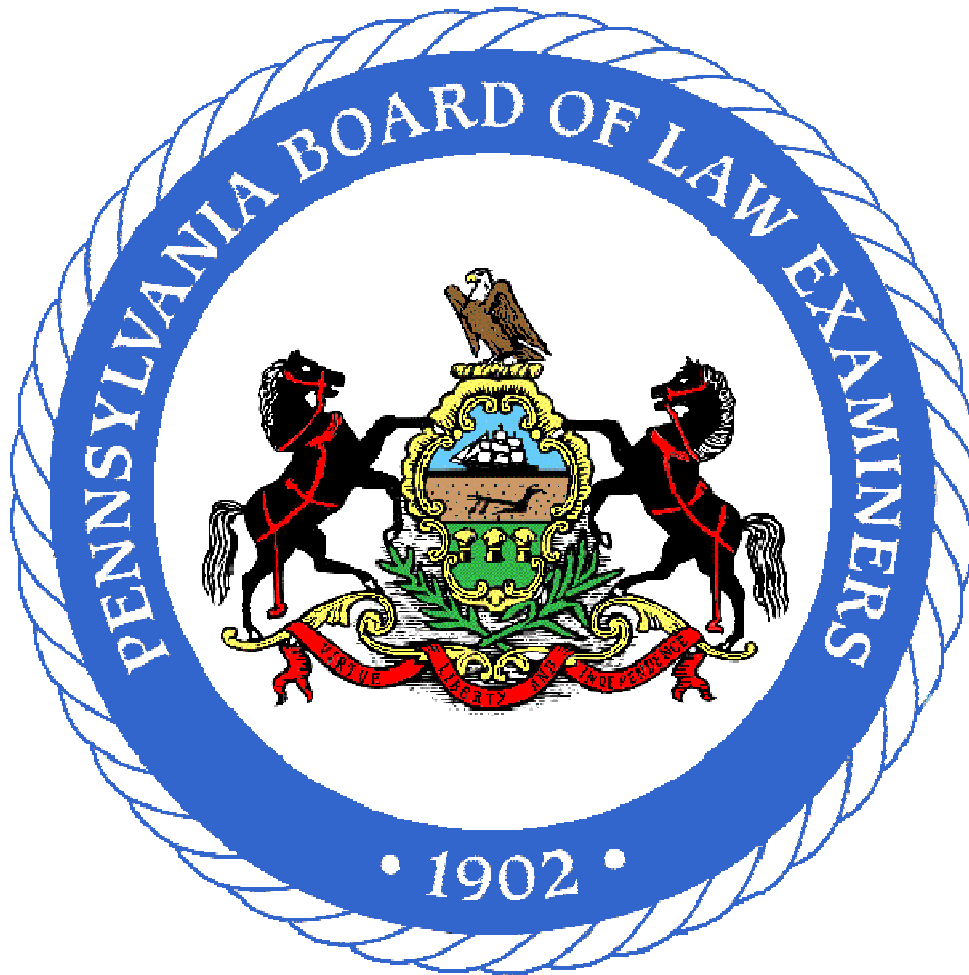


JULY 2008 PENNSYLVANIA BAR EXAMINATION

Sample Answers



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

Performance Test: Sample Answer

ISSUES PRESENTED:

1. Is Stranglehold Mortgage Corp. ("Stranglehold") entitled to Summary Judgment regarding its mortgage foreclosure action? Yes.
2. Should Defendant's counterclaim be dismissed because it is barred by Rule 1148? Yes

ARGUMENT:

1. Stranglehold is entitled to Summary Judgment because there is no genuine issue of factual dispute in the default of the mortgage and Stranglehold is entitled to a judgment as a matter of law.

Summary judgment is permitted when there is no genuine dispute as to a material issue of fact and the moving party is entitled to a judgment as a matter of law. New York Guardian Mortg. Corp. The court may look at all evidence before the court and will view the record in the light most favorable to the non moving party. Id. The non moving party may not rely solely on the pleadings to establish a genuine issue of fact and has a burden "to present 'facts by counter-affidavits, depositions, admissions, or answers to interrogatories.'" Id. To obtain a summary judgment for mortgage foreclosure, "the entry of summary judgment is proper if the mortgagors admit that the mortgage is in default, that they have failed to pay interest on the obligations, and that the recorded mortgage is in the specified amount." Cunningham. The motion may be granted even if the mortgagors have not admitted the "total amount of the indebtedness in their pleadings." Id.

Defendants have not presented any contrary evidence to the pleadings and Stranglehold has established a case of foreclosure under Pennsylvania law. Under Rule 1029(b), a general denial is considered an admission unless the denial is made in an action "seeking monetary relief for bodily injury, death or property damage." Rule 1029. Stranglehold established the existence of a mortgage by the Defendants answer to Paragraph 4 in which they admitted the existence of the mortgage. Defendants have asserted a general denial regarding Paragraph 6, concerning whether the current mortgage is in default and whether they failed to pay interest on the obligation. Answer, Paragraph 6. Without asserting a specific denial, the court is required to accept the complaint's averment and interpret the defendant's denial as an admission. Rule 1029(b). By defendants admission that there existed a valid mortgage which is currently in default and that interest is overdue, the plaintiff has satisfied the elements of a foreclosure. Cunningham.

Defendant's denial of the specified calculation of the current indebtedness is insufficient to bar recovery for a motion for Summary Judgment. Under Rule 1029(c), a party may respond to an averment that they are without sufficient knowledge as to the truth of the statement, however, this response is not permitted when it is "clear the pleader must know whether a particular allegation is true or false." Rule 1029(c), Note. Stranglehold alleges that the total amount of indebtedness is \$243,400.60 including accrued interest. Complaint, Paragraph 7. Defendants respond to the allegation that after reasonable investigation, there are insufficient facts to form a belief as to the truth or falsity. Answer, Paragraph 7. This answer by the defendants must be interpreted under Rule 1029(c) as an admission because the defendants have possession of the

note and are reasonably able to determine the veracity of the allegation. In New York Guardian Mortgage Corporation, the Pennsylvania Superior Court held that an appellant's similar denial regarding the allegations of the principal and interest due on a note was a general denial that constituted an admission. New York Guardian Mortgage Corp. The court held that other than the opposing party, "appellants are the only parties who would have sufficient knowledge on which to base a specific denial." Id.

In their Answer to the Motion for Summary Judgment, Defendants simply state that Paragraphs 4 and 5 state a conclusion of law as to which no response is required and provide the conclusory response that the allegations in their verified answer and counterclaim create a genuine dispute as to a material fact precluding the grant of summary judgment. This argument is misplaced. Defendants may not rest upon averments contained in the pleadings because in order to properly raise a genuine issue of fact, Defendants have the burden to present "facts by counter-affidavits, depositions, admissions or answers to interrogatories." See New York Guardian Mortgage Corporation (citing Stein). Accompanying Plaintiff's Motion for Summary Judgment is an affidavit from the custodian of Stranglehold's records based on personal facts averred in the complaint. Defendants have submitted no counter-affidavit disputing any fact contained within the affidavit. Indeed they have offered nothing to contradict plaintiff's claim except the denial in their Answer.

Stranglehold has established the elements of foreclosure on the disputed property and is entitled to judgment as a matter of law. Defendants admit the existence of the mortgage, admit the existence of default and interest due and through Rule 1029(c) have admitted the amount in controversy. The burden is on the non-moving party to properly raise a genuine issue of fact, and in doing so is barred from relying solely on the pleadings. Based upon the pleadings and the attached affidavit by Stranglehold, there is no genuine dispute as to a material issue of fact and Stranglehold is entitled to judgment as a matter of law.

2. Defendant's counterclaim should be dismissed because it is not related to the creation of the mortgage and therefore is barred under Rule 1148.

The Pennsylvania Rules of Civil Procedure provide that in a mortgage foreclosure action a "defendant may plead a counterclaim which arises from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose." Rule 1148. This rule is narrowly construed by Pennsylvania courts. In actions for mortgage foreclosure, as in this present case, the Pennsylvania Superior Court has held that, "only those counterclaims are permitted that are part of or incident to the creation of the mortgage itself." Cunningham. In Cunningham, Defendants raised an equitable counterclaim for misrepresentation in the agreement for sale in an action against them for foreclosure on the property. The facts in that case are nearly identical to those here. In that case, the court held that only claims alleging fraud in the inducement of the mortgage are sufficiently transactionally related to the mortgage that they may be considered valid counterclaims for an action in foreclosure, and that claims alleging fraud in the inducement of the contract for sale are not sufficiently related for this purpose. Cunningham. Defendants Mr. and Mr. Debtor have asserted a counterclaim to the mortgage foreclosure action brought by the Plaintiff. Their counterclaim asserts that Plaintiff promised them that if they bought their property, located at 123 South Overhead Street, Safehaven, Madison County, Pennsylvania, that the Plaintiff would grant them an interest free home equity loan in the amount

of \$100,000 in order that they may purchase the neighboring lot. Defendants further allege that Plaintiff failed to fund that home equity loan, and that Defendants lost profit on the rise in value of the adjacent lot as a result. The counterclaim of Defendants is, clearly and on its face, a claim of fraud in the inducement of the contract for sale. Defendants allege that they were tricked into purchasing their home by a false promise of a home equity loan. Defendants do not allege that there was any fraud involved in the contract for mortgage, such as unfair or undisclosed terms, or any other fraudulent representations. Their counterclaim solely alleges a claim of fraud in the inducement of the contract for sale of their property.

Because the counterclaim of Defendants alleges fraud in the inducement of the contract for sale, and not fraud in the inducement for the mortgage contract, it is not sufficiently transactionally related to the mortgage foreclosure action brought by Plaintiff. Because it does not arise from the same transaction or occurrence as the action for the mortgage foreclosure, their counterclaim is not permitted under Rule 1148, and must be dismissed by this Court.

CONCLUSION:

WHEREFORE, plaintiff, Stranglehold Mortgage Corp. respectfully requests that the court enter judgment in its favor and against defendants in the amount of \$243,400.60, plus post judgment interest in the per diem amount of \$69.15, from February 10, 2008, until paid, and dismiss the counterclaim raised by the defendants.

Question No. 1: Sample Answer

1. Yes, the will likely will be admitted to probate. The general rule is if a will was last seen under the exclusive control of the testator and that will cannot be found after death, there is a presumption that the testator destroyed the will with the intent to revoke. However, this presumption can be overcome by meeting the "lost wills" requirements. The parties seeking to probate the will must prove the will's contents by clear and convincing evidence and must also prove the formalities of execution were met, such as the testator's signature appearing at the end of the will.

Here, it can likely be proven that George lost his will. If Melinda is permitted to testify that George said he lost his will repeatedly, this is evidence of the lost will. Further, both Walter and Melinda have photocopies of the will, which will help to prove its contents. The fact that two parties have copies of an identical will and one of them is an attorney should be enough to prove its contents by clear and convincing evidence. Further, Walter can testify that all formalities were met. Therefore, the will can be admitted to probate.

2. Unless Roger can prove that George suffered from weakened intellect prior to the execution of his will, there is insufficient evidence that George's will was a result of undue influence of Melinda and Roger's challenge will fail.

To make a successful challenge to the will based on undue influence, the person benefitting from the alleged undue influence must have been in a close relationship with the testator at the time of the execution of the challenged will, there must have been opportunity for the alleged undue influence to have occurred, the person must actually benefit under the challenged will, and the testator must have been suffering from weakened mind or intellect at the time the challenged will was executed.

Melinda often spent time with George prior to the execution of his will, after the death of his wife, probably developing a close relationship of companionship. Prior to visiting the attorney's office George had told Walter that he wanted to leave 25% to a charity and 75% of his estate to his son, however a short time later George appeared at the attorney's office with Melinda, where she prompted George to make the changes, giving Melinda 40%, taking 25% from Roger, leaving Roger only 50%. George had also executed a Power of Attorney to Melinda. Therefore there is evidence that Melinda had a close relationship with George, that she would benefit from the challenged will and she certainly had some influence over George. However, her influence may not be "undue". There is evidence that George suffered from a weakened intellect because of his dementia, after the execution of the will, but the facts are not clear whether George suffered from the dementia prior to the execution of the will or not. If Roger is able to present evidence that the dementia existed prior to the execution of the will, Roger may succeed in his challenge to the will. However, because there is currently insufficient evidence to prove that George had a weakened intellect at the time of the execution of the will, Roger will not succeed in challenging the will based on undue influence.

3. Walter's fee arrangement for handling George's estate most likely violates the Pa. R.P.C.

Under the Pa. R.P.C., fees must not be excessive. Factors that go into determining a fee are the lawyer's skill, experience, and the time to be spent on the matter. Furthermore, lawyers owe a duty of competency and are to learn the law when needed. Also, the fee must be explained to the client in writing.

Here, Walter's fee is excessive because he is not very experienced at probating wills and he should not charge Roger more since it may take him more time than more experienced lawyers. Furthermore, Walter learned from more experienced attorneys that the fee would be from \$1,500 to \$2,500. Accepting \$7,000 from Roger is clearly excessive and the fee was not explained in writing. Therefore, Walter's fee was not appropriate under the Pa. R.P.C.

4. Melinda will not have to pay federal income taxes on the receipt of the loan proceeds from George, but she may have to pay tax on the discharge of the debt by George's estate. Gross income includes income from any source. In order for a benefit to qualify as income, the taxpayer must have a right to it such that she can freely dispose of or use the benefit as she wishes. Proceeds from a loan are not considered income because the taxpayer must repay the money to the lender, therefore the borrower does not have an absolute right to the money. There was no taxable event when Melinda received the loan proceeds from George. However, the discharge of a debt can be income because the relief of having to repay the loaned money conveys a benefit on the taxpayer that increases his personal wealth. Melinda's relief from the debt would constitute a taxable event under that rule. She may try to argue that the discharge was merely part of her inheritance and inheritance is not income under the Internal Revenue Code. Melinda may be successful in that argument because she agreed to take a reduced amount of the inheritance she would have received under the will if she had been successful in probating the copy of the will in exchange for the discharge of the debt.

Question No. 2: Sample Answer

1. The District Attorney will be successful in arguing that Ed's initial questioning, and the observations at the scene by the Officer, were not in violation of Ed's Miranda rights because they are not in response to a custodial interrogation. Miranda rights must be issued by police to a suspect informing the suspect that he has the right to remain silent, anything he says can be used against him, he has the right to an attorney, and if he cannot afford an attorney one will be provided for him. Police are required to issue such warnings before a custodial interrogation takes place. A suspect is considered to be in custody if a reasonable person would feel that he was not free to leave. Factors which will be considered in making such a determination include how many officers are present, whether they are wearing uniforms, the proximity of the officers to the suspect, the officer's demeanor, the location of the interaction, etc. An interrogation has taken place when police ask questions which a reasonable person would consider likely to illicit an incriminating response from a suspect.

First, Ed's responses to the initial questioning at the accident scene by the officer were not made during a custodial interrogation. The Officer simply asked Ed what had happened. Although this may illicit an incriminating response, an argument may be made otherwise. Upon the scene of any motor vehicle accident it is customary for an officer to inquire into what caused the accident. The officer at the point of the question had no reasonable belief that Ed had done anything wrong, and presumably did not expect Ed to confess to being at fault. Most people respond to a question by saying what happened, not by admitting that they were at a party and had been drinking. Ed's response was somewhat unlikely and would qualify as a voluntary admission. Voluntary admissions are acceptable if it can be shown that they were made independently and by the speaker's own free will. Furthermore, even if it is determined that this was an interrogation, Ed was not in police custody. He was behind the steering wheel of his own vehicle, and the officer did not tell him he was not free to leave. Therefore, the statements must be upheld.

Secondly, the officer's observations also must be upheld. Again, they were not the product of an interrogation. The tests were valid tests police officers are authorized to give. These tests do not illicit incriminating responses. Actions, such as walking, and maneuvering one's body are not made in response to questions. Although the police officer asked him to perform such tasks, they are not deemed to be statements, thus are not the product of an interrogation.

2. Defendant's motion to suppress the blood test results should be granted because the seizure of Ed's results violated his Article 1, Section 8 rights under the Pennsylvania Constitution. The PA Constitution provision protects individuals against unreasonable searches and seizures by the government. An unreasonable seizure occurs if the government invades the defendant's reasonable expectation of privacy without a warrant.

Here, the police did not obtain the blood test evidence pursuant to a warrant. The blood was taken "for medical reasons" and was given by the hospital to the officer upon his request and without Ed's consent. PA Constitutional law identifies this as a violation of Ed's rights because he had a reasonable expectation of privacy in his blood test results taken for medical reasons. Because the Officer did not have a warrant, Ed's rights were violated and the court should grant the motion to suppress.

3. Attorney Wiley should advise Al that he would probably not be successful against the Motorist for the negligent treatment of Al's injuries at the scene because the Motorist was not grossly negligent, and probably will not be successful against the Host for providing alcohol to Ed and allowing him to drive from the party because Host did not have a duty to prevent Ed from drinking and driving.

To establish a prima facie case for negligence requires (1) duty of care, (2) breach, (3) proximate and actual causation, and (4) damages. Although there is no duty to rescue an injured person, once a person begins a rescue effort, he generally must exercise reasonable care under the circumstances. Under Pennsylvania's Good Samaritan Law, medical professionals engaged in a rescue effort must be grossly negligent to be liable.

Here, the Motorist was originally under no duty to administer emergency care to Al. She undertook such a duty because she felt that emergency care was necessary, but because Motorist is a registered nurse, under the Good Samaritan Law, for Motorist to be liable she must be found grossly negligent in the discharge of her care. The facts only state that Motorist was negligent. Therefore, she will not be liable.

Under Pennsylvania law, the host of a social gathering of invitees does not have a duty to prevent the invitees from drinking and driving. In these facts, the Host would not be liable because he did not owe a duty to prevent his guests from drinking and driving. Because Ed was only an invitee, in that he was not on the premises for any business reason of the Host, the Host owed no elevated duty to ensure safety. Because he breached no duty of care, the Host would not be liable for negligence.

4. Al's attorney should argue that the cell phone reports are admissible under the business records exception to the hearsay rule, and the court should overrule the hearsay objection.

Under the Pa. R.E., hearsay is defined as any statement (including a written or recorded statement) other than one made by the witness while testifying that is offered to prove the truth of the matter asserted.

Hearsay is inadmissible unless it falls within a specific exception. The cell phone company's reports fall within the definition of hearsay. They are a recorded statement made out of court, and they are being offered to prove the truth of the matter asserted therein--i.e., that Ed was using his phone when the accident occurred. However, the reports will fall under the business record exception to hearsay, and they will be admitted. A business record is admissible provided that: (1) it is made in the ordinary course of business--not in preparation for litigation; (2) the matter sought to be admitted is germane to the business's normal operations and purposes; (3) the record was made by a person who was under a business duty to report accurately, and based upon information (if applicable) provided by a person who had such a duty; (4) the record was made in a timely manner after the recorded event occurred; and (5) someone who has personal knowledge of the procedures by which such records are made is available to testify at trial for purposes of identification and authentication. Here, the record was made by the cell phone company in the ordinary course of business: they are routinely prepared and maintained for purposes of billing disputes--not the present litigation. The records of calls made are clearly germane to the cell phone company's line of business. The record is made electronically, so there is no concern over the duty to report accurately. The records were apparently made in a

timely fashion. Finally, the custodian of records for the cell phone company is available to testify for authentication and identification purposes. It is fair to assume that the custodian has personal knowledge of the methods by which the reports are made. Therefore, the reports are admissible under the business records exception to the hearsay rule.

Question No. 3: Sample Answer

1. The charges of robbery and aggravated assault are supported by the facts but the crime of burglary is not.

In Pennsylvania, robbery occurs when, during the commission of a theft, the defendant threatens or intentionally puts a person in fear of imminent serious bodily injury. During commission of a theft includes fleeing after a theft.

Theft occurs when a person unlawfully takes the moveable property of another with intent to deprive them thereof.

Here, Paul committed theft when he took the money off the counter when he was not authorized to do so nor did he have any claim of right over the money. Paul had the intent to deprive Ellen of the money to use it for his drug habit.

Additionally, Paul threatened and intentionally put both John and Ellen in fear of imminent bodily harm when he pointed the gun and fired and when he told John to “keep his mouth shut,” as evidence by the fact that they froze in fear.

Finally, Paul performed these actions, while he was fleeing after the theft, which falls under “during the commission of a theft.” Therefore, the facts support the charge of robbery.

Aggravated Assault occurs when the defendant attempts to or knowingly, recklessly or intentionally inflicts serious bodily harm on an individual.

Here, Paul intended to inflict serious bodily harm on John when he shot at his leg. Although he missed, his specific intent and firing the gun constituted an attempt to inflict serious bodily injury.

Additionally, Paul’s awareness of Ellen’s presence means he either knowingly or recklessly injured her when he fired the gun in her direction.

Therefore, the facts support the charge of aggravated assault.

Burglary is the unauthorized entry into a building or occupied structure with the intent to commit a crime.

The defendant is authorized when the place is open to the public or he is privileged to enter.

Here, although Paul entered with the intent to commit theft, his entry is authorized because the store had opened for business and was open to the public. Therefore, the facts do not support the charge of burglary.

2. Ellen should file the civil action of assault, and battery, against Paul regarding the incident with the gun. She is likely to succeed on the assault and battery claims.

Assault is an intentional tort that involves placing a person in fear of imminent harm or battery. Ellen was placed in such fear when Paul fired the gun at John. Paul saw Ellen standing behind John when he fired the gun. Moreover, Ellen froze in fear. Paul should have known that Ellen would be placed in fear by seeing Paul in possession of a gun which he fired at John. As such, Ellen is likely to succeed on a claim for assault.

Battery occurs when the defendant intentionally causes a harmful or offensive touching to plaintiff's person.

Here, although it can be argued that Paul did not intend to hit Ellen, under the doctrine of transferred intent, his intent to shoot John, as evidenced by his aiming at him, can be transferred to Ellen. Further, Ellen suffered a gunshot wound, clearly a harmful touching. Ellen is likely to succeed on a claim for battery.

3. Paul should argue that due to his drug addiction and need for treatment he is not emancipated and is entitled to continued support, and will likely be successful, at least as to the next two months. Parents are responsible for support of their children until they are 18 or emancipated. Children over 18 may still be eligible for support if they have a serious mental or physical condition which prevents them from supporting themselves.

Although Paul is 18, his drug addiction and the requirement of in-patient rehabilitation make him unable to support himself and moreover, the support is needed to pay for the treatment. Therefore, he is likely entitled to support until the treatment is over.

Question No. 4: Sample Answer

1. The court should apply rational basis review and will likely uphold the ordinance, striking down Tim's Equal Protection claim. The Equal Protection clause of the 14th Amendment of the U.S. Constitution requires that everyone receive the equal protection of the law. Distinctions made by the state are subject to strict scrutiny, intermediate scrutiny, or rational basis review. Strict scrutiny requires the government to show that the challenged practice is necessary to a compelling government interest. This level of review is used in race, color, and national origin claims, as well as those impacting fundamental rights such as voting and marriage. Under strict scrutiny, the discrimination must be narrowly tailored and be the least restrictive means for achieving the compelling governmental interest. Intermediate review requires the government to show that the practice is substantially related to an important government interest. This level of review is most frequently used for gender discrimination. Finally, the rational basis review is a "catch all" for those distinctions that do not require strict scrutiny or intermediate scrutiny, and only requires that the practice is rationally related to a legitimate government purpose, and puts the burden on the challenger to show that the law fails rational basis review.

In this case, the discrimination is made on the basis of residency in a protected area around a local school in regard to parking rules. This would fit the rational basis review standard because residency is not a suspect classification and does not implicate a fundamental right in regard to the equal protection clause. Thus, Tim would have to show that the parking ordinance is not rationally related to a legitimate governmental purpose. However, C City will argue that it is a legitimate government purpose to limit traffic and congestion around schools and to make sure that students may be dropped off and picked up in a safe manner. The City certainly has a legitimate interest in keeping students safe when they go to school. Thus, Tim would have to show that despite this purpose the statute is not rationally related to it. However, in order to limit traffic and congestion, it could be argued that restrictions on parking in the area will keep cars out of the area, except for residents who need to be able to get to their houses. Tim could park 2 blocks away (which is not far to walk), or could wait until after the school day to park his car in the area. Thus, Tim will not be able to convince the court that the ordinance fails rational basis review, and therefore the court should deny Tim's Equal Protection claim.

2. The attorney for Mitzi's children should seek to oppose the deposition on the grounds that it is not relevant, serves no proper purpose and is only to harass, annoy and unduly burden the children. The attorney should seek an order of protection from the deposition subpoena and will likely win.

Pennsylvania's discovery rule is broad and generally permits the discovery of any material that is relevant, not privileged, and reasonably calculated to lead to the discovery of admissible evidence. Discovery that has no relevant or proper purpose is not permitted. Discovery that serves no purpose other than to harass, annoy and unduly burden will not be permitted.

Here, Tim has requested a deposition of Mitzi's children in his suit against C City. The only purpose proffered for the deposition is to establish Tim as a journalist. That reason is not relevant to Tim's Equal Protection challenge. Furthermore, there is evidence that the only reason for the deposition is to gather information regarding Mitzi's children. Tim works for a tabloid magazine which thrives on information on Mitzi and her family. Tim has followed the children

into playgrounds, restaurants and stores, and even hid in a dressing room next to a room where the children were trying on clothes. The children are justifiably afraid of Tim, and forcing them to attend a deposition in this case would harass and annoy them. In fact, the only reason for Tim's lawsuit is because he wanted to park nearby their school in order to observe them even more. The children have no relationship to the lawsuit and any information obtained from them would not be relevant. Therefore, the attorney for Mitzi's children should file for an order for protection and the court should not require the children to attend such a deposition.

3. Carl will not be able to establish a prima facie case of discrimination under the Americans with Disabilities Act (ADA) as a result of his termination.

To state a prima facie case of discrimination under the ADA, a plaintiff must show that he (1) is a qualified individual (2) with a disability, who (3) suffered an adverse employment action, and (4) his employer took the adverse employment action because of his disability. The ADA applies to employers that have 15 or more employees.

Carl satisfies prong (1). To satisfy prong (1), the plaintiff must show that he would be able to perform the requirements of the position with or without accommodation. Here, Carl has been working for his employer, the title company, for several years. Even with his recent personal phone calls and e-mails during work hours, "he usually got his work done. He therefore is a qualified individual, satisfying prong (1).

Carl does not satisfy prong (2). To satisfy prong (2), the plaintiff must show either that he has an impairment that makes him substantially limited in a major life activity, or that he has a record of such an impairment, or that his employer regarded him as having such an impairment. To show that he is substantially limited, a plaintiff must show that he is unable to perform an activity or that it is substantially more difficult for him than for people of ordinary abilities. He must also show that the impairment is long term or permanent. A major life activity is one that is central to most people's everyday lives.

Carl has an impairment in that he is severely limited in his ability to walk. Walking is a major life activity under the ADA. However, Carl has failed to show that his impairment is long term or permanent. His doctor has cleared him to return to work, and he will stop having to use crutches in about a month. He therefore fails to show that he is substantially limited in a major life activity under the ADA.

Carl satisfies prong (3). He has been terminated, which is an adverse employment action.

Carl probably does not satisfy prong (4). Carl's doctor wrote at Carl's request that Carl may return to work at home. The doctor did not state, however, that Carl must work from home or will be unable to work at the office. Carl's employer refused to let him work from home. The title company did not object, however, when Carl took the time off that he needed in order to get surgery and recuperate. There is thus no evidence that the company fired Carl because of his leg injury.

Finally, the title company has 50 employees, so it is subject to the ADA.

Question No. 5: Sample Answer

1. The issue is whether Amy breached her contract with Painter by failing to pay Painter for the portrait or whether the express condition will provide Amy with a defense.

An express condition in a contract for sale must be strictly complied with in order to advance the other party's duty to perform. When discretion is granted to a party to determine, based upon their own particular tastes, whether a condition has been satisfied, the other party cannot compel return performance unless the party is subjectively satisfied. However, when fulfillment of a condition is left up to one party's discretion to determine whether the condition has been fulfilled, the party is required to use "good faith" in exercising that discretion.

Here, an express condition of the contract was that Amy would not have a duty to pay a fee unless the portrait met with Amy's satisfaction. The standard to be applied is whether it met with Amy's subjective satisfaction, not whether the portrait is deemed acceptable within the community or some other objective standard. The fact that several artists have proclaimed it to be a masterpiece does not establish that Amy's own particular (and potentially unusual) tastes were satisfied. Although Amy has a duty to exercise her discretion in good faith, there is no evidence that duty was breached here, as the facts indicate that Amy "honestly" did not like the painting. Amy's defense based upon the condition in the agreement will be successful because Amy honestly did not like the painting and her discretion was not exercised in bad faith.

2. Based upon the language in the deed, Chuck is the sole owner of Blackacre because the deed established a joint tenancy with the right of survivorship.

As between a tenancy in common and a joint tenancy, Pennsylvania courts tend to favor tenancies in common. A deed can establish a joint tenancy only if it states so clearly, including expressly specifying a right of survivorship. Despite favoring tenancies in common, the courts will find a joint tenancy where the right of survivorship is expressly noted in the deed. The court will attempt to effectuate the intent of the parties. When parties own a property as joint tenants with right of survivorship, the share of the party that dies first, passes to the other party. The first party's share is therefore not devisable, and any attempt to devise that share is without effect.

Here, Amy pulled the deed from the internet and did not consult a lawyer. Therefore, other than the language of the deed, there is no evidence of the intent of the parties. The deed states that Blackacre is conveyed to the grantees "as joint tenants and as in common, with the right of survivorship of the survivor of them, and the heirs and assigns of such survivor, forever." This grant does use the language "in common," which might tend to show that a tenancy in common was established. If a tenancy in common were established, then Blackacre would be freely devisable. Diane would therefore own Blackacre.

However, the language of the deed goes on to discuss at relative length the fact that there is a right of survivorship. The deed uses the term "survivor" two more times after stating that there is a right of survivorship. This level of specificity and repetition is likely to convince a court that the best way to read the deed is to hold that it established Bob and Chuck as joint tenants with right of survivorship.

Since Chuck survived Bob, Chuck therefore takes Bob's share of Blackacre and therefore is the sole owner of Blackacre in fee simple.

3. Chuck should bring a suit based on misrepresentation and seek to have the contract rescinded.

At common law, a person can recover for a misrepresentation when there is a false statement regarding a material fact which a party is reasonable in relying on and does so to their detriment. The misrepresentation does not have to be intended to defraud, but can be a mere misstatement regarding a material fact that results in detrimental reliance.

Here, Bob specifically asked Amy if there was mold contamination in Blackacre. She responded no. Even though she believed there wasn't mold, this is a false statement since mold was present in the house. It was material because Bob asked because mold aggravated his chronic asthma and he wouldn't buy Blackacre since he had such condition if it had mold. Bob and Chuck detrimentally relied on the misrepresentation because they purchased the house based on Amy's affirmation that there was no mold.

Chuck can ask to rescind the contract. Rescission is an equitable remedy that terminates a contract and excuses both parties from performing.

4. After the sheriff's sale, the owners of Whiteacre are Diane, Eve and Fran. Eve and Fran own Whiteacre as joint tenants with the right of survivorship and Diane owns Whiteacre as a tenant in common with Eve and Fran. Amy owned Whiteacre with her sisters Eve and Fran as joint tenants with right of survivorship. Under such tenancy anyone of them can sell their interest in Whiteacre. When an interest in a joint tenancy is sold, it cuts off the right of survivorship because the four unities (title, time, possession and interest) are no longer there with respect to the new person. In order to have a joint tenancy with right of survivorship all persons must have taken at the same time, the same title, through the same document and have a right of possession. When Amy's interest in Whiteacre was involuntarily sold at a sheriff sale, it cut off the interest from the joint tenancy making Eve and Fran still joint tenants with right of survivorship and Diane as a tenant in common (not joint tenant with right of survivorship) with Eve and Fran.

Question No. 6: Sample Answer

1. ABC may argue that Newco is liable under the Oldco contract as Newco is a mere continuation of Oldco's business.

Usually, a company purchasing all the assets of another company not in the ordinary course of business does not assume the seller's liabilities. An exception is made, however, when the new company is a mere continuation of business from the old company. In this case, Newco purchased all of the assets of Oldco without assuming Oldco's liabilities. However, Newco is continuing to use Oldco's brand name declaring that Newco continues 10 years of business experience. Newco also operates at Oldco's site, sells the same services and goods, and has all of Oldco's employees. Thus, a court should rule that Newco is a mere continuation of Oldco's business and is liable for Oldco's contract with ABC.

2. The proposed representation presents a non-consentable, non-waivable conflict of interest, and therefore Able cannot represent both Oldco and Newco in a suit by ABC against both companies.

Under the Rules of Professional Conduct (RPC), an attorney is not prohibited under all circumstances to represent multiple parties in a lawsuit. Such joint representation is permissible where the clients give informed consent (which should always be in writing) after the lawyer explains the consequences of joint representation. Here, however, Able's representation of both Oldco and Newco presents a concurrent conflict of interest because each company's interest is directly adverse to the other. In the event of a suit brought by ABC against both Oldco and Newco, either Oldco or Newco is going to be found liable on the contract. A lawyer can proceed despite a concurrent conflict of interest, with the clients' consent on full disclosure, provided that the lawyer reasonably believes that representation of both parties will not materially limit his judgment or diligence in his representation of either party, and confidentiality is maintained. Here, it is clear that Able's representation of each company will materially limit his representation of the other. In order to allege that Newco is not liable on the contract, Able will have to assert that Oldco is liable; and in order to allege that Oldco is not liable on the contract, he will have to assert that Newco is liable. This presents a non-consentable, non-waivable conflict of interest, and Able cannot represent both Oldco and Newco in a suit by ABC against both companies.

3. There was a binding contract between Newco and XYZ. The issue is whether the conduct of the two parties created a binding contract. Under the UCC, which applies to the sale of goods, a contract for the sale of goods for more than \$500 must be in writing to be enforceable. However, when writings between the parties fail to form an enforceable contract, a contract can be created by conduct of the parties that clearly evinces the intention to be bound to a contract. Such a contract is binding on both parties.

Here, there was conduct that created a contract between Newco and XYZ. The contract was for the sale of goods, because it involved a computer system, and therefore the UCC applies. The deal was for more than \$500, so it needed to be in writing to be enforceable under the UCC. However, the writings between Newco and XYZ failed to form a contract because Karl did not sign the purchase agreement, as required by its terms to be enforceable. However, the parties formed a contract by conduct when Newco cashed the check sent to it by XYZ and promptly shipped the computer system that XYZ has indicated in the purchase agreement. XYZ's return

of the purchase agreement along with the check constituted and offer which Newco accepted when it shipped the computer system. Furthermore, XYZ accepted the computer system and indicated its acceptance to Newco. Therefore, an enforceable and binding contract was formed.

4. XYZ may recover actual damages and incidental damages arising from its contract against Newco.

When a merchant breaches a contract by an imperfect tender, the receiver may either, keep the product, keep the conforming parts or portion of the product and reject the rest or reject the entire product (s). In this case, XYZ received a non-conforming good. The company properly accepted the good, but it still has a cause of action against Newco because it promptly notified Newco of the deficiency.

Because Newco breached an express warranty, XYZ may recover the difference between the cost of the computer system that they received and the cost of system that they should have received/contracted for. XYZ may also recover the consulting fees of \$2,000.00 as incidental damages.