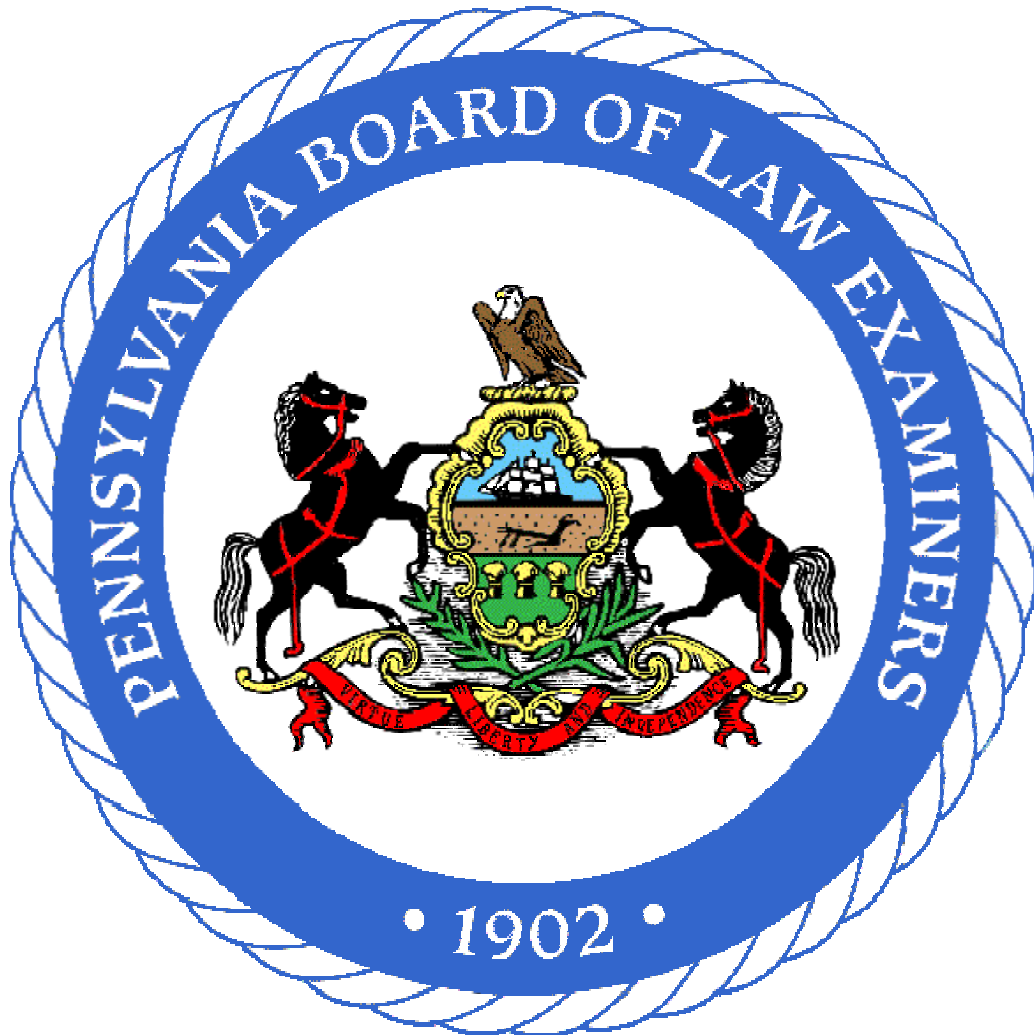


**FEBRUARY 2005  
PENNSYLVANIA BAR EXAMINATION**

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Sample Answers



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

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## Question No. 1: Sample Answer

1. Per the federal tax code, any accession to wealth, and any income from whatever source derived is taxable unless it falls into any of the exceptions in the code. The general rule is that any accession to wealth or income from any source derived is taxable. If the taxpayer is on a cash basis of income tax accounting he will claim all monies received by him in the year that he actually receives it. If the taxpayer is under the accrual basis of income tax accounting, the taxpayer claims income in the year that the transaction occurs or when the business deal is booked even if the taxpayer doesn't receive the actual money until the next or a subsequent tax year.

Frank, being on the cash basis of income tax accounting will have to declare the \$1,000 found in the false wall as part of his income in 2004. The rule is income "from whatever source derived" so it doesn't matter that Frank found the money. The Internal Revenue Service still considers this found money, per the tax code, as income and it must be claimed in the year it was found if the tax accounting system used is a cash basis one.

Under property law, Frank's finding of the money in the false wall, would be considered a treasure trove and entitles the finder of the treasure trove to keep the "treasure" ie the \$1000 provided he is unaware of the owner or its purpose for having been hidden. The facts say that the money was found behind a false wall and that neither he nor his family had any idea how it got there. Frank is therefore entitled to keep the \$1000 treasure trove but he must make sure that he declares it in his income in 2004.

2. Gambling winnings are considered reportable income according to IRS code. Gambling losses can be written off as a deduction against winnings, but not against other income. See IRS Code. Therefore, Frank's gambling winnings and losses are reportable by him for Federal Income Tax purposes in 2004. Also, the cost of Frank's winning bet can be offset against the winnings. Frank placed a bet amounting to \$100 at the local racetrack and won \$5,000. Frank's net gambling winnings on that day were \$4,900, which he has an obligation to report, along with his losing ticket to show the offset. Frank also lost \$900 on his first trip to the racetrack and then lost \$200 on New Year's Eve day. Frank could submit his losing tickets as evidence to support a deduction against his year-to-date winnings. Therefore, Frank must report \$4,900 income from his gambling winnings and can claim a deduction for \$1,100.

3. Abel violated the Pa. Rules of Professional Conduct which require an attorney, in the course of actively representing a client, to return the client's phone calls and to discuss any and all possible outcomes, defenses, or legal options with a client.

Under the Pennsylvania Rules of Professional Conduct (hereinafter PRPC), an attorney, in the course of actively representing a client shall remain in contact with said client. "Remaining in contact" includes, but is not limited to, returning the client's phone calls, communicating any and all progress or lack thereof on the client's case to the client, and answering any questions or concerns the client may have. "In the course of actively representing" should be taken to include, but not be limited to, any up-coming court dates, any required filings with a state agency, and any legal steps being taken that may affect the client or

his interests. Additionally, under PRPC, an attorney must discuss any and all possible outcomes, defenses, or legal options with a client that are reasonable and feasible to the client's interests.

In this case, Abel did not remain in contact with Frank because he did not return Frank's phone calls. This was a particularly egregious mistake in light of the fact that Frank made "several" phone calls to Abel's office and left messages which were concerning Frank's upcoming court date. Additionally, Frank left specific messages with Abel asking Abel what he (Frank) should do, that is, should he plead guilty or not. Additionally, Frank's concerns were especially justified because they pertained to a criminal charge.

Abel also did not communicate the progress that he made on Frank's case because he did not inform Frank that he (Abel) was going to speak with the prosecuting attorney nor did he inform Frank that the prosecuting attorney had offered Frank a deal until the trial date.

Finally, Abel did not discuss all the possible outcomes of a first time DUI offender with Frank because he did not tell Frank that there was the possibility of obtaining a reduced penalty from the prosecution or that there was the possibility that Frank could qualify for the special favorable first-time offender program for DUI defendants.

Therefore, Abel violated at least three separate PRPC rules by not returning Frank's phone calls, by not communicating any progress on the case with Frank and by not informing Frank of all the possibilities for the charges that Frank faces.

4. Sam will not inherit anything from his father, Frank's estate.

Under the applicable probate laws, an adult child cannot inherit from his parent's estate if there is a valid uncontestable will and the child is not bequeathed anything in the will. Additionally, even if the child is bequeathed property by the testator's will, the property must be owned by the testator upon the death of the testator. A testator cannot bequeath something he does not own even if he so desires. A will bequest can be voided by the testator prior to the testator's death by an incontrovertible act, such as the complete and total sale, thereby relinquishing ownership over the property.

In this case, there is a valid and therefore uncontestable will. Sam is named in the will; however, the devise of real property, Blackacre, that was given to Sam by the will, was not owned by Frank upon his death. Frank voided his devise to Sam by selling all his interest in Blackacre prior to his death. Therefore, because the land was not owned by the testator, the land is not part of the testator's estate and cannot pass to Sam.

Therefore, Sam will inherit nothing from Frank because Frank's only devise to Sam, Blackacre, was not owned by Frank upon his death and therefore did not become part of his estate.

5. Darla will inherit Whiteacre, with all its encumbrances, from Frank.

Under the applicable probate laws, a specific devise of property by a testator passes to

the person to whom the property is devised. A testator can make allowances for the payment of any encumbrances on his estate from the estate's fund prior to their passage to the testator's devisee if the testator so desires; however, such allowances will not be assumed unless specifically stated by the testator.

In this case, Frank died with a valid and therefore uncontestable will. When he died Whiteacre was encumbered. He bequeathed Whiteacre to Darla and did not make any specific allowances for the payment of the encumbrances.

Therefore, Whiteacre passes to Darla as is, with all its encumbrances.

### Question No. 2: Sample Answer

1. Tom's motion for judgment on the pleadings should be denied, because the plaintiff has set out facts to support a valid cause of action.

A Motion for Judgment on the Pleadings may be filed by the plaintiff or the defendant at the close of all pleadings between the relevant parties. The motion must not be filed so late as to unduly delay trial.

Under the PA Rules of Civil Procedure the court will review the pleadings to determine if the moving party is entitled to judgment as a matter of law. The pleadings that the court will consider include the complaint, the answer and new matter and the reply. The standard is nearly the same as a demurer: has plaintiff stated a claim in which relief can be granted. Here, the court should deny Tom's motion since both parties have established viable cases. Jerry claims that Tom committed a battery against him. Tom claims that his action was justified by self-defense. Jerry's reply adds little new information, and serves as a denial to Tom's averment. Thus, there is a dispute of facts as to how the incident occurred.

Because there is a dispute of facts and Jerry has established a viable claim in his pleading, Tom's motion for judgment on the pleadings should be denied.

2. Fred should object to Tom's offer of proof, since Ed's testimony about Carl's statement is hearsay. Tom's attorney should argue that the statement is admissible as an excited utterance. The court should find that the statement is admissible.

The rules of evidence start with the premise that all relevant evidence is admissible, unless there is an exception. Relevant evidence is that which is probative of a relevant fact.

Here, Carl's statement to Ed regarding his observance of the altercation between Tom & Jerry is relevant as to whether the incident occurred and who the aggressor was.

Absent an exception, relevant evidence is inadmissible if it is hearsay. Hearsay is an out of court statement offered for the truth as the matter asserted. Carl's statement is clearly hearsay,

as it is being offered to show the truth or the matter asserted: that Jerry was the aggressor and Tom acted in self-defense.

One exception to the hearsay rule is the “excited utterance.” An excited utterance is made immediately upon perceiving an event, while still under the shock of it. The excited utterance is assumed to be reliable, since the excitement of the moment would prevent the declaration from being fabricated.

Here, Carl’s statement seemed to be an excited utterance. He made it to Ed immediately after the incident, and he was still visibly shaking and upset.

It could be argued that this was a present sense impression, if it was made immediately after the event. However, this is a weaker argument, since Ed spoke to Tom before Carl. This means that too much time might have lapsed for the statement to be admissible as a present sense impression.

Because Carl uttered the statement while still under shock, it is admissible as an excited utterance.

3. Selma could have filed a claim for loss of consortium with Jerry’s claims in his civil suit against Tom.

A Plaintiff’s spouse may have a civil claim for loss of consortium arising out the transaction that is the basis for the suit. Loss of consortium consists of the spouse’s loss of the enjoyment, contribution, services and companionship of her spouse due to the tortious conduct of another.

The facts state that because of the battery by Tom, Jerry was unable to work, perform household chores, or contribute to the family’s happiness by going on vacation with them. Selma had to quit work for 6 months to care for her husband, Jerry, and help with his recovery. She did the chores he was unable to do and cancelled their vacation, thereby losing the enjoyment of his company and his contribution to the marriage.

Thus, Selma could have filed a claim for loss of consortium because she was denied the enjoyment, contribution, companionship and happiness of her husband due to the tortious conduct of Tom.

4. Perjury is a crime where one perjures themselves, or lies under oath. Tom did not testify in court under oath. However, Tom signed an affidavit verified under oath that he was not responsible for the tortious conduct. Tom again under oath, at his deposition maintained he was acting in self-defense. Tonya and Sue however, overheard Tom admit to Carl that Tom lied and hit Jerry several times without provocation and could testify to this fact. Tom did use the evidence as his defense and did lie under oath as to a material fact and could be charged with perjury.

### Question No. 3: Sample Answer

1. Pre-nuptial (Pre-nup) agreements are enforceable under Pennsylvania (PA) law. Pre-nups are governed by the common law of contracts in PA. Under the common law (cl) of contracts in PA, a party who signs a contract is presumed to have read it. It is no defense to a contract claim to argue that you did not read a contract.

However, pre-nups must fully disclose all the assets of both parties to be valid. If a party does not disclose the proper value of an asset then the pre-nup will become voidable. The reason the pre-nup becomes voidable is because without full disclosure the mutual assent requirement of a contract is not met. If full disclosure is made the court will not evaluate the fairness of the agreement. Here, the facts state that Penelope disclosed the correct value of 35 acres adjoining Lake Katherine.

The pre-nup provided that Penelope would retain the property including any increase in value during the marriage in the event of a divorce. There is no basis to void the agreement simply because the increase in value was more than Alfred expected.

2. Penelope can raise the fact that Alfred is cohabiting with a person of the opposite sex. In Pa, Alimony ceases if there is cohabitation with a person of the opposite sex. Here the facts are clear that Alfred is cohabitating with a person of the opposite sex, since he is living with Monica and sharing financial obligations. Furthermore, the facts explicitly state that Alfred is involved “intimately” with Monica.

Thus, Penelope has a defense to payment of Alimony to Alfred due to his cohabitation with Monica.

3. Penelope can be charged with the crimes of theft by deception and forgery.

Theft by deception occurs when a person purposefully makes false representations of a material fact intended to induce another to part with their ownership or control of their property.

Penelope made false statements as to the value of the property which she knowingly did so that she could get more for the property than it was worth. This intention existed at the time she made the false statement and placed the ad.

Certainly the lack of septic approval is a material fact and buyer has been deceived out of \$150,000. Buyer would never have agreed to the \$300,000 purchase price without her false representations.

Forgery is the unauthorized alteration of a document or a portion thereof with the intent to pass the article off as genuine. Uttering is a forgery which occurs by the act of presenting a forged document to a third party and with the intent to deceive that party as to its authenticity.

Penelope committed forgery when she altered the amount on buyer's check from \$6,000 to \$8,000 without his consent or knowledge. When she endorsed the check and presented it to the bank for cashing, she committed a forgery by uttering the check.

#### Question No. 4: Sample Answer

1. MAC has a First Amendment challenge in regards to denial based on content of speech through a facially neutral policy, which was inappropriately applied.

MAC, is a non-profit charitable organization. Mary, holding the position as Mayor of City C does qualify as a state actor making her obligated to follow the 14<sup>th</sup> Amendment rights which includes upholding citizens 1<sup>st</sup> Amendment speech protection. Here, City C has a neutral policy requiring all non-profit charitable organizations located in the city who want to solicit from C City employees through payroll to make a request to the Mayor. The only qualifications is that they be a non-profit organization.

Here a request was made and Mary confirmed MAC's status yet denied them the opportunity based on their objectives and goal, which goes to content. Here the forum is non-public, so restrictions can be imposed as long as they are viewpoint neutral and there is a rationally related reason for the decision.

Mary cannot rest on this principal because although this is a viewpoint neutral requirement it has been discriminately applied based on content. Content is neither expressed or implied in the requirement, the only qualifications is that they be a non-profit charitable organization. As a state actor, Mary must apply the rule indiscriminately; failure to do so will invalidate the statute.

2. (a.) The non-discrimination ordinance likely violated the 1<sup>st</sup> Amendment Freedom of Association. Under the 1<sup>st</sup> Amendment, MAC and its members are guaranteed certain rights, including the freedom to associate. A law shall not infringe upon one's right to freedom of association absent a showing that said interference is necessary to further a compelling state interest, with the burden of proof being on the state. The regulations at issue prohibit discrimination on the basis of sex by any person engaging in business services with the public. It is noteworthy that MAC is a non-profit charitable organization and is not a government entity. Thus, as a private charitable group it may choose its membership and exclude female members, for the purpose of furthering the group's beliefs in father's rights. Although the regulation appears to protect against discrimination which is an important government interest, it prevents private citizens from exercising the right to associate. The goal of prohibiting sex discrimination is important, but it is not so compelling to allow the ordinance to be upheld because of the impact on the right of association. Therefore the ordinance will be found to violate the 1<sup>st</sup> Amendment.

(b.) Solicitation Ordinance- I would advise Tim that the solicitation ordinance should be challenged on the basis that it violates his freedom of speech under the 1<sup>st</sup> Amendment. The ordinance requires the applicant to furnish C City with the name, address, and purpose of

solicitation and identity of the recipient of the funds. This constitutes mandated speech which is in violation of the 1<sup>st</sup> Amendment right to free speech. This violation requires the state to prove that the solicitation ordinance is necessary to advance a compelling state interest and that the least restrictive means are used. The ordinance was enacted to prevent fraud and crime in C City neighborhoods which are important interests. However, this ordinance is not sufficiently narrowly tailored to meet the government's objective. Fraud and crime can be addressed through less restrictive means that do not infringe upon all forms of speech. Therefore, it is likely that this ordinance will be held unconstitutional as a violation of the 1<sup>st</sup> Amendment freedom of speech.

3. MAC does have appropriate standing to be named a party to the suit. In order to have standing to bring a constitutional claim, the party must be injured or directly affected by the harm and the relief sought must alleviate the harm alleged. Tim has been harmed by the threat of enforcement. An organization may have proper standing if the harm would be to the organization itself or derivative standing on behalf of its members. In this case, although MAC has not been subject to any enforcement action by C City, the harm resulting from the enforcement action against its members affects the activities of the organization itself. Its activities would be subject to challenge on the basis of gender discrimination and its fundraising activities would also be impacted. Therefore, the constitutionality of the city's ordinances would have an impact on the organization to warrant the organization to be a party in interest in the lawsuit.

#### Question No. 5: Sample Answer

1. Dan should base his action on the theory of warranty of habitability and would be successful.

Under Pennsylvania law a person buying a newly constructed home from a developer (in this case Builder, Homes Inc.) is protected by the implied warranty of habitability. This warranty does not extend to remodified or second hand homes but applies only to newly built homes.

The facts indicate that Dan lived in the house only for 5 months and then his skylights started leaking. There was no written guarantee between Dan and the builder, but the law provides that such implied warranty of habitability need not be reduced to writing and attaches when the purchasers buy a new home from a builder. Further the repairmen of builder did not rectify the situation.

A purchaser is entitled to have the repair free of any payment to a builder. Although builder did perform his service of repairing he could not rectify the defect in the skylight. In the circumstances Dan will be able recover for breach of implied warranty of habitability from builder.

2. Damages payable to Dan from Homes Inc. for the damaged skylights would be the cost of replacement of the lights since the lights cannot be repaired. Payment to Dan of the

\$4,500 will make Dan whole. The purpose of damages in contract law is to protect the expectation interest of the injured party and put the injured party in the position he should be in if the contract was performed properly. Payment to Dan of the difference between the value of home “as is” versus if repaired is not sufficient to make Dan whole since he would only receive \$3,000 and the costs to replace the lights is \$4,500. Dan would suffer out of pocket costs of \$1,500.

3. A party in breach of their obligations under a contract where the amount due is in dispute may enter into a new agreement, call an accord, to pay a new consideration. The subsequent agreement is in satisfaction of the original debt, and though it does not discharge obligations under the original, it suspends these obligations until performance under the “satisfaction” of the accord. However, if the party fails to perform under the terms of the accord, the non-breaching party may sue under the original agreement.

Here Dan owed Pete \$6,000 for completion of the paint job. The amount owed was in dispute and the parties agreed to an accord, where Pete agreed to accept a \$4,000 car and Dan agreed to “pay” or turn it over in satisfaction of the debt. However, Dan breached this accord when he refused to turn the car over, and failed to satisfy the terms of the accord. Thus Pete is entitled to the full \$6,000 under the original debt, as he can now enforce the original agreement.

4. Dan most likely will prevail in an ejectment action against the Gas Company to obtain possession of the 15-foot right of way on Blackacre because Gas Company failed to record the easement.

PA is a race notice state which means that title belongs to a bona fide purchaser without notice who records first.

Gas Company has a valid easement appurtenant to Dan’s Blackacre for the 12-foot right of way which was recorded 30 years ago. Even though this easement did not appear in Dan’s deed from Sue, it was recorded and Dan is charged with checking title prior to purchasing. In addition, Dan had and admits to having had constructive notice of Gas Company’s 12-foot easement when he saw Gas Company employees working 50 yards from the home on Blackacre. However, Dan was a bona fide purchaser for value and did not have notice of Gas Company’s 15-foot right of way because it was never recorded and did not have constructive notice because he presumed they were working on the 12-foot easement when he noticed them 30 yards from him home.

He immediately called Gas Co. and discovered the problem. Dan can file an ejectment action successfully against Gas Co. because Dan recorded before Gas Co. (no recordation of 15-foot easement) and Dan did not have constructive notice of this 15-foot easement.

#### Question No. 6: Sample Answer

1. Chris will not be able to set aside the vote taken on February 1<sup>st</sup> because, although notice was not given, Chris attended the meeting and did not object to his lack of notice.

The Pennsylvania Business Corporation Law requires the board of directors to give notice of special board meetings. Failure to provide notice will render the decision made at the meeting void. Lack of notice can be waived, however, if a director attends the meeting and does not object on record to his lack of notice.

Here, directors Paul and Mary did not provide notice of the meeting to Chris, despite a bylaw provision and a Pennsylvania BCL provision requiring notice. He obtained notice by chance in a conversation with the attorney. Normally, the failure to give notice would render the decisions at the meeting void. However, Chris attended the meeting and did not object on the record to his lack of notice even though he objected to the decision. His attendance constitutes a waiver of the notice requirement. Chris could have attended the meeting for the purpose of protesting the lack of notice and the decision made at the meeting would have been void. This did not happen.

Therefore, Chris may not overturn the board's decision because he waived his lack of notice.

2. Chris may file a shareholder derivative suit on behalf of Land, Inc. against directors and officers Paul and Mary for breach of their fiduciary duty.

A shareholder may institute a shareholder derivative suit on behalf of a corporation. The shareholder suing must have owned shares during the alleged misconduct and must continue to hold shares throughout the litigation. Suit may be brought against the directors and officers for breach of fiduciary duty.

Chris, as a shareholder, wants to sue Paul and Mary for their breach of their fiduciary duties as directors and officers. He seeks to enforce the land sale agreement and have Paul and Mary pay the \$90,000 purchase price to the corporation. Chris owned shares at the time of the misconduct and will have to continue to own shares until the suit ends, which he will likely do in order to obtain his 1/3 share of the sale proceeds.

Before instituting a suit on behalf of the corporation against any directors or officers, the shareholder bringing the suit ordinarily must make a demand upon the board of directors for the board to bring the suit. However, demand will not be required if it is substantially certain that the corporation's interests would be jeopardized by the demand.

Here, Chris, as a director and shareholder, seeks to institute a shareholder derivative suit against directors and officers Paul and Mary. While he would ordinarily be required to demand the board bring the suit before he, himself, instituted suit, on these facts, it would be substantially certain that the board would ignore or dismiss his request because the only other board members are Paul and Mary, the people he seeks to sue, and that as a result the corporation could be harmed.

Thus, Chris should institute a shareholder derivative suit against Paul and Mary for breach of fiduciary duty and he will not have to make a demand upon the board of directors before instituting suit if he could show that by doing so the corporation would be harmed.

3. Wood, Inc. will not be able to enforce the interest provision in the confirmatory memo under the UCC because it was an additional term to a sale for goods between merchants that materially changed the original offer.

The UCC governs sales of goods in Pennsylvania. The UCC also had specific provisions for sales between merchants. Merchants are people who regularly deal in the kind of goods being sold. When a buyer-merchant sends a purchase order for a specific amount of goods and the seller-merchant sends a confirmatory memo containing additional terms, the additional terms will become part of the contract unless the buyer (1) objects within a reasonable time or (2) the additional clauses materially alter the contract.

Here, the contract is governed by the UCC because it concerns the sale of plywood, which is a good. It is also a sale between merchants. Chris is a contractor and owner of a building supply business. He can be assumed to be a merchant for the purpose of this plywood contract. Wood, Inc. is also a merchant because it is a wholesaler of wood products. Christ sent a purchase order for plywood which is an offer. Wood, Inc. accepted the offer in a confirmatory memo but added a finance charge provision. Chris did not object and had never discussed the finance charge with Wood, Inc. Although it might not be unreasonable to expect a seller to apply an interest charge on late payments, a court could find that it materially changes Chris' liabilities on the contract and therefore is not an enforceable additional term.

Thus, Wood, Inc. will not be able to enforce the additional provision despite the fact that this is a contract for goods between merchants if the additional provision materially changed Chris' liabilities and obligations under the contract.

4. Able should have analyzed the possibility for a conflict of interest and taken steps to notify the parties of the conflict of interest. Able should not continue representing either party due to the conflict of interest.

The Rules of Professional Conduct permit an attorney to draft a business agreement on behalf of two or more parties to the agreement as long as the attorney believes that he can provide competent representation and (1) explains to the clients the conflict of interest that may result and (2) obtains written consent to proceed as counsel for all parties. The attorney must advise them that in drafting the business agreement, all parties may not have the same financial interests and thus the attorney may not be able to work in the best interest of each client.

Initially, Able should have explained to Chris, Paul, and Mary the potential conflict of interest. He should have advised them to seek independent counsel or obtain a written consent from each party. Because Able had never represented either party, the parties may not have realized that there would be a potential conflict of interest. Due to the representation, Able might not be able to draft an agreement, which protected in the greatest way possible the interests of each party.

Even if consent was initially obtained, Able is no longer permitted to continue the representation. The Rules of Professional Conduct prevent an attorney from representing a party when that representation will create a conflict of interest due to his current or past representation of another client and as a result the lawyer will be unable to provide competent and diligent representation. Even if Able completely discloses the present conflict of interest, advises them to seek independent counsel and obtains a written consent, Able will be unable to represent any party in the present situation because the actual conflict that exists between Chris, Paul and Mary will prevent him from providing competent representation to all of the parties.

Able would be in violation of the Rules of Professional Conduct if he continued to represent Chris, Paul, and Mary once the actual conflict arose.

Question No. PT: Sample Answer

PLAINTIFF'S ARBITRATION BRIEF FOR KLEMP v. MITEY MOTORS, INC.

(a) As a purchaser of a new motor vehicle, who has suffered a loss because of a defect or condition which substantially impaired the use, value and safety of the vehicle, which the Defendant Manufacturer has failed to repair or correct after a reasonable number of attempts, Plaintiff has established a cause of action under the Pennsylvania Automobile Lemon Law.

Under the Pennsylvania Automobile Lemon Law, 73 P.S. 1951, et seq., a purchaser of a new motor vehicle, primarily for personal purposes, from a manufacturer is entitled to a refund of the full purchase price if, after a reasonable number of attempts, the manufacturer is unable to repair a warranty nonconformity and the nonconformity substantially impairs the use, value, or safety of the vehicle.

In the instant case, Plaintiff Phil Klemm purchased a 2 door 2004 Mitey Motors' Crawler convertible from his local Mitey Motors, Inc. authorized dealer, Pesky Cars. Mr. Klemm purchased this car as a gift for his son, Aaron, so that Aaron would have the independence to commute to Collegiate College and yet still live at home.

Mr. Klemm purchased the vehicle on April 7, 2004 and almost immediately safety problems began developing with the transmission. The problems with the transmission constituted a nonconformity because they affected use, value and safety of the vehicle. These problems were reported within one year or 12,000 miles as required by the Act. (Invoice, p. 6.) On May 13, 2004, Mr. Klemm took the vehicle to Pesky Cars, which is also an authorized Mitey Motors service provider, because the transmission slid from drive into neutral while the vehicle was being driven on the highway. This sudden dangerous and unexpected gear change caused Aaron to have to pull over and off the highway in order to place the car back into the "drive" position. (Repair Order No. 123, p.7.) On August 3, 2004, Mr. Klemm brought the vehicle into Pesky for the second time because the transmission remained problematic. There was at least a 20 second delay when the car was placed in reverse. On December 7, 2004, Mr. Klemm brought the vehicle to Pesky for the third time because the transmission would not move out of low gear

even when the vehicle was driven on the highway with the engine reviving. (Repair Order No. 2345, p.11.) On January 28, 2005, Aaron experienced his fourth bout of problems with the transmission. Again he was unable to put the vehicle in reverse. Mr. Klemp parked the car in his garage and has refused to move it. There is no evidence that any of these problems were caused by misuse by Mr. Klemp.

Mr. Klemp has met all the requirements necessary to state a claim under 73 P.S. § 1951 et seq. He is a “purchaser” defined as “a person...who obtained ownership of a new motor vehicle by...purchase which is used...primarily for personal, family or household purposes.” 73 P.S. § 1952. Mr. Klemp purchased the vehicle for use by his son as a mode of transportation to and from school. Mr. Klemp purchased a “new motor vehicle” defined as a “self-propelled, motorized conveyance driven upon public roads, streets or highways which is designed to transport not more than 15 persons, which was purchased...and is registered in the Commonwealth” 73 P.S. § 1952. The vehicle is self-propelled, as is recounted in the above facts that transmission problems occurred on the highway, it only seats five people, it was bought in the Commonwealth from Pesky, and it is registered in the Commonwealth under license plate number PAK1234. (Invoice, p. 6.) The fact that the vehicle was used as a dealer model is not dispositive since the definition of a new motor vehicle includes “a vehicle used by a manufacturer or dealer as a demonstrator...prior to its sale.” 73 P.S. § 1952. It is also clear that Mitey Motors is a manufacturer and Pesky Cars is an authorized dealer as defined in the Act.

Mr. Klemp’s problems are expressly covered under a “Manufacturer’s Express Warranty” that is a “written warranty of the manufacturer of a new automobile of its condition and fitness for use.” 73 P.S. § 1952. In this case, Mitey Motors’ General Warranty states in pertinent part “that such vehicles are free from manufacturing defects in material or workmanship for a period of 36 months or 36,000 miles, whichever ever occurs first.” (General Warranty, p. 12.) In the instant case there is only 7,000 miles on the odometer and the vehicle was not purchased over 36 months ago, (Affidavit, p. 13 at 8; Invoice p. 6.) Additionally, under 73 P.S. § 1955, “if the manufacturer fails to repair or correct a nonconformity after a reasonable number of attempts, the manufacturer shall...accept return of the vehicle from the purchaser and refund to the purchaser the full purchase price...less a reasonable allowance for the purchaser’s use.” A “reasonable number of attempts” is presumed under 73 P.S. § 1956 if “the same nonconformity has been subject to repair three times by the manufacturer.” In the instant case, the transmission has been repaired three times and is currently defective.

(b) Plaintiff has established a cause of action; therefore, he is entitled to relief in the form of the return of his purchase price, reasonable attorney fees, and court costs.

If a cause of action is established under the Lemon Law, the purchaser has the option of replacement of the vehicle or a refund of the purchase price upon return of the vehicle. Plaintiff Klemp wants to receive a refund. This amount consists of the full purchase price, including all collateral charges less a reasonable allowance for the purchaser’s use of the vehicle. 73. P.S. § 1955.

Under *Gambrill v. Alfa Romeo*, 696 F. Supp 1047, a judgment in favor of a plaintiff under 73 P.S. § 1952 et seq. entitles the plaintiff to a refund of the vehicle’s purchase price upon

return of the car to the defendant dealer. Additionally, pursuant to 73 P.S. § 1958, a plaintiff is entitled to recover reasonable attorney's fees and all court costs.