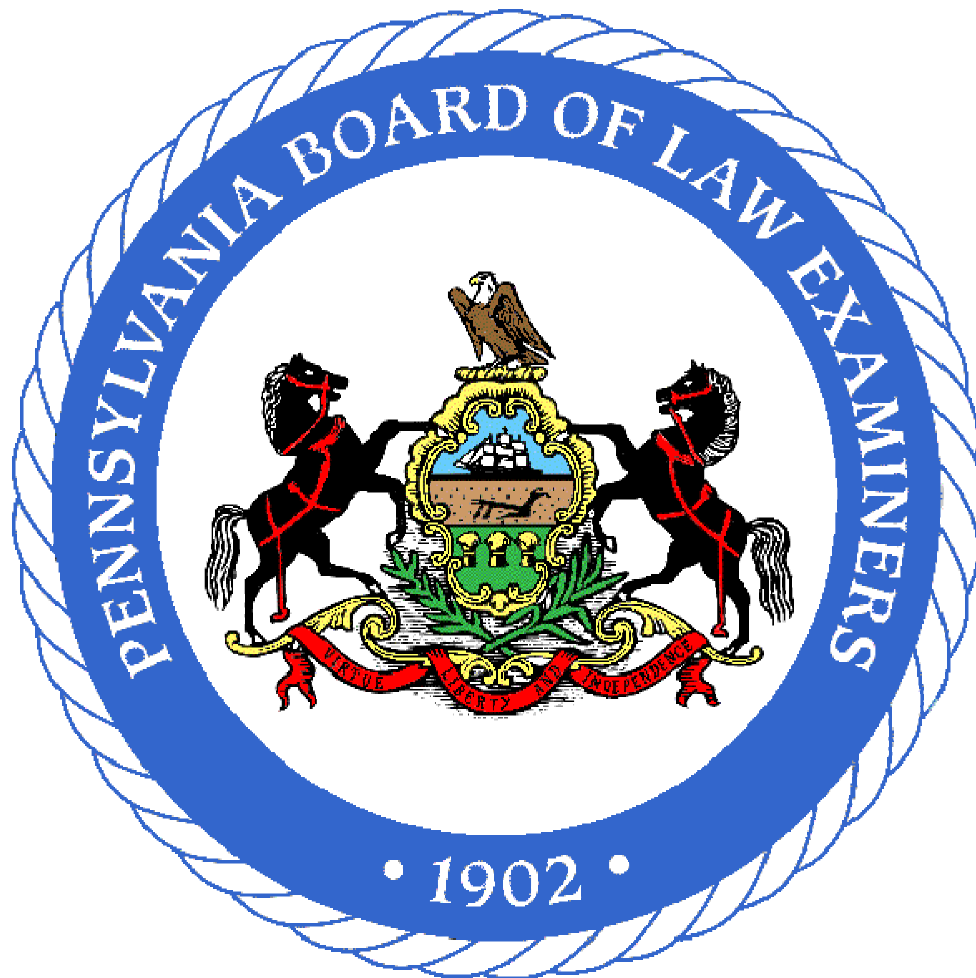
PENNSYLVANIA BAR EXAMINATION

Essay Questions and Examiners' Analyses
and
Performance Test



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Question No. 1: Facts and Interrogatories

Frank was the board chairman and CEO of and owned 51% of the stock in FranCo, Inc. (FranCo). His son, Sam, owned 24% and a friend, Hank, owned 25%. Frank had given Sam his shares 20 years ago when FranCo was formed and when all of the shares were worth $1 each. The FranCo shares have significantly increased in value since then.

Through his personal attorney, Abel, Frank was in the midst of preparing a business succession and estate plan because he was terminally ill and wanted Sam to gain control of FranCo. Frank also needed a new will because he had recently married Wendy and had adopted her daughter, Darlene, after Darlene's natural father had died. Frank's existing will left his estate one-half to Sam and one-half to Frank's ex-spouse, Wilma, who was also Sam's mother. Frank's will was valid and was executed before his divorce from Wilma. Frank had no other heirs except a grandson through Sam.

Darlene has had a strong family relationship with her natural paternal grandfather, George, who has just died intestate with significant assets leaving no relatives other than Darlene. He had maintained his relationship with Darlene at his death.

Because Frank's estate lacked liquidity to pay death taxes, Frank and Abel proposed a redemption plan (the Redemption Plan) for approval by FranCo's board of directors whereby FranCo would, after Frank's death, buy some of his FranCo stock at a price (the Redemption Price) which considering all relevant valuation factors was substantially in excess of the actual value of Frank's FranCo shares to be redeemed. Larry, corporate counsel for FranCo, had determined and told Frank that the Redemption Price was too high and that Frank's promotion of it clearly violated his corporate duties to FranCo and its other shareholders. Larry took no further action with respect to this matter. At a subsequent board meeting, where Larry was not present, the Redemption Plan was approved and put into effect. Hank and Sam, who were also board members and who were present, had no idea and were never told that the Redemption Price was too high. Larry and Abel were totally independent of each other.

A final part of the overall plan with respect to FranCo was that a few years after Frank's death Sam would sell some of his shares to Hank so that Sam could build a new home and Hank could own a larger share of FranCo. Sam needed cash because he had lost most of his portfolio in the stock market. As a result of these losses, Sam has a significant long term capital loss carryover for federal income tax purposes and intends not to buy any more stock.

Frank's illness progressed more rapidly than expected and he died before executing a new will but after the Redemption Plan went into effect. All of his assets were held in his name. Wendy, Sam, Sam's son and Darlene are Frank's only related survivors. Wilma also survived.

Assuming that all of the above parties and FranCo are subject to Pennsylvania law:

1. Will Darlene inherit any of George's estate?

2. Who will inherit Frank's estate?

3. Assume that Sam inherits Frank's shares of FranCo, that he plans future gifts of FranCo shares to his son and that Hank is going to buy some of Sam's FranCo shares. For federal income tax purposes should Sam plan to sell Hank FranCo

shares which he has inherited from Frank or his old FranCo shares which Frank gave him?

4. Under the Pennsylvania Rules of Professional Conduct, what responsibilities did Larry have and what actions should he have taken relative to Frank and FranCo regarding the Redemption Price?

Question No. 1: Examiner's Analysis

1. Even though Darlene has been adopted out of George's family, she will still inherit his intestate estate as his natural granddaughter because he has maintained a family relationship with her.

20 Pa.C.S.A. §2108 addresses the rights of adopted persons and provides generally that for estate purposes an adopted person shall be considered the issue of her adoptive parents and not of her natural parents except that she can inherit through a relative of a natural parent who has maintained a family relationship with her. The facts present in this situation are that Darlene, although adopted out of her natural grandfather's family, has had a family relationship with him which he maintained through his death. Therefore, she is not precluded from inheriting from him under the intestate succession laws of Pennsylvania if, as our facts state, he has died intestate.

The question then turns to who takes George's intestate estate. The facts show that he left no relatives other than Darlene who is his natural granddaughter. Therefore, 20 Pa.C.S.A. §2103(1) applies. It provides that George's estate goes to his issue. Since Darlene is George's only surviving issue, she will take his estate.

The Pennsylvania law applicable to the distribution of George's intestate estate makes it clear that although Darlene is adopted out of George's family, she still can inherit from her natural grandfather by intestacy if he has maintained a family relationship with her (which is a given under the facts). The Uniform Probate Code, as amended (UPC), provides that when a person is adopted by a stepfather who is married to the person's mother, the person can still take by intestacy from her paternal natural grandfather UPC §2-114(b).

2. Frank's estate will pass to his new spouse Wendy (one-half), to Darlene (one-fourth) and to Sam (one-fourth).

20 Pa.C.S.A. 2507, <u>Modification by Circumstances</u>, delineates in what instances a will such as Frank's is statutorily modified. Under the facts, several things have occurred in Frank's life which will automatically modify his otherwise valid but outdated will.

The first modification is under §2507(2) which provides that his divorce from Wilma automatically nullifies any provision for her in Frank's old will.

Next, §2507(3) provides that when someone like Frank marries after making his will, his surviving spouse (who is Wendy under our facts) receives an intestate share of his estate (i.e. the share of his estate which she would receive if he had died intestate). This share under §2102(4) is one-half. It is possible that Wendy could elect against Frank's will for a one-third share under 20 Pa.C.S.A. §2203 or might take an intestate share of Wilma's forfeiture. However, Wendy's

largest share of Frank's probate estate will result automatically under 20 Pa.C.S.A. §2507(3) where no election for same is required.

Darlene also represents a change in circumstances for which a statutory modification to Frank's will applies. She is a child adopted after Frank's will. §2507(4) provides her an intestate share of that portion of Frank's estate which is not passing to his spouse. Since Wendy is receiving one-half of Frank's estate, Darlene will share an intestate share of the other half. She will split equally with Sam for purposes of calculating her share and thus will receive one-fourth of Frank's total estate or one-half of his estate not passing to his surviving spouse. See 20 Pa.C.S.A. §2103(1) and §2104(1).

Note that all three of the foregoing modifications of Frank's will with respect to Wilma, Wendy and Darlene occur only if there are not contrary intentions expressed in Frank's old will. The facts do not evidence any such contrary intentions and thus the statutory modifications of Frank's will shall be deemed to have occurred.

The balance of Frank's estate is one-fourth after Wendy's one half share and Darlene's one fourth share; and after Wilma loses her share. This remaining one-fourth does not pass by intestacy. Instead it passes to Sam as the remaining legatee under Frank's will. Although Sam was to receive one-half of Frank's estate, he only takes the remaining one-fourth because of Darlene's qualifying for a one-fourth share. In other words, Sam's one-half share of Frank's estate adjusts to a one-fourth share on account of Darlene's rights as a child adopted after Frank's will.

3. Sam should first sell his low basis shares of FranCo which were gifted to him to the extent his gain thereon will be sheltered by his capital loss carryover thus reserving more of his recently inherited shares with a higher basis for future gifts to his son.

When Sam or any investor sells securities of the same type but with different tax basis in them, he should plan his sale to determine whether he wants to sell his high or low basis shares. Under our facts, Sam has some low basis FranCo shares of $1 each which his father gave to him. He also has FranCo shares which he has inherited from his father recently with a current basis which is much higher. The facts do not say whether Sam's basis in his inherited shares are as high as the Redemption Price but the facts state that their value at Frank's death was much higher than the old $1 per share gift price. Thus in currently selling FranCo shares to Hank, Sam can decide whether he wants to be selling the gifted shares at a high gain or the inherited shares at a lower or possibly no gain.

The gain, roughly speaking, is the sales price of the shares less his basis. See §1001(a) of the Internal Revenue Code (IRC). The gain is taxable. IRC §61(a)(3). If Sam sells his gifted low basis shares, he will have a taxable gain but he can apply his long term loss carryover against the gain under IRC §1212(b). If he sells his inherited or high basis shares, he will have little or no gain but will be left with more low basis-gifted shares to give to his son and more unused capital loss carryover.

This question underscores the importance of the difference between the basis of gifted shares versus inherited shares. The basis of gifted shares is equal to the donor's basis under IRC §1015(a). The basis of inherited shares is generally "stepped up" to the values at the deceased's date of death under IRC §1014(a). There is no rule which prevents Sam from

designating or choosing which shares he is going to sell to Hank. Hank's basis is the same either way and is what he pays Sam for the shares under IRC §1012.

Sam is generally in an enviable position. If he sells currently inherited-high basis shares, he will have little or no gain on which to pay tax. If he sells gifted-low basis shares, he will have a gain but he can use his capital loss carryover to offset the gain. If his carryover isn't adequate to avoid recognizing some gain, he can limit his sale of low basis-gifted stock to an amount covered by his carryover and complete his sale with shares of high basis-inherited stock. The important tax aspect of Sam's sale to Hank is that he be aware of his basis and be aware of his planned future gifts to his son, and to accordingly select which FranCo shares to sell. Since the facts indicate that Sam does not intend to buy any more stock and do not indicate that Sam has or intends to purchase other capital assets, he is probably wisest to use up his capital loss carryover by selling the low basis stock and thereby keeping more of the high basis stock for future gifts to his son.

4. When Larry as counsel to FranCo encountered a conflict with Frank, he should have explained to him that his primary duty was to FranCo and asked him to reconsider or get an independent legal opinion on the issue in conflict. If these steps did not resolve the conflict, he should have gone to FranCo's board of directors.

This question explores the potential conflicts of corporate counsel who must, in representing a corporation, deal with its "constituents" under Pennsylvania Rules of Professional Conduct (Pa.R.P.C.) Rule 1.13, Organization as Client, which provides in relevant parts as follows:

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

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

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

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Under subsection (a) of the Rule, Larry must realize that when representing FranCo, he must separate FranCo from its "constituents" who are defined in subsection (d) as directors, officers, employees and shareholders such as Frank. Most typically, corporate counsel works with key employees and directors who in the world of smaller corporations often are also the shareholders. Typically there are no conflicts but certainly they appear under the facts of this question where Larry has against his better judgment seen FranCo become obligated to pay Frank's estate the unrealistically high Redemption Price for certain of Frank's shares of FranCo when he knew that Frank's proposal of the Redemption Price violated Frank's duties as a FranCo board member and officer to FranCo and its other shareholders.

The first thing that Larry should have done is to make sure that Frank knew that Larry represented FranCo as distinguished from Frank on the conflicted issue of the Redemption Price. The facts aren't clear whether or not Larry explained this distinction to Frank.

The second thing that Larry should have done is make sure that Frank understood the conflict (i.e. how payment of the Redemption Price would deplete corporate reserves in favor of Frank and to the detriment of the other shareholders) and that as such Frank was violating his duties to FranCo and the other shareholders. See subsection (b) of the Rule. The facts indicate that Larry voiced his opinion to Frank against the Redemption Price and that the conflict existed, but apparently without success.

If the foregoing did not resolve the conflict, Larry should have asked Frank to reconsider and, if necessary, obtain a second opinion on the matter which would further explain the conflict and how the Redemption Price was not in the best interests of FranCo and how the Redemption Price violated Frank's duties to FranCo and the other shareholders. Larry did not take these steps. See subsection (b)(1) and (2) of the Rule.

If the matter remained unresolved, the Rule suggests that Larry's next step should have been to take the matter to a "higher authority" at FranCo. See section (b)(3) of the Rule. Here Larry should have taken the matter to the board of directors. Certainly Sam and Hank had a right to know that the Redemption Price is too high and their knowledge presumably would have caused Frank and the board to vote differently on the Redemption Plan. The facts quite clearly indicate that Larry did not do this since Sam and Hank "had no idea and were not told that the Redemption Price was too high."

Question No. 2: Facts and Interrogatories

Tom and Jerry committed a burglary at Dr. Al's house, which is located in Mountainville, Pennsylvania, from which they took assorted items including a locked portable safe.

The day before the burglary, Tom consulted Fred, a local attorney on an unrelated domestic matter. During the course of the consultation, Tom stated to Fred that he had concealed marital assets in bank accounts in an adjoining state, which he could not immediately access for legal fees. Tom further told Fred that he would be obtaining a substantial amount of cash later that night, sufficient to pay Fred's consultation fee and retainer, when he and a friend were going to "pay a secret midnight visit" to a local doctor's house.

After Tom left Fred's office, Fred became very suspicious since he knew that Dr. Al, who was the only doctor in Mountainville, was currently on vacation out of the country. Fred called the Mountainville Police and told them he had knowledge that Dr. Al's house might be burglarized that night. The police placed Dr. Al's house under surveillance that night. The police caught Tom and Jerry as they were leaving Dr. Al's house carrying a television and a locked portable safe which were stolen in the burglary. The police forcibly pried open the safe, which was locked with a combination that only Dr. Al knew. The police found a substance in the portable safe, which after analysis was determined to be marijuana. When the police apprehended Tom and Jerry, it was apparent that Jerry was under the influence of either drugs or alcohol.

In order to conceal the burglary, Tom had tampered with the house's electrical system, causing a fire. The police promptly called the fire department, which successfully extinguished the fire. The fire caused only minor damage. The Fire Chief conducted an investigation at the house before the premises were secured. The investigation produced sufficient evidence to support an arson prosecution. When the Chief left, the fire was totally extinguished and all doors were closed to protect Dr. Al's property. The next day, a detective from Mountainville Police Department went to Dr. Al's house for the purpose of looking for additional evidence to supplement the Fire Chief's determination of arson. The detective entered the house through the closed front door, which was unlocked. When the detective moved several boxes near the main electrical box, one of the boxes broke open and several photographs depicting child pornography fell to the floor.

The police investigation determined that Jerry had ingested several tablets of a controlled substance several hours before the burglary. Jerry took the tablets from his girlfriend's purse. Jerry thought the tablets were a mild prescription medication that belonged to his girlfriend, which had little effect on Jerry other than to calm him down. Actually, the tablets were his girlfriend's prescription Drug X, which is a powerful and highly intoxicating controlled substance. The ingestion of Drug X caused Jerry to be under the influence of the drug to a degree that at the time he committed the burglary he had no specific recollection of his activities.

The next morning, while at breakfast at a coffee shop in Mountainville, Attorney Fred mentioned to several other patrons his involvement in the Tom and Jerry case which came about as a result of his conversation with Tom. He further mentioned that he did not want Tom as a client since Tom concealed marital assets in another state in addition to the involvement in the burglary of Dr. Al's home.

1. Dr. Al is charged by the Mountainville Police with possession of the child pornography and the marijuana found in the locked portable safe. Will Dr. Al be successful if, based upon the Fourth Amendment to the United States Constitution, he files a Motion to Suppress the child pornography and marijuana found in the searches and seizures?

2. Will Jerry be successful in asserting as a defense to a burglary charge that he was under the influence of Drug X and did not know that he was participating in a burglary at the time the burglary occurred?

3. Did Attorney Fred violate the Rules of Professional Conduct in revealing any of the information given to him by Tom?

Question No. 2: Examiner's Analysis

1. Dr. Al will be successful in the Motion to Suppress the child pornography and the marijuana as evidence against him at trial.

Dr. Al had a reasonable expectation of privacy in his house. The Fourth Amendment to the United States Constitution would protect Dr. Al's privacy expectation. *Steagald v. United States*, 451 U. S. 204, 101 S. Ct. 1642 (1981). Generally, with few exceptions, warrantless searches are unreasonable. *Payton v. New York*, 445 U.S. 573, 586-587, 100 S. Ct. 1371, 1380 (1980).

It should be noted that the fire department was able to put out the fire which caused little damage. Also, the Fire Chief was able to successfully gather evidence sufficient to substantiate an arson charge. The house was secured by the fire personnel when they left, to protect Dr. Al's property. There was no exigent reason for the fire department or the police department to return to the house since the fire was extinguished, evidence of arson was gathered and the house was secured. Even though the detective as part of his employment would be authorized to conduct a further investigation, he must obtain a search warrant to enter the premises. Here, Dr. Al had a reasonable expectation of privacy in the house even though there had been some fire damage. Since the detective's entry was to gather evidence to bolster the arson case, a search warrant must be obtained. *Michigan v. Clifford*, 464 U.S. 287, 104 S. Ct. 641 (1984) and *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942 (1978).

The entry by the detective required a search warrant. The purpose of this entry was solely to secure additional evidence to support the arson case. The detective was not going to Dr. Al's home due to the inability to determine the cause of the fire or to make sure that the fire was out, but to conduct his own investigation in an attempt to gather more evidence to support the arson charge. There is nothing in the facts to indicate that a search warrant was obtained. Absent the issuance of a valid search warrant, the entry by the detective was in violation of the Fourth Amendment to the United States Constitution. See, *Commonwealth v. Smith*, 331 Pa. Super. 66, 479 A.2d 1081 (1984).

Even though the pornographic photographs were in plain view after they fell out of the box, the detective had no right to be in the house without a valid search warrant. The detective is a government agent and is therefore required to abide by the protections afforded by the Fourth Amendment. Dr. Al should be successful in his Motion to Suppress the pornography as evidence.

The marijuana was located in a locked portable safe that had been located in Dr. Al's house. Only Dr. Al had the combination for the lock on the safe. Dr. Al had a reasonable expectation of privacy in the contents of his safe and thus had a constitutionally protected right to

be free from unreasonable searches and seizures. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967).

The removal of the safe was done pursuant to Tom and Jerry's burglary of Dr. Al's house. The government had absolutely no part in Tom and Jerry's entry into Dr. Al's house or the removal of the safe, so that the Fourth Amendment was not violated by this initial removal. However the scope of the private seizure may not be exceeded by the government unless it has the right to make an independent search and seizure. *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395 (1980).

The police came into possession of the portable safe as a seizure of evidence from Tom and Jerry incident to their lawful arrest. The seizure of evidence incident to a lawful arrest is proper under the Fourth Amendment without the requirement of a search warrant. See, *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034 (1969). However, the authority of the police in this situation to possess the portable safe taken into evidence is distinct from the officer's authority to examine the contents of the portable safe without a search warrant. Absent some other exception, even when a package is lawfully seized to prevent loss or destruction, the Fourth Amendment requires that a warrant be obtained before the contents of the package are examined. *U.S. v. Jacobson*, 466 U.S. 109, 104 S.Ct. 1652 (1984). Further, there are no facts given to indicate that an inventory search was required pursuant to standard police practice nor are there any articulable facts to show the officers were in danger due to the contents of the safe.

The locked safe was not contraband or property from an unknown source and it was apparent that the safe came from Dr. Al's house. Without a properly issued search warrant the police had no right to pry off the lock to the safe. The safe could have been inventoried by the police as a locked safe and returned to Dr. Al when he returned from vacation or, if necessary, the police could have obtained a search warrant to examine its contents. Dr. Al's expectation of privacy under the Fourth Amendment was not protected by opening the locked safe without obtaining a search warrant.

Since a search warrant is required before the police could open the safe, the marijuana must be suppressed as evidence against Dr. Al. *Payton, supra*.

2. Voluntary intoxication or drugged condition is not a defense available to Jerry.

Jerry believed he was taking a mild controlled substance, obtained by his girlfriend with a prescription. Jerry's action in entering the purse and taking the tablets was voluntary. The fact that he made a mistake as to the type of the controlled substance he took is not material to his voluntary action of taking the tablets.

No one forced Jerry to take Drug X, nor did anyone switch controlled substances in order to mislead Jerry. The facts simply indicate that Jerry voluntarily took someone else's prescription tablets without legal authority to do so. Jerry's actions were voluntary, so 18 Pa.C.S. 308, which provides as follows, is applicable:

> Neither voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negative the element of intent of the offense, except that evidence of such intoxication or

drugged condition of the Defendant may be offered by the Defendant whenever it is relevant to reduce murder from a higher degree to a lower degree of murder.

Here, if Jerry is charged with burglary or related offenses, 18 Pa.C.S. 308 precludes his introduction of any evidence of a voluntary drugged condition as a defense. Jerry ingested Drug X voluntarily and he may not submit evidence that he did not intend to commit burglary and related offenses due to the ingestion of Drug X. *See Commonwealth v. Todaro*, 301 Pa. Super. 1, 446 A.2d 1305 (1982), *Commonwealth v. Smith*, 2003 Pa. Super. 301, 831 A.2d 636 (2003) and *Commonwealth v. Byron*, 319 Pa. Super. 1, 465 A.2d 1023 (1983).

Jerry might attempt to argue that he was involuntarily intoxicated due to this mistake. Although Pennsylvania law is unsettled in this area, if Jerry could establish involuntary intoxication under the facts, it might provide basis for a defense. However, in order to be successful, Jerry would need to prove that he made an innocent mistake based upon a reasonable belief and that he lacked culpability. *See Todaro, supra., and Smith, supra.* The stated facts are contrary to such a position since Jerry took the prescription drugs of another person without permission. Also, the facts are silent as to pertinent facts to support Jerry's position including how the pill vial was labeled, the description of the pills and how many pills Jerry took. The stated facts are not sufficient to support an involuntary intoxication defense under *Smith, supra,* and *Todaro, supra.*

3. Attorney Fred properly revealed information relating to the burglary at Dr. Al's house to the police but violated the Rules of Professional Conduct in his disclosure of information at the coffee shop.

A lawyer may reveal information he obtains from a client in the course of his representation when the lawyer reasonably believes that it is necessary to prevent his client from committing a criminal act which will result in substantial injury to the financial interest or property of another. Rule 1.6 of The Pennsylvania Rules of Professional Conduct provides as follows:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

* * *

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm or substantial injury to the financial interests or property of another.

Tom consulted Attorney Fred to discuss domestic matters. Even though a consultation fee was not paid prior to the consultation, the confidentiality rule was applicable to Tom even if he was a prospective client. The Pennsylvania rules of Professional Conduct do not distinguish between clients and prospective clients, so Attorney Fred's duties would remain the same regardless of whether he represented a client or talked to a prospective client. Discussions

between Tom and Fred were protected by attorney-client confidentiality as is set forth in Rule 1.6 of the Pennsylvania Rules of Professional Conduct. Fred is not obligated to disclose Tom's statement concerning the burglary. However, Fred's action in calling the police was based upon a reasonable belief that Dr. Al's home would be burglarized that night and that substantial injury would occur to the property of Dr. Al.

Fred did not reveal the name of his client or how he obtained the information, but in his judgment he revealed enough evidence to potentially prevent substantial harm to Dr. Al's property. Since the burglary at Dr. Al's house could cause substantial financial injury to Dr. Al, Fred acted properly in disclosing the information.

The disclosure of information by Attorney Fred at the coffee shop was improper. Fred did not disclose this information to prevent a criminal act and therefore this action does not fit within the exceptions to disclosure as are outlined in 1.6 of the Rules of Professional Conduct. The disclosure of the information Fred gained from his client Tom, was revealed in a casual conversation with other patrons at the coffee shop. Fred was relating his decision not to represent Tom but the fact that Tom consulted Fred is itself confidential and protected by Rule 1.6.

Tom is not planning a crime in relation to the out of state bank accounts since the concealment of marital assets is not criminal in and of itself. The concealment has already occurred and Fred cannot justify his action by alleging that he is going to prevent a criminal activity. Also, the disclosure at the coffee shop was part of Fred's discussion relating to Tom and had nothing to do with any attempt to prevent harm that falls within Rule 1.6 exceptions. This disclosure of confidential information relating to the out of state bank accounts was in violation of Rule 1.6 and therefore improper.

The disclosure of any information about Fred’s involvement in the burglary case which arose out of Tom's statements to Fred relating to the burglary would also be a violation of Rule 1.6. The burglary was complete and the disclosure of information that Fred learned from Tom to patrons at the coffee shop does not fall within any of the exceptions contained in Rule 1.6.

Question No. 3: Facts and Interrogatories

On April 4, 2002, Kim was struck by an automobile while crossing the street which resulted in serious personal injuries, including a broken right knee. In addition to her physical injuries, Kim was psychologically traumatized by the accident causing her to become easily upset. Immediately after the accident, Kim began treatment with Dr. Payne, an orthopedic surgeon, who properly prescribed antidepressants for Kim’s psychological state and scheduled her for knee surgery on April 7, 2002.

After her knee surgery, Kim underwent physical therapy for her right knee. The therapy was painful and was not improving the mobility of her right knee. She complained to Dr. Payne that the therapy was not helping and he assured her that the operation went “great” and her knee would get better with time. She completely trusted Dr. Payne and had no reason to think he had done anything wrong during the operation but she was becoming impatient with her lack of progress. On July 30, 2002, Kim went to see Dr. Brown, another orthopedist, to determine if any alternate treatments could be administered to speed up her recovery. On that date, after reviewing the X-rays obtained from the hospital from immediately before and after the April 7,

2002 knee surgery performed by Dr. Payne, Dr. Brown informed Kim for the first time that her continuing knee problems were primarily a result of Dr. Payne misaligning her knee, and that with proper alignment, she would have been expected to have normal range of motion by then.

Several days after her appointment with Dr. Brown, Kim went to Dr. Payne's office to request her medical records. The receptionist told Kim that she would check with Dr. Payne in order to get approval to release the records. Concerned that he may have made a mistake and that Kim was thinking about filing a lawsuit against him, Dr. Payne directed his receptionist to stall Kim and not release her medical records. This delay tactic lasted for four months and was contrary to his normal practice of releasing records within five days of a request by a patient. During this four-month period of time, Kim told Dr. Payne that she wanted $50,000 for her knee problem and Dr. Payne responded, "I'll pay you $2,500 if you'll just settle the whole thing with me right now." Kim immediately declined the offer as being insufficient. During this same four-month period, Dr. Payne was also informed by his receptionist on eight occasions that Kim was becoming increasingly anxious and was noticeably trembling when the receptionist refused to give her the records. Furthermore, when Kim's prescription for the antidepressant expired and she asked for a renewal, Dr. Payne told his receptionist, "Let her suffer. I'm not going to make it easy for her." It was clear to Dr. Payne that the renewal was medically necessary to manage her psychologically frail condition. As a result of Dr. Payne's failure to release her medical records and renew her prescription, Kim's psychological state severely worsened causing her to be hospitalized for twenty days for severe depression under significantly increased psychotropic medication, none of which was covered by her insurance.

On July 27, 2004, Kim comes to your office and asks you to represent her in connection with any potential claims against Dr. Payne.

1. (a) With respect to his post-surgery conduct, what intentional tort claim(s) should be asserted against Dr. Payne and with what likelihood of success?

   (b) Aside from attorney's fees and court costs, what type(s) of damages would Kim be able to recover in such an action?

2. Assuming that Kim has a valid negligence claim against Dr. Payne as a result of the surgery, is there still time to file a claim against Dr. Payne?

3. Assume for the purpose of this question only that Kim's case is scheduled to proceed to trial in state court on a negligence theory. Counsel for Dr. Payne files a pre-trial motion seeking to bar the introduction of evidence at trial of Dr. Payne's $2,500 offer to Kim, which he suspects Kim's lawyer will try to introduce at trial to establish Dr. Payne's liability for her right knee problem. Assuming the evidence is relevant, how should the trial judge rule on the pre-trial motion filed by Dr. Payne's Counsel?

Question No. 3: Examiner's Analysis

1(a) An intentional infliction of emotional distress claim should be asserted against Dr. Payne and the claim would likely be successful.

To prove a claim of intentional infliction of emotional distress, the following elements must be established:

(1) The conduct must be extreme and outrageous;
(2) It must be intentional or reckless;
(3) It must cause emotional distress; and
(4) That distress must be severe.

Hoy v. Angelone, 456 Pa. Super. 596, 691 A.2d 476 (1997) aff'd 720 A.2d 745; citing *Hooten v. Penna. College of Optometry*, 601 F. Supp. 1151, 1155 (E.D.Pa. 1984); Restatement (Second) of Torts §46.

The gravemen of the tort of intentional infliction of emotional distress is outrageous conduct on the part of the tortfeasor. *Kazatsky v. King David Memorial Park, Inc.,* 515 Pa. 183, 527 A.2d 988 (1987). Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "outrageous!". Restatement (Second) of Torts §46, comment d. (1965). The repeated refusal to provide a patient with medical records when a physician knew of her emotional problems has been held to be at a minimum reckless and has supported a finding of an intentional infliction of emotional distress claim. *Pierce v. Penman*, 357 Pa. Super. 225, 515 A.2d 948 (1986).

As applied here, Dr. Payne's conduct must be examined to determine if it was extreme and outrageous. When Dr. Payne began treating Kim immediately after the accident, he immediately prescribed antidepressants for psychological trauma caused by the accident. Dr. Payne knew of Kim's fragile emotional state and took steps to attempt to alleviate her symptoms. When Kim requested her medical records shortly after the surgery, Dr. Payne became concerned that she might be considering a lawsuit against him and he repeatedly, and intentionally, refused to honor her requests for her medical records. He knew that she was getting increasingly upset to the point where she would tremble at his office. Despite this, he continued to block the release of the records. Further, he refused to renew her prescription and he knew, or was substantially certain, that the failure to renew the prescription would only exacerbate her fragile psychological state. As the facts indicate, the Doctor knew that the renewal was medically necessary to manage her depressed condition. He also made it clear to his staff that he had no problem with letting Kim suffer. When viewed from the eyes of an average member of the community, these actions by Dr. Payne would likely be determined to be both extreme and outrageous.

As to the second element, it could be argued that Dr. Payne intended to cause Kim harm. He was concerned about the possibility of being sued and he intentionally set out on a course of conduct, including failure to release the records and renew Kim's prescription, which he knew, or was substantially certain, would only worsen Kim's condition. This intent is supported by his statement to his receptionist, "Let her suffer. I'm not going to make it easy for her." Further, despite the fact that he was informed that his actions were beginning to cause Kim to physically tremble, he did nothing. The intent required is acting with the knowledge that severe distress is substantially certain to be produced by your conduct. *Hoffman v. Memorial Osteopathic Hospital*, 342 Pa. Super. 375, 492 A.2d 1382 (1985). At a minimum, this conduct would be determined to be reckless under the circumstances.

With regard to the third element, Kim was already suffering from psychological trauma at the time that she first saw Dr. Payne. However, this condition significantly worsened to the point that it required hospitalization for a period of twenty days. Dr. Payne would be liable for the aggravation of this pre-existing emotional condition due to the fact that a defendant must take the plaintiff as he finds her and damages are available for the aggravation of a previously existing condition. See *Geyer v. Steinbronn*, 351 Pa. Super. 536, 506 A.2d 901(1986).

With regard to the final element which requires that the distress be severe, this element would also likely be met given the twenty-day period of hospitalization and increased medication that became necessary as a direct result of Dr. Payne's actions.

1(b) Kim will be able to recover compensatory and punitive damages in connection with her claim for intentional infliction of emotional distress.

Kim can recover both compensatory and punitive damages. First, Kim can recover for the emotional distress attributable to Dr. Payne's actions as well as the cost of medical care to treat that distress. See *Pierce, supra,* 357 Pa. Super. at 236, 515 A.2d at 953 citing *Reist v. Manwiller*, 231 Pa. Super. 444, 332 A.2d 518 (1975) (emotional distress alone can result in the recovery of compensatory damages) and *Al's Café, Inc. v. Sanders Insurance Agency*, 2003 Pa. Super. 110, 820 A.2d 745 (2003) (victims of tortious conduct must be compensated for all that they lose and all that they suffer from the tort of another).

Additionally, Kim can recover for punitive damages. Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future. Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motives or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant. Restatement of Torts, §908, adopted by Pennsylvania in *Chambers v. Montgomery*, 411 Pa. 339, 344, 192 A.2d 355, 358 (1963). If it can be shown that the conduct in question is outrageous due to defendant's evil motive or reckless indifference to the rights of others, then punitive damages can be assessed against the defendant. See *Hoffman, supra.* As discussed above, it is likely that Dr. Payne's conduct will be determined to be outrageous under the circumstances. He clearly intended to make Kim suffer because he felt he was about to be sued by her. He abused his power as a physician by intentionally refusing to renew Kim's prescription when it was clear that it was medically necessary. His actions were contrary to that which is expected of a physician by the average person in our society.

2. Kim still has time to file the claim against Dr. Payne due to the discovery rule.

In Pennsylvania, a person generally must commence an action within two years of when a claim accrues to recover damages for injuries caused by the negligence of another. 42 Pa. C.S.A. §5524. However, under certain circumstances, a claim will not be deemed to accrue until the Plaintiff knows that he has been injured and that the injury has been caused by another's conduct. *Foulke v. Dugan*, 187 F. Supp. 2d 253 (E.D. Pa. 2002). The "discovery rule" is an exception to the general rule barring suit on a claim once the prescribed statutory period has expired, and arises from the inability of the injured person, despite the exercise of due diligence, to know of the injury or its cause. If a defendant, through fraud or concealment, causes a plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from

invoking the bar of the statute of limitations. *Burton-Lister v. Siegel, Sivitz and Lebed Associates,* 2002 Pa. Super. 128, 798 A.2d 231 (2002). Where the existence of an injury cannot be reasonably ascertained, the statute of limitations does not begin to run until such time as the injury's existence is known or discoverable by the exercise of reasonable diligence. *Ward v. Rice,* 2003 Pa. Super. 248, 828 A. 2d 1118 (2003), appeal granted, 837 A.2d 1178 (Pa. Dec. 10, 2003).

Dr. Payne operated on Kim's right knee on April 7, 2002. Despite Dr. Payne's concern that he made a mistake during the operation, he expressly told Kim that the operation went "great" and the knee would get better in time. Kim learned from Dr. Brown on July 30, 2002 that Dr. Payne misaligned her knee during the April 7, 2002 operation. The facts make clear that July 30, 2002 was the first time that Kim was made aware that her continuing knee problems were primarily the result of the operation performed by Dr. Payne on April 7, 2002, as opposed to being solely attributable to the car accident. Even though Kim went to confer with Dr. Brown, the facts make clear that this was to inquire into alternative methods to accelerate the healing process. There is no indication that Kim either suspected or should have suspected that Dr. Payne had done anything wrong at the time she went to see Dr. Brown. The facts indicate that Dr. Payne had advised Kim that the "knee would get better with time" and that she "completely trusted him" and "had no reason to think that he had done anything wrong." Since July 30, 2002 is the first day that Kim learned of Dr. Payne's negligence, the two-year statute of limitations has likely not yet expired and Kim has a short period of time to initiate her negligence claim against Dr. Payne.

3. The trial judge should grant the pre-trial motion to bar the introduction of Dr. Payne's $2,500 settlement offer to Kim.

Pennsylvania Rule of Evidence 408 provides in pertinent part that evidence of offering valuable consideration in compromising or attempting to compromise a claim which was disputed as to its validity or amount is not admissible to prove liability for the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. There are two rationales which have been offered for excluding offers of compromise. The first is that the rule is designed to facilitate the peaceful resolution of disputes. Such resolution would be discouraged if offers of compromise could be used against the offeror. *Rochester Machine Corp. v. Mulach Steel Corp.* 498 Pa. 545, 449 A.2d 1366 (1982). The second is that the offer may not be an admission but simply an effort to peacefully settle the dispute. *Rochester, supra,* 498 Pa. 545, 449 A.2d 1366 (1982); *Smith v. Leflore, 293 Pa.Super.* 149, 437 A.2d 1250 (1981).

As applied here, Dr. Payne offered to pay the $2,500 to attempt to compromise Kim's $50,000 monetary demand which he clearly did not agree with. Since the offer to pay $2,500 was made during the course of settlement discussions it should not be admissible pursuant to Pa. R.E. 408. The Judge should grant the pre-trial motion and bar the introduction of Dr. Payne's offer at trial.

Question No. 4: Facts and Interrogatories

Mona and Fabian had grown up together in Podunk, Pennsylvania. They had a stormy relationship, breaking up and getting back together many times. In June 1991, Mona and Fabian

had a daughter, Dora. Within 2 months after Dora's birth, Mona became restless and decided to leave Podunk.

Fabian and Mona executed a document to address issues about Dora while Mona was away. Because Mona felt very strongly that Dora should be raised in Mona's faith, the written agreement provided that Fabian would have sole legal and physical custody of Dora, that Mona would pay a reasonable amount of child support each month, and that Fabian would become actively involved with Mona's religion so that Dora's religious training and education in Mona's faith would continue.

Mona's mother, Grammy, was furious that Mona left. Grammy vowed never to speak to Mona again, but offered to care for Dora on weekdays so Fabian could maintain his medical practice. Soon after Mona left, Fabian met Terry. In December 1991, Fabian, Terry and Dora moved to State M in order to pursue better job opportunities for Fabian. Fabian and Terry lived as a married couple in State M but never formalized their relationship. State M law defined common law marriage as "two otherwise unmarried adults cohabiting as man and wife for at least ten years."

Dora was happy and flourished. Mona consistently sent generous child support payments. Fabian and Terry nurtured and raised Dora and were the only "parents" Dora really knew. Fabian did not continue his participation in Mona's faith or Dora's religious education and involvement in Mona's faith. Instead of attending and taking Dora to religious activities at Mona's place of worship, Fabian and Terry took Dora to meetings of "Roots of Truth"(ROT), a group that advocated non-violence, honesty and preservation of the environment. ROT was not affiliated with any religion and advocated that religion's external trappings corrupted a person's moral being.

In June 2003, Fabian, Terry, and Dora moved back to Podunk to start a local ROT Chapter. Because of a housing shortage, Fabian, Terry and Dora moved in with Grammy who resumed weekday after-school care for Dora. Grammy reminded Dora constantly that Mona had run off and abandoned them. Grammy's negative comments upset Dora, causing her to doubt her mother's feelings about her. Terry was always supportive, assuring Dora that her mother loved her.

In June 2004, an old friend told Mona that Fabian was neither participating in religious activities nor raising Dora with the religious upbringing as he had agreed. She also said that Dora was being indoctrinated with ROT and being cared for by Grammy. Mona returned to Podunk where she filed a Custody Complaint with a proposed order which would require Fabian to: (1) attend and take Dora to religious education classes in Mona's faith when Dora was with him, and (2) stop taking Dora to ROT.

1. On what federal constitutional grounds should Fabian oppose the proposed order and with what likely result?

Weeks of interacting with Mona during the custody litigation rekindled their relationship and Fabian decided that he did not love Terry. When he told Terry that he wanted to marry Mona immediately, Terry screamed, "you can't marry her, you are already married to me!"

2. Assume, for purposes of this question, that under Pennsylvania substantive domestic relations law Terry and Fabian's relationship would not constitute a

common law marriage. What legal action should Terry pursue in Pennsylvania court to determine her marital status with Fabian, and how would the court rule with respect to Terry's marital status?

In late July, 2004, Fabian took Dora and moved out of Grammy's home. Dora was deeply saddened by the separation from Terry. Terry and Grammy, who was intensely disliked by Mona, were worried that they might not be able to spend time with Dora now that Mona was on good terms with Fabian. Grammy and Terry each filed a petition seeking partial physical custody of and/or visitation with Dora. Mona and Fabian filed responsive pleadings opposing both petitions.

3(a). What is the likely outcome of Grammy's petition?

(b) What is the likely outcome of Terry's petition?

Question No. 4: Examiner's Analysis

1. Fabian should argue that granting the relief in Mona's proposed order would be an impermissible interference with Fabian's substantive Due Process rights under the Fourteenth Amendment and would violate the Establishment Clause and the Free Exercise Clause of the First Amendment. Fabian should be successful in his effort to oppose the relief sought in the proposed order.

Mona filed a Custody Complaint seeking to have the court impose certain mandates and restrictions on Fabian with respect to raising Dora. Action of state courts and judicial officers in their official capacities is to be regarded as an action of the State within the meaning of the 14th Amendment. *Shelley v. Kraemer*, 334 U.S. 1 (1948). Court enforcement of a private racially restrictive covenant has been deemed to be state action. *Id.* Likewise, if the court signed Mona's proposed order which imposed religiously restrictive mandates, this would provide the required element of state action, which would be vital to Fabian's constitutional arguments.

If this proposed order were to become an order of the court, the state would be acting to restrict Fabian's ability to make decisions regarding Dora's upbringing during his periods of custodial time. Parents have a constitutionally protected right to the companionship and management of their children, which undeniably warrants deference and, absent a powerful countervailing interest, protection. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225 (1975). The due process clause of the 14th Amendment protects the rights of parents to the care and control of their children. *Troxol v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000). The custody, care, nurture and instruction of children resides first in the children's natural parents, as a constitutionally recognized fundamental right. *Lehr v. Robinson,* 463 U.S. 248, 103 S.Ct. 2985 (1983). The substantive due process right to raise children and make choices regarding the upbringing of one's family also has been addressed and confirmed in the context of educational decisions. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Meyer v. Nebraska*, 262 U.S. 390 (1923).

So long as a parent adequately cares for his or her children there will normally be no reason for the state to inject itself into the private realm of the family or further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. *Troxel,* supra, 530 U.S. at 58. The Due Process Clause of the Constitution does not allow a state

to infringe on the fundamental right of parents to make such decisions regarding the upbringing and parenting of the children, merely because the court believes the court could make a "better" decision. *Id.* at 61. This constitutional right of parents still exists even if a parent has not been a "model" parent. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388 (1982). The statist notion that government may supercede parental authority in order to ensure bureaucratically or judicially determined "best interests" of children has been rejected as repugnant to American tradition. *Parham v. J.R.,* 442 U.S. 584, 99 S.Ct. 2493 (1979).

Therefore, because as Dora's father, Fabian has the fundamental right to make decisions regarding Dora's upbringing, it is likely that Fabian will be successful in opposing the proposed order which would have prohibited Fabian from taking Dora to ROT meetings without a credible showing of substantial threat of physical or mental harm to Dora. The order would interfere with Fabian's fundamental substantive Due Process right to parent Dora in the manner he wishes. The facts state that she was happy and flourished under Fabian's care and therefore it is unlikely that the court would have reason to interfere with the private realm of the family or further question the ability of Fabian to make the best decisions concerning the rearing of Dora.

This proposed order would also force Fabian to attend and take Dora with him to religious services during his custodial time. The First Amendment of the Bill of Rights provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. State action which forces an individual to either go to or not go to or participate in a religion violates the Establishment Clause of the constitution. *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504 (1947). The Establishment Clause and the Free Exercise Clause of the constitution require that the state neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief. *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560 (1963). Constitutionally recognized parental authority over upbringing of children is augmented by the Free Exercise and Establishment Clause of the 1st Amendment with regard to religious upbringing of children. *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. 1990).

In matters of religious upbringing, the United States Supreme Court has held that parental authority may be encroached upon only if there is a showing of substantial threat of physical or mental harm to the child or to the public safety, peace, order or welfare. *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972). Each parent may pursue whatever course of religious doctrine the parent sees fit during periods of custodial time. In order to restrict the parent in lawful custody, the objecting parent must demonstrate a substantial risk of harm in absence of the restriction posed. *Zummo*, *supra* at 1157.

It is unlikely that the court would compel Fabian to attend and take Dora to religious services during his custodial time against his wishes and beliefs. This could appear to be advocating religion over Fabian's choice of not participating in organized religion and therefore violate the Free Exercise Clause under the First Amendment. Such an order could also be viewed as the state, through the court system, preferring one religion over non-religion and implicate the Establishment Clause of the federal constitution as well.

Therefore, it is probable that the court would allow each parent to determine whether or not Dora would participate in any activities, religious or otherwise, during his or her custodial time as each parent has a constitutionally protected substantive Due Process interest under the 14th Amendment to make such decisions regarding the parenting of his or her children. Furthermore, the proposed court order would likely violate the Free Exercise Clause and

Establishment Clause by preferring religion over the anti-organized religion philosophy of ROT; by becoming entangled with and advancing Mona's specific religion; and by depriving Fabian of a choice about which, if any, religion he wishes to practice.

Since Mona did not bring an action to enforce the 1991 agreement, a discussion of the enforceability of the private 1991 agreement between Mona and Fabian or an analysis of the private agreement under contract principles is not warranted. However, even if Mona had filed an action in contract seeking to enforce the written agreement from 1991, the result would be the same because it is unlikely that the agreement would have been enforced by Court order because enforcement would have encroached upon the fundamental right of Fabian to question, doubt and change his religious convictions and expose Dora to the new found beliefs. See *Zumo v. Zumo*, 384 Pa.Super. 30, 574 A.2d 1130 (1990)

2. Terry should file a declaratory judgment action to determine the legal status of her relationship with Fabian in which the court would likely apply the law of State M and find that a common law marriage of Fabian and Terry exists.

Declaratory Judgment actions are expressly authorized in Pennsylvania when a party seeks a declaration of existing legal rights, duties, or status of parties if the determination will aid in determination of a justiciable controversy. *Warner v. Continental/CNS Ins. Companies***,** 688 A.2d 177 (Pa. Super. 1997).

Specifically, Pennsylvania statute provides:

42 Pa.C.S.A. Section 7532. General scope of declaratory remedy

Courts of record, within their respective jurisdictions, shall have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

Additionally, Pennsylvania statute specifically provides that a Declaratory Judgment is proper when there is a question of whether a valid marriage exists:

23 Pa.C.S.A. Section 3306. Proceedings to determine marital status

When the validity of a marriage is denied or doubted, either or both of the parties to the marriage may bring an action for declaratory judgment seeking a declaration of the validity or invalidity of the marriage and, upon proof of the validity or invalidity of the marriage, the marriage shall be declared valid or invalid by decree of the court and, unless reversed upon appeal, the declaration shall be conclusive upon all persons concerned**.**

Thus, Terry should file a declaratory judgment action to determine her marital status.

The next question is which state law would be applied to determine whether a common law marriage exists.

Restatement (Second) of Conflict of Laws provides that:

Section 283 Validity of Marriage

(2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

The **Restatement** defines the term "state where the marriage was contracted" and explains that the word "marriage" includes a common law marriage:

> The "state where the marriage was contracted" means the state where the marriage was celebrated or where some other act was done that is claimed to have resulted in the creation of a marriage status. In some states, the status can be created by an act other than a formal ceremony, such as in the case of a common law marriage. **Restatement (Second) of Conflict of Laws Section 283 (1971)**, *Comment* on Subsection (2).

Pennsylvania follows the general rule that the validity of a marriage is determined by the law of the place where it was contracted. *Commonwealth v. Case*, 200 Pa. Super. 200, 189 A.2d 756 (1963) *citing Jewett v. Jewett*, 196 Pa. Super. 305, 175 A.2d 141 (1961).

Pennsylvania would apply the law of State M in the Declaratory Judgment action to determine whether or not Terry and Fabian were married. State M statute recognized common law marriages and defined common law marriage as "two otherwise unmarried adults cohabiting as man and wife for at least ten years." There is nothing in the facts to indicate that either Terry or Fabian were ever married to other individuals. Terry and Fabian lived as husband and wife in State M for more than ten years. Therefore, Terry and Fabian met the requirements for a common law marriage in State M. State M also had the most significant relationship to Terry and Fabian, the spouses, and the marriage at the time of the marriage. The common law marriage of Terry and Fabian in State M would then be valid and it would not matter whether or not Pennsylvania recognized common law marriage.

Terry should proceed with the Declaratory Judgment action which is likely to determine that Terry and Fabian are married.

3(a). Grammy likely has standing to seek partial physical custody of or visitation with Dora. Although it could be found by the court that granting partial physical custody or visitation was in Dora's best interest, Grammy might not be granted either partial physical custody or visitation of Dora because a court could easily find that granting such time with Dora might interfere with the parent-child relationship due to the bitter nature of Grammy's relationship with Mona.

Before a court may analyze and determine the best interests of a child in a custody matter, a party must have standing to seek custody or visitation with a particular child. *Malone v. Stonebrook*, 2004 Pa. Super. 48 (February 27, 2004). Pennsylvania courts generally find standing in third party visitation and custody cases only where the legislature specifically authorizes the cause of action " or "where that party stands *in loco parentis* to the child." *T.B. v.*

L.R.M., 567 Pa. 222, 786 A.2d 916 (2001). Pennsylvania statute specifically provides standing for grandparents to seek partial physical custody or visitation with an unmarried child under certain circumstances and also provides the framework for the determination of such requests:

23 Pa.C.S.A. Section 5313. When grandparents may petition

(a) Partial custody and visitation

If an unmarried child has resided with his grandparents or greatgrandparents for a period of 12 months or more and is subsequently removed from the home by his parents, the grandparents or greatgrandparents may petition the court for an order granting them reasonable partial custody or visitation rights, or both, to the child. The court shall grant the petition if it finds that visitation rights would be in the best interest of the child and would not interfere with the parent-child relationship.

In this instance, Fabian, Terry and Dora moved in and lived with Grammy, who also helped out by providing child care for more than one year. Therefore, Grammy has standing under **23 Pa.C.S.A. Section 5313** to seek partial physical custody of and/or visitation with Dora because Grammy has resided with her unmarried grandchild, Dora, for more than the required 12 month period of time.

Under this statutory provision, the court would then consider whether granting partial physical custody and/or visitation would be in Dora's best interest and whether such partial physical custody and/or visitation would interfere with the relationship between Mona and Dora.

In this grandparent visitation case, the grandparent has the burden of proving that visitation is in the best interests of a child. *Norris v. Tearney*, 422 Pa. Super. 246, 619 A.2d 339 (1993). The paramount concern in a child custody case is the best interests of the child, based upon a consideration of all factors that legitimately affect the child's physical, intellectual, moral and spiritual well-being. *Swope v. Swope*, 455 Pa. Super. 587, 689 A.2d 264 (1997).

Even though contact with Grammy could be considered to be in Dora's best interest, the court must consider whether custodial or visitation rights would interfere with the parent-child relationship. In this case, it is unlikely that the court would grant Grammy the partial physical custody and/or visitation she is seeking because Grammy and Mona have had a very hostile relationship for more than 10 years. Granting either partial custody or visitation to Grammy, who made it very clear to Dora how she believed Dora's mother had abandoned Dora and Grammy, may interfere with Dora's relationship with Mona. Although Grammy could make an argument that she has stood in loco parentis to Dora because she provided a home and cared for her after school on weekdays, the argument is not likely to be successful because Fabian and Terry were acting as Dora's parents during that time.

In *Troxol v. Granville*, the United States Supreme Court struck down as overly broad a Washington State statute which provided that any third person could petition the court at any time for visitation with a child and the court could order visitation when it served the best interest of the child. *Troxol v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000). The Supreme Court held that this particular Washington State provision impermissibly infringed upon the due process clause of the 14th Amendment right of parents to rear their children by permitting any third party to seek visitation with a child based solely on the child's best interest. *See Troxol*. In

contrast, the Pennsylvania statute discussed above is narrowly tailored to give grandparents, specifically, standing to seek and gain custody and/or visitation under certain, limited circumstances. As recently as May 2004, the Pennsylvania Superior Court held that the Grandparents' Visitation Act is constitutional and, by distinguishing one of the Pennsylvania provisions as being remarkably more narrow than *Troxol*, concluded that the parent's substantive due process rights were not violated. *Fausey v. Hiller*, 851 A.2d 193 (Pa. Super. 2004).

3(b). Terry will probably be successful in obtaining visitation with Dora by arguing that she stands in loco parentis to Dora because Terry has acted as a parent to Dora for more than 10 years.

Terry would have standing to seek partial custody of and/or visitation with Dora under the theory of *in loco parentis*. Individuals who have stepped into the shoes of a parent have the chance to litigate fully the issue of whether that relationship should be maintained even over a natural parents' objection**.** *J.A.L. v. E.P.H.*, 453 Pa. Super. 28, 682 A.2d 1314 (1996). Grandparents, as well as other individuals who are unrelated to a child, have achieved status to seek partial custody or visitation through the doctrine of *in loco parentis* when they have acted as a parent to a child and assumed responsibility for raising the child*. Albright v. Com. Ex rel. Fetters*, 491 Pa. 320, 421 A.2d 157 (1980), *Bupp v. Bupp***,** 718 A.2d 1278 (Pa. Super. 1998).

The phrase *in loco parentis* refers to a person who puts herself or himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. *Commonwealth ex rel. Morgan v. Smith*, 429 Pa. 561, 241 A. 2d 531 (1968). The status of in loco parentis embodies two ideas: first, the assumption of parental status, and second, the discharge of parental duties**.** *Id*. at 533.

Clearly, Terry has acted *in loco parentis* to Dora by caring for and nurturing her for more than 10 years. Terry has standing to seek partial physical custody and/or visitation because she has acted as a parent. Although Terry is not a blood relation to Dora, the court would likely find that to continue the relationship would be in Dora's best interest. The court would likely not destroy the close personal relationship which has developed and has provided Dora with the only female "parent" she has known. The facts also disclose that Dora was deeply saddened by the separation from Terry, which may indicate that the relationship was and is extremely important to Dora. Therefore, because it appears to be consistent with Dora's best interest and based on an *in loco parentis* theory, it is likely that Terry would be granted partial physical custody and/or visitation with Dora.

Question No. 5: Facts and Interrogatories

In 1980, Al purchased Blackacre which was located in a small, quiet subdivision in C County, Pennsylvania. The Grantor/Developer recorded the subdivision plan in 1965 which provided: "None of the Lots shall be used for any purpose other than residential use." Al's deed and those of the 14 other property owners in the subdivision contained a similar provision.

In 2003, Al, who was an accountant, began using a large portion of his home on Blackacre as an office where he met with clients. This arrangement was so convenient that he no longer rented office space in the city.

Paul lived next door to Al on Whiteacre and complained about Al's home office. Al responded that he was not hurting anyone and he knew of other longstanding home businesses in the subdivision. Pam had an insurance office in her home, Mary operated a beauty shop in her home and Meg was operating a daycare center in her home. No one had objected to those different uses of the property within the subdivision even though the volume of traffic had increased substantially.

Al and his sister, Sue, always maintained a close relationship. Sue wanted to have cosmetic surgery but knew that she could not pay for it. Al told her: "Go ahead and have the surgery. I will pay your medical expenses in full." Sue proceeded to undergo the surgery and presented Al with her medical bills. Al apologized and said that he would not pay her medical bills because he had incurred unanticipated legal fees as a result of Paul's action against him. Sue became very distraught when she received past due notices from the medical providers and began making payments to them.

After Paul's dispute with Al was resolved in court, Paul entered into a valid, written Agreement of Sale with Vic to purchase a home and lot (the Estate) in C County. The Agreement provided that time was of the essence and that if Vic could not deliver marketable title to the Estate by March 1, 2004, Paul could rescind the contract and recover his deposit. Paul paid a $15,000 deposit to Vic and closing was set for March 1, 2004. Paul retained a qualified title searcher who reported that a forty foot strip of land between Vic's home and his neighbor's home was not included in any prior deed to Vic although it was included as part of the Estate in the Agreement of Sale.

Upon learning of the title search, Paul notified Vic and advised him that he would not close if the title was not marketable by March 1, 2004. Vic accurately explained that the forty foot strip originally belonged to the adjoining landowner but since he bought his property in 1982, Vic removed trees, mowed the grass and planted flowers on the forty foot strip and used it for frequent family picnics. Vic stated that on two occasions the adjoining landowner told him that the forty foot strip did not belong to Vic but had never taken any legal action to assert ownership of the strip of land. On March 1, 2004, Paul failed to appear for the closing and Vic refused to return Paul's deposit.

1. Paul filed an action seeking to compel Al to cease using his home for business purposes.

a. Upon what legal theory should Paul rely in his action?

b. What defenses should Al assert at trial and what is his likelihood of success?

2. Sue filed an action in C County Court to recover damages from Al for the medical expenses she incurred undergoing the surgery. Upon what legal theory should Sue rely and will Sue prevail?

3. Paul filed an action to rescind the Agreement of Sale and recover his deposit based on a claim that Vic could not convey title to the forty foot strip of land under the terms of the Agreement. What argument should Vic raise in response to this claim and will Vic be successful?

Question No. 5: Examiner's Analysis

1a. Paul should assert that Al is violating a restrictive covenant contained in the subdivision plan and Al's deed.

The restrictive covenant contained in the subdivision plan and deed to Al prohibits him from using his property for non-residential purposes. Restrictions on the use of land are not favored by the law in Pennsylvania because they may interfere with an owner's free enjoyment of his property. *Baumgardner v. Stuckey,* 735 A.2d 1272, 1274 (Pa.Super. 1999). While restrictive covenants are legally enforceable, they are strictly construed and will not be enlarged by implication. *Id*.

Both the deeds to the property owners and the subdivision plan make specific reference to the restrictive covenant. The restrictions in the subdivision plan and deeds are enforceable in equity by an interested deed holder. *See*: *Perrige v. Horning*, 440 Pa.Super 31, 39, 654 A.2d 1183, 1187 (1995); *Philadelphia Fresh Food Terminal Corporation v. M. Levin and Co.*, 239 Pa.Super. 287, 297-298, 361 A.2d 886, 891, 892 (1976).

The restrictive covenant at issue is clear and unambiguous. The property can only be used for residential purposes. Al is using his home for business as well as residential purposes and is therefore in violation of the restrictive covenant.

1b. Al should argue that the character of the neighborhood has changed so that the covenant is no longer enforceable.

Al should argue that the character of the neighborhood has changed and the neighborhood is no longer residential because of the residents' use of their homes for business purposes. Changes in circumstances and surroundings may result in the restrictions no longer being useful. A deed restriction might not be enforced when "there has been a change of surroundings in the neighborhood or in the character of the improvements and in the purpose to which the restrictions are applied." *Pastore v. Lake Shore Maintenance Association*, 197 Pa.Super. 419, 423, 178 A.2d 776, 778 (1962). Thus, a restriction will not be enforced if its purpose and intent have been materially altered and it no longer provides substantial benefit to the party seeking to enforce it. *Rieck v. Virginia Manor Co.*, 251 Pa.Super. 59, 380 A.2d 375 (1977).

The original subdivision plan shows an intent to maintain a purely residential neighborhood. With the passage of time, other residents of the subdivision have used their homes for business purposes causing a substantial increase in the volume of traffic. Arguably, enforcement of the restriction as to Al will not result in the preservation of a purely residential community which was the benefit originally intended. The benefits of a residential community had already been lost. Even if Al ceased to use his home office, the goal originally intended by the restriction could not be achieved in light of the other violations of the restrictive covenant in the subdivision.

Moreover, neither Paul nor his neighbors took legal action against any of the other residents of the subdivision who have violated the restrictive covenant. Paul was aware of the fact that the restrictive covenant had been in existence for several years and yet took no action when other residents violated the covenant. The Court will not enforce a covenant when its terms no longer provide a substantial benefit to the owner of the dominant tenement because the

predominant character of the neighborhood has changed as a result of the parties seeking to enforce the covenant having acquiesced in prior violations without complaint. See *Rome v. Rehfuss*, 391 Pa. 82, 137 A.2d 233 (1958)

One could argue that the predominant character of the neighborhood has not changed from residential to commercial by the mere use of several homes for business purposes, where the houses were still used as residences and maintained the exterior appearance of residences. However, if Al can show that the predominant character of the neighborhood has changed as a result of the number of in-home businesses and the increased volume of traffic and that as a result a strict adherence to the terms of a restrictive covenant would be ineffective to achieve the end desired, he will be successful in defending against the enforcement of the restrictive covenant.

A closely related alternative argument Al may raise is that where violations have been permitted to such an extent that the entire restrictive plan has been abandoned, objections to further violations will be barred and enforcement of the restrictive covenant denied. *Scott v. Owings,* 223 Pa.Super 481, 302 A.2d 423, 425 n4 (1973). The court would consider whether the three other violations in a development of 15 homes indicates an intent to abandon the entire restrictive covenant. The court will examine evidence presented in support of Al's defense to make this determination.

2. Sue should assert a claim against Al under the doctrine of promissory estoppel and she will likely prevail.

The doctrine of promissory estoppel or detrimental reliance is recognized by Pennsylvania courts and allows a party under certain circumstances to enforce a promise although the promise is not supported by consideration. *Thatcher's Drug Store v. Consolidated Supermarkets, Inc.*, 535 Pa. 469, 636 A.2d 156 (1994). Courts may find a substitute for consideration under the doctrine of promissory estoppel. *Weavertown Transport Leasing, Inc. v. Moran*, 834 A.2d 1169 (Pa.Super. 2003).

Pennsylvania courts have adopted the Restatement (Second) of Contracts § 90 (1981) which provides:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Restatement (Second) of Contracts § 90(1) (1981).

The party asserting a claim of promissory estoppel has the burden of establishing all of the essential elements. *Thatcher's Drug Store v. Consolidated Supermarkets, Inc.*, *supra*, 636 A.2d at 160. The essential elements are inducement and justifiable reliance on that inducement to one's detriment so that injustice can be avoided only by enforcement of the promise.

There was no consideration for Al's promise to pay Sue's medical bills. He should reasonably have expected his promise to induce action on Sue's part which it did when she decided to undergo the cosmetic surgery and proceeded to do so. The facts indicate that Sue knew she could not pay for the surgery and decided to go forward only after Al made his promise.

A court would likely find that Al's promise induced Sue's reliance and that Sue's reliance was reasonable.

The final requirement is that enforcement of the promise must be necessary to avoid injustice. One of the factors that a court may consider in determining whether a promise has satisfied this element is "the reasonableness of the promissee's reliance." *Thatcher's Drug Store*, *supra*, 636 A.2d at 160, citing Restatement (Second) of Contracts § 90, cmt. b. The facts state that Sue and Al had a close relationship and there are no facts stated that would indicate that Sue had any reason not to believe that Al would pay her medical bills. A court would likely find that enforcement of the promise is necessary to avoid injustice.

Sue will probably prevail in her action against Al based on the theory of promissory estoppel.

3. Vic should argue that he has title to the strip of land by adverse possession but his argument will probably not succeed in defeating Paul's claim because he could not convey marketable title on March 1, 2004.

One who claims title to real property by adverse possession must affirmatively prove that he or she had "actual, continuous, exclusive, visible, notorious, distinct, and hostile possession of the land for 21 years." *Glenn v. Shuey*, 407 Pa.Super. 213, 595 A.2d 606 (1991) citing *Conneaut Lake Park, Inc. v. Klingensmith*, 362 Pa. 592, 594-95, 66 A.2d 828, 829 (1949). Each of these elements must be proven in order to establish title by adverse possession. In Pennsylvania, the statutory period required for adverse possession is 21 years. 42 Pa.C.S.A. § 5530(a)(1).

Actual possession of land means dominion over the land; it is not the equivalent of occupancy. *Brennan v. Manchester Crossings, Inc.*, 708 A.2d 815, 817 (Pa.Super. 1998). The determination of actual possession for purposes of adverse possession depends on the facts of the case and the nature of the land. *Id*. 708 A.2d at 818.

Visible and notorious possession necessary to establish title by adverse possession is possession that is evidenced by conduct which places a reasonable person on notice that his or her land is being held by the claimant as his own. *Id*. 708 A.2d at 818, citing *Sterner v. Freed*, 391 Pa.Super 254, 570 A.2d 1079 (1990).

Exclusive and distinct possession need not be absolutely exclusive but of the type that would characterize an owner's use. The possession must generally exclude others. *Reed v. Wolyniec*, 323 Pa.Super. 550, 471 A.2d 80 (1983).

The term "hostile" used in this context implies an assertion of ownership rights adverse to that of the true owner and all others. *Schlagel v. Lombardi*, 337 Pa.Super. 83, 486 A.2d 491 (1984). It is not required that ill will exists between the claimant and the true owner and the element of hostility will be implied if all of the other elements of adverse possession are established. *Brennan v. Manchester Crossings, Inc.*, *supra,* 708 A.2d at 818.

The possession must have been continuous for 21 years. Continuous possession does not require daily use of the premises or remaining on the land at all times. In *Inn Le'Daerda, Inc. v. Davis*, 241 Pa.Super. 150, 360 A.2d 209 (1976), the court found that the use and maintenance of a lawn for the statutory period was sufficient to establish adverse possession of the land.

Here, Vic removed the trees, mowed the grass and planted flowers on the strip of land. He openly held family gatherings on this property. Such use of the premises was sufficiently open to put the true owner who resided beside the strip of land on notice that Vic was using the land in a manner consistent with ownership rights. His maintenance of the grass and use of the premises for family gatherings would clearly be inconsistent with the true owner's rights. Although Vic did not necessarily use the premises daily, his permanent removal of trees and continued maintenance and use of the property would satisfy the requirement for continuous possession. The owner of record even expressly objected to Vic's possession on two occasions. Vic has also satisfied the statute's requirement of 21 years of possession. A court would probably conclude that Vic had acquired title to the forty foot strip of land by adverse possession.

A second issue arises as to whether Vic's title, so acquired, was marketable at the time of the proposed closing. The Pennsylvania Superior Court has defined marketable title:

> A marketable title is one that is free from liens and encumbrances and 'which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and ready to perform his contract, would, in the exercise of that prudence which businessmen ordinarily bring to bear upon such transactions, be willing to accept and ought to accept.' *Barter v. Palmerton Area School District*, 399 Pa.Super. 16, 20, 581 A.2d 652, 654 (1990) quoting 77 Am.Jur.2d, Vendor and Purchaser, § 131 (1975).

In general, marketable title means that title is reasonably free from doubtful questions of law or fact and not likely to result in litigation. When the character of title is such that it leads to a reasonable belief that the purchaser may be called upon to defend possession or title or be involved in litigation regarding title, courts do not view it as marketable title. *Id*. Where, however, there is only a bare possibility or remote probability that there may be litigation with respect to title, the title is not considered unmarketable. *Rice v. Shank*, 382 Pa. 396, 115 A.2d 210 (1955).

As a general rule, title derived from adverse possession may constitute marketable title. *Smith v. Windsor Manor Co.*, 352 Pa. 449, 43 A.2d 6 (1945). There is not a general rule, however, as to when an alleged title by adverse possession is shown with sufficient clarity to justify compelling an unwilling buyer to accept it. This issue necessarily depends on the facts and circumstances of each case. 46 A.L.R. 2d 544. It is rare for a court to find marketable title based on an adverse possession claim prior to a hearing where all parties in interest are present because proof of the elements of adverse possession necessarily rests on parol evidence. *See Hoover v. Pontz*, 271 Pa. 285, 114 A. 522 (1921).

Thus, title may not be marketable until such time as the possessor has the title acquired by adverse possession evidenced by some publicly recorded document. BOYER, HOVENKAMP AND KURTZ, THE LAW OF PROPERTY 4th Ed. § 4.5 (1991). The title may be good title, and the person claiming by adverse possession may later win in a lawsuit by the record titleholder who might claim that one of the elements of adverse possession was not satisfied, but title may still not be marketable. Indeed, at trial, Vic may be able to establish all of the elements of adverse possession. At the time of the closing scheduled for March 1, 2004, however, Vic had not proven title by adverse possession. Paul could refuse to accept title prior to an adjudication on

the issue of adverse possession because there would exist a reasonable possibility that the adjoining landowner might challenge the title.

The Agreement of Sale specified that time was of the essence. Such a clause requires performance by the specified date unless extended by the oral agreement or waived by the conduct of the parties. See: *Davis v. Northridge Development Assoc.*, 424 Pa.Super. 283, 622 A.2d 381 (1993). Because Vic had not established adverse possession by March 1, 2004, it cannot be said that Paul breached his contract. Accordingly, the court would find in favor of Paul on his action to rescind the Agreement of Sale and recover his deposit.

Question No. 6: Facts and Interrogatories

In 2001, Pam designed and obtained a patent on a machine that could stamp images on rubber pads for use as computer mouse pads. Pam entered into an agreement with StampCo to manufacture her machine for her. The agreement prohibited further manufacture or sale of the machine by StampCo without Pam's consent. Pam then formed PadCo, a Pennsylvania corporation, to produce and market customized mouse pads.

Mike is the sole shareholder of Marketing, Inc. ("MarCo"), a Pennsylvania corporation he had formed on his own. MarCo has no bylaws, minutes, stock certificates, letterhead or tangible assets; but, does have a checking account bearing its name. Mike routinely pays his personal expenses with checks drawn on the MarCo account.

Last year, Pam met Mike. Mike was impressed with PadCo's customized mouse pads and offered to have MarCo market them for PadCo. PadCo contracted with MarCo to market the mouse pads. As part of the deal MarCo would collect payments from customers, retain a five percent commission and remit the balance to PadCo. The arrangement worked so well that Pam decided to give Mike ten percent of the outstanding PadCo stock. Soon, PadCo could not keep up with orders. Frustrated, Mike demanded that Pam sell him a controlling interest in PadCo so he could "run the company properly." Mike told Pam he would have MarCo withhold $50,000 in payments due to PadCo until Pam agrees. Pam has refused his demand.

Mike decided to form NewCo to compete with PadCo; but, has not yet filed articles of incorporation for NewCo. Mike visited StampCo to buy a stamping machine. Concerned about Pam's patent, Mike provided StampCo with a letter. The letter, written by Mike, was on PadCo letterhead that Mike had stolen. Mike had signed Pam's name to the letter. The letter stated Pam authorized StampCo to sell a machine to NewCo. Relying on the letter, StampCo and NewCo entered into a written contract to sell NewCo one of Pam's stamping machines. Mike signed the contract as president of NewCo.

Worried StampCo might contact Pam; Mike also visited EquipCo, a manufacturer of stamping equipment and met with Ed, EquipCo's president. Mike explained he needed a stamping machine that could stamp on rubber. Mike made it clear he did not know anything about stamping machines and was relying on Ed's expertise to choose the right stamping machine for use with the rubber pads. Although EquipCo's machines had only been used to stamp images on paper products, Ed assured Mike that he would select a machine that could handle stamping on rubber pads. EquipCo delivered the machine two weeks ago. After using the EquipCo machine Mike has determined that, although it operates as a stamping machine should, it is incapable of stamping images on rubber.

Pam has refused all contact with Mike. Mike has overextended MarCo to the point of insolvency. Assume that all of the corporations have their principal place of business in Pennsylvania and that all of the transactions and activities between the corporations occurred in Pennsylvania.

1. On what basis should PadCo attempt to hold Mike liable in an action to recover the $50,000 it is owed by MarCo and with what likelihood of success?

2. Given that NewCo has not yet been formed does Mike have any personal liability to StampCo if StampCo desires to enforce the contract it made with NewCo?

3. Assume for this question only that NewCo was properly formed before Mike met with StampCo and Mike was and is NewCo's president. If StampCo learns that Pam never wrote the letter authorizing the sale to NewCo, does StampCo have any basis to rescind its contract with NewCo?

4. Under the Uniform Commercial Code, what implied warranties might be asserted by a buyer if a product fails to perform and could Mike successfully assert these warranties in an action against EquipCo?

Question No. 6: Examiner's Analysis

1. PadCo should assert the equitable theory of piercing the corporate veil of MarCo in order to find Mike personally liable for the $50,000.

PadCo has a legitimate contractual claim against MarCo for the $50,000 it is owed. MarCo, however, is insolvent. PadCo could file an appropriate action to attempt to recover the $50,000 and ask the court to pierce the corporate veil of MarCo and impose liability upon Mike as its sole shareholder. PadCo should be successful.

Generally, a corporation is an entity distinct from its shareholders even if all of the stock of the corporation is owned by one individual. *Barium Steel Corp. v. Wiley*, 379 Pa. 38, 108 A.2d 336 (1954). Courts generally will uphold the separate corporate existence and not hold a shareholder liable for a corporation's debts. JOHN W. MCLAMB, JR. AND WENDY C. SHIBA, PENNSYLVANIA CORPORATE LAW & PRACTICE, § 5.9, (1993). There are certain circumstances, however, when the corporate entity can be justifiably pierced allowing a claimant to recover from a shareholder.

There is no precise rule or test as to the conditions under which a court should pierce through an entity and impose liability on its shareholders. *Barium, supra at 48, 341.* Piercing a corporate veil is equitable in nature and is driven by the circumstances of each case. "There are, however, two overarching elements required by most jurisdictions. First, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist. Second, the circumstances must indicate that adherence to the fiction of separate corporate existence would sanction fraud or promote injustice." FLETCHER CYC. CORP. § 41.30 (PERM. ED. 1999).

Although there is no specific test or set of elements that must be satisfied or established to pierce a corporate veil there are certain factors that have been established by case law that tend to support piercing a corporate entity. Some of these factors are whether a corporation is inadequately capitalized, fails to observe corporate formalities, fails to issue stock, fails to pay dividends, operates without profit, commingles corporate assets with the personal assets of its shareholder(s), was insolvent when the contract was entered into and is devoid of corporate records. *Id.* The Pennsylvania Supreme Court has stated, "the corporate veil is properly pierced whenever one in control of a corporation uses that control or corporate assets to further one's own personal interests." *College Watercolor Group, Inc. v. Newbauer,* 468 Pa. 103, 117, 360 A.2d 200, 207 (1976). Essentially, if the corporation exists merely in name only and is used as the alter ego of the shareholder a court may pierce the corporate veil and impose liability directly on the shareholder.

In the instant case, MarCo has no assets. Mike has failed to observe corporate formalities; i.e., MarCo has no bylaws, minutes or issued any stock certificates. It does not have its own letterhead. Even though it has a checking account in its name, Mike routinely uses it as his personal checking account. Finally, Mike threatened to have MarCo withhold corporate funds from PadCo in order to advance his personal interest in PadCo. Given these factors PadCo could be successful in convincing a court to pierce the corporate veil of MarCo and impose liability on Mike for its claim. *See, College Watercolor Group, Inc., Id.*

2. As a promoter Mike could have personal liability to StampCo if StampCo chooses to enforce the contract.

A "promoter" is a person who assumes to act on behalf of a corporation to be formed that has not yet been incorporated. Generally, a promoter is someone who takes an active part in creating, organizing and projecting the corporation. FLETCHER CYC. CORP. § 189 (PERM. ED. 1999). Generally, an officer of a corporation not yet formed who executes a preincorporation contract has the legal status of a promoter. *Id.*

Generally, in the absence of an express or implied agreement to the contrary, a promoter is liable on a preincorporation contract even though it purports to have been on behalf of the corporation to be formed. Id. at § 215. "Even though they purport to act on behalf of the proposed corporation and not for themselves, promoters may be held personally liable on contracts made by them prior to the actual formation of the corporation. In the absence of a novation or an agreement by the other party to a release of liability, the promoter will remain liable after the corporation is formed." JOHN W. MCLAMB, JR. AND WENDY C. SHIBA, PENNSYLVANIA CORPORATE LAW & PRACTICE, § 2.2, (1993). To a large extent promoter liability draws from agency principles. The promoter is personally liable given that fact that his or her principal does not yet exist.

In the instant case, Mike was acting as a promoter. He negotiated for StampCo to enter into a contract with NewCo, a corporation that he never formed. The facts do not indicate that he had an agreement with StampCo that StampCo would look only to NewCo to enforce its rights under the contract. Accordingly, StampCo should be successful in asserting a claim directly against Mike, as a promoter, under the contract. *See, RKO-Stanley Warner Theaters, Inc. v. Graziano et. al,* 467 Pa. 220, 355 A.2d 830 (1976).

3. StampCo could rescind the contract with NewCo by arguing that it was fraudulently induced into entering into the contract by Mike, NewCo's president.

To establish fraud one must show that the person allegedly engaging in the fraudulent activity (1) has made a false material assertion; (2) had knowledge of the falsity or a high degree of disregard for the truth; (3) intended the other party to rely on the false assertion; (4) that he or she has reasonably relied on the assertion; and (5) that as a result of the reliance damage has or will occur. RICHARD A. LORD, WILLISTON ON CONTRACTS, § 69:3 (4TH ED. 2003). Citing the Restatement of Contracts, the Pennsylvania Supreme Court has stated, "One may not, with impunity, induce another to contract by fraudulent misrepresentations. 'Where a party is induced to enter into a transaction with another party that he was under no duty to enter into by means of the latter's fraud . . . the transaction is voidable as against the latter.'" *College Watercolor Group, Inc. v. Newbauer,* 468 Pa. 103, 115, 360 A.2d 200, 206 (1976). In *College* the court ultimately ruled that the fraud of the party who induced the plaintiff to enter into a contract based upon misrepresentation supported rescission of the contract by the court.

In the instant case, Mike as President of NewCo, clearly misrepresented Pam's consent to StampCo. It was not an innocent misrepresentation. Mike prepared a letter and signed Pam's name to the letter without her authorization. StampCo relied on the letter. If StampCo is compelled to supply the machine they might be exposed to suit by Pam for infringement of her patent. Under these circumstances StampCo should be successful in rescinding its contract with NewCo.

4. The buyer of a product from a merchant that fails to perform may have available the implied warranties of merchantability and fitness for particular purpose. Mike could successfully claim breach of implied warranty of fitness for particular purpose; but, most likely will fail on a claim of breach of warranty of merchantability.

When a merchant sells goods that do not perform, certain implied warranties arise under the Pennsylvania Uniform Commercial Code (the "Code"). These implied warranties include a warranty of merchantability and a warranty of fitness for particular purpose. *See, 13 Pa. C.S.A. §§ 2314 and 2315, respectively.* Under the Code, EquipCo is clearly a merchant; i.e., one engaged in regular sale of goods of the type sold to Mike. *See, 13 Pa. C.S.A. 2104.* Accordingly, one must review the warranty of merchantability and the warranty of fitness for particular purpose for applicability.

Section 2314 of the Code states, "unless excluded or modified (section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Generally, to be merchantable goods must be "fit for the ordinary purposes for which such goods are used." JAMES J. WHITE AND ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, § 9-8 (4TH ED. 1995). The question thus becomes was the stamping machine fit for its ordinary purpose? The facts clearly indicate that the stamping machine operated as a stamping machine should. Based upon this fact it appears that a claim based upon the warranty of merchantability would fail unless the machine was considered to be a specially manufactured custom good in which its ordinary purpose might be stamping on rubber.

Mike, however, could successfully assert a claim based upon breach of implied warranty of fitness for a particular purpose. Section 2315 of the Code provides:

Where the seller at the time of contracting has reason to know:

(1) any particular purpose for which the goods are required; and
(2) that the buyer is relying on the skill or judgment of the seller to select or furnish suitable goods;

there is unless excluded or modified under section 2316 (relating to exclusion or modification of warranties) an implied warranty that the goods shall be fit for such purpose.

EquipCo clearly knew of the particular need that Mike had for the stamping machine; i.e., it had to be capable of stamping images on rubber pads. It also appears clear that Mike was relying on Ed to select an appropriate machine and that Ed was aware of Mike's reliance on Ed to choose an appropriate machine. Likewise, there is no evidence of any type of disclaimer of warranty by EquipCo. Accordingly, Mike should be successful in asserting a claim based upon breach of implied warranty of fitness for particular purpose given the fact that the machine simply could not stamp the images on the rubber pads.

Grading Guidelines

Question No. 1

1. **Right of Adopted Person to Inherit From Natural Grandparent**

- An adopted person is considered the issue of her adopting parent or parents and is not considered as continuing to be the child of her natural parent or parents except in distributing the estate of a natural kin, other than the natural parent, who has maintained a family relationship with the adopted person.

- Under applicable intestate succession laws, the estate of one who does not leave a spouse first passes to his issue and if but one person qualifies as issue such an estate will pass to that one person.

3 points

Comments: Applicants are expected to recognize that Darlene will inherit from George even though adopted out of George's family because George is her natural kin other than her father and because George has maintained a family relationship with her up to and including the time of his death. Under the applicable intestacy laws, Darlene, under the facts, is George's only intestate heir and, as such, she will take all of his estate.

2. **Modification of Will by Circumstances**

- If a testator is divorced after making his will, any provision in the will in favor of the divorced spouse shall become ineffective unless it appears from the will that the testator had a contrary intent.

- If a testator marries after making his will, the surviving spouse shall, at least, receive an intestate share of his estate unless a contrary intent is evident in the will.

- Unless a contrary intent appears in the will, if a testator adopts a person after making his will, such after-adopted child shall receive an intestate share of the portion of the testator's estate which does not pass to a surviving spouse computed as if there was no surviving spouse.

7 points

Comments: Applicants are expected to recognize that unless a contrary intent appears in Frank's will: 1) Wilma, who is divorced from Frank, after he drew his will, will not take under his will; 2) Wendy, who married Frank after he made his will, will take an intestate share of his estate; and 3) Darlene, who was adopted by Frank after he made his will, will take an intestate share of the portion of his estate which does not pass to Wendy computed as if there were no surviving spouse. Applicants are also expected to recognize that the share of a residuary beneficiary such as Sam can be reduced by statutory modifications of the testator's will.

3. Comparing Basis of Gifted Securities to Basis of Inherited Securities

- The basis of securities received as a gift is generally equal to the basis of the shares in the hands of the donor.
- The basis of securities received by inheritance is generally equal to the value of the securities at the date of death of the decedent.
- A capital loss carryover can be used against capital gains.
- For a taxpayer with both low basis and high basis shares of the same security, the taxpayer when selling part of the securities can choose whether to sell the low basis or high basis securities.
- A taxpayer who has both low basis and high basis shares of the security can when making a gift of a portion of those securities choose whether to gift the high basis or low basis shares.

5 points

Comments: Applicants are expected to recognize that the basis of gifted shares is generally the basis of the donor at the date of the gift whereas the basis of inherited shares is generally the value of the shares at the death of the decedent. Applicants are expected to recognize that a capital loss carryover can be used indefinitely until consumed against gains. Applicants are expected to recognize that, in general, it is advantageous to plan whether high or low basis securities should be the subject of a gift or sale under all the applicable circumstances, including the existence of a capital loss carryover.

4. Organization as a Client

- The lawyer representing a corporation represents the corporation acting through its officers, directors and shareholders.
- When a lawyer who represents a corporation senses a conflict between the corporation and its constituents, the lawyer should explain that the corporation and not its constituents is his client.
- If a lawyer senses a conflict between one associated with the corporation and the corporation in which a violation of a legal obligation to the corporation is evident or which a violation of law may be imputed to the corporation, and where substantial injury to the corporation is likely to result, the lawyer should take steps in the best interests of the organization. Such steps include asking that the conflicted matter be reconsidered, advising that a separate opinion on the conflicted matter should be obtained, and referring the conflicted matter to others in the corporate structure with higher authority.

5 points

Comments: Applicants are expected to recognize the conflict between FranCo and its CEO/Chairman Frank. Applicants are expected to recognize that Larry should explain this conflict to Frank and that Larry represents FranCo, not Frank individually. He should ask Frank to reconsider the conflicted matter, and to request that a separate legal opinion on the conflicted matter be obtained. If the matter is not resolved Larry should take the matter to a higher authority in the corporation such as the board of directors.

Question No. 2

1. Motion to Suppress - Child Pornography

- The initial entry into the house by the Fire Chief and the gathering of evidence to substantiate arson was proper.
- Dr. Al had a reasonable expectation of privacy in his home even though there had been fire damage.
- Since the premises was secured by the Fire Chief whose investigation was complete, a warrantless entry the next day by the detective for investigatory purposes would be contrary to Dr. Al's Fourth Amendment protections.
- The Motion to Suppress the child pornography based upon an illegal search and seizure would be granted by the Court if a search warrant had not been obtained by the detective.

4 Points

Comment: The candidate must recognize that although the entry to fight the fire and determine the cause of the fire was proper, once the arson determination was made and the premises were secured after the fire was extinguished; a subsequent entry by governmental officials for investigatory purposes may only occur with a properly issued search warrant. The child pornography would be suppressed as evidence if a search warrant had not been obtained.

2. Motion to Suppress - Marijuana

- The police properly came into possession of the portable safe which was seized incident to the arrest of Tom and Jerry.
- The portable safe was not contraband and the police had no authority to enter the portable safe.
- The Fourth Amendment requires that a search warrant be obtained prior to the search of the portable safe.
- The Motion to Suppress the marijuana based upon the illegal search and seizure would be granted by the Court.

4 Points

Comments: Just like in the situation dealing with the suppression of the child pornography, the candidate must recognize that Dr. Al had an expectation of privacy in the portable safe and the Fourth Amendment requires the issuance of a search warrant before entry may be made to the portable safe.

3. Voluntary Intoxication

- Jerry's act of taking the tablets was voluntary and the mistake as to the effect of the tablets was immaterial since Jerry assumed the risk of his reaction to the drug.

- Voluntary intoxication is only a defense to reduce first degree murder to a lesser degree.

- Jerry will not be successful in raising voluntary intoxication as a defense.

4 Points

Comments: The candidate must recognize that voluntary intoxication is only a defense in Pennsylvania to reduce first degree murder to a lesser degree. Since Jerry voluntarily took his girlfriend's prescription, he would be unsuccessful in using the defense of voluntary intoxication.

4. Attorney Fred's Disclosure of Information to the Police

- The information Attorney Fred obtained regarding the anticipated burglary was gained though the attorney/client relationship and is confidential.

- The Rules of Professional Conduct do permit the attorney to reveal otherwise confidential information to prevent his client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another.

- The disclosure of information by Attorney Fred was proper under the Rules of Professional Conduct.

4 Points

Comments: The candidate must recognize that although conversations between an attorney and client are confidential there are limited situations where the attorney may disclose such conversations to third parties. Here, in order to prevent the burglary of Dr. Al's house, the attorney properly disclosed the information to the police.

5. Attorney Fred's Disclosure of Information at the Coffee Shop

- The information Attorney Fred obtained from Tom regarding marital bank accounts and burglary were confidential and protected by the attorney/client privilege.

- No exception to the prohibition of disclosure of this information exists and therefore Attorney Fred violated the Rules of Professional Conduct by disclosing this information to patrons at the coffee shop.

4 Points

Comments: The candidate must recognize that the conversation between Tom and Attorney Fred was confidential. No exception under the Rules of Professional Conduct would permit the disclosure of this information at the coffee shop.

Question No. 3

1(a). Intentional Infliction of Emotional Distress

- A claim should be filed against Dr. Payne for intentional infliction of emotional distress.
- Intentional infliction of emotional distress requires extreme and outrageous conduct performed by the Defendant in an intentional or reckless manner which results in severe emotional distress.
- Dr. Payne would be liable for the aggravation of Kim's pre-existing emotional condition.

6 Points

Comments: The candidate is expected to identify the tort of intentional infliction of emotional distress and apply the elements of it to this fact pattern. In addition, the applicant is expected to recognize that Dr. Payne would be liable for the aggravation of Kim's pre-existing emotional condition.

1(b). Compensatory/ Punitive Damages

- Kim will be able to recover compensatory damages which includes all damages reasonably flowing from the tort including the cost of her medical care and a recovery for her increased emotional distress.
- Kim can also recover for punitive damages as a result of Dr. Payne's outrageous conduct.
- Punitive damages are designed to punish and deter outrageous conduct.

7 Points

Comments: The candidate is expected to recognize that Kim can recover both compensatory and punitive damages on the facts of this case and discuss and apply each of those types of damages as they apply to this factual situation.

2. Statute of Limitations

- The statute of limitations for negligence in Pennsylvania is generally two (2) years.
- Where the existence of any injury cannot be reasonably ascertained, the statute of limitations does not begin to run until such time as the injury's existence is known or is discoverable by the exercise of reasonable diligence.

5 Points

Comments: The candidate is expected to recognize that the statute of limitations in Pennsylvania is generally two (2) years but in certain circumstances the statute will not begin to run until the Plaintiff knows or by the exercise of reasonable diligence should know the existence of an injury and its cause. Further, the candidate should recognize that under the facts of this case the statute of limitations is not likely to begin to run until July 30, 2002 and that there is still time to file a negligence claim.

3. Admissibility of Settlement Offers

- Pennsylvania Rules of Evidence generally exclude offers of settlement.

2 Points

Comments: The candidate is expected to recognize that the Pennsylvania Rules of Evidence generally exclude settlement offers made in compromise negotiations and that said offers would not be admissible at trial. Under these facts, the $2,500 settlement offer by Dr. Payne to Kim would likely not be admissible.

Question No. 4

1. Free Exercise Clause/Establishment Clause/14th Amendment Substantive Due Process

- 14th Amendment Due Process right of parents to make decisions regarding the care and control of children and bring them up
- Court order would constitute state action for constitutional purposes
- Issuance of the proposed order would implicate the Free Exercise Clause
- Free Exercise Clause does not permit a state to force someone to practice a religion
- Issuance of the proposed order would implicate the Establishment Clause
- Establishment Clause does not permit a state to advance religion or favor one religion over another or select religion over no religion

- Proposed order would advance Mona's religion and violate Fabian's rights to raise Dora and to make a choice regarding religion and to practice or not practice religion

8 points

Comments: Applicant should identify and define the federal constitutional grounds implicated by the proposed custody order as the 14th Amendment due process rights of parents to the custody and control and upbringing of their children, the Free Exercise Clause and the Establishment Clause, apply the facts and conclude that the proposed order would likely not pass constitutional muster.

2. Declaratory Judgment/Conflict of Laws

- Terry should file a declaratory judgment action for the purpose of determining the status of rights, including marital status

- A choice of law/conflict of law analysis is required

- Pennsylvania would likely look to the law of State M because State M was the place where the act took place which resulted in the creation of a marriage and Terry and Fabian had the closest relationship to that state at the time of the alleged marriage

- The general rule is that if the marriage meets the requirements of the state where it was contracted, it will be recognized as valid everywhere

- Terry and Fabian were common law married in State M because they were not married to other people and lived together as husband and wife for more than 10 years which was the legal standard for establishing a common law marriage in State M

- Pennsylvania would likely recognize the law of State M and declare the common law marriage valid

5 points

Comments: Applicant should recognize that a declaratory judgment action would be the procedure for Terry to pursue a legal determination of her marital status, and that in deciding the matter the court would apply the law of State M. Applicants should understand that Terry and Fabian are common law married under the law of State M and reach a well reasoned conclusion that the common law marriage of Terry and Fabian would likely be recognized in Pennsylvania.

3. Custody/Grandparent Visitation/*In Loco Parentis* Status

- Dora has lived with her grandmother (Grammy) for a little more than a year

- Grammy likely has standing to seek partial custody of and/or visitation with Dora under Pennsylvania statute because Dora has lived with Grammy for more than 12 months

- Courts consider the best interest of the child when making a determination regarding custody or visitation

- Granting partial custody of and/or visitation with Dora may be in Dora's best interest but the statute also requires that the visitation not interfere with the parent-child relationship

- Bitterness of Grammy's relationship with Mona would likely mean no partial custody and/or visitation because it might negatively impact the relationship between Mona and Dora

- Grammy might be awarded visitation with a caveat that Grammy not criticize Mona in front of Dora

- Terry has *in loco parentis* standing to seek at least visitation with Dora because she has acted as a parent to Dora for more than 10 years

- Dora was sad at the separation from Terry, and time with Terry would most likely be in Dora's best interest because Terry nurtured and raised Dora and they have a close relationship

- Terry would probably succeed in obtaining visitation with Dora

7 points

Comments: Applicant should recognize that third parties may have standing to seek partial custody or visitation by statute or by being *in loco parentis,* apply the facts and reach a well reasoned conclusion that Grammy has standing under Pennsylvania statute but is not likely to obtain partial visitation or partial physical custody of Dora because it would likely interfere with Dora's relationship with Mona and that Terry would likely be awarded some visitation because she stands *in loco parentis* to Dora.

Question No. 5

1(a). Restrictive covenant

- Provision barring use for non-residential purposes is a restrictive covenant or equitable servitude which may be legally enforced.

- The restrictive covenant is clear and unambiguous and Al is in violation of it.

2 points

Comments: The applicant is expected to recognize a restrictive covenant and that a clear and unambiguous restrictive covenant is legally enforceable.

1(b). Restrictive covenant may be unenforceable because of changes in the character of the neighborhood

- Changes in the neighborhood may result in a restrictive covenant no longer being enforced.
- If purpose and intent of restrictive covenant no longer provide benefit to party seeking to enforce it, it will not be enforced.
- Benefits of residential neighborhood had already been lost by other residents' use of homes as businesses and the resulting substantial increase in traffic.
- Court will not enforce the restrictive covenant if there were changes in the predominant character of the neighborhood or when violations are permitted to such an extent as to indicate that the entire restrictive plan has been abandoned,
- Court will examine Al's defense(s) to determine if the restrictive covenant at issue is enforceable.

4 points

Comments: The applicants should recognize that changes in the predominant character of the neighborhood could result in a restrictive covenant no longer being enforced and discuss the facts in reaching a well reasoned conclusion. Candidates could also discuss this issue under a theory of abandonment or waiver of the restriction by other residents.

2. Promissory estoppel

- Promise may be enforceable although not supported by consideration through promissory estoppel.
- Elements of promissory estoppel:
  - Inducement
  - Justifiable reliance on the inducement
  - Avoidance of injustice

6 points

Comments: The applicant is expected to recognize the doctrine of promissory estoppel allows a party to enforce a promise in the absence of consideration. Additionally, an applicant should discuss the essential elements of promissory estoppel and apply the facts to these elements and reach a well-reasoned conclusion.

3. Adverse possession/marketable title

- Claim of adverse possession must be based on actual, continuous, visible, notorious, distinct and hostile possession of land for 21 years.

- Title acquired by adverse possession may constitute marketable title if title is evidenced by some publicly recorded document.

- "Time is of the essence" clause requires performance by the specified date.

- The court will find in favor of Paul because title by adverse possession had not been established by March 1, 2004.

8 points

Comments: Applicants are expected to discuss the elements of adverse possession and apply the law to the facts. Applicants are also expected to recognize the issue of what constitutes marketable title and apply the facts to the principles of marketable title in concluding that Vic did not have marketable title by March 1, 2004 and the court will therefore rule in favor of Paul.

Question No. 6

1. Piercing the Corporate Veil

- Generally, shareholders are not liable for corporate debts.

- To pierce a corporate veil there must be unity of interest and it must be necessary to avoid injustice.

- Test includes lack of stock, lack of bylaws, commingling of funds and use of corporate assets for personal gain.

- Veil should be pierced under the facts given.

6 points

Comments: The candidates should recognize that generally a shareholder is not liable for the debts of a corporation but that under certain circumstances the corporate veil may be pierced. The candidates should discuss when the veil may be pierced and apply the facts to that standard.

2. Promoter Liability

- A promoter, is one who acts for a corporation not yet formed.

- A promoter is liable for preincorporation contracts unless there is an agreement to the contrary.

4 points

Comments: The candidates should recognize that a promoter of a corporation not yet formed may be held liable for contracts entered into on behalf of the corporation unless there is an agreement to the contrary.

3. Fraud in the Inducement of Contract

- Fraudulent inducement occurs when a false statement is knowingly made with the intent to induce reliance.
- Damage must occur as a result of the inducement.

5 points

Comments: The candidates should recognize that a contract that is fraudulently induced may be subject to attack and may be set aside. They should explain the elements of fraudulent inducement and apply the facts.

4. Implied Warranties

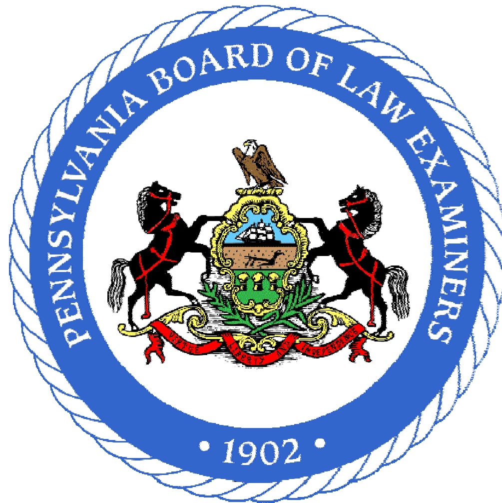
- To be merchantable goods must be fit for the ordinary purpose for which the goods are used.
- Implied warranty of fitness for a particular purpose applies when the seller has reason to know the particular purpose for which the goods are required and that the buyer is relying on the skill or judgment of the seller to select or furnish suitable goods.

5 points

Comments: The candidates should define the two warranties and conclude that merchantability does not likely apply and that fitness for particular purpose does apply.

Applicant Exam Number______________

PT



Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination

July 27 and 28, 2004

PERFORMANCE TEST
July 27, 2004 – 9:00 a.m. to 10:30 a.m.

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

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FILE

STRONG AND ABLE
ATTORNEYS AT LAW

Memorandum
To: Applicant
From: I.M. Able, Senior Partner
Re: Plaintiff Paul v. Defendant Dr. Jones

We represent Dr. Linda Jones, a licensed medical doctor who is certified in the specialty of radiology, which involves the reading and interpretation of images of the body created by x-rays, CAT scans and MRI imaging equipment. Plaintiff Paul (Paul) brought a medical malpractice action in the Court of Common Pleas of C County Pennsylvania against Dr. Jones seeking damages because of severely impaired vision that he alleges was caused by the negligence of Dr. Jones. Paul is represented by Attorney Sally.

Paul's complaint alleged that his vision loss is caused by a benign (non-cancerous) tumor of the pituitary gland, which is located in the skull, that is pressing upon his optic nerve. Prior to trial, Paul had been asserting that Dr. Jones breached her duty of care by failing to discover the benign tumor in an x-ray she took of his skull.

Our defense asserted that Dr. Jones did not breach a duty of care by failing to discover Paul's tumor because a tumor of the pituitary gland is nearly impossible to detect by an x-ray. Further, we asserted that the tumor was not pressing on the optic nerve and that Paul's impaired vision resulted from another cause, namely his use of contact lenses for extended periods of time beyond that recommended by the manufacturer. We presented expert witnesses at trial to support these defenses.

Attorney Sally called two expert witnesses as part of the plaintiff's case, Dr. White and Dr. Green. The only evidence offered by the plaintiff with respect to the causation of the impairment is the testimony set forth in Excerpt 2 of the Trial Transcript which is included in the File. Yesterday, the jury returned a verdict in favor of Paul, finding that Dr. Jones was negligent and that the negligence was the cause of Paul's impaired vision. It awarded damages to Paul in the amount of $250,000.

It is my opinion at this point that each of the trial judge's rulings on my objections and motions set forth in the excerpts from the trial transcript that are contained in the File was erroneous. Therefore, I believe that we should file a Motion for Post-Trial Relief in order to challenge those rulings. Your assignment consists of two tasks. The first is to complete the draft of a Motion for Post-Trial Relief, which I began to prepare on behalf of Dr. Jones, by inserting the grounds for relief based upon each ruling of the trial judge. The second task is to provide an analysis of each ground you include in the Motion so that I can assess which grounds should be incorporated in the Motion that is filed with the court.

I have included my draft of the Motion in the File, along with the expert report prepared by Dr. White and three excerpts from the trial transcript that contain rulings by the trial judge, which, if

erroneous, would be grounds for relief. An excerpt of the transcript may include background information, which summarizes what transpired prior to the colloquy/testimony that is presented in the excerpt. The report from Dr. White was submitted in response to Interrogatories that we served on Plaintiff requesting the information set forth in Pennsylvania Rule of Civil Procedure 4003.5. I have also included a Library, which includes the only legal authorities that you should consider and rely upon in completing this task.

In completing this assignment, you should:

1. Restate paragraph #3 as set forth in the Motion for Post Trial Relief and then, in a manner consistent with the applicable procedural rule, complete paragraph #3 by separately listing each ruling of the trial judge as a ground for relief, in the form of a statement asserting the legal basis to contend that the ruling was erroneous. Each ground is to be lettered alphabetically beginning with "(a)".

2. Provide a written analysis of each ground you asserted in the Motion, which includes (i) the legal argument(s) which could be advanced to support a conclusion that the trial court's ruling was erroneous, (ii) your assessment of the likelihood of success of those arguments, and (iii) the reasoning supporting your assessment. This portion of your assignment should begin with the heading "Analysis", followed by your analysis of each ground, labeled with the letter which you assigned to that ground in the text of paragraph #3 of the Motion.

IN THE COURT OF COMMON PLEAS OF C COUNTY, PENNSYLVANIA
CIVIL DIVISION

PAUL,	)	
	)	
Plaintiff	)	
	)	NO. 111-2004
	)	
vs.	)	
	)	
LINDA JONES, M.D	)	JURY TRIAL DEMANDED
	)	
Defendant	)	

MOTION FOR POST TRIAL RELIEF FILED ON BEHALF OF DEFENDANT, LINDA JONES, M.D.

AND NOW, the Defendant, Linda Jones, M.D., by and through her attorney, Able, files this Motion for Post-Trial Relief pursuant to Rule 227.1 of the Pennsylvania Rules of Civil Procedure and avers the following:

1. Trial in the instant action commenced on July 22, 2004, before this Court.

2. The jury trial resulted in a verdict in favor of Plaintiff Paul on July 26, 2004.

3. The Defendant files the within Motion for Post-Trial Relief and in support thereof asserts the following grounds for relief:

Use subparagraphs lettered alphabetically beginning with (a)

WHEREFORE, the Defendant requests that the Court enter judgment in favor of the Defendant or in the alternative grant a new trial.

ATTORNEY ABLE

BY ______________________________

Attorney for Defendant
Linda Jones, M.D

EXPERT REPORT

To: Attorney Sally

From: Dr. White

Date: April 28, 2004

At your request, I have examined the medical records of Paul, whom you represent as a plaintiff in an action filed against Dr. Linda Jones for damages resulting from impaired vision. This constitutes my report regarding the subject matter on which I am expected to testify, the substance of the facts and opinions with respect to that opinion, and the summary of the grounds for my opinion.

Paul is a 35-year old male who suffers from approximately 50% loss of vision in both eyes. You have requested that I examine Paul's medical record, and in particular the x-ray taken and interpreted by Dr. Jones. Dr. Jones's report interpretating the x-ray did not identify a benign tumor of the pituitary gland, although this tumor was subsequently identified in further studies of a possible problem with Paul's optic nerve.

Although a benign tumor of the pituitary gland is extremely difficult to identify in an x-ray, my very careful analysis of the x-ray shows enough that I have concluded that Dr. Jones should have had a reasonable suspicion from the x-ray that a tumor was present. In my opinion the failure of Dr. Jones to identify this benign tumor did not meet the standard of care for interpretation of an x-ray.

By the time Paul's benign tumor of the pituitary gland was discovered, it was too large to remove by a surgical procedure. Thus, the tumor remains in place today, although no further growth in the tumor has occurred over the last year. I believe that the size of the tumor has stabilized.

I should note that it is possible that other tests may also have disclosed the presence of the tumor at the time of his original examination by Dr. Jones.

Dr. White

Defense Exhibit 5

-4-

Excerpt One

Trial Transcript - page 74

Page 74

Background: Dr. White was sworn and offered extensive testimony as to his education, training and experience as a licensed medical doctor certified in the specialty of internal medicine, which involves the diagnosis and non-surgical treatment of diseases of the body. He testified that he has extensive experience in the diagnosis and treatment of a variety of medical conditions, including conditions of the pituitary gland and use of x-rays for diagnostic purposes.

Attorney Sally: I offer Dr. White as an expert witness on behalf of Paul.

Attorney Able: I object to the qualifications of Dr. White, on the grounds that he is not certified in the specialty of radiology, which is the specialty of the defendant, Dr. Jones. As such, he does not possess the skill and experience necessary to testify on matters involving the standard of care of a radiologist in the reading and interpretation of x-rays.

Trial Judge: The defense objection to Dr. White's testimony on the grounds of qualification as an expert is overruled. He will be permitted to testify as an expert witness.

Attorney Able: In light of your ruling on my objection, Your Honor, I request an offer of proof as to the proposed testimony of Dr. White.

Trial Judge: Attorney Sally, would you please provide the Court with a brief summary of the intended testimony of Dr. White?

Attorney Sally: Certainly Your Honor. Dr. White will testify that it is his opinion that the most reliable means of detecting the existence of a benign tumor of the pituitary gland is a CAT scan, which provides sufficiently detailed images of the brain in order to identify the existence of such a tumor. Dr. White will testify that the failure of Dr. Jones to order a CAT scan of Paul's skull as part of her review violated the standard of care applicable to a physician in these circumstances. In Dr. White's opinion, any examination of a patient for otherwise unexplained loss of vision should include a CAT scan in order to either identify or rule out the existence of a tumor on the pituitary gland, and that Dr. Jones's failure to order a CAT scan breached a duty to Paul.

Attorney Able: I object to this expert testimony on the part of Dr. White. In response to the defendant's interrogatories requesting an expert report for each proposed expert witness with information set forth in Rule of Civil Procedure 4003.5, we did in fact receive a report from Dr. White which has been admitted as Defense Exhibit 5. There is no mention in the expert report of the need for a CAT scan, or that Dr. Jones's failure to order a CAT scan was a breach of a duty to Paul. Therefore, Dr. White's proposed testimony is outside the scope of his expert report and is not admissible.

Trial Judge: Your objection is overruled, and Dr. White will be permitted to testify in conformance with the offer of proof.

Excerpt Two

Trial Transcript – page 184

Page 184

Background: the parties have stipulated that Dr. Green is qualified as an expert in the field of ophthalmology, which involves the diagnosis and treatment of diseases of the eye.

Attorney Sally:	I now call Dr. Green as an expert witness on behalf of Paul. He will present his medical opinion that the cause of Paul's impaired vision is pressure on his optic nerve from a benign tumor of the pituitary gland. Dr. Green, have you heard the testimony presented today that Paul suffers from a benign tumor of the pituitary gland?
Dr. Green:	Yes I have.
Attorney Sally:	And have you also heard the testimony today that Paul suffers from a substantial loss of vision in both eyes, approaching 50% loss of vision?
Dr. Green:	Yes, I have heard the testimony concerning the impairment of Paul's vision.
Attorney Sally:	Do you have an opinion as to whether Paul's benign tumor is the cause of, or a substantial factor in, causing Paul's impaired vision?
Dr. Green:	Yes, I have such an opinion.
Attorney Sally:	Would you please state that opinion for the jury?
Dr. Green:	In my medical opinion, it is more likely than not that Paul's impaired vision is caused by pressure on his optic nerve from the benign tumor on his pituitary gland. I believe that it is very highly probable that his tumor is the cause of his impaired vision.
Attorney Able:	Objection, Your Honor, and I move to strike Dr. Green's testimony. His opinion as to the cause of Paul's impaired vision is not of sufficient certainty to permit such an opinion to be considered by the jury.
Trial Judge:	Objection overruled, and the jury will be permitted to consider Dr. Green's opinion.

Excerpt Three

Trial Transcript - page 225

Page 225

Attorney Sally:	Your Honor, I have now concluded the presentation of the plaintiff's case, and Attorney Able may proceed with the defense.
Attorney Able:	May it please the Court, I move for a compulsory non-suit pursuant to Rule 230.1 of the Pennsylvania Rules of Civil Procedure, on the ground that plaintiff Paul has failed to establish a right to relief. Specifically, plaintiff Paul has presented only the testimony of Dr. Green in an attempt to establish that the benign tumor of his pituitary gland is the cause of his impaired vision. Because that testimony should have been excluded Plaintiff Paul has failed to establish all of the elements of his case.
Trial Judge:	I will deny your motion for compulsory non-suit. Please proceed to present your evidence in defense of Paul's claim.

LIBRARY

Pennsylvania Rules of Civil Procedure

Rule 227.1. Post-Trial Relief

(a) After trial and upon the written Motion for Post-Trial Relief filed by any party, the court may

(1) order a new trial as to all or any of the issues; or

(2) direct the entry of judgment in favor of any party; or

(3) remove a nonsuit; or

(4) affirm, modify or change the decision or decree nisi, or

(5) enter any other appropriate order.

(b) Post-trial relief may not be granted unless the grounds therefore,

(1) if then available, were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial; and

(2) are specified in the motion. The motion shall state how the grounds were asserted in pre-trial proceedings or at trial. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds.

(c) Post-trial motions shall be filed within ten days after

(1) verdict, discharge of the jury because of inability to agree, or nonsuit in the case of a jury trial; or

(2) notice of nonsuit or the filing of the decision or adjudication in the case of a trial without jury or equity trial.

If a party has filed a timely post-trial motion, any other party may file a post-trial motion within ten days after the filing of the first post-trial motion.

(d) A motion for post-trial relief shall specify the relief requested and may request relief in the alternative. . . .

* * *

Rule 230.1. Compulsory Nonsuit at Trial

(a) (1) In an action involving only one plaintiff and one defendant, the court, on oral motion of the defendant, may enter a nonsuit on any and all causes of action if, at the close of the plaintiff's case on liability, the plaintiff has failed to establish a right to relief.

(2) The court in deciding the motion shall consider only evidence which was introduced by the plaintiff and any evidence favorable to the plaintiff introduced by the defendant prior to the close of the plaintiff's case.

* * *

Pennsylvania Rules of Civil Procedure

**Rule 4003.5. Discovery of Expert Testimony.
Trial Preparation Material**

(a) Discovery of facts known and opinions held by an expert, . . . acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(1) A party may through interrogatories require

(a) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and

(b) the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.

* * *

(b) An expert witness whose identity is not disclosed in compliance with subdivision (a)(1) of this rule shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

(c) To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings under subdivision (a)(1) or (2) of this rule, the direct testimony of the expert at the trial may not be inconsistent with or go beyond the fair scope of his or her testimony in the discovery proceedings as set forth in the deposition, answer to an interrogatory, separate report, or supplement thereto. However, the expert shall not be prevented from testifying as to facts or opinions on matters on which the expert has not been interrogated in the discovery proceedings.

Superior Court of Pennsylvania

Joanne K. CORRADO and Joseph A. Corrado,
Appellees,
v.
THOMAS JEFFERSON UNIVERSITY HOSPITAL, et al. Appellant,
and
Joanne K. Corrado and Joseph A. Corrado, H/W
Appellants,
v.
Thomas Jefferson University Hospital, et al.
Appellee,
and
Herbert E. Cohn, M.D. and Giancarlo Barolat, M.D. and Jerome M. Cotler, M.D.
and John R. Cohn, M.D., Appellees.

790 A.2d 1022

This is an appeal and cross-appeal from an order which granted in part and denied in part appellant Joseph A. Corrado's motion for post-trial relief. In its order the trial court granted a new trial as to appellee/cross-appellant Thomas Jefferson University Hospital (the "Hospital"), and denied a new trial and a request to remove non-suit made by Corrado as to appellees Herbert E. Cohn, M.D. and John R. Cohn, M.D. For the reasons that follow, we affirm.

--Facts and Procedure--

In this medical malpractice case Corrado alleged that the appellee doctors failed to timely diagnose his wife Joanne K. Corrado's recurrence of lung cancer. Mrs. Corrado was initially diagnosed with lung cancer in April 1992. . . . She was referred to Dr. John Cohn, a pulmonologist who referred her to Dr. Herbert Cohn, a thoracic surgeon, for surgery. Following a lung lobectomy in May of 1992, Mrs. Corrado continued her follow-up care with Dr. John Cohn and Dr. Herbert Cohn. For the next two years Mrs. Corrado suffered from a persistent cough. Numerous diagnostic tests were performed on Mrs. Corrado to detect the presence of cancer. However, according to her treating physicians, the tests were negative. In particular, in May 1993, a CT scan was performed on Mrs. Corrado at Thomas Jefferson University Hospital. The CT scan was interpreted by Dr. Alfred Kurtz, a Hospital radiologist. Dr. Kurtz's report indicated no cancer cells were present. . . . [M]alignant cells were detected during a bronchoscopy performed by Dr. John Cohn in April 1994. Soon thereafter Mrs. Corrado sought a second opinion from Dr. Luther Brady. Dr. Brady reviewed the results of Mrs. Corrado's past diagnostic tests, and concluded that the May 1993 CT scan showed a recurrence of cancer.

Mrs. Corrado filed this medical malpractice action in April 1996. After Mrs. Corrado died on September 4, 1996, a wrongful death/survival action followed. The case proceeded to trial on September 10, 1999. . . . At trial Corrado presented documentary evidence and the testimony of

several witnesses including Robert DeJager, M.D. and Luther Brady, M.D., as well as John Cohn, M.D. and Herbert Cohn, M.D., on cross-examination. Following Corrado's case in chief, each of the appellees motioned for compulsory non- suit. The trial court granted each appellees' motion for non-suit. Corrado filed a motion for post-trial relief, requesting the court to remove the non-suits and grant a new trial because of alleged errors. The trial court issued an order dated March 31, 2000, granting Corrado a new trial as to the Hospital. However, the trial court denied Corrado's request for a new trial and removal of the non-suit as to appellees Dr. Herbert Cohn and Dr. John Cohn. The Hospital filed an appeal. Corrado also appealed the trial court's order.

--New Trial Against Hospital--

. . . The Hospital maintains the trial court erred in removing a non-suit and granting a new trial against it. Preliminarily, we note that a trial court has broad discretion to grant or deny a new a trial. (citation omitted). Absent a clear abuse of discretion by the trial court, appellate courts must not interfere with a court's authority to grant or deny a new trial. (citation omitted)

The Hospital first argues the requisite expert evidence against it was lacking. At trial, Corrado's theory of liability against the Hospital was based upon the alleged negligence of its agent, radiologist Dr. Kurtz, who read and prepared a report of the CT scan of the decedent taken in May of 1993. At trial, Corrado offered the testimony of Dr. Robert DeJager, who was asked if he had an opinion based upon his review of the decedent's medical records whether the Hospital's radiologist who read the May 1993 CT scan films deviated from the acceptable standard of medical care. Counsel for the Hospital and Dr. John Cohn objected on the basis of Dr. DeJager's lack of qualifications to testify regarding the standard of care of radiologists. The trial court sustained the objection, finding that because Corrado only qualified Dr. DeJager in the areas of internal medicine and oncology, plaintiff's expert was unqualified to testify about the standard of care in radiology. As a result of the absence of any expert testimony from Corrado on the issue of the liability of the Hospital, the trial court entered non-suit in favor of the Hospital. Upon reviewing Corrado's post-trial motions the trial court determined that it had erred in precluding Dr. DeJager from testifying regarding the standard of care of radiologists. Therefore, the trial court granted a new trial as to the Hospital.

On appeal, the Hospital submits that Corrado was not entitled to a new trial on this issue. The Hospital maintains that Dr. DeJager had no qualifications on the issue of

reading and interpreting CT scans or the standard of care concerning radiologists. We disagree.

> [I]t is well established in this Commonwealth that the standard for qualification of an expert witness is a liberal one. The test to be applied when qualifying an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine. (Citations omitted).

In the area of medicine, specialties sometimes overlap and a practitioner may be knowledgeable in more than one field. (citation omitted). While different doctors will have different qualifications and some doctors are more qualified than others to testify about certain medical practices, it is for the jury to determine the weight to be given to expert testimony in light of the qualifications shown by the expert witness. (citation omitted). Whether a witness has been properly qualified to give expert witness testimony is vested in the discretion of the trial court. (citation omitted).

Dr. DeJager testified that he specialized in internal medicine and medical oncology, and was board certified in those areas. Dr. DeJager further noted that he received training in reading radiology films and CT films as part of his residency and fellowship training. Moreover, he testified that his work involved the multi-disciplinary approach in the diagnosis of cancer cases in university hospitals which required consultation between specialties. The Hospital's contention that Dr. DeJager was not qualified because he is not a radiologist is unavailing because experts in one area of medicine may be found qualified to address other areas of specialization where the specialties overlap in practice or where the specialist has had experience in a related field of medicine. (citations omitted).

We find the trial court was correct in determining that Dr. DeJager should have been qualified as an expert because his experience logically embraces the matter at issue. Thus, we find the decision of the trial court to grant a new trial because it had failed to qualify Dr. DeJager as an expert during trial did not constitute an error of law or an abuse of discretion. Without Dr. DeJager's testimony, Corrado could not establish the causation element of his *prima facie* case against the Hospital. Therefore, the trial court correctly removed the non-suit.

The Hospital next argues that even if Dr. DeJager was qualified to provide expert testimony as to the standard of care applicable to radiologists, a new trial is unwarranted because Dr. DeJager's expert report does not mention an alleged deviation from the standard of care with respect to an interpretation of the CT scan. The Hospital

submits that if Dr. DeJager rendered an opinion on whether Dr. Kurtz deviated from the standard of care, such testimony would fall outside the scope of Dr. DeJager's expert report and would be inadmissible under Pa.R.Civ.P. 4003.5(c).

* * *

. . . [W]e find the argument without merit. Rule 4003.5(c) of the Pennsylvania Rules of Civil Procedure specifically states:

> To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings under . . . this rule, the direct testimony of the expert at trial may not be inconsistent with or go beyond the fair scope of his or her testimony in the discovery proceedings as set forth in his deposition, answer to an interrogatory, separate report, or supplement thereto. However, the expert shall not be prevented from testifying as to facts or opinions on matters on which the expert has not been interrogated in the discovery proceedings. Pa.R.Civ.P. No. 4003.5(c).

The Rule's Explanatory Note states that "where the full scope of the expert's testimony is presented in . . . the separate report . . . this will fix the permissible limits of his testimony at trial." This limitation "serves to insure that an expert's report will be sufficiently comprehensive and detailed to inform an opposing party of the expert's testimony at trial." (citation omitted). When applying the "fair scope" rule, our court has held that:

> In deciding whether an expert's trial testimony is within the fair scope of his report, the accent is on the word "fair[.]" The question to be answered is whether, under the particular facts and circumstances of the case, the discrepancy between the expert's pre-trial report and his trial testimony is of a nature which would prevent the adversary from preparing a meaningful response, or which would mislead the adversary as to the nature of the response. (citations omitted).

The purpose of requiring a party to disclose, at his adversary's request, "the substance of the facts and opinions to which the expert is expected to testify" is to avoid unfair surprise by enabling the adversary to prepare a response to the expert testimony. (citation omitted). The question is whether the discrepancy between the expert's pretrial report and his trial testimony is of a nature which would prevent the adversary from preparing a meaningful response, or which would mislead the adversary as to the nature of the appropriate response. (citation omitted)

Here, the pre-trial report of Dr. DeJager stated that the CT scan performed on 5/3/93 was incorrectly interpreted as showing no signs of intrathoracic recurrence of tumor. The report further provided that metastatic disease documented on CT scans went undetected by radiologists and attending physicians from 5/93 until 3/94. The report went on to state that the "delay in recognizing and treating metastatic lung

cancer with chemotherapy more likely than not had an adverse effect on [the decedent's] quality of life by failing to control cancer related respiratory symptoms that were getting worse." . . . We find Dr. DeJager's expert report was sufficient to place the Hospital on notice that he believed there existed an alleged deviation from the standard of care with respect to an interpretation of the CT scan. . . .

--Non-suit as to Dr. John Cohn--

Next, we address the issues raised in Corrado's appeal. Corrado first argues that the trial court erred in entering a non-suit as to Dr. John Cohn. Our Court has stated that:

> [Entry] is proper only if the factfinder, viewing all the evidence in favor of the plaintiff, could not reasonably conclude that the essential elements of a cause of action have been established. When a nonsuit is entered, the lack of evidence to sustain the action must be so clear that it admits no room for fair and reasonable disagreement. A compulsory nonsuit can only be granted in cases where it is clear that a cause of action has not been established and the plaintiff must be given the benefit of all favorable evidence along with all reasonable inferences of fact arising from that evidence, resolving any conflict in the evidence in favor of the plaintiff. The fact-finder, however, cannot be permitted to reach a decision on the basis of speculation or conjecture. (citations omitted).

In the context of actions for medical malpractice, the plaintiff's evidence must establish that (1) the physician owed a duty to the patient; (2) the physician breached that duty; (3) the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient; and (4) the damages suffered by the patient were a direct result of that harm. (citation omitted). A plaintiff is required to present an expert witness who will testify, to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered. (citation omitted).

Corrado argues the trial court erred in striking a portion of Dr. DeJager's testimony. Dr. DeJager testified that because the decedent had an 80% likelihood of developing metastatic cancer, repeated CT scans were necessary as part of her follow-up care. He further testified that a procedure called a bronchoscopy should have been performed in 1993, in addition to the CT scan because a bronchoscopy raises the sensitivity level of the CT scan. Counsel for Dr. John Cohn moved to strike that portion of Dr. DeJager's testimony on the basis that it was beyond the scope of his expert report. The trial court sustained the objection and instructed the jury to disregard Dr. DeJager's statement regarding the need for bronchoscopy in 1993. Corrado claims the failure to perform the bronchoscopy in

1993 was a statement within the fair scope of the expert report because the issue at trial was whether Dr. John Cohn was negligent in failing to diagnose the recurrence of decedent's lung cancer in May of 1993. He submits that because the performance of a bronchoscopy as a diagnostic tool increases the sensitivity of a CT scan, as it reduces the risk of a false negative, the failure to perform a bronchoscopy in 1993 is within the report's fair scope.

A review of Dr. DeJager's report reveals no mention of the necessity to perform a bronchoscopy in 1993. Nothing in Dr. DeJager's report would have lead Dr. John Cohn to anticipate that Dr. DeJager would express the opinion at trial that a bronchoscopy should have been performed and the failure to do so was a deviation from the standard of care. Dr. DeJager's report did not place Dr. Cohn on notice that the failure to diagnosis necessarily includes the failure to perform a bronchoscopy. Accordingly, any proposed testimony concerning the necessity of a bronchoscopy was outside the scope of Dr. DeJager's report. Furthermore, Dr. John Cohn would have been prejudiced by the introduction of this portion of Dr. DeJager's testimony because he would have been placed in the position of having to cross-examine the doctor on the subject and prepare a meaningful response. We find the trial court properly limited the scope of Dr. DeJager's testimony.

Next, Corrado argues a non-suit on behalf of Dr. John Cohn was improper because he presented sufficient evidence to satisfy his burden of proof against Dr. Cohn through the expert testimony of Dr. DeJager. In response, Dr. Cohn argues that because of Dr. DeJager's failure to state his opinions with sufficient certainty, the grant of a non-suit was correct. We agree. [O]ur Court stated:

> We acknowledge that an expert need not testify with absolute certainty or rule out all possible causes of a condition. Nor do we require an expert to testify in precisely the language used to enunciate the legal standard. Rather, we review expert testimony in its entirety to assess whether it expresses the requisite degree of medical certainty. "An expert fails this standard of certainty if he testifies 'that the alleged cause "possibly", or "could have" led to the result, that it "could very properly account" for the result, or even that it was "very highly probable" that it caused the result.' "

(citation omitted)

When asked whether he had an opinion based upon a reasonable degree of medical certainty if Dr. John Cohn deviated from the standard of care, Dr. DeJager answered, "more likely than not in my opinion he deviated from the standard of care.". . . Dr. DeJager was then questioned about whether or not the decedent suffered any harm as a result of Dr. John Cohn's deviation from the standard of care, to which Dr. DeJager eventually responded,". . . more

likely than not [the decedent] would have responded to treatment in 1993 as she did a year later when they finally made the diagnosis of recurrent disease, that means that that patient would have been [sic] probably had at least a 15 months symptom free status between 1993 and some time later.". . . After reviewing his testimony in its entirety, we conclude that Dr. DeJager did not express the requisite degree of medical certainty. Corrado therefore failed to state a *prima facie* case of medical malpractice and the trial court's grant of non-suit was proper.

* * *

Order affirmed.

Performance Test Question: Grading Analysis

OVERVIEW

This task requires that the Applicant draft a portion of a Motion for Post Trial Relief based upon an assignment received from senior partner I. M. Able. Able represents Dr. Linda Jones in an action brought by Plaintiff Paul alleging that she negligently failed to diagnose the presence of a benign tumor of Paul's pituitary gland, and that pressure upon his optic nerve caused by the benign tumor resulted in a loss of vision in both eyes. A jury has returned a verdict in the amount of $250,000 against Dr. Jones and Able intends to file a Motion for Post Trial Relief seeking either entry of judgment on behalf of Dr. Jones or a new trial. The task requires the Applicant to identify the rulings of the Trial Judge as grounds for relief, draft the substantive content of Section No. 3 of the Motion for Post Trial Relief and to provide an analysis of each ground asserted in the Motion in order to assess the likelihood of success.

The file includes (i) a memorandum from Able to the Applicant explaining the task; (ii) a partially completed Motion for Post Trial Relief; (iii) an expert report from Dr. White, one of Plaintiff Paul's expert witnesses presented at trial; and (iv) three excerpts from the trial testimony containing testimony and/or colloquies between counsel and the Court.

The library includes the only legal principals and authorities the Applicant should consider and rely upon in completing this task. The Applicant should assume that all of the information in the file is factually accurate.

DRAFTING THE MOTION **20%**

The applicant should restate the introduction to Section 3 of the draft Motion for Post Trial Relief furnished with the materials, and then include the following grounds for relief:

a. The Trial Judge erred in overruling Defendant's objection to Dr. White's qualifications to testify as an expert witness, in that as a specialist in internal medicine, Dr. White is not qualified to testify as an expert witness as to the standard of care exercised by the Defendant, Dr. Jones, who is a radiologist.

b. The Trial Judge erred in overruling Defendant's objection to the expert opinion of Dr. White that the failure of Dr. Jones to order a CAT scan of Paul's skull as part of her review violated the standard of care applicable to a physician in those circumstances, in that such opinion was outside the fair scope of his expert report submitted in response to Defendant's Interrogatories.

c. The Trial Judge erred in overruling Defendant's objection and motion to strike Dr. Green's opinion that Paul's impaired vision is caused by pressure on his optic nerve from the benign tumor on the pituitary gland, in that the opinion was not of sufficient medical certainty to be considered by the jury.

d. The Trial Court erred in denying Defendant's Motion for Compulsory Nonsuit pursuant to Pa. R.C.P. 230.1 in that if the testimony of Dr. Green as to causation was properly stricken, Plaintiff Paul failed to establish a right to relief.

ANALYSIS

First Ground for Post Trial Relief **20%**

Ground presented: The Trial Judge erred in overruling Defendant's objection to Dr. White's qualifications to testify as an expert witness, in that as a specialist in internal medicine, Dr. White is not qualified to testify as an expert witness as to the standard of care exercised by the Defendant, Dr. Jones, who is a radiologist.

Analysis:

- Dr. Jones is a medical doctor certified in the specialty of radiology which involves the reading and interpretation of images of the body created by x-ray machines, CAT scans and MRI imaging equipment.

- Dr. White is not a radiologist, but rather is certified in the specialty of internal medicine, which involves the diagnosis and non-surgical treatment of diseases of the body.

- Dr. White also testified that he had extensive experience in the diagnosis and treatment of a variety of medical conditions, including the use of x-rays for diagnostic purposes.

- The standard for qualification of an expert witness is liberal, focusing on whether the witness has any reasonable pretension to specialized knowledge in the subject under investigation. *Corrado v. Thomas Jefferson University Hospital*, 790 A.2d 1022 (Pa. Super. Ct.), p. 12.

- Whether a witness has been properly qualified to give expert witness testimony is vested in the discretion of the trial court. *Corrado, p. 12.*

- Although Dr. White is a specialist in the field of internal medicine rather than radiology, he testified that he is experienced in reading x-rays for purposes of making diagnosis.

- In light of the liberal standard for qualification of an expert witness, it is likely that the trial court did not abuse its discretion in allowing Dr. White to testify as an expert witness with respect to the standard of care exercised by Dr. Jones.

- This ground for a new trial was raised by means of an objection at page 74 of the trial transcript.

Likelihood of Success: Not likely to be a successful ground for post-trial relief.

Second Ground for Post Trial Relief **20%**

Ground Presented: The Trial Judge erred in overruling Defendant's objection to the expert opinion of Dr. White that the failure of Dr. Jones to order a CAT scan of Paul's skull as part of her review violated the standard of care applicable to a physician in those circumstances, in that such opinion was outside the fair scope of his expert report submitted in response to Defendant's Interrogatories.

Analysis:

- According to the offer of proof presented by Attorney Sally, Dr. White will testify that the most reliable means of detecting the existence of a benign tumor of the pituitary gland is a CAT scan, and further that Dr. Jones's failure to order a CAT scan violated the standard of care applicable to Dr. Jones. *Trial Transcript, p. 74.*

- The expert report submitted by Dr. White prior to trial and furnished to Attorney Able pursuant to Pa. R.C.P. 4003.5(a)(1)(b) asserted that the failure of Dr. Jones to identify the benign tumor on an x-ray did not meet the standard of care for interpretation of an x-ray. *Dr. White's Expert Report*.

- Dr. White's expert report does not specifically reference the failure to order a CAT scan as an omission by Dr. Jones that failed to meet the standard of care. *Dr. White's Expert Report*.

- However, Dr. White's report does note that "it is possible that other tests may also have disclosed the presence of the tumor at the time of his original examination by Dr. Jones." *Dr. White's Expert Report*.

- Pursuant to Pa. R.C.P. 4003.5(c), to the extent that opinions held by an expert have been furnished in an expert report submitted in accordance with the Rule, the direct testimony of the expert at trial may not be inconsistent with or go beyond the fair scope of the opinions set forth in the report.

- Clearly, Dr. White's report does not reference the failure to order a CAT scan as a specific basis for Dr. Jones's failure to meet the standard of care.

- Dr. White's report does state that other tests may have also disclosed the presence of the tumor.

- In applying the "fair scope rule" under Rule 4003.5(c), the test to be applied by the trial court is whether, under the particular facts and circumstances of the case, the discrepancy between the pre-trial report and trial testimony would prevent the adversary from preparing a meaningful response. *Corrado, p. 13.*

- The general reference to “other tests” in Dr. White’s report does not place Attorney Able on sufficient notice to prepare a meaningful response to Dr. White’s opinion that failure to order a CAT scan was the basis of Dr. Jones’s negligence, rather than her failure to identify the tumor on an x-ray.

- Accordingly, Dr. White’s expert opinion regarding the CAT scan should have been excluded by virtue of Pa. R.C.P. 4003.5(c).

- This issue was raised by Attorney Able through his objection to Dr. White’s expert testimony on page 74 of the trial transcript.

Likelihood of Success: Likely to be a successful ground for post trial relief.

Third Ground for Post Trial Relief **20%**

Ground Presented: The Trial Judge erred in overruling Defendant’s objection and motion to strike Dr. Green’s opinion that Paul’s impaired vision is caused by pressure on his optic nerve from the benign tumor on the pituitary gland, in that the opinion was not of sufficient medical certainty to be considered by the jury.

Analysis:

- Dr. Green testified that in his medical opinion “it is more likely than not that Paul’s impaired vision is caused by pressure on his optic nerve from the benign tumor on his pituitary gland.” Further, he stated “I believe that it is very highly probable that his tumor is the cause of his impaired vision.” *Trial Transcript, p. 184.*

- An expert need not testify with absolute certainty or rule out all possible causes of a condition. However, an expert must testify to a reasonable degree of medical certainty in order for the testimony to be admissible. *Corrado, p. 15.*

- The court is to review expert testimony in its entirety to assess whether it expresses the requisite degree of medical certainty. *Corrado, p. 15.*

- An expert fails the standard of certainty if he testifies that the alleged cause “possibly” or “could have” led to the result, that it “could very properly account” for the result, or even that it was “very highly probable” that it caused the result. *Corrado, p. 15.*

- Dr. Green testified that it was “more likely than not” that Paul’s impaired vision is caused by pressure on the optic nerve. He stated his belief that it was “very highly probable” that the tumor is the cause of his impaired vision.

- This opinion does not meet the requisite standard for certainty to be submitted to the jury. *Corrado, p. 16.*

- This issue was raised by the objection to Dr. Green's proposed testimony on page 184 of the trial transcript through his Motion to Strike.

Likelihood of Success: Likely to be a successful ground for post trial relief.

Fourth Ground for Post Trial Relief **20%**

Ground Presented: The Trial Court erred in denying Defendant's Motion for Compulsory Nonsuit pursuant to Pa. R.C.P. 230.1 on the grounds that if the testimony of Dr. Green as to causation was properly stricken, Plaintiff Paul has failed to establish a right to relief.

Analysis:

- A non-suit should be granted when at the close of plaintiff's case on liability the plaintiff has failed to establish a right to relief. Pa. R.C.P.230.1

- A non-suit should be granted if the fact finder, viewing all of the evidence in favor of the plaintiff, could not reasonably conclude that the essential elements of a cause of action have been satisfied. *Corrado at p. 14*

- In actions for medical malpractice, the plaintiff's evidence must establish that (1) the physician owed a duty to the plaintiff; (2) the physician breached that duty; (3) the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient; and (4) the damages suffered by the patient were a direct result of that harm. *Corrado, p. 14.*

- Plaintiff must present expert testimony to a reasonable degree of medical certainty showing that the acts of the physician deviated from accepted medical standards and that the deviation was the proximate cause of the harm suffered. *Corrado, p. 14.*

- Dr. Green's expert testimony addressed the third element of Paul's cause of action, which is that the undiscovered tumor was the proximate cause of Paul's loss of vision as it caused pressure on the optic nerve.

- Dr. Green's expert opinion testimony should have been excluded by the Trial Judge because it failed to meet the standard of medical certainty required by Pennsylvania law. *Corrado, p. 16.*

- Without this testimony, the causation element of Paul's cause of action cannot be satisfied by the Plaintiff's evidence, and the Trial Judge should have granted the non-suit.

- This ground was preserved by Able's motion for compulsory non-suit as set forth in the Trial Transcript, p. 225, made at the close of Plaintiff Paul's case.

- Although the exclusion of Dr. White's testimony (on the grounds that it exceeded the scope of his expert report) would result in a failure to establish that Dr. Jones breached a duty of care, that basis for a compulsory non-suit was not raised in Able's motion.

Likelihood of Success: Likely to be a successful ground for post trial relief.