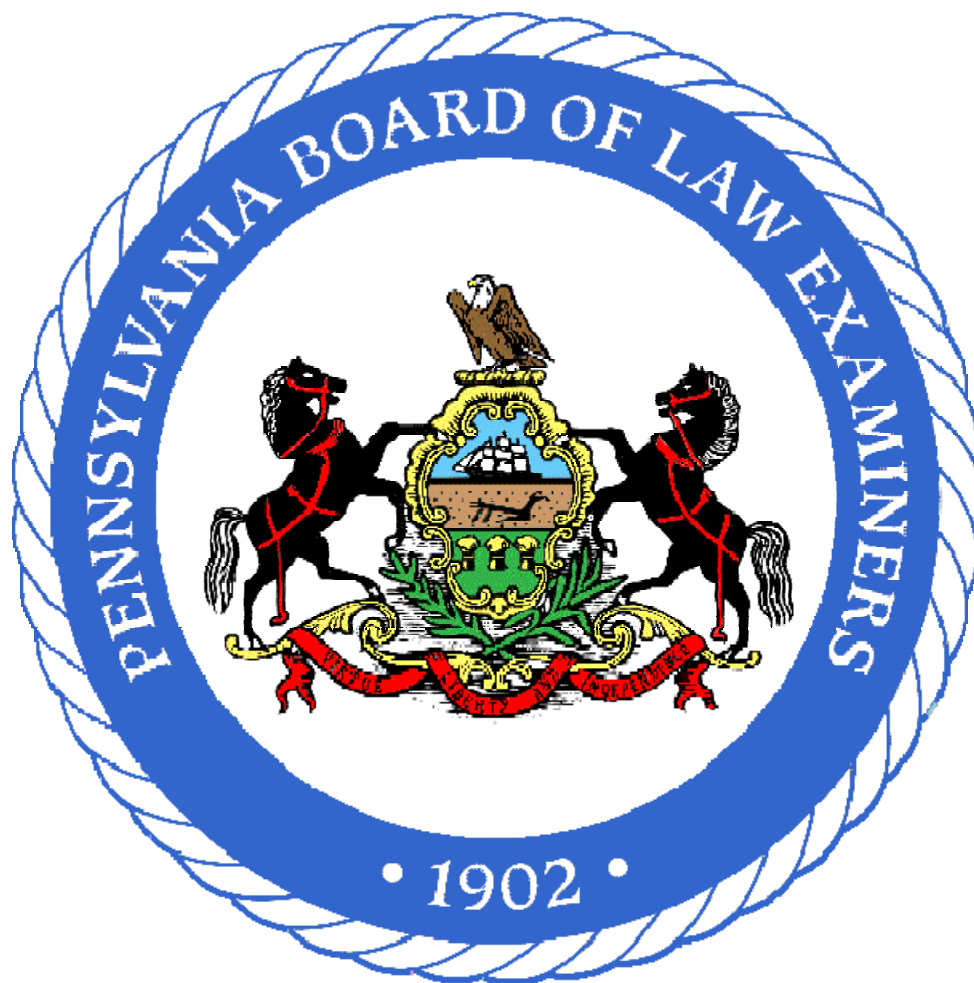


JULY 2011 PENNSYLVANIA BAR EXAMINATION

Essay Questions and Examiners' Analyses and Performance Test



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Table of Contents

Index	i
Question No. 1: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines	1
Question No. 2: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines	9
Question No. 3: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines	18
Question No. 4: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines	24
Question No. 5: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines	32
Question No. 6: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines	40
Performance Test and Grading Guidelines	48

Index

Question No. 1

1. Decedents' Estates: latent ambiguity
2. Decedents' Estates: power of appointment
3. Federal Income Tax: alimony, child support
4. Professional Responsibility: candor toward tribunal – duty of subordinate lawyer

Question No. 2

1. (a) Civil Procedure: compulsory non-suit
(b) Torts: res ipsa loquitur
2. Torts: defamation
3. Family Law: marital property, equitable distribution

Question No. 3

1. Criminal Law: simple assault, recklessly endangering another person, disorderly conduct
2. Evidence: character evidence regarding defendant in criminal case
3. Criminal Law: Miranda Warnings

Question No. 4

1. Constitutional Law: procedural due process
2. Professional Responsibility: communication with client, compensation from third party, professional independence
3. Employment Discrimination: sexual harassment

Question No. 5

1. Property: severance of joint tenancy with right of survivorship
2. Contracts: mutual mistake
3. Property: fixtures, personalty, trade fixtures
4. Property: failure to record – subsequent bona fide purchaser for value

Question No. 6

1. Corporations: duty of loyalty – corporate opportunity
2. U.C.C., Art. II – Sales: gap filler – time of delivery
3. Corporations: apparent authority to contract – effect of by law prohibition
4. Conflict of Laws: hybrid approach – discovery of attorney/client communication

Question No. 1

Arthur was a retired widower living in E County, Pennsylvania. He had one son, Richard, who was married to Jane, and they had three teenage children. Arthur owned two parcels of real estate and other assets. In June of 2009, he contacted Harold, an E County lawyer, to prepare a will. Arthur showed Harold what he said were, "all my important papers," including certificates totaling 2,000 shares in General Power, Inc. Pursuant to Arthur's instructions Harold prepared a will which stated in part, "I give my shares of General Power, Inc., stock to my two friends, Bob and Joe, in equal shares of 1,000 each and give all the remainder of my estate to Richard, for the necessary support of himself and with power to distribute to such of his issue as he chooses during his lifetime, with any property or other assets remaining at his death to be distributed equally to his issue." The will was properly executed and witnessed and named Richard executor. Arthur died in December 2009.

Richard and Jane were divorced in January of 2010, and incident thereto executed a settlement agreement which disposed of their property and provided for payments of, "\$1,000 per month to Jane for 10 years or until her death, if sooner," and a separate payment of, "\$250 per month per child for the support of their three children until each reached the age of 18."

Richard hired Harold as the attorney for Arthur's estate. Harold assigned John, who was an associate lawyer in his firm, to handle the legal work for Arthur's estate under Harold's supervision. A few weeks later as Richard was looking through Arthur's papers he found 1,000 shares of General Power, Inc., stock purchased by Arthur in 2007, which were in addition to the 2,000 shares which had been shown to Harold. Richard informed Harold of the newly discovered shares, and suggested that they should be part of the residuary. Harold informed John of the additional stock certificates, as John was preparing the Final Account of the estate which

is filed with the Register of Wills and is required to list all assets for the final distribution of the estate's assets to all beneficiaries. Harold instructed John not to add the 1,000 shares of stock to the Account because they had already processed the change of ownership of the 2,000 shares set forth in the will to the two specific legatees, saying to John, "I don't want to hold up closing the estate with a dispute. We will cash those shares and I will decide how to distribute the proceeds later, so don't include those shares." John complied with this instruction when he filed the Final Account, which was signed by Richard as Executor and John as Attorney.

Shortly after discovering the 1,000 shares, Richard saw Bob at a business meeting and mentioned to him that he had discovered the additional shares of stock. When the Account was filed, Bob noted the absence of the 1,000 shares and along with Joe, filed an objection to it.

After Arthur's estate was finally distributed, Richard gave the two parcels of Arthur's property which were in the residuary to his eldest child, Richard Jr. for his 18th birthday, because Richard Jr. was the only child who remained on good terms with Richard after the divorce. This gift in January 2011 was approximately 50% of the value of Arthur's residuary estate. A few months later Richard suddenly died, and was survived by his three children. Richard did not have a will, and he had not disposed of any more of Arthur's estate.

1. Who is entitled to the additional 1,000 shares of General Power, Inc., stock that were discovered by Richard?
2. Jane, on behalf of the two minor children, brought suit to challenge Richard's gift of the two parcels of land from Arthur's residuary to Richard Jr. How should the court rule?
3. What are the 2010 federal income tax consequences, if any, of the monthly \$1,000 payments to Jane and the \$750 for child support made pursuant to the divorce agreement?
4. Has either Harold or John violated any provisions of the Rules of Professional Conduct with respect to the concealment of the additional 1,000 shares of stock from the Account filed with the Register of Wills?

Question No. 1: Examiner's Analysis

1. The latent ambiguity in the bequest should be resolved through parol evidence, and the additional 1,000 shares should be distributed to Bob and Joe.

Arthur's will provided that his shares of General Power, Inc. be divided in equal shares of 1,000 each among Bob and Joe, but in fact he owned 3,000 shares. There is a "latent ambiguity" in the language of the will because it is unclear whether the bequest refers only to 2,000 shares or to all of the shares owned by Arthur at the time of his death. A latent ambiguity arises from collateral facts which make the meaning of a written document uncertain, although the language appears clear on the face of the document. *Krizovensky v Krizovensky*, 425 Pa.Super. 204, 624 A.2d 638 (1993), *appeal denied*, 536 Pa. 626, 637 A.2d 287 (1993). The court in *In Re Thomas' Estate*, 457 Pa. 546, 327 A.2d 31 (1974) discussed a latent ambiguity as follows:

Where the words of a will are on its face plain, consistent and certain, and where the uncertainty arises from extrinsic facts or circumstances in relation to the property bequeathed, there exists by definition a latent ambiguity. This court has repeatedly held that where a latent ambiguity does exist, parol evidence is admissible to explain or clarify the ambiguity.

The Superior Court determination in *In Re Estate of Schultheis*, 747 A.2d 918 (Pa. Super. 2000), *appeal denied*, 563 Pa. 703, 761 A.2d 551 (2000) involved a matter similar to the present facts. The testator had explicitly bequeathed his shares of bank stock to specific beneficiaries in various shares, for a total amount of 2,045 shares, but the Executrix discovered an additional 1,243 shares after the testator's death and allocated them to the specific beneficiaries. The residuary beneficiaries challenged that distribution, and the court was permitted to consider evidence beyond the language of the will itself in order to explain or clarify the ambiguity as it was unclear whether "my shares of stock" referred only to the 2,045 shares set forth in the will, or to all of the stock owned by the decedent at the time of his death. The Superior Court, in affirming the decision of the Orphans' Court determined based on parol evidence that the decedent's intention was to give all of the stock he owned, in the proportions listed, to the named beneficiaries, attributing the discrepancy of the number of shares bequeathed and the total owned by the decedent to have been a mistaken understanding that he owned only 2,045 shares.

In order to resolve the ambiguity of Arthur's bequest, it would be permissible for the court to take testimony from Harold, as the scrivener of the will, who could testify that Arthur thought he had "all his important papers" which included 2,000 shares of stock in General Power, Inc., when he came to the office to have the will prepared. *See Estate of McKenna*, 340 Pa. Super. 105, 489 A.2d 862 (1985) This testimony would support a finding that Arthur believed that he owned only 2,000 shares of stock. Additionally, the will described the shares of stock to be distributed to Bob and Joe as "my shares" of stock rather than simply giving 1,000 shares each to Bob and Joe. It appears that this set of facts is somewhat similar to those in *Estate of Schultheis*, in that Arthur made a mistake as to the number of shares that he owned and that he did not devise any shares to anyone other than Bob and Joe. Absent any parole evidence supporting a contrary intention, the evidence in the facts would likely be sufficient to cause the additional 1,000 shares to be distributed equally among Bob and Joe, not to the residuary.

2. The court should rule that Richard's disproportionate gift of the land to Richard Jr. was a proper use of the special, exclusive Power of Appointment Arthur had given him in the will.

The residuary clause of Arthur's will gave Richard a testamentary power of appointment over the entire residue of the estate. A power of appointment is defined as "a power created or reserved by a person (the donor) having property subject to his disposition, enabling the donee of the power to designate, within such limits as the donor may prescribe, the transferees of the property or the shares in which it shall be received." *In Re Kohler's Estate*, 463 Pa. 150, 344 A.2d 469 (1975). Questions involving the exercise of a power of appointment are resolved by determining the donor's intent. *In Re McMullin's Estate*, 490 Pa. 502, 417 A.2d 152 (1980)

A power of appointment may be general or special, with a general power authorizing the donee to distribute to anyone, and a special power restricting distributions to a limited class designated by the donor. See *In Re Schede's Estate*, 426 Pa. 93, 231 A.2d 135 (1967), *In Re Estate of Stewart*, 325 Pa. Super. 545, 473 A.2d 572 (1984) A special power of appointment may be either "exclusive," which allows the donee to choose among the class members, or "non-exclusive," under which the power must be exercised in favor of all the class members. A power to appoint to "such issue" as the donee determines is an exclusive power. *In Re Kohler's Estate*.

In addition to being able to use the residuary for necessary support, the power of appointment given to Richard in Arthur's will was a special, exclusive power during his lifetime to distribute the residuary of Arthur's estate to "such of his issue as he chooses."

His choice to give the two parcels of land constituting a large portion of the residuary of Arthur's estate to his eldest child was, therefore, a proper exercise of the power of appointment given to him by the language of Arthur's will. The remaining half of Arthur's residuary estate which Richard had not distributed during his life will be divided equally among all three of Richard's children, despite Richard Jr. having been given the other half of Arthur's estate already.

3. Jane must pay income tax on the payments to her, which are alimony, but not on the amounts designated as child support. Richard is entitled to deduct the payments to Jane but cannot deduct the payments for child support.

The payments provided to Jane under the divorce settlement are of two different kind. The \$1,000 per month is to be paid to Jane for "10 years or until her death, if sooner." This falls within the definition in Section 71 of the Internal Revenue Code of Alimony or Separate Maintenance Payments, which are income to the recipient, and deductible to the payor, so long as the payments are in cash and:

- (A) such payment is received by a spouse or former spouse pursuant to a divorce or separation agreement,

- (B) the divorce or separation agreement does not designate such payment as a payment which is not includible in gross income and not allowable as a deduction under Section 215,
- (C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and
- (D) there is no liability to make any such payment for any period after the death of the payee spouse. 26 U.S.C.A. 71

When the agreement or decree is silent as to the nature of such periodic payments made to a spouse under a divorce settlement, they will be presumed to be income to the recipient and deductible to the payor. It is necessary for the substance of a non-alimony designation to be reflected in the agreement, by for example identifying such payments as part of the property distribution or child support in order to negate such presumption. *Estate of Goldman v. Commissioner*, 112 T.C. 317 (1999).

Jane's \$1,000 payments are received by her as a former spouse pursuant to the agreement reached with her divorce; the facts do not indicate that she continued to live with Richard, and the payments would end in 10 years or sooner with her death. Since the agreement does not designate the payments as non-alimony Jane must declare the \$1,000 payments as income, and Richard (and his estate after his death) is entitled to deduct them so long as Jane receives payment. The deduction is an "above the line" deduction authorized under Section 62 of the IRC, regardless of whether or not he itemizes deductions.

The \$750 total payment for the three children is designated specifically as "child support," which is treated differently under subsection (c) of Section 71, Payments to Support Children. The treatment of payments as income does not apply "to any part of any payment which the terms of the divorce or separation agreement fix (in terms of money or a part of the payment) as a sum which is payable for the support of children of the payor spouse." The payment for Richard's three children in 2010 is neither includible as income to Jane, nor deductible to Richard.

4. **Harold violated the Rules of Professional Conduct (RPC) by instructing John to conceal the additional stock in the estate accounting, and the violation was likely clear enough to make John responsible under RPC 5.2 because he signed the account as attorney.**

Harold instructed John, a lawyer subordinate to Harold, to present the Account of Arthur's estate to list only the 2,000 shares referenced in the will. In doing so, he caused the Account to be incomplete and inaccurate. John complied with this instruction.

Executors of estates are required by the Pennsylvania Probate, Estates and Fiduciaries Code to file an Account, including a statement of proposed distribution or a request that distribution be determined by the court. 20 Pa. C.S.A. 3501.1, 3513, Pennsylvania Orphans'

Court Rules 6.1-6.12. The executor has a fiduciary obligation to preserve and protect the property for distribution to the proper persons within a reasonable time. See *In Re Estate of Campbell*, 692 A.2d 1098 (Pa. Super. 1997) The standard of care for the attorney for the estate is at least equivalent to that of the executor. *Estate of Westin*, 874 A.2d 139 (Pa. Super. 1977). The attorney for the estate is responsible for assisting the executor in the proper administration of the estate, which would include the preparation of a correct accounting for distribution of the estate's property to the proper persons.

The Pennsylvania Rules of Professional Conduct (RPC) include several provisions which require lawyers to be truthful and accurate in their statements to the court, to other tribunals, and to other persons. Rule 3.3 Candor Toward the Tribunal, prohibits a lawyer from "knowingly" making a "false statement of material fact or law to a tribunal."

Harold certainly knew that the 1,000 additional shares should be disclosed as such in the ultimate distribution of the estate. Nevertheless, he told John to under-report the value of Arthur's estate, by concealing the fact that the additional shares were discovered in order to get the Account filed promptly and avoid any argument over the 1,000 shares. It is likely that Harold was in violation of Rule 3.3 because he was not fully candid or accurate in listing the assets of Arthur's estate, which was his obligation as the attorney. By ordering such a violation of the RPC, Harold becomes responsible for John's violation under Rule 5.1(c) (1). Had the concealment of the 1,000 shares continued through the final distribution of the estate, the specific beneficiaries of the 2,000 shares would have been deprived of their right to demand that the additional shares be included, had Richard not mentioned their existence to Bob. Concealing the existence of the additional shares eliminated the ability of potential beneficiaries to challenge the distribution of the shares, notwithstanding the fact that Harold intended to determine how the proceeds of the sale of the stock should be distributed at a later time.

John's actions are the subject of RPC 5.2 Responsibilities of a Subordinate Lawyer, which states that (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acts at the direction of another person, and (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. The Explanatory Comment to this Rule states the following in part, regarding the responsibilities shared or allocated between supervisor and subordinate lawyers when there is an issue which involves professional judgment in the prospective action to be taken:

If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly.

Here, the narrative indicates that Harold did not want to delay filing the Account and closing the estate. The information should have been included in the Account, rather than concealed, even if Harold was uncertain whether the 1,000 shares belonged to the residuary or to Joe and Bob. Any uncertainty surrounding the determination of how the stock should be

distributed is separate from the determination of whether the stock needed to be disclosed in the Account. Harold's decision not to account for the additional stock was not "reasonable," because it provided the incorrect amount and nature of total assets to the Register of Wills, even though Harold anticipated resolving the distribution of the shares sometime in the future by cashing them and determining how to distribute the proceeds. Therefore, John was clearly not entitled to rely on Harold's instruction, and because he actually signed the deficient Account as Attorney, would likely also be in violation of the Rules of Professional Conduct.

Question No. 1: Grading Guidelines

1. Latent ambiguity of will. Resolution by parol evidence

Comments: Candidates should recognize that there is a latent ambiguity because based on collateral facts the will language is ambiguous as to the additional 1,000 shares. The candidate should also recognize that evidence outside the will as to the testator's intent can be presented, and that the evidence in the facts would likely be sufficient to cause the shares to be distributed to the specific beneficiaries of the other shares, especially if there in no other parol evidence supporting a contrary intention.

4 points

2. Power of Appointment. Special, exclusive power -authorized disproportionate distribution.

Comments: Candidates should recognize Richard's lifetime Power of Appointment as to the residuary of Arthur's estate, and that it was a specific exclusive power which enabled him to favor one of his children with a large gift.

4 points

3. Federal income tax. Alimony, distinction from Child Support

Comments: Candidates should acknowledge presumption of taxability and deductibility of periodic payments to spouse as alimony, and the non-taxability or deductibility of payments designated as child support.

6 points

4. Professional Responsibility, concealment of information by lawyer, subordinate responsibility for direction by superior when violation clear

Comments: Candidates should recognize that withholding of necessary information in an estate account filing with the court is a violation of the RPC, and that because it is a clear violation, a subordinate lawyer who complies with a supervising lawyer's direction is also in violation.

6 points

Question No. 2

Ben was injured while working for the ABS Paving Company, which had been hired by Big Box Sales (Big) to resurface its C County, Pennsylvania, store parking lot. Ben's specific job was to follow behind the asphalt roller on Big's lot and pour hot tar along the seams in the newly compressed blacktop. While pouring the tar, Ben stepped on a metal sewer grate which gave way, causing him to fall into the sewer inlet. Ben sustained serious injuries from the fall.

At the time of the accident, Ben was separated from his wife Pam, but no divorce action had been filed. Ben retained Attorney Wiley to represent him in a personal injury claim against Big. Wiley filed a negligence lawsuit for Ben against Big in the Court of Common Pleas of C County, Pennsylvania. In addition to testimony concerning his injuries received in the fall into the sewer inlet, Ben's case at trial consisted of witness testimony establishing that the sewer grate was 10 years old, looked to be in good condition before the accident, and that they saw Ben do nothing to contribute to the accident; and Ben's expert's testimony establishing that the asphalt roller did not come in contact with or damage the grate, which was recessed below ground level, and Ben's weight could not have broken a grate in good condition.

Six months after the accident Big had still not repaired the collapsed sewer grate. Big did not repair the sewer grate as is required by a C County ordinance relating to parking lot safety, but C County had not sent a notice of violation nor filed a violation charge with the Court.

After a public meeting of the C County Commissioners, Tom, who was the owner of a small business in competition with Big, complained in front of twenty-five people as he was exiting the meeting room and while a live broadcast on public television was still running that Big failed to remedy a safety concern to the public and that the County had failed to file an ordinance violation against Big. Tom stated that there was something wrong with the County's

failure to file an ordinance violation against Big and that there was more to the story between the County and Big. Tom also said Big was a typical discount chain store that did not play by the rules that pertain to others in society but used its influence and economic clout to either pay off or intimidate local government into granting it favorable treatment. Tom knew his statements were untrue, and his comments were based solely upon his personal dislike for large chain stores that competed with his business. Following the statement made by Tom, Big experienced a twenty percent decline in its sales, which market analysts attributed to Tom's statement since there were no other economic or market factors related to the decline in sales.

At the time of their separation Ben and Pam divided small items of personal property but major items of marital property such as their home, vehicles and pensions were not divided. The parties also had a small amount of marital debt. Ben's workers compensation income from his injury was equal to Pam's wages. When Ben is able to return to work his income will be slightly higher than Pam's wages. Other than Ben's accident related injuries, neither party has disabilities that would affect their ability to earn wages in the future. The parties have been able to live after separation in a similar lifestyle as they did while together.

- 1(a). What motion could Big's attorney make at the close of Ben's case to challenge the sufficiency of the evidence submitted on behalf of Ben, and what standard should the Court use in deciding the motion?
- 1(b). What arguments should Ben's attorney make in opposition to the defense motion challenging the sufficiency of his evidence, and how should the Court rule?
2. Big consulted its attorney regarding a possible defamation lawsuit against Tom based upon his statements after the C County Commissioner's meeting. What advice should the attorney give Big regarding the likelihood of success of a potential defamation lawsuit against Tom?
3. If Ben's claim against Big is settled for a substantial sum, what relevance, if any, would the settlement have to a claim for equitable property division if Pam files a divorce action in the Court of Common Pleas of C County, Pennsylvania?

Question No. 2: Examiner's Analysis

- 1.(a) Big's attorney could make a motion for a compulsory nonsuit under the criteria of Pa.R.C.P. No. 230.1, and the Court will determine whether plaintiff has introduced sufficient evidence to establish the necessary elements to maintain a cause of action.**

The Pennsylvania Rules of Civil Procedure provide as follows:

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.

The proper motion to be made by the defense would be a motion for a compulsory nonsuit at the conclusion of the plaintiff's case. The motion would allege that the plaintiff failed to introduce sufficient evidence to establish the necessary elements of negligence so as to maintain its cause of action. See *Dietzel v. Gurman*, 806 A.2d 1264 (Pa. Super. 2002). A compulsory nonsuit "is to be entered only in cases where the plaintiff has clearly not established a cause of action despite the resolution of all evidentiary conflicts in the plaintiff's favor, and with all reasonable inferences drawn from the evidence viewed most favorably to the plaintiff." *Fleishman v. General American Life Insurance Company*, 839 A.2d 1085 (Pa. Super. 2003), *appeal denied*, 579 Pa. 712, 858 A.2d 110 (2004).

The Court would therefore be required to use the previously stated standard to evaluate the plaintiff's evidence at the conclusion of his case. If the plaintiff has met his burden of proof then the case will go forward. If the plaintiff fails to meet his burden of proof then the Court will grant the motion for compulsory nonsuit.

The Court would simply look at the testimony presented during plaintiff's case to see if enough evidence was presented to establish the elements of negligence.

- 1(b) Although Ben did not produce direct evidence to support his contention of negligence against Big by showing that Big breached a duty of care to him, using the legal principle of *res ipsa loquitur*, Ben would likely be able to meet his burden of showing that the motion for compulsory nonsuit should not be granted.**

The facts indicate that Ben was on Big's premises, in its parking lot, as an employee of ABS Paving. ABS had a contract with Big to resurface Big's parking lot in C County, Pennsylvania. While performing his job of following the asphalt roller and sealing the cracks with tar, Ben fell through a sewer grate. There is no indication that there was anything visibly wrong with the sewer grate. In fact, testimony indicated that the sewer grate appeared to be in good condition.

The Pennsylvania Supreme Court adopted section 328D of the Restatement (Second) of Torts (1965) which sets forth the evidentiary rule of *res ipsa loquitur*. *Gilbert v. Korvette, Inc.*, 457 Pa. 602, 327 A.2d 94 (1974). In adopting section 328D of the Restatement (Second) of Torts (1965) the Court set forth the following elements that make up the principle of *res ipsa loquitur*:

“(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when

(a) the event is of a kind which ordinarily does not occur in the absence of negligence;

(b) other responsible causes, including the conduct of plaintiff and third persons, are sufficiently eliminated by the evidence; and

(c) the indicated negligence is within the scope of defendant’s duty to the plaintiff.” *Id*

In *Smith v. City of Chester*, 357 Pa. Super. 24, 515 A.2d 303 (1986) the Court in addressing the doctrine of *res ipsa loquitur* stated:

This doctrine is not a substantive rule of law nor a procedural rule, but is merely evidentiary in nature. The rationale behind this doctrine is to aid plaintiffs in making a *prima facie* case of negligence against defendants by allowing an inference of negligence to be deduced from competent evidence on the theory that in the course of ordinary events, the injury or damage complained of would not have occurred in absence of negligence.

The Court pointed out that all of the elements of section 328D must be satisfied before the inference of negligence can be drawn from an event such as the accident involving Ben. Ben would therefore argue based upon the Restatement (Second) of Torts, section 328D, that the motion for a compulsory nonsuit should be denied.

Ben would point out that negligence should be inferred since he sustained injuries as a result of the sewer grate collapsing and him falling into the sewer outlet, maintaining that an event such as this would not ordinarily have occurred in the absence of some negligence. This point would be supported by the fact that the sewer grate is located in the parking lot that is open and usable by vehicular and pedestrian traffic, and one would not expect the grate to fall in from use absent some negligence.

Ben could also argue that other responsible causes were eliminated by the evidence. There appears to be no natural cause or any external factors that would have caused the accident. These other causes would be ruled out by the witness testimony that indicated that the asphalt roller did not come in contact with or damage the grate since the grate was located slightly below the level of the parking lot. The testimony further provided that the grate was 10 years old and not only did the grate appear to be in good condition but that Ben did nothing to contribute to the injury. One would reasonably believe that there may have been some defect to the grate that the public, including those invited onto the premises, would not have seen.

Also, the third component of the Restatement requirements is met since Big would have a duty to Ben to maintain safe premises. In *Gutteridge v. A.P. Green Services, Inc.*, 804 A.2d 643 (Pa. Super. 2002) the Superior Court found that the duty of a landowner to an independent contractor, such as ABS Paving and its employees would be the same duty of the landowner to business invitees. The duty to business invitees is that the landowner must not only protect the invitee against known dangers, but against those that might be discovered with reasonable care. *Id.* 804 A.2d at 656. Ben did not present direct evidence that his accident was caused by a breach of a duty owed to him by Big. However, *res ipsa loquitur* can be used to prove the element of breach of duty by the use of circumstantial evidence.

Here, Ben would maintain that with reasonable inspections of the sewer grate Big could have detected that there was a problem with the grate and that the grate was at risk of collapsing. Since the grate was 10 years old and the paving machine has been ruled out as the cause of the sewer grate collapse, there appears to be no other logical explanation for the accident other than that the structural integrity of the sewer grate had been weakened over time which should have been discovered by routine inspections. It is sufficient for a plaintiff to present a case from which a jury may reasonably conclude that the negligence was more probably than not that of the defendant. *City of Chester, supra*. A jury may disagree with this conclusion and it again is noted that this is merely an evidentiary inference that is sufficient to defeat the motion for compulsory nonsuit.

2. Big's attorney should advise Big that it has a strong case against Tom for defamation relating to the statements Tom made after the C County meeting.

Big would have a strong case against Tom for defamation based upon the statements Tom made after the meeting. Since the action against Tom is based upon an oral statement, Big would have a slander action against him. *Solosko v. Paxton*, 383 Pa. 419, 119 A.2d 230 (1956).

In Pennsylvania, in order to have a successful claim for defamation, one must generally meet the statutory criteria contained at 42 Pa.C.S.A. 8343 which states as follows:

(a) Burden of plaintiff.—In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

- (1) The defamatory character of the communication.
- (2) Its publication by the defendant.
- (3) Its application to the plaintiff.
- (4) The understanding by the recipient of its defamatory meaning.
- (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
- (6) Special harm resulting to the plaintiff from its publication.
- (7) Abuse of a conditionally privileged occasion.

(b) Burden of defendant.—In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

- (1) The truth of the defamatory communication.
- (2) The privileged character of the occasion on which it was published.
- (3) The character of the subject matter of defamatory comment as of public concern.

A statement is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him. *Kurowski v. Burroughs*, 994 A.2d 611 (Pa. Super. 2010), *appeal denied*, 12 A.3d 752 (Pa. 2010). Tom's statement regarding Big's failure to make prompt repairs to the parking lot would not in and of itself be construed to be defamatory. In *Kurowski* the Court found that a statement as to the failure of a landlord to make timely repairs of a fire damaged building would not in and of itself be defamatory. However, unlike the *Kurowski* case where in offering an opinion the person disseminating the information did not express or imply that they were aware of any undisclosed facts, the situation here differs.

Here Tom did more than offer an opinion. He made a specific statement that Big did not play by the rules that pertain to others and used its influence and economic clout to either pay off or intimidate local government into granting it favorable treatment. The portion of Tom's statement alleging a payoff and intimidation of C County is clearly defamatory. Additionally, Tom made a statement that there was something wrong with the County's failure to file an ordinance violation against Big. Tom's statement implies some allegedly improper dealings between Big and C County especially when the potential violation of the safety ordinance had not been pursued by C County. Tom's statement goes beyond mere criticism of the way Big handled the parking lot repairs and indicates that there are undisclosed reasons for the failure of Big to remedy the parking lot issue. Tom implies that there is an improper arrangement between Big and C County based on undisclosed information and is thus defamatory. A statement that imputes to a person or entity characteristics and conduct which are incompatible with the proper and lawful exercise of a business is capable of a defamatory meaning. See *Tucker v. Philadelphia Daily News*, 577 Pa. 598, 848 A.2d 113 (2004) *citing Cosgrove Studio and Camera Shop, Inc. v. Pane*, 408 Pa. 314, 182 A.2d 751 (1962). Thus, Tom's statement alleging a payoff and implying that there is more to the story is defamatory.

Big could also meet its burden of proof relating to publication. The statement of Tom was made after a public meeting in the presence of twenty-five individuals and was broadcast live on public television. There is no doubt that the publication relates to Big since Big was named in Tom's statement. There appears to be little doubt that Tom intended the statement to imply that Big was a dishonest business entity that had some type of improper special arrangement with the County. The thrust of the statement by Tom was to attack Big by stating that it did not play by the rules that governed others in an attempt to discourage competition by Big in C County. Actual damages have been shown by Big since its sales declined by twenty percent since the statement made by Tom. The sales decline was not related to any downturn in the economy or other market factors.

Based on constitutional requirements, additional elements may be required to be proven depending on the character of the statement, the role of the defendant as a media outlet and the

role of the plaintiff as a public figure or private person. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558 (1986) - a private figure plaintiff is required to prove the falsity of the statement as well as fault in making the statement before recovering damages for defamation on a matter of public concern published by the media. In order to establish fault for defamation, a private figure plaintiff is required to show that the defamatory statement was negligently published regardless of whether the speech is on a matter of public or private concern. *American Furniture System, Inc. D/B/A/ Progressive Business Publication v. Better Business Bureau of Eastern Pennsylvania*, 592 Pa. 66, 923 A.2d 389 (2007). While the United States Supreme Court has not addressed the burden of proving the falsity of a defamatory statement made by a non-media defendant, Pennsylvania courts have held that if the statement in question bears on a matter of public concern or the defendant is a member of the media, First Amendment concerns compel the plaintiff to prove that the alleged defamatory statement is false. *Lewis v. Philadelphia Newspapers Inc.*, 833 A.2d 185 (Pa. Super. 2003), *appeal denied*, 577 Pa. 690, 844 A.2d 553 (2004). However, in analyzing the defamation claim under the facts of this case, since Tom spoke with knowledge that the defamatory statements were false, it does not matter whether Big is a private or public figure or whether non-media defendants are entitled to the same protections under the First Amendment since the statements were made by Tom with malice which would satisfy even the most stringent standard.

There are insufficient facts to establish that Big was a limited purpose public figure, however the failure of C County to cite Big for a violation and the allegations of impropriety connected therewith would likely constitute a matter of public concern. Thus Tom's defamatory statement would likely be found to have been made against a private entity on a matter of public concern. Tom's allegation that Big was paying off C County is defamatory; however Tom had no basis to support his defamatory statement against Big, and his conduct in knowingly making a false statement was clearly negligent and likely malicious. Additionally, the facts indicate that Tom knew his statements were not true so the falsity of the statements should be able to be established by Big. The attorney should advise Big that it has an excellent chance of prevailing against Tom because the statements of Tom tend to harm the reputation of Big and may well deter third parties from dealing with Big. See *Tucker, supra*.

3. Even though Ben's settlement would not be marital property under Pennsylvania law, the Court would factor the settlement into the overall equitable division of marital property.

Since Pam filed a divorce action the ancillary claim of equitable property division is properly before the Court. The Court would first need to determine what property is marital property subject to equitable division. Generally all property obtained during the marriage until final separation is marital property together with the increase in value of pre-marital or gifted property. 23 Pa. C.S.A. 3501. Under Pennsylvania law the settlement received from Big by Ben would not be marital property since the claim accrued after the date of final separation. 23 Pa.C.S.A. 3501(a)(8). The critical element to evaluate in determining whether an award is marital property is when the right to receive the payments arose. *Drake v. Drake*, 555 Pa. 481, 725 A.2d 717 (1999). The settlement and even the underlying injury occurred after the parties separated. Thus the settlement would not be marital property and would not be before the Court for equitable property division.

However, under 23 Pa.C.S.A. 3502 there are a number of factors that the Court must consider in making an award of marital property division. The facts list a number of factors that

the Court would normally inquire into such as the source and amount of income, employability needs of the parties, value or extent of other property and the standard of living the parties established.

Certainly the receipt of a substantial settlement in Ben's name only, to which he would have access to live reflects upon how the marital estate should be distributed. A court would look at his settlement and make a just and equitable award of the balance of the marital property and the allocation of marital debt based upon all of the factors set forth including the receipt of the settlement.

Question No. 2: Grading Guidelines

1a. Compulsory Nonsuit

Comments: The candidate is expected to recognize that a motion for a compulsory nonsuit could be made at the conclusion of plaintiff's case and discuss the proper standard to be used by the Court to determine whether the motion should be granted.

2 Points

1b. Res Ipsa Loquitor

Comments: The candidate should discuss the concept of res ipsa loquitor and conclude that the motion for a compulsory nonsuit should be denied since the plaintiff has met his burden of establishing the necessary elements of negligence based upon the doctrine of res ipsa loquitor.

8 Points

2. Defamation

Comments: The candidate should identify the elements Big would need to establish to prove slander and then conclude that Big's attorney should advise it that it has a strong likelihood of success in a defamation case against Tom.

6 Points

3. Equitable Division

Comments: The candidate should recognize that even though the settlement is not marital property it would be factored into the overall division of marital property by the Court.

4 Points

Question No. 3

In June 2011, Mallory and her friend, Rachel, attended the Keystone 500, a three day car racing event in C County, Pennsylvania. They arrived on the first day of the event and parked their motor home on the infield of the race track. They immediately decorated their motor home with various banners showing support for their favorite driver, Nickey Speedo. A short time later, Conner and Vince arrived at the infield with their motor home and parked next to Mallory and Rachel. The boys, who were devoted supporters of a rival car racer, immediately began to verbally taunt the women about the Nickey Speedo banners.

Later that evening, as Mallory and Rachel were trying to get to sleep, Mallory could hear something hitting the outside of their motor home. She looked out the window and saw Conner throwing beer cans at her motor home. Mallory, who had enough of these antics, walked outside the motor home and pulled out her loaded 9 mm hand gun, which she was licensed to carry, and walked up to Conner who was standing in a crowd of people. Mallory pointed the gun at Conner's head, with her finger off the trigger, and said, "One more problem from you and I will put this bullet in your head." Conner, and the people standing immediately behind him, became terrified and fled the area.

Conner immediately ran to a State Police Trooper who was patrolling the infield and reported what had just happened. Within minutes, Mallory was placed under arrest and read her Miranda rights by the Trooper. Mallory immediately told the Trooper she wanted an attorney. Two minutes later, the Trooper said to Mallory, "This will go a lot better for you if you just own up to what you did," to which Mallory responded, "That idiot had it coming. I don't regret sticking my gun in his face." As they arrived at the State Police barracks for booking, Mallory

said to the booking Trooper, without being asked anything, “I should have just shot the bum. He was a jerk.”

1. Aside from possession of instruments of a crime, terroristic threats and harassment, with what crimes should Mallory be charged and likely be found guilty in the C County Court of Common Pleas regarding the incident with Conner?

Assume the charges proceed to trial and as part of Mallory’s defense Mallory takes the stand to testify to her good character and that she is a peaceful and law abiding citizen. On rebuttal, the prosecution, having provided proper notice, attempts to cross examine Mallory on her general character of being violent towards others including a specific incident where she threatened someone with a knife for which she was charged and convicted of simple assault, which the prosecution was able to establish in their pre-trial interviews of other witnesses.

2. If Mallory’s counsel objects to the prosecution’s proposed character evidence, how should the Court rule?
3. If Mallory’s counsel moves to suppress the admissibility of the statements made by Mallory to the Trooper and the booking Trooper on the basis that her Miranda rights were violated, how would the Court likely rule on this motion?

Question No. 3: Examiner's Analysis

- 1. Aside from the charges of possession of instruments of a crime, terroristic threats and harassment, Mallory should be charged with simple assault, recklessly endangering another person and disorderly conduct, and Mallory will likely be found guilty of these offenses.**

A person commits the crime of simple assault when he or she attempts by physical menace to put another in fear of imminent serious bodily injury. 18 Pa. C.S.A. Section 2701 (a)(3). The act of pointing a gun at another person can constitute simple assault as an attempt by physical menace to put another in fear of imminent serious bodily injury. *In Re Maloney*, 431 Pa. Super. 321, 636 A.2d 671, 674 (1994).

As applied here, Mallory pointed her loaded 9 mm handgun, with her finger off the trigger, at Conner's head and said, "One more problem from you and I will put this bullet in your head." The act of pointing the gun and the statement support a reasonable inference that she attempted to place Conner in fear of imminent serious bodily injury. In fact, Conner was terrified by the incident and immediately fled the scene. Thus, a charge of simple assault is likely supported under the above facts.

A person commits the crime of recklessly endangering another person through reckless conduct which places or may place another person in danger of death or serious bodily injury. 18 Pa. C.S.A. Section 2705. "The crime of recklessly endangering another person is a crime of assault which requires the creation of danger. As such, there must be an actual present ability to inflict harm." *Commonwealth of Pennsylvania v. Reynolds*, 835 A.2d 720 (Pa. Super. 2003) citing *Commonwealth v. Rivera*, 349 Pa. Super. 303, 503 A.2d 11 (1985). A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. 18 Pa. C.S.A. Section 302 (b)(3).

As applied here, it can be argued that the pointing of a loaded gun at Conner's head was reckless conduct that placed or may have placed Conner in danger of death or serious bodily injury. In particular, this conduct demonstrates a conscious disregard of a substantial and unjustifiable risk that serious bodily harm might result to Conner. Further, since the gun was loaded the requisite "actual present ability to inflict harm" was present. Accordingly, there is a strong argument that the crime of recklessly endangering another person is supported by the stated facts. See *Newcomer v. Civil Service Commission of Fairchance Borough*, 100 Pa. Cmwlth. 559, 515 A.2d 108 (1986), *appeal denied*, 514 Pa. 626, 522 A.2d 51 (1987) (pointing a loaded firearm at another individual's chest supports a charge of recklessly endangering).

A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he engages in fighting or threatening, or

in violent or tumultuous behavior. 18 Pa. C.S.A Section 5503 (a)(1). Fighting words will support a conviction for disorderly conduct. *Commonwealth v. Lutes*, 793 A.2d 949 (Pa. Super. 2002). As applied here, it can be argued that Mallory recklessly created a risk of public alarm by both the threatening statement that she would put a bullet in Conner's head and the act itself of pointing the gun at his head. Her actions not only caused Conner to flee the scene but also caused all of the people standing behind him to flee as well. This charge is likely also supported on facts presented.

2. The Court should rule that the testimony being proposed by the prosecution should be admissible.

Pa. R.E. 405 sets forth methods of proving character. Subsection (a) of that Rule addresses reputation evidence and provides that in all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination of the reputation witness, inquiry is allowable into specific instances of conduct probative of the character trait in question, except that in criminal cases inquiry into allegations of other criminal misconduct of the accused not resulting in a conviction is not permissible.

Pa. R.E. 404 (a) provides that evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. However, there are exceptions to this rule including Pa. R.E. 404(a)(1) which addresses the character of the accused in a criminal case. This rule provides that in a criminal case evidence of a pertinent trait of character of the accused is admissible when offered by the accused, or by the prosecution to rebut the same. Additionally, 42 Pa. C.S.A. Section 5918 provides in pertinent part that "no person charged with any crime and called as a witness in his own behalf, shall be asked, or if asked, shall be required to answer, any question tending to show that he has committed, or been charged with, or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation unless he shall have at such trial, . . . given evidence tending to prove his own good character or reputation." When a defendant asserts his own good character by volunteering that he is a non-violent person, the Commonwealth may properly rebut that assertion by bringing out the defendant's prior conviction for a violent crime. *Commonwealth v. Trignani*, 334 Pa. Super. 526, 483 A.2d 862 (1984).

In this case, Mallory has offered testimony to her good character which the prosecution would have the right to rebut under Pa. R.E. 404(a)(1). Thus, the prosecution's cross examination of Mallory regarding her reputation for generally violent character would be admissible. In addition, since the defendant has testified to her own good character the prosecution would be permitted to cross examine her on her prior conviction for simple assault. If Mallory had elected not to testify as to her character none of the above evidence would have been admissible by the prosecuting attorney.

In summary, the Court will likely grant the prosecution's attempts to cross examine Mallory on her generally violent character and the conviction for simple assault.

3. The first statement made by Mallory will not likely be admissible against her while the second statement will likely be admissible.

The rules set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966) are designed to protect the privilege against self incrimination. Under *Miranda* the statements of the accused arising from custodial interrogation are inadmissible unless the prosecution shows that the procedural safeguards required by *Miranda* to secure the privilege against self incrimination were offered the accused. *Id.* Additionally, once a person invokes their right to counsel all questioning must stop until counsel is obtained or provided unless the accused initiates further communication, exchanges or conversations with the police. *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880 (1981)

A custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda, supra.* Under both the federal and Pennsylvania Constitutions, the test for determining whether or not a person is in custody for *Miranda* purposes is based on an objective analysis of how a reasonable person in the suspect's situation would have understood his situation. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138 (1984), *Commonwealth v. O'Shea*, 456 Pa. 288, 318 A.2d 713 (1974), *cert. denied*, 419 U.S. 1092, 95 S.Ct. 686 (1974).

Interrogation under *Miranda* refers not only to express questioning but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from a suspect. *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682 (1980), *Commonwealth v. Williams*, 941 A.2d 14 (Pa. Super. 2008), quoting *Commonwealth v. Ingram*, 814 A.2d 264 (Pa. Super 2002). Where a defendant who has invoked his right to counsel offers an "unsolicited" or a "gratuitous" statement, the statement will not be subject to suppression. *Miranda v. Arizona, supra.*, *Commonwealth v. Hughes*, 536 Pa. 355, 639 A.2d 763 (1994).

As applied here, the facts make clear that Mallory was placed under arrest and read her *Miranda* rights and was in the custody of the state police. Upon being placed under arrest and read her *Miranda* rights she immediately told the Trooper that she wanted an attorney. Once she invoked her right to counsel all questioning by the police should have terminated. Despite the invocation of her right to counsel the Trooper went on to say to Mallory, "This will go a lot better if you just own up to what you did." It could be argued that this type of statement by the Trooper was reasonably likely to elicit an incriminating response from Mallory and in fact she did respond by indicating, "That idiot had it coming. I don't regret sticking the gun in his face." The defense has a strong argument to exclude this statement as the Trooper arguably violated her rights in eliciting this incriminating response from her.

With regard to the statement made by Mallory during the booking process this statement will likely be admissible. Despite the fact that she had invoked her right to counsel, she was not even asked a question by the booking Trooper when she stated, "I should have shot the bum. He was a jerk." Since this statement was voluntarily made by Mallory, and not in response to any questioning by the police, it is likely that this statement would be admissible against her at trial.

Question No. 3: Grading Guidelines

1. Criminal Law

Comments: The candidate is expected to identify the crimes of simple assault, recklessly endangering another person and disorderly conduct, discuss the elements of each of the offenses and conclude that Mallory is likely to be found guilty of each offense.

9 Points

2. Evidence

Comments: The candidate is expected to discuss the applicable rules of evidence in a criminal case concerning character evidence and use of prior convictions, including the exceptions to each rule, and conclude that the character evidence to rebut Mallory's evidence of good character and conviction of crime evidence will likely both be admissible at trial.

5 Points

3. Miranda

Comments: The candidate is expected to recognize that under Miranda once a person is in custody he is entitled to be read his Miranda rights and once the right to counsel is invoked no further questioning should ensue. The candidate is expected to discuss the rules applicable to interrogation including the fact that statements should not be made by the police which are likely to elicit an incriminating response from a suspect and the candidate is expected to discuss that any statements made voluntarily and not in response to interrogation are likely admissible.

6 Points

Question No. 4

Sam, an 82 year old widower and resident of C-City, Pennsylvania, owned a farm on which he had lived for 50 years. He had one son, Junior, who was 45 years old and lived in C-City with his wife and children.

Following a hospital stay, Sam moved into the County Home for the Elderly (Home) in C-City for care and treatment in the hope that he would recover sufficiently to return to his farm. Sam's stay in Home was paid for by a public benefits program whose governing law entitles participants to care from "qualified providers," which are defined as facilities licensed by the state. The law provides that benefits under the program cannot be terminated without a hearing.

Home is owned and operated by the county government in which C-City is located. It is licensed by the state of Pennsylvania, which inspects and re-licenses it each year. In April of 2011, Sam and the other residents were informed by the state that, based on inspection reports submitted by health care professionals, Home's license was being revoked effective August 1, 2011. They were also informed that, effective on the date of the revocation, the public benefits program would no longer pay for their stay at Home and they would be required to move to another licensed facility. Home filed a request for a hearing on its license revocation, but the hearing will not be held until after the revocation becomes effective. Sam and other residents covered by the same public benefits program filed suit in the federal district court for C-City alleging that, under the Due Process Clause of the Federal Constitution, they were entitled to a hearing before Home's license could be revoked and they were required to move. They claimed that the revocation of Home's license resulted in their loss of public benefits by precluding Home from providing care to them at government expense and that the resulting forced move would cause physical and psychological harm.

1. How should the court analyze the residents' due process claim, and with what result?

While Sam was living in Home, his son, Junior, met with Attorney Able, who had represented Sam for many years, most recently for estate planning. Junior told Able that he was meeting with him on his father's behalf, and requested that Able prepare a document by which Sam would make Junior his agent for all financial and healthcare decisions and transactions. Able considered Sam to be his client and complied with the request to prepare the document for him. Able prepared the appropriate document as requested without ever contacting Sam, and he sent it to Junior, along with the bill for his services. Junior promptly paid Able's bill.

2. Did Attorney Able violate any of the Rules of Professional Conduct with respect to his preparation of the documentation requested by Junior, including the payment of his fee?

Pat, a former management employee of Home, filed suit against her former employer, claiming she was severely sexually harassed and forced to resign, in violation of Title VII of the Civil Rights Act of 1964. Pat alleged that for the past year, her supervisor daily invited her to "warm up the bed" in a vacant resident room and frequently followed her into a room that was vacant, closing the door behind him and making humiliating and offensive sexually suggestive comments to her. She followed procedures in the employees' manual for making claims of discrimination and complained to the human resources director who told her to "lighten up" and "laugh it off" since nothing had happened to her so far, and the HR Director took no further action. The supervisor's conduct continued, and on one occasion the supervisor locked her in a closet with him, and threatened to fire her or make her life miserable if she continued to refuse his advances. As a result, Pat resigned and sued Home after satisfying all procedural prerequisites.

3. What would Pat be required to establish to make out a claim for sexual harassment; what would Home be required to prove to support an affirmative defense to the claim, and what is Pat's likelihood of success?

Question No. 4: Examiner's Analysis

- 1. The court should determine whether the residents have been deprived of a protected interest in property or liberty and conclude that, while the residents may have a property right in continued benefits, the issue the residents raised does not involve a protected property right or liberty interest, and, as a result, the residents' due process rights were not violated.**

Plaintiffs, residents of Home, claim that they are entitled to a pre-termination hearing before Home's operating license can be revoked and they can be forced to relocate to other facilities. They base their claim on their rights under the Due Process Clause.

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *American Manufacturer's Mutual Insurance Company v. Sullivan*, 526 U.S. 40, 59, 119 S. Ct. 977, 989 (1999) "A claim of unconstitutional deprivation has three essential elements: 1) the claimant must be 'deprived' of a protectable interest; 2) that deprivation must be due to some government action; and 3) the deprivation must be without due process." *Cospito, et. al. v. Heckler, et. al.*, 742 F.2d 72, 80 (3d Cir. 1984), *cert. denied*, 471 U.S. 1131, 105 S. Ct. 2665 (1985). Sam and the other residents must allege, and ultimately establish, that they have a property or liberty interest in continued residence in Home that entitles them to a hearing before Home's license may be terminated and before they may be required to move.

Property interests must be derived from existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and support claims of entitlement to those benefits. *See Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2707 (1972). A public program that provides for continued benefits to an individual under certain standards may constitute a property interest requiring a hearing before the benefits can be terminated. *Goldberg v. Kelly, et. al.*, 397 U.S. 254, 90 S. Ct. 1011 (1970). However, "...it is clear that not every inconvenience resulting from state action, whatever an individual's expectation may be, is a deprivation of property cognizable under the due process clauses." *Caton Ridge Nursing Home, Inc., et. al. v. Califano, et. al.*, 447 F. Supp. 1222, 1225 (D.Md. 1978), *aff'd.*, 596 F.2d 608 (4th Cir. 1979), *See also Murray v. West Baton Rouge Parish School Board*, 472 F.2d. 438 (5th Cir. 1973).

Here, the residents' right to paid residence in a nursing home is not at issue, although their continued residence in Home may be. The "right" which would be protectable is their continued eligibility for the public benefits program, not a right to remain in the nursing home of their choice. In *O'Bannon et. al. v. Town Court Nursing Center, et. al.*, 447 U.S. 773, 784, 100 S. Ct. 2467 (1980), the Supreme Court held: [the residents argue that the statutory benefit programs] "give them a property right to remain in the home of their choice absent good cause for transfer and therefore entitle them to a hearing on whether such cause exists... and that a transfer may have such severe physical or emotional side effects that it is tantamount to a deprivation of life or liberty, which must be preceded by a due process hearing. We find both arguments unpersuasive." The Court concluded that the residents' right to continued public benefits was not at issue because the residents were merely required to use the benefits for care

at a different facility. The Court also found that the residents had no right to receive benefits for continued residence in an unlicensed home, and that any limitation on the ability to transfer a resident applied to the provider not to the government's right to make a transfer necessary by decertifying a facility. The Court further concluded that the Due Process Clause only applies to direct government action affecting a citizen's rights, not the incidental consequences of an enforcement action directed against a third party that affects the citizen indirectly or incidentally.

Accordingly, Sam and the other residents will likely be found to have no protectable property right or liberty interest which would require a hearing on the dispute between Home and the licensing agency, and their due process claims will fail.

2. Attorney Able violated the Rules of Professional Conduct by preparing documentation for Sam to make Junior his agent for financial and healthcare decisions, without ever meeting with Sam, and for billing and accepting payment for his services from a third party (Junior).

Able previously represented Sam in various matters, and Able considered Sam to be his client for purposes of preparing the documentation requested by Junior. The ethical issue would concern Able's lack of contact with his client and his acceptance of direction and payment from Sam's son, Junior. Rule 1.2 of the Rules of Professional Conduct provides, in pertinent part:

- (a) . . . a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

Rule 1.4 of the Rules of Professional Conduct provides, in pertinent part:

- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Based on the information provided, Able never contacted, spoke, or met with Sam, and prepared the document at Junior's direction. Thus, Able never consulted with his client about the objectives of the representation or the means by which the objectives were to be accomplished and instead relied solely on Junior's directions.

Additionally, by failing to communicate with Sam, and by billing and accepting payment from Junior, Attorney Able likely violated Rule 1.8, which provides, in pertinent part:

- (f) A lawyer shall not accept compensation for representing a client from one other than the client, unless:
 - (1) the client gives informed consent;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by Rule 1.6.

Further, Rule 5.4 provides:

Professional Independence of a Lawyer

- (c) A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Here, Able has had no communication with Sam in this matter. He has taken all instructions from Junior, and has, apparently, made no effort to contact Sam. He accepted payment from Junior for preparing documentation for Sam to designate Junior to make financial and healthcare decisions for Sam. As such, he should have ensured that he complied with the exceptions to Rule 1.8(f). He should have met with Sam and obtained Sam's informed consent to the representation and to Junior's paying for it. He should have met independently with Sam, or at least conferred with him in private, to ensure that the instructions provided by Junior were consistent with Sam's intent so that Able would be exercising independent judgment in preparing the documentation.

- 3. **Pat can establish a Title VII claim for sexual harassment by her supervisor that created a hostile work environment. She would be required to show that the harassment was unwelcome, and so severe and pervasive that her working conditions became intolerable. Her former employer would have to show that it took appropriate corrective action and Pat failed to avail herself of such corrective action. Since Pat did follow procedures, without any satisfaction, she is likely to prevail.**

At issue is the burden of proof that Pat will bear for her sexual harassment/constructive discharge claim under Title VII of the Civil Rights Act of 1964.

Title VII provides, in pertinent part:

“It shall be an unlawful employment practice for an employer...to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

with respect to his compensation, terms, conditions or privileges of employment, because of such individual's ...sex..." 42 U.S.C. 2000e-2(a).

The prohibition against sex discrimination in Title VII has been applied to unwelcome gender based sexual harassment that creates a hostile or abusive work environment. *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986). Pat should be able to establish that the harassing conduct was both unwelcome and based on her sex. Pat can show that the conduct was unwelcome because there is nothing in the facts to show that she encouraged her supervisor's behavior and, in fact, complained about the behavior through existing procedures. Additionally, it is reasonable to presume that the harassment was based on Pat being female based on the explicit proposals for her to engage in sexual activity which were made by her male supervisor.

Sexual harassment claims have traditionally been categorized as either *quid pro quo* claims, based on sexual misconduct linked to carried-out economic threats, or hostile workplace claims, in which the unwelcome sexual harassment creates a hostile or abusive work environment. *Id.* See also, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998). In *Burlington Industries*, the Court stated:

To the extent [the terms *quid pro quo* and hostile work environment] illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. **For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.** Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct. *Id.* at 753-754. (emphasis added)

Had adverse action been taken against Pat by her supervisor, no additional proof would have been required of her, and liability would have been established. Since no such action was taken, Pat would further be required to establish that the complained-of conduct was "severe or pervasive." *Id.* at 754. It would appear that Pat can meet this additional burden. In determining whether an environment is hostile or abusive, a court looks at all of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993).

The facts of Pat's case indicate that the supervisor's unwelcome harassing conduct was frequent and offensive. The discriminatory comments occurred on a daily basis, and were humiliating and offensive. Further evidence of the abusive conditions is the fact that the comments were often made behind closed doors at times when her supervisor had followed her

into a vacant room. Additionally, Pat can show that the supervisor locked her in a closet with him and threatened her if she did not comply with his advances.

In order for a hostile work environment claim to be actionable, the work environment must be both objectively and subjectively hostile or offensive, *i.e.* it must be one that a reasonable person would find hostile or abusive and be one that the victim perceived to be so. *Id* The facts indicate that the supervisor's unwelcome harassing conduct was hostile, both objectively and subjectively, as viewed by Pat.

While Pat will be able to establish a claim for sexual harassment, she will also likely be able to establish that the harassment led to her being forced to resign from the company. In order to establish "constructive discharge", Pat must show that the abusive working environment was so intolerable that her resignation was an appropriate response, or, in other words that "working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141, 124 S. Ct. 2342 (2004). Given the above referenced facts, it is reasonably likely that Pat will be able to establish that the work environment was hostile and offensive and that a reasonable person would have felt compelled to resign.

Pat's employer may seek to avoid vicarious liability for the acts of Pat's supervisor by attempting to assert an affirmative defense. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor, but an employer can defend an action for constructive discharge based on supervisor harassment where no adverse employment action was taken by showing: "... (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Industries, Inc. v. Ellerth*, *supra*, at 765; *Suders*, *supra*.

Although Home had procedures for making complaints about discriminatory conduct in the workplace, when Pat followed the procedures and reported the sexual harassment to the human resources director, no action was taken. Accordingly, Pat should be viewed as having taken advantage of corrective opportunities, and the employer's lack of action would appear to render the employer fully liable for the constructive discharge caused by the sexual harassment of its supervisor.

Question No. 4: Grading Guidelines

1. Procedural Due Process

Comments: Applicants should discuss the requirements of procedural due process, analyze the facts and apply the law to the facts to reach a well-reasoned conclusion.

7 points

2. Professional Responsibility

Comments: Applicants should identify and discuss the relevant concepts set forth in the appropriate Rules of Professional Conduct, and apply them to the facts to reach a well-reasoned conclusion.

5 points

3. Sexual Harassment

Comments: Applicant should discuss the elements of Title VII insofar as it applies to claims for sexual harassment and defenses to such claims, and apply the law to the facts to reach a well-reasoned conclusion.

8 points

Question No. 5

Al and his son, Bill, owned Blackacre, a residential property located in Smallville, Pennsylvania, as joint tenants with right of survivorship. Bill was an avid collector of comic books. While attending a comic book convention in Metropolis, Pennsylvania, Bill saw a copy of Action Comics No. 1, an extremely rare and valuable edition of the first Superman comic book ever published, in a glass-enclosed case. Bill and Dave, a reputable amateur dealer in comic books and the owner of the comic book on display at the convention, immediately signed a valid agreement for Bill to purchase the comic book from Dave for \$250,000. To pay for the comic book, Bill exhausted his life savings and borrowed a substantial sum of money from a local bank. As collateral for the loan, Bill executed a mortgage on his interest in Blackacre. Due to the age and fragile condition of the comic book, Dave delivered it to Bill in the same glass-enclosed case in which Dave had received the comic book when he purchased it several years earlier from a trustworthy professional dealer. Dave told Bill that he had never opened the case to inspect the copy of Action Comics No. 1 prior to purchasing it. Despite Dave's repeated invitations to open the case and inspect the comic book prior to paying for it, Bill, fearing possible damage to the book, declined to do so.

Al also owned a cabin on a parcel of land in Rural County, Pennsylvania, known as Greenacres. Due to his declining health, Al decided to give Greenacres to Bill. Al signed a valid deed to Greenacres and delivered it to Bill. Distracted by his recent purchase of the comic book, Bill forgot to record the deed. When Al later learned that Bill had spent his life savings on a comic book, Al decided to gift Greenacres to his daughter, Ellen. Al executed a new deed proper in all respects and delivered it to Ellen, who immediately recorded it and established a residence on the property. Ellen had no knowledge of Al's prior deed giving Greenacres to Bill.

Using the monies from his sale of the comic book to Bill, Dave leased space in a building in Metropolis owned by Carol to open a comic book–themed bar/restaurant called “Super Heroes.” Prior to opening Super Heroes, Dave had a new automatic sprinkler system installed to satisfy new city fire code rules. The sprinkler system was installed in such a manner that it could not be removed without substantially damaging the leased space. Dave also installed a new state-of-the-art tap system for the many specialty beers that he planned to serve at his new bar/restaurant. Finally, Dave placed his vast collection of comic books on display throughout Super Heroes.

Al died on July 1, 2011. By a valid will, he conveyed his interest in Blackacre to Ellen.

To impress his new girlfriend, Bill finally opened the glass-enclosed case containing the comic book. He discovered that one of the numerals in the comic book’s title had been covered by the case frame and that the comic book inside was not Action Comics No. 1, but Action Comics No. 11, a widely available reprint edition of Action Comics No. 1 having no value to comic book collectors.

1. Following Al’s death, who owns Blackacre?
2. Bill wants to rescind the agreement with Dave for the sale of the comic book. What legal theory under the common law of contracts should Bill raise in his suit to rescind the agreement?
3. To improve business, Dave decided to exercise his right of early termination stated in his lease with Carol so that he could relocate Super Heroes to another part of Metropolis. Dave timely notified Carol that he intended to close Super Heroes at its current location in Carol’s building and to remove his comic books, the sprinkler system and the tap system before the lease terminated. Carol believed that as the owner of the premises all of the items belonged to her and filed an action to restrain Dave from removing any of the items. The lease is silent on removal of these items. How should a Pennsylvania court decide the matter?
4. Bill filed a quiet title action in Rural County against Ellen claiming that he is the owner of Greenacres. Will Bill’s action be successful?

Question No. 5: Examiner's Analysis

1. Because the joint tenancy with right of survivorship was severed by Bill's mortgage, Bill and Ellen own Blackacre as tenants in common following Al's death.

Al and Bill owned Blackacre as joint tenants with right of survivorship. A joint tenancy with right of survivorship is created by the co-existence of the four unities of interest, title, time and possession. *In Re Estate of Quick*, 588 Pa. 485, 490, 905 A.2d 471, 474 (2006). The essence of this form of concurrent ownership is to vest title equally in two or more persons during their lifetimes, with sole ownership passing to the survivor upon the death of the other joint tenant or tenants. *In Re Parkhurst's Estate*, 402 Pa. 527, 532, 167 A.2d 476, 478 (1961). The survivorship characteristic of a joint tenancy precludes a joint tenant from disposing of his interest by will. *Nicholson v. Johnston*, 855 A.2d 97, 100 (Pa. Super. 2004) (citations omitted).

A joint tenancy with right of survivorship is severable by the action, voluntary or involuntary, of either one of the joint tenants that destroys one of the required four unities. *Sheridan v. Lucey*, 395 Pa. 306, 149 A.2d 444 (1959). Upon the destruction of any of the four unities, the joint tenancy with right of survivorship becomes a tenancy in common. *In Re Larendon's Estate*, 439 Pa. 535, 266 A.2d 763 (1970). Each tenant in a tenancy in common possesses the power to dispose of his interest or any portion thereof by deed or by will. R. Boyer, H. Hovenkamp and S. Kurtz, *The Law of Property: An Introductory Survey*, Chapter 5, Section III, at 105 (4th ed.).

In some states, one joint tenant's execution of a mortgage is regarded as simply a lien on title and does not cause a severance. Under Pennsylvania law, whether a mortgage operates to sever a joint tenancy with right of survivorship and create a tenancy in common is dependent upon how many joint tenants execute the mortgage. Where fewer than all of the joint tenants execute a mortgage on the joint tenancy property, the mortgage effectuates a severance of the joint tenancy with right of survivorship and results in the creation of a tenancy in common. *General Credit Co. v. Cleck*, 415 Pa. Super. 338, 346, 609 A.2d 553, 557 (1992), *appeal discontinued*, 531 Pa. 655, 613 A.2d 560 (1992), *citing*, *Simpson v. Ammons*, 1 Binn. 175 (Pa. 1806). Where all of the joint tenants execute the mortgage on the joint tenancy property, the mortgage does not effectuate a severance of the joint tenancy with right of survivorship because the unities necessary for a joint tenancy with right of survivorship are considered to be preserved. *Id.*, *citing*, *Estate of Kotz*, 486 Pa. 444, 458, 406 A.2d 524, 532 (1979).

The facts state that only Bill executed the mortgage on Blackacre. By executing the mortgage, Bill caused a severance resulting in Al and Bill owning an undivided one-half interest in Blackacre as tenants in common. When Al died, his interest in Blackacre passed by will to his daughter, Ellen. Therefore, Bill and Ellen are the owners of Blackacre as tenants in common.

2. Bill should raise mutual mistake as the basis for avoiding the contract with Dave for the sale of the comic book. Whether Bill's mutual mistake ground will be successful depends upon which party should bear the risk of loss for the mistake.

Where both parties to a contract are mistaken as to existing facts at the time of the

formation of the contract, the mistake is considered to be mutual. *Loyal Christian Benefit Association v. Bender*, 342 Pa. Super. 614, 618, 493 A.2d 760, 762 (1985). Mutual mistake may serve as a valid ground for rescinding or avoiding a contract. *Ehrenzeller v. Chubb*, 171 Pa. Super. 460, 90 A.2d 286 (1952).

In determining whether relief should be granted due to a mutual mistake at the time of the formation of the contract, Pennsylvania case law follows the standards in the Restatement (Second) of Contracts. Under the Restatement, a party adversely affected by a mutual mistake must show: (1) the mistake relates to the basis of the bargain or a basic assumption upon which the contract was made; (2) the mistake has a material effect on the agreed upon performances; and (3) the party adversely affected by the mistake does not bear the risk of loss for the mistake. *Hart v. Arnold*, 884 A.2d 316, 333 (Pa. Super. 2005), *appeal denied*, 587 Pa. 695, 897 A.2d 458 (2006); Restatement (Second) of Contract, § 152 (1981).

The initial two Restatement standards for avoiding a contract based upon a mutual mistake are likely satisfied under the stated facts. Both Bill and Dave clearly were mistaken as to an existing fact at the time of the formation of their agreement that was the basis of their bargain or a basic assumption upon which their agreement was made: both parties mistakenly believed that the item being sold was the extremely rare and valuable Action Comics No. 1. Further, that mistake materially affected the agreed upon performances of the parties because Bill gave Dave his life savings and borrowed monies and expected an authentic Action Comics No. 1 in return.

Section 154 of the Restatement (Second) of Contracts sets the standard for determining when a party should bear the risk of a mistake in a contract. Section 154 provides:

§ 154. When A Party Bears The Risk Of A Mistake

A party bears the risk of a mistake when

- (a) the risk is allocated to him by agreement of the parties, or
- (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
- (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

Restatement (Second) of Contract, § 152 (1981), *quoted in, Hart v. Arnold, supra*, 884 A.2d at 334.

Because there is no evidence in the facts that the agreement between Bill and Dave contained a provision allocating the risk of a mistake, a court would have to use one of the other factors in Section 154 - limited knowledge of a party or what is reasonable under the circumstances - to decide whether Bill or Dave should bear the risk in this instance.

The facts state that Bill and Dave never took the comic book out of the glass-enclosed case and inspected it prior to purchasing it. The failure to inspect the comic book arguably is an indication that Bill had limited knowledge of the facts related to the mistake, the authenticity of the comic book, but treated his limited knowledge as sufficient.

As to who should bear the risk of a mistake based upon what is reasonable under the circumstances, Bill could argue that his failure to inspect was understandable given the comic book's age and fragile condition. Bill also could argue that Dave should bear the risk of loss because Dave should have determined the authenticity of the comic book when he originally purchased it from the professional dealer. Dave, however, could counter with the argument that Bill was aware that Dave had not inspected the comic book prior to his purchase and nonetheless refused to take advantage of Dave's repeated invitations for Bill to inspect the comic book.

The court would have to consider all of these arguments in determining which party should bear the risk of the mutual mistake.

3. The court should rule that (a) the comic books can be removed because they are personalty; (b) the sprinkler system cannot be removed because it is a fixture; and (c) the tap system can be removed because it is a trade fixture.

The right to possession of chattels that are attached to leased real estate is determined by classifying the chattels as either fixtures or personal property. See, *Clayton v. Lienhard*, 312 Pa. 433, 436-37, 167 A.321, 322 (1933). Chattels which are not physically attached to real estate are always considered to be personalty. *Id.* Personalty is freely removable by its owner. *Lehmann v. Keller*, 454 Pa. Super. 42, 48, 684 A.2d 618, 621 (1996).

Chattels which are physically attached to real estate fall into two categories. The first category is chattels which are so annexed to real estate in such a manner that they cannot be removed without physically damaging the real estate or the chattels. These chattels are considered to be fixtures. *Clayton v. Lienhard, supra.* The second category is those chattels which, although physically attached to the real estate, can be removed without material damage to the real estate or the chattels. When a chattel falls into this category, its status as a fixture or as personalty depends upon the intention of the parties at the time of the annexation to the real estate. *Id.*

In a landlord-tenant context, the well-settled rule in Pennsylvania is that where a tenant attaches to real estate fixtures and equipment necessary for the operation of the tenant's business, such items are considered to be trade fixtures. *Cattie v. Joseph P. Cattie & Brothers, Inc.*, 403 Pa. 161, 168 A.2d 313 (1961). If an article is a trade fixture, a presumption arises that the tenant is entitled to remove it during or at the termination of the lease regardless of its physical annexation to the real estate. *Berry v. Heinel Motors*, 162 Pa. Super. 52, 56 A.2d 374 (1948). Unless a contrary intent is expressed in the agreement by the parties, Pennsylvania law favors the tenant in the removal of trade fixtures which the tenant placed on the premises in the course of business. There is a strong presumption that trade fixtures installed by the lessee remain the lessee's personal property. *Lehmann v. Keller, supra.*

In this case, Dave's comic book collection was not attached to the real estate. Therefore, it is personal property and Dave can remove it at any time. The automatic sprinkler system was installed in the building in such a manner that it could not be removed without substantially damaging the building. Thus, the sprinkler system is a fixture and Dave cannot remove it. *See, e.g., Clayton v. Lienhard, supra.* (Sprinkler system installed in a garage is a fixture). Finally, the tap system was installed for the business that Dave wished to conduct on the leased real estate - a bar/restaurant. Thus, the tap system would be considered a trade fixture. Additionally, there are no facts that would rebut the presumption that Dave is entitled to remove this trade fixture before the lease expired or was terminated. The lease is silent on the question of removal of any items from the leased premises. Since there is no expression of a contrary intent in the lease between Dave and Carol, Dave can remove the tap system as a trade fixture.

4. Even though he did not record his deed, Bill has title to Greenacres because Ellen is not a bona fide purchaser for value without notice under Pennsylvania's recording statute.

Delivery of an executed deed is all that is necessary to pass title between a grantor and a grantee. *Malamed v. Sedelsky*, 367 Pa. 353, 358, 80 A.2d 853, 856 (1951). Recording of a deed is not essential to establish the passage of title. *Matter of Pentrack's Estate*, 486 Pa. 237, 240, 405 A.2d 879, 880 (1979).

Moreover, failure to record a deed does not render it void under all circumstances or as to all persons. An unrecorded deed gives the grantee an equitable interest in the property and is valid against the grantor and the grantor's heirs and devisees. It also is valid against certain subsequent grantees who may claim ownership of the property. *Land v. Commonwealth of Pennsylvania Housing Finance Agency*, 101 Pa. Cmwlth. 179, 515 A.2d 1024 (1986); 2 Ladner, *Pennsylvania Real Estate Law*, § 19.03 (5th ed. R. Friedman 2006).

Pennsylvania statutory law nonetheless attempts to discourage secret equities in real estate and to eliminate the possibility of fraud resulting from the failure to record a deed. *Lund v. Heinrich*, 410 Pa. 341, 346, 189 A.2d 581, 584 (1963). Pennsylvania's recording statute gives a subsequent grantee priority over the equitable estate of the first grantee by deeming the unrecorded deed of the first grantee void. *Long John Silver's, Inc. v. Fiore*, 255 Pa. Super. 183, 189, 386 A.2d 569, 572 (1978) (citation omitted). To attain the priority and the protection afforded by the recording statute, the subsequent grantee must: (1) be a bona fide purchaser for value of the property; (2) be without actual or constructive notice of the equitable interest of the prior grantee; and (3) record a deed to the property before the first grantee records. Pa. Stat. Ann. tit. 21, § 351.

The facts state that Ellen recorded her deed and immediately established a residence on Greenacres. The facts further state that Ellen had no knowledge of Al's prior deed giving Greenacres to Bill. Ellen, however, received her deed from Al not as a purchaser for value, but as a donee. Because Ellen was not a bona fide purchaser for value, she will not receive the protection of Pennsylvania's recording statute.

Although it was not recorded, Al's earlier deed passed title to Greenacres to Bill. Therefore, Bill's quiet title action will be successful.

Question No. 5: Grading Guidelines

1. Effect of a Mortgage on Property Owned as Joint Tenants With Right of Survivorship.

Comments: Candidates should recognize the essential characteristics of the form of concurrent ownership known as joint tenants with right of survivorship. Based upon the stated facts, Candidates should apply the principles of Pennsylvania law regarding how a mortgage affects this form of ownership in reaching a well-reasoned conclusion regarding who is the owner of the property.

5 Points

2. Mutual Mistake

Comments: Candidates should recognize that mutual mistake as to an existing fact at the time of the formation of a contract is a valid basis for rescinding or avoiding a contract. In analyzing the stated facts, candidates should discuss the elements necessary to assert the ground of mutual mistake under Pennsylvania law.

4 Points

3. Fixtures, Trade Fixtures and Personalty

Comments: Candidates should discuss the applicable law governing the right to possession of chattels attached to real estate. Candidates should discuss the factors that distinguish fixtures from personalty. Candidates also should recognize the special rules developed under Pennsylvania law for equipment attached to real estate leased for a business or trade. Candidates should apply the applicable principles of law to the stated facts in reaching a conclusion regarding which of the respective items are removable.

6 Points

4. Recording Statute; Protection of a Bona Fide Purchaser for Value

Comments: Candidates should recognize that an unrecorded deed to real property can pass valid title to a grantee. Candidates should discuss how Pennsylvania law encourages the recording of deeds by giving priority to a subsequent grantee over such prior grantee who has not recorded a deed if the subsequent grantee is a bona fide purchaser for value without notice of the prior deed and records first. Candidates should apply these principles to the stated facts in reaching the conclusion that the subsequent grantee is not afforded the protection of Pennsylvania's recording statute.

5 points

Question No. 6

Pull It Effortlessly, Inc. (“PIE”), a Pennsylvania corporation, manufactures and sells custom trailers. PIE also maintains a trailer parts and tire store.

PIE has five board members. Paul, a State X resident, owns 10% of PIE’s stock and Matt, a Pennsylvania resident, owns 90%. Both serve on PIE’s board, and Paul has been PIE’s president since it was formed ten years ago. PIE was Paul’s idea; however, at its start-up Paul had no funds, so he convinced Matt to invest in PIE. PIE has flourished. Paul has on more than one occasion had Able, his attorney in State X, contact Matt’s attorney, Mable, an attorney practicing in Pennsylvania, and offer on behalf of Paul to buy Matt’s shares. Much to Paul’s frustration, Mable’s responses have been that Matt does not want to transfer his stock to Paul.

PIE subcontracts the painting of its trailers, and PIE’s board has discussed acquiring a paint shop to reduce painting costs. Paul learned that a Pennsylvania paint shop owner would like to sell out. Paul had Able form Newco, a Pennsylvania corporation owned solely by Paul, and Paul had Newco purchase the paint shop. Paul has executed a contract on behalf of PIE to send all of its paint work to Newco. Paul never disclosed the availability of the paint shop or his interest in Newco to PIE’s board.

Paul has executed and delivered a contract with TireCo (a tire wholesaler) to supply tires to PIE. The contract contains the price per tire, the quantity of each size ordered and payment terms. The contract is silent as to time for delivery of the tires.

Paul recently obtained a \$300,000 loan from Bank on behalf of PIE. Bank is PIE’s Pennsylvania lender. Paul deals with Bank regularly on behalf of PIE and has signed loan documents on behalf of PIE with Bank in the past. Paul never discussed the loan with PIE’s board of directors. PIE’s bylaws prohibit the incurrence of debt by or on behalf of PIE in excess of \$250,000 without the unanimous consent of the PIE board. Bank has never seen PIE’s bylaws, and Paul did not make Bank aware of the bylaw restriction.

Able recently prepared a letter addressed to Paul at his home in State X, marked, “Privileged Attorney-Client Communication,” wherein Able recited all relevant facts regarding the formation of Newco and the acquisition of the paint shop and suggested that he and Paul needed to discuss whether or not Paul had violated his fiduciary duty to PIE. Able inadvertently faxed the letter to Mable when he pushed the wrong speed dial number on his fax machine. Upon receipt, Mable called Able and asked if it had been sent to her by mistake. Able responded, “Yes,” and directed Mable to return the letter immediately. Mable complied with Able’s request.

Mable reported the contents of the letter to Matt, who disclosed the contents to PIE’s board. PIE immediately fired Paul. PIE filed suit against Paul and Newco in Pennsylvania court with respect to Newco’s purchase of the paint shop, seeking an injunction and an accounting of profits. In discovery, PIE is seeking to obtain the inadvertently sent letter for use as part of its evidence at trial, but Paul’s counsel has objected based on the attorney client privilege. Under State X law, which Paul’s counsel argues is applicable, the letter would be protected by the attorney-client privilege, which could only be waived by an express waiver from Paul; however, under Pennsylvania law, which PIE’s counsel argues is applicable, the attorney-client privilege was waived by the inadvertent disclosure by counsel.

1. Under Pennsylvania corporate law, what substantive basis should PIE have asserted in support of its suit to challenge Paul’s action of having Newco buy the paint shop?
2. Assuming for this question that a valid contract exists between PIE and TireCo, when must TireCo deliver the ordered tires?
3. Under Pennsylvania corporate law, if PIE defaults on the loan and Bank files an action to enforce the loan, will PIE be successful in asserting a defense to the action based upon PIE’s bylaw restriction?
4. How should the court analyze and determine which state’s law should be applied to determine if the attorney-client privilege prevents production of the letter?

Question No. 6: Examiner's Analysis

1. **PIE should have asserted that Paul breached his duty of loyalty to PIE and has taken advantage of a corporate opportunity to the detriment of the corporation.**

Section 1712(a) of the Pennsylvania Business Corporation Law of 1988 (the "BCL") states, *inter alia*, "[a] director of a business corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director . . . in good faith, in a manner he reasonably believes to be in the best interest of the corporation . . ." 15 Pa. C.S.A. §1712(a). Section 1712(c) imposes this same duty of loyalty upon corporate officers again requiring the officer to act "in a manner he reasonably believes to be in the best interests of the corporation." 15 Pa. C.S.A. §1712(c). A director of a corporation owes a duty of loyalty to the corporation he serves and must not put himself in a position where his personal interests conflict with his duties to the corporation. *See, Sell, Pennsylvania Business Corporations, Rev. 2d Ed. §1712.4.*

The instant facts present a classic "corporate opportunity" scenario. Paul has taken advantage of an opportunity that he should have presented to the corporation because of the benefit the corporation would have derived if it had taken the opportunity. "The law has long recognized the doctrine of corporate opportunity which prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence." *Fletcher Cyc. Corp. (Perm Ed.) §861.1* A corporate opportunity is said to exist "when a proposed activity is reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage." *Id.* Directors "must devote themselves to the corporate affairs with a view to promote the common interests and not their own, and they cannot, either directly or indirectly, utilize their position to obtain any personal profit or advantage other than that enjoyed also by their fellow shareholders." *Seaboard Industries, Inc. v. Monaco*, 442 Pa. 256, 261, 276 A.2d 305, 309 (1971). The *Seaboard* court further stated:

In short, there is demanded of the officer or director of a corporation that he furnish to it his undivided loyalty; if there is presented to him a business opportunity which is within the scope of its own activities and of present or potential advantage to it, the law will not permit him to seize the opportunity for himself; if he does so, the corporation may elect to claim all of the benefits of the transaction.

Paul has breached his duty of loyalty by having Newco purchase the paint shop without first offering it to PIE. He had a duty to disclose the opportunity to the corporation. *See, Sell, Pennsylvania Business Corporations, Rev. 2d Ed. §1712.6.* If, after full and fair disclosure of the opportunity to the corporation, it would have chosen not to avail itself of the opportunity then he could have, assuming no other conflict existed, pursued the opportunity. (It should be noted, that if the opportunity had been waived by PIE, Paul would have also had to consider the rules applicable to a situation where Paul's company would be providing services to PIE.)

The facts are clear that PIE has been discussing the acquisition of a paint shop. Paul should not have taken advantage of the opportunity until he had disclosed it to the corporation and the corporation had passed on the opportunity. Paul has breached his duty of loyalty by taking the opportunity.

2. The Pennsylvania Uniform Commercial Code will fill in the delivery “gap” by establishing a delivery schedule requiring delivery within a reasonable time given the circumstances of the parties.

Article II of the Pennsylvania Uniform Commercial Code (the “Code”) on Sales generally is applicable to transactions in goods. *13 Pa. C.S.A. §2102*. “Goods” are “all things . . . which are movable at the time of identification to the contract for sale . . .” *13 Pa. C.S.A. §2105(a)*. The tires forming the subject matter of the valid contract between PIE and the TireCo are goods so Article II—Sales would be applicable to the contract.

The Code contains sections that assist parties to a contract who have failed to address certain terms in the body of their agreement. These “gap filler” provisions come in to play when the agreement of the parties is silent on the terms in question. *See, White and Summers, Uniform Commercial Code §3-4 (4th Ed. 1995)*.

TireCo and PIE have executed an agreement that is silent on when delivery of the tires should occur. Section 2309 of the Code provides “[t]he time for shipment or delivery or any other action under a contract if not provided in this division or agreed upon shall be a reasonable time.” *13 Pa. C.S.A. §2309(a)*. Accordingly, delivery must be made by TireCo within a “reasonable time.” What is a “reasonable time” will be derived by examining the duties of good faith and provisions relating to commercial reasonableness under the Code. A “reasonable time” depends upon “what constitutes acceptable commercial conduct in view of the nature, purpose and circumstances of the action to be taken.” *13 Pa. C.S.A. §2309, comment 1, See also 13 Pa. C.S.A. §1205*.

TireCo will be required to deliver the tires within a reasonable time given the circumstances of the parties. Industry standards and common delivery times would be considered and would provide guidance in establishing what would be a reasonable time. *See, White and Summers, Uniform Commercial Code §3-5 (4th Ed. 1995)*.

3. PIE will not be successful in defending an action to collect on the loan based on an argument that the loan is contrary to PIE’s bylaws.

Paul, as president of PIE, can be found to have apparent authority to act on behalf of PIE with respect to the loan documents. Paul has dealt with Bank on a regular basis and has executed loan documents on behalf of PIE with Bank in the past. It would be reasonable for Bank to conclude that Paul has authority to bind PIE. *See, 15 Pa. C.S.A. §1506*.

PIE’s bylaws prohibit it from incurring a loan in excess of \$250,000 unless approved unanimously by PIE’s board. Paul has executed and delivered loan documents on behalf of PIE contrary to the bylaw prohibition.

Bank was unaware of PIE's bylaw provision. Bank, being unaware of any limitation on Paul's authority would have a basis to conclude that Paul had at least apparent authority, if not express authority to bind PIE in connection with the loan. Bank, being PIE's bank, would also know that Paul is and has been PIE's president and based on its prior dealings would reasonably assume that he has authority to bind the corporation.

Section 1503 of the BCL, provides guidance on the availability of a defense based upon a bylaw limitation where an otherwise valid contract (one executed by one with authority) exists, providing: "a limitation upon the business, purposes or powers of a business corporation, expressed or implied in its articles or bylaws or implied by law, shall not be asserted in order to defend any action at law or in equity between the corporation and a third person, or between a shareholder and a third person, involving any contract to which the corporation is a party." (emphasis added). *15 Pa. C.S.A. §1503(a)*. This section abolishes the defense of "ultra vires" (including a defense based upon a bylaw provision) with respect to contracts to which the corporation is a party involving third persons, particularly where the third party had no knowledge of the limitation and has proceeded in good faith. Section 1505 of the BCL also provides, "the bylaws of a business corporation shall operate only as regulations among the shareholders, directors and officers of the corporation and shall not affect contracts or other dealings with other persons unless those persons have actual knowledge of the bylaws." *15 Pa. C.S.A. §1505*. Bank did not have knowledge of the bylaw provision.

PIE might argue that Bank should have required a board resolution signed by the secretary of the corporation as evidence of PIE's authorization of Paul to sign the loan documents and, therefore, that Bank was negligent in closing the loan. If this had been done the issue would have been brought to the PIE board prior to the loan closing. However, Bank will counter that it had the ability to rely on Paul's apparent authority as President of the corporation and that a resolution was not necessary.

It is unlikely that PIE will be successful in asserting this defense and Bank should be able to enforce and collect on the loan despite the bylaw provision. Bank acted in good faith and without knowledge of the bylaw limitation.

4. The Court would have to determine if the laws of Pennsylvania and State X actually differ and if each state has an interest in having its law apply and, if so, the court must then analyze the governmental interests underlying the litigation and the contacts of the parties to each state and determine which state has the greater interest in the application of its law to the matter at hand.

Pennsylvania has jurisdiction in the suit filed by PIE and is the forum state. As the forum state, Pennsylvania will apply its conflict of laws rules to determine the state law to be applied. *Troxel v. A.I DuPont*, 431 Pa. Super. 464, 636 A.2d 1179 (1994), *appeal denied*, 538 Pa. 648, 647 A.2d 903 (1994). Pennsylvania uses a hybrid approach in resolving conflict issues combining the methodologies of the governmental interest analysis and the most significant relationship test. See *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

The fact, however, that a court has jurisdiction over a matter and is the forum state is not determinative on the issue of whether or not the law of Pennsylvania should be applied to the issue at hand. Pennsylvania law is not applied just because a Pennsylvania court has jurisdiction and is the forum state. *Commonwealth v. Eichinger*, 591 Pa. 1, 19, 915 A.2d 1122, 1133 (2007). Where more than one state has an interest in the issues at hand a court should “apply the policy of the jurisdiction most intimately concerned with the outcome of [the] particular litigation.” *Griffith*, *supra*.

The court first must determine if it should engage in a conflict of laws analysis. It must determine whether the laws of the competing states actually differ and if they do, the court must determine if each state has interests to be protected if its law is applied. “If the laws do not differ, then a true conflict is not present and no further analysis is necessary. In that case, we apply Pennsylvania law.” *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 886 (Pa. Super. 2006). The facts make it clear that the law of State X only allows for a waiver of the attorney-client privilege if there has been an express waiver by the client, and as a result the letter would not be discoverable. State X has an interest in having its law applied to protect attorney-client communications. Under Pennsylvania law, on the other hand, the attorney client privilege would have been waived based upon an inadvertent disclosure by counsel, and as a result the letter would be discoverable. Pennsylvania has an interest in applying its waiver rule to favor the open exchange of information and the discovery of facts bearing on the litigation so that all relevant facts are before the court before a decision is made. Since the state rules are in opposition and each state has a valid interest to protect, a true conflict exists and the court must move to the next step in the analysis.

“If we determine that a true conflict is present, we must then analyze the governmental interest underlying the issue and determine which state has the greater interest in the application of its law to the matter at hand.” *Id.* In considering which state has the paramount interest in the case the court will consider factors such as the place of contracting or the location of the transaction or occurrence which gave rise to the cause of action, where the contract was negotiated, where the contract was to be performed, where the parties were located or employed at the time of the act, the state of incorporation of the entities involved and the state of the parties involved in the matter. *See, Carbis Walker, LLP v. Hill, Barth and King, LLC*, 930 A.2d 573 (Pa. Super. 2007). In the instant case, the lawsuit by PIE against Paul and Newco arises out of a transaction occurring in Pennsylvania (the acquisition in question was a Pennsylvania business purchased by a Pennsylvania corporation owned by a State X resident who was employed in Pennsylvania by the plaintiff at the time). Additionally, the lawsuit is brought in Pennsylvania court by a Pennsylvania corporation (PIE) against its former president (Paul) and another Pennsylvania corporation (Newco) for having usurped a corporate opportunity available to PIE in Pennsylvania. Finally, the letter at issue was disclosed to an attorney located in Pennsylvania and directly relates to the issues involved in the Pennsylvania lawsuit. The only factors weighing against Pennsylvania involvement are that the letter was written by a State X attorney for transmission to a State X resident, who is a defendant in the lawsuit.

An argument can be advanced for the court to apply Pennsylvania law because Pennsylvania has the greater interest in having its law applied. Paul was employed in Pennsylvania by PIE when he had his own Pennsylvania corporation buy the paint shop in

violation of his fiduciary duty to PIE, a Pennsylvania corporation. Additionally, the claim arises and is being brought in Pennsylvania, the state where PIE is incorporated and which is the forum most closely tied to PIE since it was formed under the laws of Pennsylvania. Finally, the communication at issue directly relates to the claim being brought in Pennsylvania court. The counter argument would be that State X has the greater interest in having its law applied because the letter in question originated from a State X attorney and was directed to a State X resident and the parties involved expected and believed that they were operating under State X's rules. Although arguments can be made both for the application of Pennsylvania law and for the law of State X, the court would likely find that Pennsylvania has the greater interest in the outcome of the litigation. See *Carbis Walker, supra*.

Question No. 6: Grading Guidelines

1. Corporate Opportunity – duty of loyalty

Comments: The candidates should recognize this as a corporate opportunity situation and discuss the duty of loyalty and the breach posed if the opportunity is taken without disclosure and rejection by the corporation.

5 points

2. U.C.C. Sales - gap filler provision

Comments: The candidates should conclude that Article II of the Code applies to a sale of goods and that the gap filler provision on time of delivery would require delivery within a reasonable time given commercial standards.

5 points

3. Corporation's bylaws – ultra vires defense

Comments: The candidates should discuss the authority of the president of the corporation to enter into the contract and identify the potential defense and conclude that the defense will not be successful under Pennsylvania law.

5 points

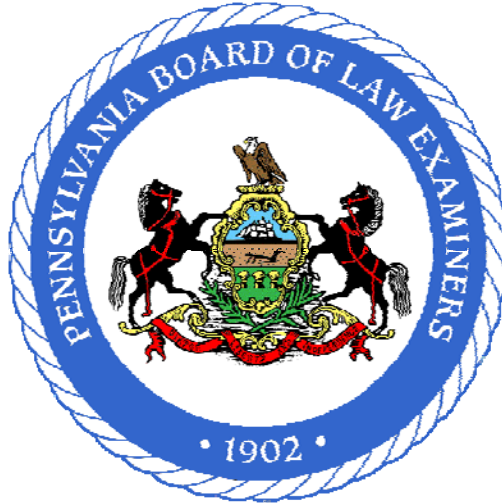
4. Conflict of laws

Comments: The candidates should recognize that a conflict of laws issue exists and that the court should first determine if there is a true conflict and once concluding that a true conflict exists determine which state has the most significant interest in having its law applied.

5 points

PT

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Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
July 26 and 27, 2011

PERFORMANCE TEST
July 26, 2011

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

Table of Contents

File

Memorandum to applicant assigning task	1
Arrest Report dated July 24, 2011	2

Library

Ordinance

Borough of Madison Ordinance No. 1999-76	3
--	---

Statutes

18 Pa. C.S.A. § 5104	3
18 Pa. C.S.A. § 5505	3
35 P.S. § 780-113	3
53 P.S. § 46121.	3

Rules

Pa. R. Crim. P. 109	4
Pa. R. Crim. P. 400	4

Cases

Commonwealth v. Jackson (Supreme Court of Pennsylvania)	5
Commonwealth v. Rainey (Superior Court of Pennsylvania)	8
Commonwealth v. Meyer (Superior Court of Pennsylvania)	10
Commonwealth v. Bullers (Supreme Court of Pennsylvania)	13

FILE

**OFFICE OF THE DISTRICT ATTORNEY
MADISON COUNTY, PENNSYLVANIA
Suite 400, Madison County Judicial Center
Madison, Pennsylvania 19999-9999**

M E M O R A N D U M

TO: Applicant
FROM: Hamilton Phish, District Attorney
DATE: July 26, 2011
SUBJECT: Commonwealth v. George Gunsel; No. 2011-07-24-0001

George Gunsel was arrested by Sgt. Minor, a local borough police officer on July 24, 2011, and has been charged with (1) a violation of Borough of Madison Ordinance No. 1999-76, (2) Public Drunkenness - 18 Pa. C.S.A. § 5505, (3) Resisting Arrest -18 Pa. C.S.A § 5104, and (4) Possession of a Small Amount of Marihuana - 35 P.S. § 780-113(a)(31). I have been contacted by Mr. Gunsel's attorney who is seeking to have the charges dismissed on the basis that there is insufficient evidence to support the charges and the arrest of Mr. Gunsel was unlawful. Mr. Gunsel's attorney has stated that continuing the prosecution would be harassment and a violation of Mr. Gunsel's civil rights for which he will seek relief if the charges are not dismissed. Mr. Gunsel is reputed to be a member of an organized crime gang, so I would like to prosecute him if it seems reasonably likely that I can obtain one or more convictions.

Your assignment is to prepare a memorandum to me discussing the proper disposition of this case, identifying yourself only by the title of Assistant District Attorney (ADA), and analyzing whether the admissible evidence contained in the file will support a conviction of any of the charged offenses. Since I am familiar with the police report, it will not be necessary to state the facts separately, but you should include the relevant facts in your analysis of each offense with which Mr. Gunsel has been charged.

In preparing your memorandum, discuss the four offenses with which Mr. Gunsel has been charged in the order in which they are listed above, applying the law to the facts related to each of the offenses. You should have a separate heading for each of the charged offenses, and in analyzing each offense identify the elements of the offense, and determine whether there is sufficient evidence to support each element of the offense setting forth the reasoning supporting your determination. Finish with a short one sentence conclusion at the end of each offense as to whether you think I can successfully prosecute that offense and the reason why or why not. Although you should cite to relevant authority, it is not necessary to use a full, formal citation form (*i.e.*, Bluebook format is not required).

The File and Library which are provided contain the only facts and legal principles you should consider and rely upon in completing this assignment.

**BOROUGH OF MADISON POLICE DEPARTMENT
ARREST REPORT**

Date: July 24, 2011
Filed By: Sergeant M. Minor, MBPD
Perpetrator(s): George Gunsel, 1313 Verdant Lane, Madison
Location: 1313 Verdant Lane, Madison

On 7/24/2011, at 0930 hours, the undersigned was dispatched by 911 Operator No. 24 to 1313 Verdant Lane, Madison, to investigate an alleged violation of Madison Ordinance No. 1999-76, which had been reported by an anonymous caller. When approaching the premises, the undersigned noticed that the lawn appeared to have been freshly cut, and there were numerous grass clippings in the street next to the curb.

I proceeded to 1313 Verdant Lane, Madison. Upon knocking on the door and identifying myself as a police officer, an adult male wearing shorts and a t-shirt opened the door, but did not step out on to the porch. He asked me what I wanted. I told him to come out into his yard where I could see him clearly. After ascertaining that he was George Gunsel, the owner and occupier of the premises, I asked him how the grass clippings came to be in the street. He replied: "God put them there." At this point, I noticed that Mr. Gunsel's breath smelled strongly of beer, his eyes were bloodshot, his speech was slurred, and he was unsteady on his feet.

I then directed him to accompany me to the sidewalk in front of his house. While standing on the sidewalk, I pointed to the grass clippings on the street and I asked him directly if he was responsible for the clippings in the street, whereupon he became loud and abusive and stated: "Why don't you go catch a criminal instead of bothering people in their homes?"

We walked back to his porch and I then informed Mr. Gunsel that he was under arrest for violation of Madison Ordinance No. 1999-76, and for public drunkenness. Mr. Gunsel was directed to accompany the undersigned to the Madison P.D. The suspect then laughed at the undersigned, stepped back inside his house and attempted to close the door in the undersigned's face. The undersigned's right foot which I inserted in the doorjamb, was bruised when the door shut on it. This officer attempted to restrain Mr. Gunsel by grasping his arm, at which time Mr. Gunsel twisted out of my grasp, causing my hand to hit the door, spraining the index finger. Mr. Gunsel then submitted to arrest by this officer. The undersigned conducted a pat down search of Mr. Gunsel incident to the arrest and recovered from Mr. Gunsel's pocket a plastic sandwich bag containing a small amount of what appeared to be a dried green vegetative leafy substance with stems and seeds which the undersigned recognized to be marihuana and which the undersigned knows to be a controlled substance.

Supplemental Report (7/25/2011)

The State Police crime laboratory confirmed that the substance taken from Mr. Gunsel consisted of marihuana and weighed 10 grams.

Mr. Gunsel was charged with a violation of Borough of Madison Ordinance No. 1999-76, Public Drunkenness - 18 Pa. C.S.A. § 5505, Resisting Arrest - 18 Pa. C.S.A. §5104, and Possession of a Small Amount of Marihuana - 35 P.S. § 780-113(a)(31).

LIBRARY

Ordinance:

Borough of Madison Ordinance No. 1999-76

It shall be a criminal summary offense punishable by a fine not to exceed \$100.00 or imprisonment for three (3) days, or both, for any person to deposit snow, ice, grass clippings, leaves or other vegetative or foreign matter into any borough street or the gutters adjacent thereto.

Statutes:

18 Pa. C.S.A. § 5104. Resisting arrest or other law enforcement

A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

18 Pa. C.S.A. § 5505. Public drunkenness and similar misconduct

A person is guilty of a summary offense if he appears in any public place manifestly under the influence of alcohol or a controlled substance . . . except those taken pursuant to the lawful order of a practitioner, as defined in the Controlled Substance, Drug, Device and Cosmetic Act, to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

35 P.S. § 780-113. Prohibited acts; penalties

(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:

* * *

(31) Notwithstanding other subsections of this section, (i) the possession of a small amount of marihuana only for personal use; (ii) the possession of a small amount of marihuana with the intent to distribute it but not to sell it; or (iii) the distribution of a small amount of marihuana but not for sale. For purposes of this subsection, thirty (30) grams of marihuana or eight (8) grams of hashish shall be considered a small amount of marihuana.

* * *

(g) Any person who violates clause (31) of subsection (a) is guilty of a misdemeanor and upon conviction thereof shall be sentenced to imprisonment not exceeding thirty days, or to pay a fine not exceeding five hundred dollars (\$500), or both.

53 P.S. § 46121 Appointment, suspension, reduction, discharge, powers . . .

Borough council may . . . appoint . . . one or more suitable persons . . . as borough policemen, who shall . . . and may, within the Borough . . . without warrant and upon view, arrest, and commit for hearing any and all persons guilty of breach of the peace, vagrancy, riotous or disorderly conduct or drunkenness, or who may be engaged in the commission of any unlawful act tending to imperil the personal security or endanger the property of the citizens or for violating any ordinance of the Borough for the violation of which a fine or penalty is imposed

Rules:

Pa. R. Crim. P. 109 Defect in Form, Content, or Procedure

A defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, citation, summons, or warrant, or a defect in the procedures of these rules, unless the defendant raises the defect before the conclusion of the trial in a summary case or before the conclusion of the preliminary hearing in a court case, and the defect is prejudicial to the rights of the defendant.

Pa. R. Crim. P. 400 Means of Instituting Proceedings in Summary Cases

Criminal proceedings in summary cases shall be instituted either by:

- (1) issuing a citation to the defendant; or
- (2) filing a citation; or
- (3) filing a complaint; or
- (4) arresting without a warrant when arrest is specifically authorized by law.

Supreme Court of Pennsylvania
COMMONWEALTH of Pennsylvania,

Appellant,

v.

Brian JACKSON, Appellee.

Opinion

A Philadelphia police officer observed appellee among a group of men throwing dice on the street. The officer suspected the men were gambling, in violation of Philadelphia City Code §10-612 (2). He approached, but appellee fled, despite the officer's instructions to stop. The officer pursued appellee and attempted to apprehend him, but appellee punched the officer in the face and chest several times and got away. The officer gave chase and caught appellee again, but appellee kned the officer in the groin, knocking him to the ground. While the officer was down, appellee tried to take the officer's gun-with his hands on the gun, appellee threatened, "You're done," but was unable to remove the gun. The officer eventually forced appellee to the ground and arrested him. Appellee was convicted and sentenced for aggravated assault on a police officer, simple assault, recklessly endangering another person, and resisting arrest.

Appellee filed an appeal, . . . challenging the sufficiency of the evidence

for his recklessly endangering another person and resisting arrest convictions.

* * *

The Superior Court affirmed his recklessly endangering another person conviction but reversed the resisting arrest conviction. The court found that because the officer did not observe appellee rolling dice for money, he lacked probable cause to arrest appellee for gambling (citation omitted). Therefore, the court found the underlying arrest for gambling was unlawful; an unlawful arrest will not support a resisting arrest charge.

We granted allowance of appeal to determine:

Where a defendant's assault on a police officer occurs as the result of the officer's attempt to unlawfully arrest him, whether that assault may give rise to a lawful arrest, the resistance of which will support a charge of resisting arrest under 18 Pa. C.S.A. § 5104.

* * *

The Commonwealth argues . . .that *Commonwealth v. Biagini*, 540 Pa. 22, 655 A.2d 48 (1995) compels the conclusion that where a defendant commits a crime during an attempted arrest, illegal for want of probable cause, that new crime allows a lawful arrest of the defendant. Appellee

argues the resistance of the initial unlawful arrest was a continuous course of conduct that could not be divided into different parts to create probable cause for a lawful arrest.

A lawful arrest is an element of the crime of resisting arrest. . . . (citation omitted). Thus, to be convicted of resisting arrest, the underlying arrest must be lawful. *Biagini*, at 497. In the present context, the lawfulness of an arrest depends on the existence of probable cause to arrest the defendant. *Id.*

In *Biagini*, we addressed whether a defendant who is arrested without probable cause could be prosecuted for crimes he committed in response to an officer's attempt to unlawfully arrest him. The co-defendants in *Biagini* argued that because the initial encounter with the police was an unlawful arrest, all additional charges arising from that arrest were invalid. *Id.* We disagreed and stated individuals do not have a right to resist arrest even when they believe the arrest is unlawful. (citations omitted). Thus, individuals are not justified in resisting arrest and cannot avoid being prosecuted for their actions in resisting and assaulting police officers. *Biagini*, at 493. Therefore, we upheld the co-defendants' convictions for aggravated assault although the underlying arrest was unlawful. *Id.*

However, we concluded the co-defendants' convictions for resisting arrest could not stand since "[t]he language of the statute is quite clear and unambiguous; in order to be convicted of resisting arrest, the underlying *arrest* must be lawful." *Id.*, at 497 (citation omitted) (emphasis in original). Thus, because a lawful arrest is an element of resisting arrest, a conviction for that crime cannot be sustained where that arrest is found to be unlawful. *Id.*

Here, assuming an unlawful initial arrest, the initial resistance would support only assault charges, not a resisting arrest charge. However, after appellee fled and the officer caught him, appellee punched the officer several times, and fled again. At that point, the officer had probable cause to arrest appellee for that assault. The officer chased appellee and arrested him after the violent struggle described above; this arrest was lawful because the officer had probable cause to arrest him for assault, and appellee's struggle constituted resisting arrest.

Appellee's argument the incident was only one criminal episode is unpersuasive. Even if it is one episode, committing a new crime during the episode can serve as the basis for probable cause to arrest appellee. Clearly appellee could be

prosecuted for other crimes he committed while resisting an unlawful arrest (citation omitted), his new criminal activity would establish cause to arrest him, lawfully, for these new crimes. The initial illegality does not give the arrestee a free pass to commit new offenses without responsibility. Neither does that initial illegality “poison the tree,” preventing lawful police conduct thereafter—the new crimes are new trees, planted by appellee, and the fruit that grows from them is not automatically tainted by the initial lack of probable cause.

Appellee’s arrest, based on probable cause he committed assault on the officer while resisting the unlawful arrest, was a lawful arrest that appellee was not justified in resisting. We hold on the facts of this case, where a defendant’s assault on a police officer occurs as the result of the officer’s attempt to unlawfully arrest him, that assault would justify a subsequent lawful arrest, the temporally distinct resistance of which will support a charge of resisting arrest under 18 Pa.C.S. § 5104.

* * *

Since the officer had probable cause to arrest appellee after appellee punched the officer several times, viewing the evidence in the light most favorable to the Commonwealth, it is clear there was

sufficient evidence to convict appellee of resisting arrest.

Order reversed. Jurisdiction relinquished.

Superior Court of Pennsylvania
COMMONWEALTH of Pennsylvania

v.

George Anthony RAINEY, a/k/a
Theodore George Rainey, Appellant.

Opinion

This is an appeal from the judgment of sentence entered against appellant for resisting arrest. (footnote omitted)

* * *

The sole question raised is the sufficiency of the evidence to sustain the conviction.

* * *

Reading the evidence in the light most favorable to the Commonwealth the facts established at trial are these. Inebriated after a night of heavy drinking, appellant sought refuge at the home of a friend, Fletcher Duncan. Unknown to appellant Duncan had shortly before moved. Upon arriving at his friend's former residence, appellant entered and found the apartment vacant. Obligated by the call of nature and the effects of too much drinking, appellant proceeded to the bathroom. The sound of the toilet flushing awakened the inhabitant of the second floor apartment, who then called the police. A short time thereafter, Officer Hockley of the Harrisburg Police Department entered and found appellant

lying on the floor. Officer Hockley roused the appellant and placed him under arrest.

* * *

Officer Brown entered the apartment and placed appellant against the wall for frisking. He then escorted appellant to a waiting police van. . . . The walk to the van was uneventful but once reaching it, appellant attempted to run away. Officer Brown pursued and grabbed appellant by the sleeve of his coat. Appellant began to shake himself violently, to wiggle and squirm in an attempt to free himself of the officer's grasp. Corporal Neubaum arrived on the scene and proceeded to strike appellant on the head with his nightstick, inflicting a wound which later required six stitches. Even after the blow to his head, appellant continued his aforesaid conduct. Officer Brown then grabbed appellant by the throat choking him to such an extent that he was obliged to release his grip lest appellant succumb for lack of air. While choking appellant Officer Brown struck his knee against the curb, slightly reinjuring the joint, which had then only recently been operated upon. Finally, Officer Hockley came to the assistance of Officer Brown and Corporal Neubaum. The three then subdued appellant and handcuffed him. By their own testimony, Officers Brown and Hockley admitted that at no time

during the fracas did appellant strike, push or kick anyone, but merely attempted to squirm, wiggle, twist and shake his way free of their grasp. Officer Brown's fall came about as a result of his attempt to hold onto appellant's throat and not through any aggressive act on the appellant's part.

* * *

. . . [O]ur Section 5104 mirrors Section 208.31 of the Model Penal Code. The comment to Section 208.31 reads in part: "Resistance to arrest is one of the commonest forms of obstructing the execution of the law. We deal with it specifically . . . because we wish to confine the offense to forcible resistance that involves some substantial danger to the person."

In light of the comments to the Model Penal Code and the evidence adduced at trial, we cannot say that the Commonwealth proved beyond a reasonable doubt all the elements of the crime of resisting arrest. Appellant's actions in attempting to escape were no more than efforts "to shake off the policeman's detaining arm." Appellant neither struck, nor struck out at the arresting officers; nor did he kick or push them. At most this was a "minor scuffle" incident to an arrest. While it may be that appellant's conduct

was disorderly (18 Pa.C.S. s 5503), his intoxication public (18 Pa.C.S. s 5505), and his trespass criminal (18 Pa.C.S. s 3503), the evidence in the case is insufficient to convict appellant of resisting arrest as that crime is defined by Section 5104 of the Crimes Code.

* * *

Superior Court of Pennsylvania
COMMONWEALTH of Pennsylvania,

v.

Robert A. MEYER, Appellant

Opinion

Robert A. Meyer has appealed from the lower court's affirmance of his conviction by a magistrate, of the summary offense of public drunkenness. The central issue for our determination is whether, under the facts presented, appellant's conduct constituted public drunkenness within the statutory definition of the offense. The lower court found that appellant's conduct constituted public drunkenness and that his arrest for that offense was proper. We reverse.

* * *

The facts are as follows. On August 7, 1978, at approximately 10:30 p. m., appellant . . . entered V.F.W. Post 118 in Millvale, Pennsylvania. He had been a member of the V.F.W. for approximately thirty-five years. He sat down and ordered a Pepsi-Cola from the stewardess, Mrs. Mueller, placing a dollar bill on the bar for the drink, which was collected by Mrs. Mueller, who thereafter placed his change on the bar. While she was on the telephone, Mrs. Mueller heard Mr. Meyer complain loudly that he had been overcharged. She testified that she had overcharged him a nickel.

. . . [A]ppellant and Mrs. Mueller exchanged angry words, and . . . Mrs. Mueller

then asked her husband, the Commander of the club, to call the police.

. . . [D]uring the dispute, appellant became very loud and abusive. A few minutes later, two Millvale police officers arrived. Both officers testified that upon entering the club, they approached Mr. Meyer and told him he was going to have to leave. After speaking to him for a few minutes, they escorted him outside. Once outside, appellant was put into a police car and taken to the police station, where he was placed in a cell.

18 Pa.C.S. s 5505 states:

A person is guilty of a summary offense if he appears in any public place manifestly under the influence of alcohol to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

Appellant argues that he was not manifestly under the influence of alcohol to the degree that he was a danger to himself or to other persons or property, or to the degree that he annoyed persons in his vicinity. He further contends that the V.F.W. Post is not a "public place."

The Commonwealth contends, however, and the court below found, that appellant was arrested outside the Post, which, it argues, may be considered a "public place."

. . . [O]ur first task, therefore, is to construe the meaning of "public place" within the context of the statute, in order to determine

whether this element of the offense was established by the Commonwealth.

Section 5505 does not define “public place.” The term does appear, however, in two places in the Crimes Code. . . . Section 5902(f) defines it as “any place to which the public or any substantial group thereof has access.” The ordinary meaning of “access” is: “the right to enter or make use of;” “the state or quality of being easy to enter.”(footnotes omitted)

Section 5503(c) defines public places as, inter alia, “any premises which are open to the public.”

We find that V.F.W. Post 118 is a private club which is not “open to the public.” On cross-examination, the stewardess testified that in order to use the premises, one must be a member or a guest of a member. . . . It therefore cannot be said here that the public at large has the right to enter V.F.W. Post 118 or make use of its facilities, nor can it be said that V.F.W. Post 118 is “easy to enter” when the individual attempting entry is not a member or the guest of a member. The same applies to the area outside the Post in this case. Although the general public may be permitted to enter the area outside the building itself, from the street, we do not find that such an area fits within the concept of “public place.” Our finding is based in part on the category of “public places” contained in the disorderly conduct section which includes highways, transport facilities, schools, prisons

and neighborhoods. There are no Pennsylvania cases holding a private club to be a public place for the purposes of this or any other section of the Pennsylvania Crimes Code.

However, even if we find that even if the area outside the Post may be considered a “public place,” we hold that it was error to find appellant guilty of public drunkenness under the facts of this case.

* * *

We find that the statute was enacted to deal with the problem of chronic alcoholics who voluntarily appear on our streets, in our parks, in our neighborhoods, on a routine basis, shouting and cursing at real or imagined foes, causing disruption and annoyance. It should not be used as the basis for arrest in a situation in which an intoxicated individual, who has not been shown to be a chronic alcoholic, is escorted by two policemen from a private place into an arguably public one. In order to be found guilty of public drunkenness, the accused must be in the “public place” voluntarily.

* * *

We find here that appellant’s appearance outside the V.F.W. Post was not “voluntary,” and therefore his conviction must be reversed. We would find the same even if the area outside the Post may rightfully be considered a “public place.”

* * *

Finally, we hold that the Commonwealth

did not prove beyond a reasonable doubt that appellant was “manifestly under the influence of alcohol....”

* * *

Although not binding on us, we find the case of *U.S. v. Crutchfield*, (citation omitted) to be persuasive in its statement that (Section 5505) is carefully drawn so as not to punish all forms of drunkenness but only drunkenness... to such a degree as to endanger the person himself or other persons or property or annoy persons in the vicinity...Id. at 702 (emphasis added)

* * *

Here, we find that the Commonwealth did not prove beyond a reasonable doubt that appellant was intoxicated to the degree required by the statute. Other than testimony to the effect that he was staggering a bit and that his breath smelled of alcohol, there is nothing in the record to support the Commonwealth’s contention that he was “manifestly under the influence of alcohol.” It must be remembered that for the Commonwealth’s argument to succeed, it must be shown that appellant was intoxicated to the requisite degree while he was outside the Post, in the so-called “public place.” Therefore, it must be shown that while appellant was outside the Post, he was intoxicated to such a degree that he might endanger himself or others or property, or annoy persons in his vicinity.

It appears from the record that the only

persons outside the Post at that point in time were the two officers, and there is no testimony indicating that they felt appellant might harm them or himself, especially since, as soon as they arrived outside, the officers put appellant in a squad car. The only persons in appellant’s vicinity to annoy were the two officers. Again it is our opinion that the statute was designed to protect the public from “manifestly drunk” persons who voluntarily go to public places where they are likely to harm or annoy the people likely to be found there. Since the only persons in appellant’s vicinity were the two officers who insisted that appellant accompany them outdoors, we hold that this element of the offense was not established here beyond a reasonable doubt.

* * *

Accordingly, we hold that appellant’s conduct . . . did not fit within the statute and that the Commonwealth failed to prove every element of the offense beyond a reasonable doubt.

Order reversed.

Supreme Court of Pennsylvania
COMMONWEALTH of Pennsylvania,

Appellant,

v.

Richard BULLERS, Appellee

OPINION

This appeal raises the issue of whether the authority of a police officer to arrest without a warrant extends to the summary offense of underage drinking when the defendant does not exhibit disorderly conduct, a breach of the peace, drunkenness or other irregular behavior. We affirm the decision of the Superior Court and find that warrantless arrests under such circumstances are not authorized.

The facts in the instant case are not in dispute. On April 5, 1990, upon reporting to work at 11:00 p.m., Sergeant Bryan Lee Parana of the Johnsonburg Borough Police Department became involved in the investigation of the theft of a vehicle owned by Richard Wolfe. Wolfe had notified the police around 10:00 p.m. that he had left his keys in his truck, with the doors unlocked, and that his truck was not where he had parked it. Wolfe further stated that he left a pistol, containing a loaded clip, between the seats of the truck. At about 11:45 p.m., a radio call came in from the St. Mary's Borough Police Department, indicating that a vehicle fitting the description of Wolfe's truck had been located in a cemetery in St. Mary's. Sergeant Parana arrived at the cemetery ten minutes later, determined that the truck was registered to

Wolfe, and noticed that the pistol was not in the vehicle.

* * *

At approximately 2:45 a.m., Sergeant Parana, while driving in a fully marked police cruiser, found Bullers walking on Grant Street in Johnsonburg. Sergeant Parana knew Bullers from previous juvenile proceedings against him involving theft and improper use of vehicles. Bullers stopped upon Sergeant Parana's second request, and the officer left his vehicle and approached Bullers in order to ask him questions regarding the theft of Wolfe's truck. After engaging Bullers in conversation, Sergeant Parana detected the odor of beer on his breath. Knowing from previous experience with Bullers that he was nineteen years old, the officer arrested him for underage drinking, 18 Pa.C.S. § 6308.

Incident to the arrest, Sergeant Parana conducted a patdown search and discovered the following items: a pen; a house key; a brown, leather credit card holder; an envelope containing a key; loose change amounting to six dollars and eighty-eight cents; a single five dollar bill; and several rolls of coins in a red canvas bag. A later search at the station revealed Wolfe's loaded, holstered pistol hidden beneath Bullers's jacket, inside his belt and against his back. Bullers had no license or permit to carry a concealed firearm.

On August 28, 1990, Bullers was found

guilty by a jury of theft of a firearm, 18 Pa.C.S. § 3921, firearms not to be carried without a license, 18 Pa.C.S. § 6106(a), unauthorized use of an automobile, 18 Pa.C.S. § 3928(a), and receiving stolen property, 18 Pa.C.S. § 3925(a).

* * *

The Superior Court held that Bullers’s arrest was unlawful, since no authority exists for a warrantless arrest for the summary offense of underage drinking, and that the trial court erred by admitting the evidence which resulted therefrom. We granted allocatur . . . on the validity of the arrest issue

* * *

The rules governing procedure in summary criminal cases permit criminal proceedings to be instituted by one of the following methods: (a) issuing a citation to the defendant; (b) filing a citation; (c) filing a complaint; or (d) arresting without a warrant when arrest is specifically authorized by law. (citation omitted) It is therefore clear that statutory authorization was necessary for Bullers’s arrest for underage drinking. The legality of the arrest is relevant to the derivative question of whether a search incident to the arrest was permitted under the circumstances.

* * *

. . . [A] warrantless arrest for a summary offense may be authorized by another statute. The Commonwealth contends that authority can . . . be found within § 46121 of the Borough

Code.

§ 46121. Appointment suspension, reduction, discharge, powers; mayor to have control

Borough council may, subject to the civil service provisions of this act, if they be in effect at the time, appoint . . . one or more suitable persons . . . as *borough policemen*, who *shall and may*, within the borough or upon property owned or controlled by the borough . . . *without warrant and upon view, arrest, and commit for hearing any and all persons guilty of breach of the peace, vagrancy, riotous or disorderly conduct or drunkenness, or who may be engaged in the commission of any unlawful act tending to imperil the personal security or endanger the property of the citizens or for violating any ordinance of the Borough for the violation of which a fine or penalty is imposed.* . . . 53 P.S. § 46121 (emphasis in original).

The Superior Court in *Commonwealth v. Williams*, (citation omitted), determined that § 46121 provides specific authorization to police officers to arrest for behavior encompassed within the statute. The Commonwealth argues that underage drinking falls within the statute because the hazards and dangers that may accompany it “tend to imperil the personal security” of citizens.

This argument is not persuasive. . . . Bullers was merely walking down the street

with the odor of beer on his breath. Surely it is a stretch of the imagination to find that this alone “tends to imperil the personal security” of Bullers and other persons in contact with him. We therefore hold that a violation of § 6308, unaccompanied by any disorderly conduct, a breach of the peace, or public drunkenness, does not fall within § 46121 of the Borough Code.

* * *

We have herein held that underage drinking without any disorderly conduct, a breach of the peace, or public drunkenness does not fall within 53 P.S. § 46121. Since statutory authority is necessary for Bullers’s arrest, and neither 18 Pa.C.S. § 6308(d) or 53 P.S. § 46121 provide such authorization, we hold that Bullers’s arrest was unlawful and the evidence found by the search pursuant thereto is inadmissible.

* * *

Instructions

The performance test is designed to test an applicant's ability to perform the legal task that has been assigned using the factual information contained in the File and legal principles that are provided in the Library.

The File contains the only factual information that you should consider in performing the assigned task. The task to be completed is set forth in the first document in the File in the form of a memorandum to the applicant. The Library contains the only legal principles that you should consider to complete the assigned task. Although your general knowledge of the law may provide some background for analyzing the problem, the factual information contained in the File and the legal principles contained in the Library are the only materials that you should use in formulating your answer to the assigned task.

Your response should be written in the answer book that has been provided. Be sure to allow sufficient time for reading the materials, organizing your answer and completing the task assigned. Your answer should demonstrate an understanding of the relevant facts, recognition of the issues and the applicable principles of law and the reasoning that supports your answer. Your grade will be based on the content of your response and your ability to follow instructions in performing the assigned task.

The events depicted and the persons portrayed by the information in the File are fictitious and such information does not depict nor is it intended to depict or portray any actual person, company or occurrence. Any similarity to any person, living or dead, or any occurrence is purely coincidental.

Question No. PT: Examiner’s Analysis and Grading Guideline

For this assignment, the applicant, as an assistant district attorney, is asked to prepare a memorandum to the district attorney analyzing whether, on the given facts, any of the charged offenses can be successfully prosecuted. In order to do so, the applicant will have to review the facts as reported by the arresting sergeant, and then determine whether there is sufficient admissible evidence to support a conviction for four possible offenses. In completing the assignment, the applicant will need to face the somewhat challenging task of drafting a memorandum which may be disappointing to his or her superior.

Format

2 Points

A beginning lawyer is expected to be able to follow instructions, including instructions as to the formation of not only legal pleadings, but also letters and internal firm memoranda. The applicant must organize the answer in a memorandum format, properly identify himself or herself as an ADA, and have sections with headings for the substantive legal discussions for each of the offenses. The discussions should be in the order in which the offenses were listed, apply the law to the facts relating to the elements of the offense under discussion and set forth a one sentence conclusion as to whether the offense can be successfully prosecuted.

Littering the street

2 Points

Borough of Madison Ordinance No. 1999-76 makes it illegal for a person to deposit grass clippings or vegetative matter into a borough street.

Although Sergeant Gunsel observed what appeared to be a freshly mowed lawn and grass clippings in the street in front of Mr. Gunsel’s property, he did not observe the offense and had no way to determine who might have done it. There are no known witnesses to the offense and Mr. Gunsel did not admit to having deposited the grass clippings in the street.

There is insufficient evidence to prove beyond a reasonable doubt that Mr. Gunsel committed this offense, and accordingly, this charge would be dismissed, and should not be prosecuted.¹

Public drunkenness

6 Points

A person who appears in any public place manifestly under the influence of alcohol to the degree that he may endanger himself, or other persons or property or annoy persons in his vicinity is guilty of a summary offense. 18 Pa. C.S.A. §5505

¹As discussed later, the arrest for violation of the Ordinance was unlawful because the criminal proceedings for the summary offense were initiated by an arrest rather than a citation. However the defect in failing to follow the proper procedure for instituting proceedings for a summary offense does not automatically require a dismissal of the charge for violation of the Ordinance absent a showing of prejudice by the defendant. Pa. R .Crim. P. 109 Since there is no evidence of prejudice to the defendant as a result of how the proceedings were initiated, the underlying charge must be evaluated on its merits.

Gunsel was in his own home, yard and the sidewalk adjacent to his yard when the incident occurred. Gunsel's home and yard are not public places, which are defined as places to which the public or a substantial group thereof has access. *Commonwealth v. Meyer*

The statute requires that the defendant's drunkenness occur in a public place where he is voluntarily. *Meyer*. To the extent that his sidewalk could be considered to be a "public" place, Gunsel was not there voluntarily, because Sgt. Minor directed him to go out to the sidewalk. *Meyer*

While Sgt Minor did have a basis to believe that Gunsel was inebriated, because of the odor of beer, and other physical manifestations including slurred speech and unsteadiness, the statute requires that the person be manifestly under the influence of alcohol to the degree that he may endanger himself or other persons or property, or annoy persons in the vicinity.

Although Gunsel smelled of beer, had bloodshot eyes and slurred speech, and was unsteady, he did not engage in any conduct in a public place which would indicate that he was a danger to himself, other persons or property.

The statute is designed to protect the public from manifestly drunk persons who voluntarily go to public places where they are likely to harm or annoy the people likely to be found there. *Meyer*

There is insufficient evidence to prove beyond a reasonable doubt all of the elements required to find that Mr. Gunsel engaged in public drunkenness, and this charge should be dismissed.

Resisting arrest

7 Points

A person who with the intent to prevent a public servant from effecting a lawful arrest creates a substantial risk of bodily injury to the public servant or employs means justifying or requiring substantial force to overcome the resistance is guilty of an offense. 18 Pa. C.S.A. §5104.

A key element of resisting arrest is that the attempted arrest be a lawful arrest. 18 Pa. C.S.A. §5104. A person cannot be convicted of resisting arrest unless the underlying arrest was lawful. *Id.*, *Commonwealth v. Jackson*.

The littering offense is a summary offense. Madison Ordinance 1999-76. As such, the only permissible ways of initiating a prosecution are as stated in Pa. R. Crim. P. 400, which permits an arrest without a warrant when the arrest is specifically authorized by law. *Commonwealth v. Bullers*

There is no statute in the Library to indicate that an arrest without a warrant is authorized for the offense of littering which was not observed by the officer, and which was not one of the other offenses for which arrest without a warrant is authorized by the Borough Code, 53 P.S. § 46121. Thus, the arrest of Mr. Gunsel for violation of the ordinance was unlawful. *Commonwealth v. Bullers*

The lawfulness of an arrest also depends on the existence of probable cause to arrest the defendant. *Commonwealth v. Jackson* The arrest for littering was unlawful because Officer Minor did not have

probable cause to make an arrest for this violation because he did not witness or have any other evidence to show that Mr. Gunsel deposited the grass clippings into the street.

With respect to the public drunkenness offense, although the Borough Code does authorize an arrest for the summary offense of public drunkenness, the arrest for this offense was unlawful because of the lack of evidence to support the elements of the offense. *Commonwealth v. Jackson*.

Since the arrests for littering and public drunkenness were unlawful, there was insufficient evidence to support a charge of resisting arrest.

Furthermore, to be guilty of resisting arrest, the defendant must do more than fail to cooperate with his arrest. Mere flight will not support a conviction, nor will engaging in evasive conduct, such as squirming, wriggling, twisting and shaking. There must be forcible resistance that involves some substantial danger to the person. *Commonwealth v. Rainey*.

Here, Gunsel did no more than step back into his house, attempt to shut his door, and twist away from the officer. The minor injury allegedly suffered by the officer resulted from no more than a minor scuffle which did not involve substantial danger to the officer or substantial force to overcome. *Commonwealth v. Rainey*.

There is insufficient evidence to prove beyond a reasonable doubt all of the elements to support a conviction of the defendant for resisting arrest, and this charge should be dismissed.

Possession of a small amount of marihuana

3 Points

It is unlawful to possess a small amount of marihuana in Pennsylvania. 35 P.S. § 780-113(a)(31).

Thirty grams of marihuana is considered to be a small amount of marihuana for purposes of 35 P.S. § 780-113(a)(31).

Gunsel possessed ten grams of marihuana that was found by Sergeant Minor and confirmed by the lab.

A person may be convicted of other crimes occurring during an episode even if the initial arrest is unlawful, but there must be admissible evidence of such crimes to support the convictions. *Jackson*.

In this case, the finding of the marihuana was the immediate fruit of the unlawful arrests for violation of the ordinance, public drunkenness and resisting arrest, and therefore, the marihuana found by the search pursuant to the unlawful arrest is not admissible into evidence. *Commonwealth.v. Bullers*.

There is insufficient evidence to support a conviction on the charge of possession of a small amount of marihuana, and this charge should be dismissed.