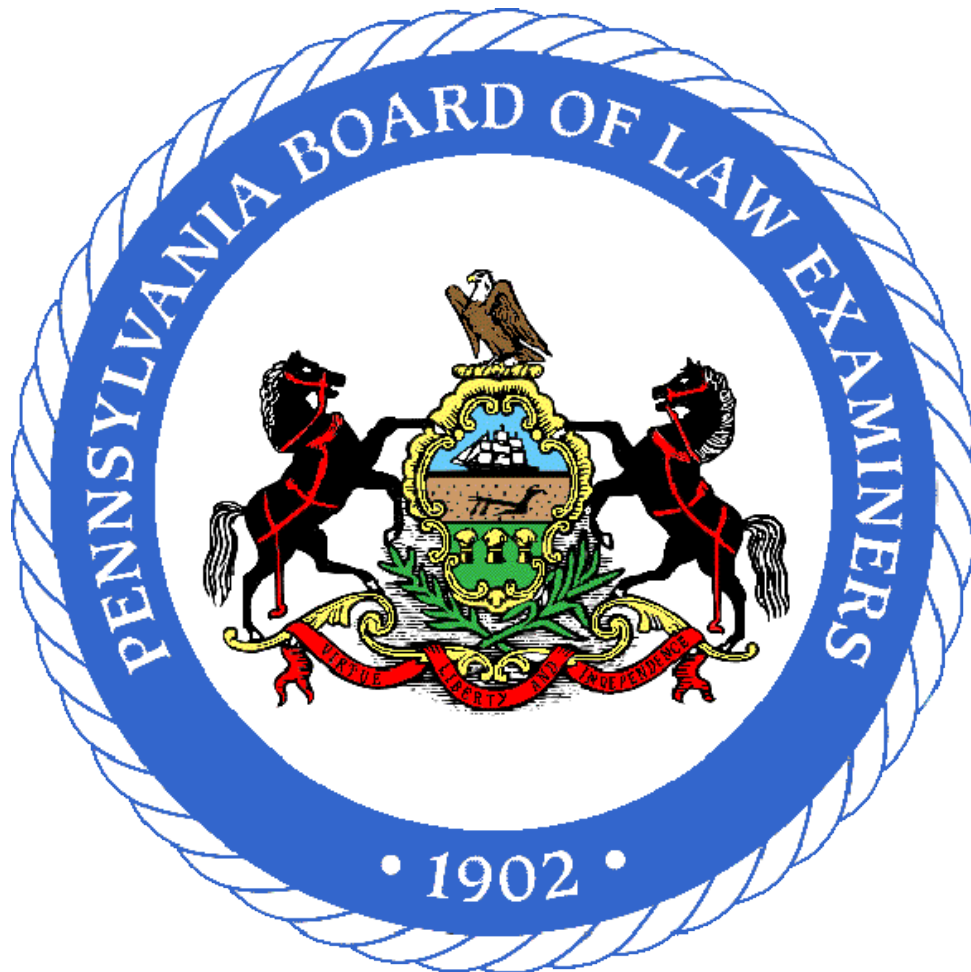


July 2011 PENNSYLVANIA BAR EXAMINATION

Sample Answers



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Performance Test: Sample Answer

ANSWER

TO: Hamilton Phish, District Attorney
FROM: Assistant District Attorney
DATE: July 27, 2011
RE: Commonwealth v. George Gunsel; No. 2011-07-24-001

Ordinance No. 1999-76

There is likely not enough admissible evidence in the case to support a conviction for this offense.

The elements of a violation of the ordinance are (1) a person (defendant) deposits snow, ice, grass clippings, leaves or other vegetative or foreign matter (2) into street or gutters. (Ordinance) As you are aware, in order to secure a conviction, we must establish every element of the crime beyond a reasonable doubt. Furthermore, pursuant to the Superior Court's holding in Commonwealth v. Jackson, if an officer does not observe the defendant committing the act, there may be a lack of probable cause to make an arrest or issue a citation for a violation of a municipal ordinance. (Jackson, pg.5). In this case, the officer did not observe Gunsel depositing the grass clippings into the street, and Gunsel made no admission to such conduct. Therefore, because the officer did not observe Gunsel depositing the clippings into the street and there was no other evidence to support this element there was no probable cause to charge him with violating the ordinance and a conviction will fail.

The Defendant Could not Properly be Convicted of Public Drunkenness.

Public drunkenness is defined as a summary offense. It occurs when the person appears in any public place while manifestly under the influence of alcohol, to the degree that he may endanger himself or others or property, or annoy nearby persons. (See 18 PA C.S.A. 5505).

The Superior Court has explained that the appearance in a public place must be voluntary as opposed to coerced by the police. (Meyer)

Additionally, a public place means a place open to the public or a substantial portion thereof. (Meyer). Open to the public means that the public has a right of entry. (Meyer). Open to the public ordinarily does not include areas immediately outside of private places, such as the immediate outskirts of private clubs. (Meyer).

As to the element of manifestly under the influence, this must be established beyond a reasonable doubt to violate this public drunkenness statute. (Meyer). Relatedly, the government must establish that, because of this influence, the person was a danger to himself or others or property, or was annoying

to nearby people. (Meyer). See also 18 PA C.S.A. 5505). More specifically, the extent to which these dangers or annoyances are present is the extent to which the crime occurred. (See Meyer).

Here, the charge of public drunkenness could not stand for several reasons. First, the facts indicate that the defendant was not in a “public place.” The defendant was either inside his home or on his porch or outside his house at all relevant times. Nothing suggests that his house or porch were open to the public or a substantial portion thereof, or that anyone else had a right to enter thereon. The strongest argument for him being “in public” would be when the officer brought him out of his house to the sidewalk/street. However, this would not succeed given that his presence there would have been coerced by the police. (See Meyer).

While the failure of this element of being in a public place would, alone, void the crime, a brief discussion of other problems is warranted. First, it is unclear whether the defendant was manifestly drunk so as to be a danger to himself, others, or property, or annoying to nearby persons. (See Meyer, 18 PA C.S.A. 5505). Although he was slurring his speech and smelled of alcohol and his eyes were bloodshot and he was unsteady on his feet, there is no evidence that he might have been a danger to himself and nothing suggests he was a danger to others unless perhaps his resistance of arrest was deemed included in this. As he was in his own home, he was no danger to other people’s property. Nothing suggests that others were nearby to be annoyed.

Accordingly, it is highly unlikely that defendant could be convicted of public drunkenness given that the facts indicate that he was never voluntarily “in public” as required by the statute and the case law interpreting it.

Resisting Arrest

A person is guilty of resisting arrest when “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. 5104. The key to this statute is the presence of a “lawful arrest.” The Supreme Court in Jackson established that “because a lawful arrest is an element of resisting arrest, a conviction for that crime cannot be sustained where the arrest is found to be unlawful.” Jackson. Further the Court held that, “the lawfulness of an arrest depends on the existence of probable cause.” Id. Additionally, the Superior Court discussed the requirement of creating a substantial risk of bodily injury by stating that “we wish to confine the offense to forcible resistance that involves some substantial danger to the person.” Rainey. The court in Rainey found that simply wiggling and squirming to evade an officer’s grasp was not enough to constitute resisting arrest. Id.

In this case there does not appear to have been enough probable cause to warrant an arrest of Mr. Gunsel. There was no evidence that he had placed the clippings in the street. There was also little proof that he was manifestly under the influence. Furthermore, Gunsel was only outside of his home because of Sgt. Minor’s direction and therefore he was not voluntarily in a public place. Additionally, the arrest for violation of the ordinance was unlawful because it was not authorized by law because the offense was not observed by the officer. Bullers, Borough Code – 53 PS 46121. Furthermore, Gunsel’s actions were likely not sufficient to constitute the degree of force required to convict for resisting arrest.

Mr. Gonsel never hit Minor or otherwise assaulted him. Gonsel merely stepped inside his home upon Minor's assertion of arrest. Gonsel later only wiggled his hand away from Minor. Minor's injuries to his foot and hand were not directly caused by Gonsel. This is similar to the conduct of the defendant in Rainey where he wiggled and squirmed only. Rainey. An officer in the Rainey case was injured but only because he slipped while restraining the defendant and not because of an act of the defendant. Rainey. Similarly in this case, Gonsel merely wiggled from Minor's grasp and the door hit Minor's foot and his hand was only injured when it slipped off Gonsel's arm.

Conclusion: Therefore it would be unlikely that Gonsel would be convicted of resisting arrest both because the underlying arrest was not valid for lack of probable cause and Gonsel's actions did not rise to the level of substantial risk of harm to the officer as required to find him guilty of resisting arrest.

IV. Possession of a Small Amount of Marijuana:

The possession of small amount of marijuana cannot be successfully prosecuted because it was found as an illegal search incident to an illegal arrest.

In order to be found guilty of the offense a defendant must possess a small amount of marijuana for personal use.

Here the search of Gonsel where Minor found a small amount of marijuana was not lawful because the initial arrest was not lawful. Therefore, absent a lawful arrest a search incident to arrest cannot be performed and those things found will not be admissible. In *Commonwealth v. Bullers*, the gun found on the defendant was not admissible because it was found in a search incident to an unlawful arrest for underage drinking, a summary offense. In these facts before us, Gonsel's arrest was unlawful as discussed above for the ordinance violation, public drunkenness and resisting arrest and as such the search incident to the unlawful arrest would not be valid and the marijuana would be inadmissible. Therefore, the charge for possession of a small amount of marijuana cannot likely be successfully prosecuted.

Question No. 1: Sample Answer

1. Through a properly executed will, Arthur, the testator, gave “my shares of General Power, Inc., in equal shares of 1,000 each,” to his friends Joe and Bob. In addition, the residuary went to his only son, Richard.

The problem with this is the finding of an additional 1,000 shares of General Power stock, which was not clearly referenced in the will, as Arthur devised “my shares” but only referenced 2,000 shares, 1,000 each to Joe and Bob. This creates an ambiguity in the interpretation of the will, because it must be determined who the stock belongs to, Joe and Bob, or Richard.

There are two types of will ambiguities: patent and latent ambiguities. A patent ambiguity is an ambiguity on the face of or within the will. Latent ambiguities are ambiguities created by facts outside the meaning of the will, and extrinsic evidence can be used to solve the ambiguity.

In this case, it would appear that the 1,000 shares found by Richard should go to Joe and Bob. While Richard takes all additional property other than the specific bequest to Joe and Bob, both the face of the will and the use of extrinsic evidence show that Arthur’s intent was to give the shares to Joe and Bob. Accordingly, despite the potential claim from Richard that the 1,000 shares would be residuary, the meaning of the will by using (“my shares”) and extrinsic evidence (Arthur thinking he brought all of shares to his lawyer), show that Arthur’s testamentary intent would have been for Bob and Joe to receive the shares.

2. The court should rule that Richard’s gift of the two parcels to Richard Jr. was a valid exercise of the power of appointment created in Richard by Arthur’s will.

When a document like a will uses language of appointment, the donee of the power of appointment is limited in his exercise of the appointment by the terms of the will. If the testator (donor of the power) limits the class of individuals to whom property can be distributed via the power, the holder of the power is limited to appointing the property to those individuals. The individuals who will take if the power is not exercised are known as the “takers in default” and they will automatically receive the property if the power is not exercised.

In this case Arthur’s will vested Richard with a power of appointment over all of Arthur’s estate remaining after the shares of stock were distributed to Bob and Joe. The language that granted this power is as follows, “and give all the remainder of my estate to Richard, for the necessary support of himself and with the power to distribute to such of his issue as he chooses during his lifetime, with any remaining property or other assets remaining at his death to be distributed equally to his issue.” This language gave Richard the power to use Arthur’s residuary property for his own benefit during his lifetime or to distribute (appoint) the property to his issue. In this case Richard Jr. is the issue of Richard’s because he is Richard’s son. Although Richard was not permitted by the language of the power to wait until his death and exercise the power via his own will, he was permitted to exercise the power “during his lifetime.” There was no restriction on how this power was to be exercised other than it had to be exercised during his lifetime and to his issue. Richard’s issue were takers in default under the power and would be entitled to an equal share of the property had Richard died without distributing

the property according to the power. In this case Richard validly exercised his power under the will to distribute the two parcels of Arthur's property to Richard Jr. during Richard's life. The issue (including Richard Jr.) will be entitled to an equal share of the property remaining from Arthur's residuary that was not given to Richard Jr. due to their status as takers in default.

Therefore, the court should rule that Richard validly exercised his power of appointment and thus his minor children have no claim to the two parcels that were given to Richard Jr.

3. Absent an agreement to the contrary in the divorce settlement agreement, the \$1,000 to Jane each month will be considered alimony that can be deducted from Richard's income and must be reported by Jane as income. The \$750 in child support, on the other hand cannot be deducted by Richard and is not considered income for Jane.

Under the Federal Tax Code, alimony paid is tax deductible by the payor and must be included in income by the payee. Child support, on the other hand, cannot be deducted by the payor, nor must it be reported as income by the payee. Alimony is payment to support a former spouse, whereas child support is a payment to support the upbringing of a child. Alimony generally must be paid for some finite period of time whereas child support automatically terminates when the child reaches 18. In this case, the fact that the settlement agreement indicates that the \$1,000 payment was for Jane and terminates at the end of 10 years (regardless of the children's age at that time), that payment appears to be alimony, and therefore it will be deductible from Richard's income and reportable as part of Jane's income. On the other hand, the \$750 payments are designated as child support and the payment clearly terminates (\$250 per child) when the child turns 18. Thus, the \$750 is not deductible for Richard and must not be reported as income by Jane.

4. Harold has violated the duty of honesty and candor under the Rules of Professional Conduct (RPC) and John has likely violated those same rules for not disclosing the additional shares of stock. Under the RPC, an attorney must act with honesty and integrity both outside and inside the court. They have the utmost duty of integrity and honesty and are required to disclose any additional information to the court they learn.

Here, once Richard informed Harold of the additional shares of stock, Harold was under a duty to the court to disclose and amend the Final Account even if it would take longer and hold up the closing. Instead, Harold informed John of the additional shares and advised him not to add the shares to the Account because they had already processed the change of ownership of the \$2,000 shares and didn't want to hold up the closing with an estate dispute. Therefore, Harold violated his duty of integrity, and candor required by all attorneys.

John will also likely be held to have violated this same duty. A subordinate attorney is generally held to a lower standard than his supervising attorney, and the subordinate attorney can rely on the supervisor's reasonable resolution of an uncertain question of duty. Here, John followed orders by his supervising attorney not to include the additional shares, however, John should have known that he has the utmost duty of candor to the court. Therefore, although he is governed by a lesser standard than Harold, he should still be held liable for violating the clear duty of honesty and candor to the court.

Question No. 2: Sample Answer

1a). Big's attorney should make a motion for Compulsory Non-Suit following the conclusion of Ben's case. The issue is what motion should Big's attorney make at the close of the Plaintiff's evidence only. A Compulsory Non Suit is similar to the Federal Motion for Judgment as a Matter of Law. In Pennsylvania, a motion for Compulsory Non Suit is made after the close of the plaintiff's evidence and will be considered using the standard of whether the Plaintiff has established the elements for a cause of action based on the evidence presented. Accordingly, the motion would allege that the Plaintiff has failed to set forth evidence proving every element of the requisite claim at issue and that no reasonable person could come to any conclusion but for the defendant. In this case, the motion would be arguing that Ben/Plaintiff has not proven every element of the negligence case. Big's attorney should make a motion for a Compulsory Non-Suit following the close of the Plaintiff's evidence.

1(b). Ben's attorney should oppose this motion by establishing that a jury may find negligence on the defendant's part by using the doctrine of *res ipsa loquitor*. The doctrine of *res ipsa loquitor* is a doctrine used when the plaintiff cannot factually prove casual negligence on the defendant's part. To use the doctrine of *res ipsa loquitor*, the plaintiff must prove that the accident that occurred would not have happened without negligence, and also would have to prove that the defendant is the party in control at the time the accident occurred and likely responsible for the accident. Ben's attorney may likely get this case to the jury if he can prove that this is the type of accident that would not have occurred without negligence. Here, it is reasonable to assume that when an individual is standing on a street grate, it should not give way. Grates are meant to be walked and stood on by pedestrians and but for some breach of duty on the defendant's part, the accident would not have occurred. Ben's attorney should argue that the grate should not have collapsed and it can therefore be presumed that there was negligence on some part of the defendant since other causes were eliminated. Moreover, the accident is the type that happened while the defendant was in control and can be attributed to the defendant. Here, nothing in the facts state to the contrary that Big was the party in possession of the parking lot at the time of the accident and at all times prior to the accident. Ben's attorney has presented evidence that Ben did nothing to contribute to the grate giving way. Therefore, Ben's attorney, based solely on the evidence presented, should argue that there is a sufficient basis to use this doctrine and the issue should now be a question for the jury.

2. Big's attorney should advise Big that they would likely be successful in a claim against Tom for defamation.

To prove a cause of action for defamation a plaintiff must show that the defendant made a defamatory statement specifically referring to the plaintiff, that the statement was published and in certain cases damages must be established. No damages must be established if the comment was in a permanent form (libel) or constituted slander per se which means it negatively reflected on the plaintiff's business, or implied a crime of moral turpitude. The constitution further requires that if the matter on which the defendant spoke is a matter of public concern and the plaintiff is a public officer or a public figure the plaintiff must prove that the defendant's statement was false and that the defendant acted with actual malice by making the statement either intentionally knowing the statement was false or with reckless disregard for the truth. A statement is defamatory if it is an assertion of fact that reflects negatively on an aspect of character. Even an assertion of opinion can be considered defamatory if a reasonable person would believe that the speaker has factual support for their statement. A statement is

published when the defendant communicates the statement to one or more people other than the defendant.

In this case Tom made a defamatory statement because he insinuated that Big improperly influenced government officials to act according to Big's wishes. This statement reflects negatively on Big's character because it implies that Big is not an honest organization and is willing to lie and cheat to get what it wants from the government and that Big does not care about its customers. Tom specifically referred to Big by mentioning it by name. Tom's statement was published because he said it to twenty-five people. Furthermore, there is no need for Big to show damages because the statement would be considered slander per se because it reflects negatively on Big's business and it also implies a crime of moral turpitude because it implies that Big is bribing government officials. Therefore damages do not need to be proven to be successful in the defamation case. However, if damages are not proven the court may only award Big nominal damages. Therefore Big should also introduce the evidence of the negative economic effect that Tom's statements have made including a twenty percent decline in sales since the statement because Big's market analyst has found that the drop is directly related to Tom's statements. Furthermore, Tom's statement implied improper conduct in relation to the government and therefore was a matter of public concern. Big may be a public figure because it is a big store. Big can prove that Tom's statements were false because even Tom knew the statements were untrue. Furthermore, Big can show actual malice because Tom knew the statements were not true and said them simply out of dislike for Big.

Therefore, Big should bring a defamation cause of action against Tom and will likely be successful.

3. The settlement amount would be considered separate property but could have an impact on the property distribution between Ben and Pam.

In determining a proper means of property distribution the court begins by separating the couples' property into separate and marital property.

Separate property consists of all property that the spouses brought into the marriage (less the gain in value of such property during the marriage), property acquired by the spouses by gift or inheritance, and property acquired after the couples' final separation. All other property is considered to be marital property and is distributed by the court according to the court's analysis of a list of non-exclusive factors laid out in the PA family law code. For the purpose of personal injury awards and workers compensation awards the key is when the injury occurred and not when the money actually comes to the injured party. The relative amount of separate property is a factor that can be considered in allocating the shares of the marital property to the spouses.

In this case, Ben was separated from his wife at the time of his accident which gave rise to his settlement with Big. This was Ben's final separation from Pam because there is no mention that he and Pam ever got back together after the accident before they began the divorce process. Because Ben's injury which gave rise to the settlement with Big occurred after his final separation from Pam, the settlement amount should be considered separate property and thus is not part of the marital property to be divided by the court between Pam and Ben. However the settlement amount may impact the property distribution between Pam and Ben because it will make Ben's separate property larger than it otherwise would have been which can have an impact on the court's division of marital property.

Question No. 3: Sample Answer

1. Mallory can be charged and likely convicted of simple assault, recklessly endangering another person and disorderly conduct. One way of establishing the crime of simple assault is by showing that the defendant intentionally placed the person in fear of imminent bodily harm. Assault can thus be established without any actual harm. In this case, Mallory pointed a loaded gun at Conner's head and made seriously threatening remarks. The fact that Conner and the bystanders were all terrified and fled demonstrates the seriousness of the threat. Mallory's statements after the incident that "he had it coming to him" and "I should have just shot the bum" further support her intent, though the former statement is likely inadmissible as discussed in Part 3 below.

Mallory should also be charged with Reckless Endangerment of Another Person (REAP) with regards to her incident with Conner. Mallory would likely be found guilty of this crime.

Under PA law one is guilty of REAP if he engages in reckless conduct that places others at risk of death or serious bodily injury.

Here, Mallory had a loaded gun in her hand. She approached a crowd of people and pointed the gun at Conner's head. This act endangered Conner's life and the life of each and every person in the crowd. Thus Mallory should be charged with, and convicted of, REAP.

Mallory should be charged and likely found guilty of disorderly conduct because pointing a loaded gun at someone's head while standing in a crowd of people recklessly places them in danger of serious bodily injury, and causes disruption to the public. Disorderly conduct is any threatening act tending to alarm or cause a disruption to the peace of mind of the public or to be a nuisance to those around the perpetrator.

2. If Mallory's counsel objects to the prosecution's proposed character evidence, the court should rule the evidence admissible because Mallory has opened the door for the prosecution and the evidence is relevant to impeach her character. Generally, bad character evidence of a defendant cannot be admitted by the prosecution unless the defendant testifies to her good character. If a defendant testifies to her good character, the prosecution can bring in certain evidence to impeach her credibility and show her bad character.

Here, Mallory took the stand and testified to her good character and that she was a peaceful and law abiding citizen. Once Mallory opened the door to her good character, the prosecution is able to impeach her testimony and show that she is not peaceful or law abiding. This can be done through both reputation evidence and criminal convictions. Here, the prosecution wants to present evidence that she has a general character of being violent. This can be done through reputation evidence and also through specific criminal convictions. Therefore, Mallory's conviction of simple assault can be admitted to impeach her testimony that she is a law abiding citizen and peaceful. This conviction for simple assault directly rebuts her testimony that she is both law abiding and peaceful.

Thus, if Mallory's counsel objects to the prosecution's proposed character evidence, the court should rule the evidence admissible because Mallory has opened the door for the prosecution and the evidence directly impeaches her good character.

3. The court should rule the statement to the Trooper is inadmissible because it violated Mallory's Fifth Amendment right against self-incrimination, but should rule her statement to the booking Trooper is admissible because it was a spontaneous statement.

Under the Fifth Amendment to the Constitution, a person must be read their Miranda warnings if they are subject to a custodial interrogation. Thus there are two elements necessary to give rise to Miranda warnings: a custody and an interrogation. To determine whether a person is in custody, you must look to what the officer objectively conveyed to the accused. If the officer objectively conveyed that the accused was not free to leave, then a person will be deemed in custody. An interrogation occurs when the statements by the police are ones that would likely elicit an incriminating response. Such statements need not be in the form of questions to be an interrogation. If a police officer fails to give a person Miranda warnings, then he violates the accused's Fifth Amendment right against self-incrimination. The remedy for such a violation is the suppression of the statement. If an accused is given Miranda warnings, and requests counsel, all questioning must halt. The Fifth Amendment right against self-incrimination is not offense specific. The courts have interpreted an accused's request for counsel to mean they need assistance in answering questions. The police may not reinitiate, and re-read an accused's Miranda warnings if they request counsel. Questioning may only continue if it is at the initiative of the accused. However, any statement made by the accused after Miranda warnings were read, that was not in response to any statement by the police is considered a spontaneous statement. Spontaneous statements will not be found to be in violation of an accused's right against self-incrimination because there is no interrogation element. The accused instead voluntarily makes such a statement, without any police involvement.

Mallory was placed under arrest and read her Miranda rights. There is no question that she was in custody of the police. She immediately asked for an attorney. At that point, the police may not interrogate Mallory. Two minutes after Mallory requests an attorney, the Trooper said to her "This will go a lot better for you if you just own up to what you did." While such a statement is not in the form of a question, it is a statement that is likely to elicit an incriminating response. Because Mallory had already requested an attorney, the Trooper was not permitted to make such a statement to her. That statement, while not a question, is an attempt to get Mallory to speak to the police without her attorney present, thus it is an interrogation, and a violation of Mallory's Fifth Amendment right against self-incrimination. As Mallory was taken for booking, she voluntarily and spontaneously said "I should have just shot the bum. He was a jerk." The booking Trooper did not say anything to Mallory that would cause her to make such a statement. Her statement to the booking Trooper was a spontaneous statement. Such a spontaneous statement given by an accused is not a violation of Miranda, and thus will be admissible.

Therefore, because the Trooper's statement to Mallory is one which is likely to elicit an incriminating response, the court will likely suppress it as a violation of Mallory's right against self-incrimination. However, her statement to the booking Trooper was a spontaneous statement that should be admitted into evidence.

Question No. 4: Sample Answer

1. The court should analyze the residents' due process claim under the Due Process Clause of the 14th Amendment to the U.S. Constitution and should find that the government's closure of a facility that fails to meet inspection standards does not terminate the residents' public benefits and therefore does not infringe on a right which would trigger due process of law.

The Due Process Clause of the 14th Amendment to the U.S. Constitution provides for both substantive and procedural due process of the law. The Due Process Clause applies only to state action and does not apply to private individuals. In essence, the Due Process Clause recognizes that individuals have certain rights to life, liberty, and property and they cannot be deprived of these rights without due process of the law. Due process of the law requires that the individual is given enough process to be fair and usually requires that the individuals being deprived of their rights have notice and an opportunity to be heard (such as a formal hearing). Here, the residents claim is twofold: first, that the state is infringing on their right to enjoy public health benefits by terminating them without a hearing; and second, that the state is infringing on their right to enjoy public health benefits by revoking the license of a public facility. The facts demonstrate, however, that the government is not infringing on the residents' right to public benefits, but rather where the residents can obtain those benefits. If, for example, the government was revoking Sam's individual public benefit, Sam would be entitled to a hearing before benefit termination. Similarly, if the home for the elderly (Home) suffered license revocation by the state, it would be entitled to a hearing on its license revocation. The residents, however, have no recourse under the Due Process Clause to fight the government's decision to withhold the renewal of Home's license. In fact, in regulating the health and safety of its citizens, the government of C-City, has a strong argument that it would be negligent to allow Home to operate if the government knows that Home cannot meet certain inspection standards. Even though the court may appreciate that moving to another facility may cause the residents some physical and psychological harm, the court will likely find that this harm is not a termination of the residents' public benefits. Since the residents can continue to enjoy their public benefits (albeit at a different licensed facility), there is no true infringement of the residents' rights. The residents should not be afforded any hearing with regard to the process of Home losing its license.

2. Able did violate the Rules of Professional Conduct with respect to his preparation of the documents and by accepting payment from Junior.

An attorney must act with diligence and competence in representing their clients. The attorney must make reasonable steps to ensure that the actions they are taking are in the best interests of their clients and keep them informed of what they are doing. Also, an attorney may not disclose confidential information of their client. An attorney also violates the Rules of Professional Conduct when they accept a fee for services from a third party without informing the actual client of the payment. The attorney must ensure that no information is disclosed to the third party and the third party cannot direct how the attorney is to perform for the actual client.

Here, the actual client was Sam, not Junior. When Able accepted the payment by Junior for his work performed, which he thought was for Sam, Able violated the Rules of Professional Conduct when he did not disclose this information to Sam and further violated this rule by allowing Junior, the third party, to control how and what Able did for Sam, and because all information was from Junior and made available to Junior without the knowledge or consent from Sam. Also, in preparing the document, Able made no attempt to ensure that he was acting in the best interest of his client, Sam, by never actually contacting Sam to make sure this was what he wanted and that everything conformed to an actual request from Sam.

Therefore, Able did violate the Rules of Professional Conduct with respect to both his preparation of the documents and by accepting payment from Junior.

3. In order to make out a claim for sexual harassment under Title VII Pat must show that she was (1) a member of a protected class, (2) that her membership in this class is the reason why she was subjected to harassment, (3) that a reasonable person would find the harassment to be severe, pervasive, unreasonable, and offensive, and (4) that she subjectively found the harassment to be offensive. In order for Home to defend against Pat's claim they would need to show that: (1) they had a proper workplace dispute and harassment resolution system in place designed for handling and resolving all workplace discrimination and sexual harassment issues; and (2) that Pat failed to properly utilize the complaint system provided by Home. Pat's likelihood of success is great.

Pat will most likely be successful. Pat meets all of the necessary elements under Title VII since she is female, she was harassed due to being female, a reasonable person would find that the harassment was pervasive, severe, unreasonable, and highly offensive, and it is clear that Pat was subjectively offended by the harassment since she filed an inter office complaint with Human Resources to complain about it. The duration of the harassment, including its humiliating nature and sexually suggestive aspect of it, would also greatly favor a finding of a hostile workplace due to sexual harassment. Similarly, Home's affirmative defense lacks merit since, although they had a proper anti-discrimination program in place, their HR department failed to follow and implement it. Since Pat attempted to resolve the dispute through the office's internal regulatory process and that process completely ignored her complaint, Home will be found liable for her claim.

Question No. 5: Sample Answer

1. Bill and Ellen both own an equal portion of Blackacre as tenants in common. Although some jurisdictions recognize the lien theory of mortgages on joint tenancies, which does not view a mortgage as severing a joint tenancy, Pennsylvania law holds that when a mortgage is taken out on real property owned by a joint tenancy the mortgage does not sever the joint tenancy if all of the tenants agree and sign for the mortgage. In contrast to this, if less than all of the joint tenants take out a mortgage on a property jointly held in Pennsylvania it does sever the joint tenancy. When a joint tenancy is severed in Pennsylvania the end result is a tenancy in common, which, unlike a joint tenancy, does not include a right of survivorship. Therefore, one's interest in a tenancy in common is devisable.

When Bill took out a mortgage on his interest in Blackacre he severed the joint tenancy. This is because his father Al did not also sign for the mortgage, and Al was not responsible for the mortgage. When Bill severed the joint tenancy Bill and Al's interests in Blackacre became a tenancy in common, which is devisable. By conveying to Ellen through his will his interest in Blackacre Al successfully devised one half of the interest in Blackacre to Ellen. Thus, both Bill and Ellen have a one half interest in Blackacre as tenants in common.

2. Bill should argue that he and Dave were both operating under a mutual mistake when they made the contract and thus the contract should be void. A mutual mistake occurs when both parties to a contract are operating under false beliefs. The false belief must be a material part of the contract. The person attempting to claim mutual mistake cannot bear the risk of loss. A person bears the risk of loss when they entered the contract without the information they could have obtained in a reasonable manner, or they had knowledge of the possibility of mistake and took the risk anyway.

Here, Dave and Bill both believed the contract they entered into was for the sale of Action Comics No. 1. However, they were both mistaken. The contract they entered into was actually for a worthless comic book not worth anywhere close to \$250,000.

It was reasonable for Bill to believe that Dave possessed the highly valuable Action Comics No. 1 since Dave was a reputable amateur dealer in comic books. Further, Bill should argue that he did not bear the risk of mistake since Dave was a reputable comic dealer. This may be a hard burden to overcome, however, Bill can emphasize his fear that the comic book would be destroyed if he opened the glass case to inspect the product.

If Bill argues that he and Dave entered into a mutually mistaken contract he may be able to circumvent the contract and get his purchase price back.

3. A Pennsylvania court should allow Ellen to retain the sprinkler system but return the comic books and tap system because they are unaffixed personal property and trade fixtures.

At issue is when improvements to a leased structure by the leaseholder become part of the structure so that they must remain part of the structure even after the termination of the lease.

Improvements to leasehold property can take three forms – (1) unaffixed personal property; (2) trade fixtures; (3) fixtures. Unaffixed personal property is generally the property of the leaseholder and the leaseholder is free to remove any unaffixed personal property from the premises. Trade fixtures are property of the leaseholder installed in the course of the leaseholder's business that may change the structure of the building. Fixtures are improvements made to the property that significantly attach to the property and would materially alter the property should they be removed such that the property would not be in a position it was before the leasehold.

Here, the comic books that Dave displayed should be considered unaffixed personal property. They are simply on display, and the facts do not indicate that they were permanently attached to the structure in any way. Even if they were attached by a few screws and nails, removing them would not have a significant impact on the property. Therefore, Dave can take them.

The tap system is likely a trade fixture that Dave can remove. He installed the tap system in the course of his business running his bar/restaurant. The facts suggest that the tap system probably made some alteration to the structure of the building, but it is unclear. Even if the tap system required alterations to the floor of the structure, the tap system could be removed and the structure could be restored to the condition it was previous to the leasehold. As a result, the tap system is a trade fixture, and Dave should be allowed to remove it.

The sprinkler system is likely a fixture that Dave cannot remove. The sprinkler system was installed in order to bring the building up to compliance with city fire codes. Removing it would not only take the structure out of compliance with those codes, but also cause significant damage to the structure. As a result, the sprinkler system is a fixture that Dave should not be allowed to remove.

Therefore, Dave should be able to take the comic books and tap system, but not the sprinkler system.

4. Bill's action to quiet title will be successful because Al initially intended to give Greenacres to Bill; and Ellen, as a donee, is not protected by the recording statute. The issue is whether the deed to Greenacres was delivered to Bill and whether the subsequent gift of the property to Ellen has any effect.

In order for a deed to legally pass title from the grantor to the grantee, it must be lawfully executed and delivered. Delivery is a legal standard and does not require actual physical delivery. Instead, it looks at the intent of the grantor and whether the grantor intended to relinquish control to the property. A court will look to the grantor's conduct and whether a delivery took place as a result of that conduct. Once a deed is recorded, recording statutes come into play when a property has been deeded several times to several different owners. Recording statutes protect bona fide purchasers for value who get the property without notice that someone else got it first. PA is a race notice jurisdiction and not only must a purchaser be a BFP without notice, but must also win the race to record. Recording statutes do not protect donees.

While it is clear that Al delivered the deed to Bill initially, the issue is whether Ellen lawfully owns the property as a result of Al's gifting of Greenacres after learning of Bill's comic book purchase. Even though Bill did not record his deed, recordation is not required to complete delivery. The intent of Al, the grantor, was to deliver the deed to Bill, at least at first. Ellen will be the lawful owner of Greenacres, however, if she is a BFP without notice who won the race to record. Unfortunately for Ellen, she was not a BFP without notice, as a donee is not considered a BFP. Ellen therefore does not have a legal claim to Greenacres even though she won the race to record and did not have notice of Al's prior deed giving Greenacres to Bill. The delivery of the deed to Bill makes Bill the lawful owner of Greenacres and thus his action to quiet title will be successful.

Question No. 6: Sample Answer

1. Under Pennsylvania corporate law, PIE should assert that Paul has breach his duty of loyalty to PIE by usurping a corporate opportunity. Members of a corporation's board of directors owe the corporation the duty of care and duty of loyalty. The duty of care states that the directors should act in good faith and with reasonable belief that their actions are in the best interest of the corporation. The director is bound to the standard of which a reasonably prudent person would conduct his individual business affairs. Directors also owe the corporation the duty of loyalty. Under the duty of loyalty the directors may not usurp any corporate opportunity without first notifying the board fully of the opportunity and waiting for the board to reject the opportunity before an individual director may take the opportunity for himself. In this case, Paul is one of the five board members for PIE corporation and thus he owes the corporation both the duty of care and the duty of loyalty. In this case, Paul breached the duty of loyalty by usurping PIE's opportunity to acquire a paint company.

PIE's board has discussed acquiring a paint shop to reduce painting costs because PIE currently outsources its painting. Paul had his attorney Able form Newco, a Pennsylvania corporation owned solely Paul, and Paul had Newco purchase the paint shop after he learned that the Pennsylvania paint shop owner wanted to sell out. Paul did not inform PIE of the opportunity and did not allow the board the opportunity to accept or reject the opportunity to acquire the paint company. If Paul had presented the opportunity to PIE, the remaining disinterested directors would have been entitled to vote on the acquisition of the paint company. In this case, Paul did not afford the opportunity to PIE and no vote was conducted. Failure to present the corporate opportunity was a breach of Paul's duty of loyalty to the corporation.

2. The Uniform Commercial Code (UCC) will govern the sale of the tires between TireCo and PIE. The UCC governs the sale of goods between merchants. In this case, both parties are merchants because they deal in goods of this kind and the contract at issue is for tires, which constitute goods under the UCC. Under the UCC, to be valid under the Statute of Frauds (SOF) the contract must set forth the quantity of goods to be delivered. The remaining terms can be filled in by UCC gap fillers, custom of trade, or terms used between the merchants in previous contracts. In this case, the contract between TireCo and PIE contains the quantity of each tire ordered and thus is valid under the SOF. Because no delivery terms are stated, under the UCC the term will be filled in by using the custom in the industry. Thus, the tires will be required to be delivered within a reasonable amount of time. If the parties have conducted business in the past, the tires will be delivered according to the previous contracts and how the delivery was effectuated in said prior contracts. Since the delivery terms are not specifically listed, the tires simply must be delivered within a reasonable time according to industry standard.

3. If a corporate actor, acting with apparent authority, enters into a contract with a third party, the corporation will be liable for that debt. While the bylaws prohibit this loan without the consent of the board, this action can be upheld because Paul was acting with apparent authority to bind the corporation and the bank was not aware of this restriction. Under the facts here, Paul had regularly dealt with the bank and signed loans with them on behalf of the corporation. The bank was surely aware that Paul was the president of PIE and had authority to bind the

corporation. The bank therefore had no expectation that this loan would not be enforceable. The corporation will be liable for the bad acts of one of its officers because the alternative would place the innocent third party at a disadvantage.

4. The conflict of laws that exists is one between two states. The court will begin analyzing the conflicts of law problem by applying the conflict of law principles of the forum state. PIE has filed suit against Paul and Newco in Pennsylvania court and thus Pennsylvania is the forum state and the Pennsylvania conflicts of law principles will apply. Pennsylvania takes a balanced approach in which they combine the factors of the most significant relationship approach and the government interest approach. In Pennsylvania if there is a false conflict, the law of the forum state will apply. However, here there exists a direct conflict between State X and Pennsylvania in regards to which law will apply. State X law states that the disclosed letter would be protected by attorney-client privilege, which could only be waived by an express waiver from Paul. Pennsylvania law states that the attorney-client privilege was waived by the inadvertent disclosure by counsel. Thus, the states' laws are in direct conflict. If State X law is applied, the letter would not be discoverable because it would be protected, whereas it would be discoverable in Pennsylvania.

The factors the court would consider are: 1) interstate and international interest, 2) the forum states interest in applying its own laws, 3) the interest of the other state in the suit, which includes its interest in applying its conflicts law, 4) the expectation of the parties, 5) the applicable substantive law which is applicable 6) the interest in uniformity and ease of the applicability of the substantive law. Pennsylvania has an interest in applying its laws because its law has been designed to ascertain the truth in litigation and to encourage attorneys to practice diligence in executing communications between adverse parties and if its law was not enforced this goal would not be effectuated. State X also has an interest in enforcing its law because they have designed their law to protect inadvertent disclosures which would be detrimental to an attorney's client. If its law was not enforced Able's client would be subject to punishment by PIE because of his attorney's accidental disclosure of confidential and privileged information. The issue at hand is one of professional conduct regarding attorney-client privilege. The law is specifically set forth in the Pennsylvania Code of Conduct which directly applies so PIE's expectation would be honored by following Pennsylvania law because they have filed suit in Pennsylvania and have relied on Pennsylvania law in forming the basis for the suit against Paul and NewCo. The court must also consider uniformity and applicability of the laws at issue to allow for future issues to be decided similarly and with ease.

The court will also consider the contacts of Pennsylvania and State X in determining the interests. In this case, PIE is located in Pennsylvania. Furthermore, Matt is a director of the corporation who owns 90% of PIE. PIE does business in Pennsylvania and it is likely that many of the employees and customers are residents of Pennsylvania. PIE also conducts banking and lending through a Pennsylvania bank. Paul, however, is a resident of State X and his attorney is a resident in State X. It is possible that PIE may conduct business in State X. The majority of contact and business is conducted in Pennsylvania and thus there is an overarching interest in having the laws of Pennsylvania apply. Furthermore, balanced with the factors, Pennsylvania has the majority interest in having its law applied. Accordingly, Pennsylvania will apply Pennsylvania law.