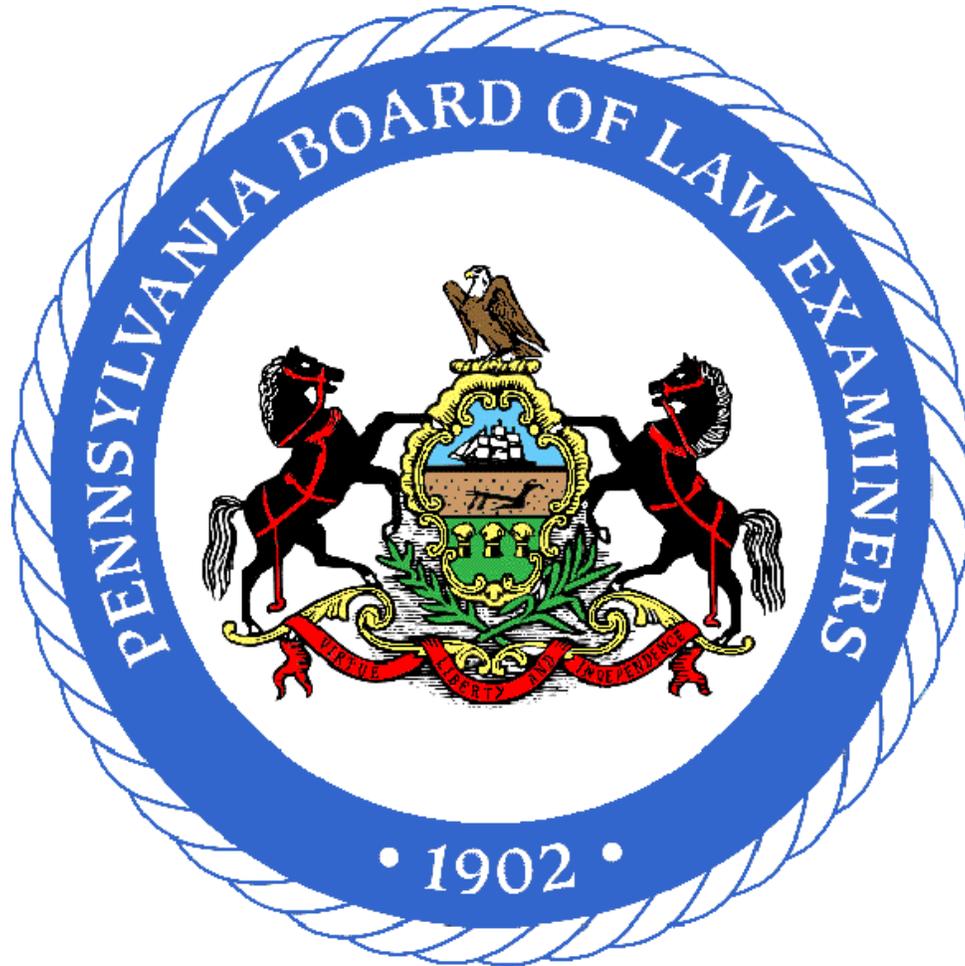


OCTOBER 2020 PENNSYLVANIA BAR EXAMINATION

Sample Answers



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Performance Test: Sample Answer

Issue 1

Memorandum of Law

TO: Lilly Benjamin, Managing Partner

FROM: Applicant

RE: Luke Anderson's Watch, File # 06031995

DATE: October 5, 2020

This Memorandum provides a summary and analysis of the legal issues presented in Mr. Anderson's legal matter. Mr. Anderson's legal matter involves a rare and valuable watch that he won in a nationwide drawing. The item is currently in possession of the Superintendent of Midtown School District (hereinafter, the "School District"), Mark Tierney (hereinafter, the "Superintendent"). In his role as Superintendent, Mr. Tierney took possession of the watch after an altercation between Mr. Anderson's son and another student and has failed to return the item to our client. Mr. Anderson has made numerous calls and emails directed to the Superintendent that have been unanswered and ultimately have failed to prove our client with rightful possession of the watch. Given these facts, this Memorandum serves to provide a summary and analysis of a potential claim for conversion on behalf of Mr. Anderson, as well as an analysis on the defense of governmental immunity that may be raised in response to such a claim.

Issue 2

Conversion

Mr. Anderson will likely have a successful claim of conversion as the Superintendent deprived Mr. Anderson of his lawful right to his property, the watch, or his use or possession of it, without Mr. Anderson's consent and without lawful justification.

The issue in the instant matter is whether the Superintendent's failure to return the watch to Mr. Anderson constitutes a conversion of the chattel.

"Conversion is the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." *Stevenson v. Economy Bank of Ambridge*, 197 A.2d 721, 11 (Pa. 1964). Conversion is defined as "unreasonably withholding possession from one who has a right to it." *Id.* To prevail on a claim of conversion, the plaintiff seeking damages must show that he/she is entitled to rightful possession of such chattel. *Id.* A contractual right of access provides such possessory rights and intrusion upon such rights may render the defending party liable. *Id.* Refusal to allow possession to the chattel's rightful owner constitutes a willful interference with the right of possession and constitutes an act of conversion. *Id.*

In the instant matter, Mr. Anderson has a compelling claim for conversion. First, Mr. Anderson can show that he is the lawful owner of the chattel in issue, the watch. Like in *Stevenson*, where the Pennsylvania Supreme Court held that the Appellee was lawfully entitled to possession of the cash contents of the security deposit box that entitled her to bring a claim for conversion, here Mr. Anderson is the lawful owner and the individual entitled to lawful possession of the watch he won from the nationwide contest. Mr. Anderson won the watch as part of a nationwide drawing held by a watch manufacturer's trade association. He received the watch at the live drawing on August 10, 2020, whereby he took lawful possession and ownership of the watch. Unlike the case of *Stevenson* where the Pennsylvania Supreme Court examined the lease to determine whether a lawful right of access to and entry into the box was provided, Mr. Anderson's matter provides no contractual language or other terms of the contest that may cast doubt on whether Mr. Anderson was lawfully entitled to possession of the chattel. Rather, when he won the contest on August 10, 2020, he became the rightful owner of the watch and was fully entitled to possession of the watch after that point. There is no evidence to show that Mr. Anderson consented to the taking of the watch by the School District. Despite the fact that his son wore the watch to school without his permission, Mr. Anderson did not consent in any way to the school taking possession of the watch.

The Superintendent and School District will likely raise a variety of arguments to show that the taking of the watch was lawfully justified to dismiss the conversion claim. First, the Superintendent and School District may assert that Mr. Anderson consented to the watch being taken by the school by allowing his son to wear it to school. This argument will likely have no merit as Mr. Anderson did not consent to the taking by the School District and did not "implicitly" do so by allowing his son to wear the watch from time to time.

The School District and Superintendent will likely next argue that the taking was lawfully justified as it was confiscated as a result of an altercation between Mr. Anderson's son and another student. The School District and Superintendent will likely assert that they had no intent to keep possession of the watch, rather the recent asbestos survey that showed dangerous levels in the school prevented them from returning it. The Superintendent will assert that he was acting pursuant to statute requiring him to act in the best interests of the health and welfare of the students by shutting down the district due to the asbestos levels. Mr. Anderson can counter this defense by asking what statute provides the Superintendent this power and showing that he reached out to the Superintendent numerous times via phone and email to retrieve the watch, and even went so far as to hire a certified environmental technician of the school district's choosing that would wear appropriate gear to safely enter the building and retrieve the watch. Despite this compelling argument the Superintendent refused, which goes to show that the School District and Superintendent had no grounds to deny Mr. Anderson's request. However, the School District and Superintendent will likely argue that the Superintendent denied that request as it would not be fair because it would bring a string of calls from others asking to retrieve objects left at school. This argument will likely be held to have strong merit as it would be unsafe to allow anyone in the building despite Mr. Anderson's lawful claim to the object.

Given these facts, while Mr. Anderson has a strong claim for conversion given that he was entitled to lawful possession of the chattel, the School District and Superintendent will likely have a counterargument that the taking and failure to return the object was lawfully justified

given the asbestos incident at the school.

Issue 3

Governmental Immunity

Assuming Mr. Anderson can succeed on a claim of conversion, the next issue is whether he can bring the claim against the School District and the Superintendent, in his official capacity.

Under Pennsylvania law, "no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person . . ." except as otherwise provided in 42 Pa. C. S. Section 8542. "Local Agency" is defined as a "government unit other than the Commonwealth government." 42 Pa. C. S. Section 8501. A local agency is liable for damages for injuries to a person or property within the limits of 42 Pa. C.S. Section 8542 if the following two-prong test is satisfied: (1) the damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and (2) " the injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b)." 42 Pa. C.S. Section 8542(b). ""Negligent Acts" shall not include acts or conduct which constitutes a crime, actual fraud, or actual malice . . ." 42 Pa. C.S. Section 8542(b). Acts which impose liability to a local agency or any of its employees may result in the imposition of liability on a local agency include those which involve the "care, custody or control of personal property of others in the possession or control of the local agency." 42 Pa. C.S. Section 8542(b).

Here, the School District will likely not be liable for the acts of its employee, the Superintendent because his acts were not negligent, rather they were intentional. The School District likely constitutes a government unit other than the Commonwealth government because it serves as the Midtown Public School District. Therefore, the School District would be liable for the conversion if two-prong test in 42 Pa. C.S. Section 8542 is satisfied and the claim results from the care, custody or control of personal property of others in the possession or control of the local agency. Here, the School District will likely satisfy the two-prong test in 42 Pa. C.S. Section 8542 to dispose of governmental immunity for the Superintendent's actions taken on behalf of the School District.

The School District would be able to satisfy the first prong of the two-part test by showing that damages would be recoverable under common law or statute creating a cause of action if the injury were caused by a person now having available a defense under Section 8541 or Section 8546. Here, the cause of action for conversion would render any ordinary person liable for damages even if he or she did not have a defense under Section 8541 or Section 8546. A cause of action for conversion may be brought against any person under Pennsylvania law.

However, the School District will likely retain its governmental immunity on the claim because the Superintendent's actions were not caused by negligence, rather they were intentional. While the Superintendent can likely assert that his actions were justified, they were not the result

of negligence. The Superintendent took the watch purposefully as a result of the altercation between Mr. Anderson's son and another students during the school day. He further acted intentionally by not returning the watch to Mr. Anderson. His actions were in no way negligent by taking the watch.

Therefore, because the Superintendent's actions were intentional, the School District will retain its governmental immunity to a claim of conversion.

Issue 4

Under Pennsylvania law, "an employee of a local agency is liable for civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties only to the same extent as his employing local agency. 42 Pa. C.S. Section 8545. The local agency "may assert common law defenses which are available to the employee on his behalf and the defense that the conduct of the employee which gave rise to the claim was authorized or required by law, or that he in good faith reasonably believed that the conduct was authorized or required by law." 42 Pa. C.S. Section 8459. The provisions of this subsection do not apply if the employee's actions were a crime, actual fraud or actual malice.

Here, the Superintendent is likely not liable for the action because it took place within his scope of employment for the local agency. He was acting as the Superintendent for the district by breaking up the altercation and thus was acting within the scope of his duties. The School District may assert the ability to assert defenses on the employee's behalf because his actions were required by law or that he had a good faith belief that the conduct was authorized by law. The School District can assert that the Superintendent was acting in good faith because he was acting to protect the students' health and well-being. He was not allowing Mr. Anderson or his offered contractor into the building for the well-being of all involved. Further, the School District could argue that he was acting in a manner authorized or required by law as the Superintendent asserted that he had the power to dismiss the students by a statute in Pennsylvania. Mr. Anderson can assert that these defenses are not applicable, because the Superintendent's actions broke the law by intruding on his lawful possession of the watch. Further, he can assert that the statute which the Superintendent bases the power to dismiss school was not provided. However, it is likely that the Superintendent had justification for closing the school.

Given these facts, it is likely the Superintendent will not be liable in his capacity for the conversion if the charge is deemed to have merit.

Issue 5

Damages

Under Pennsylvania law, "damages from a cause of action or transaction or occurrence or series of causes or transactions or occurrences shall not exceed \$500,000 in the aggregate." 42 Pa. C.S. Section 8553(b). Damages are recoverable for property losses under Pennsylvania law. 42 Pa. C.S. Section 8553(c). Further, if a claimant receives or is entitled to receive benefits under a policy of insurance, the amount of such benefits shall be deducted from the amount of

damages which would otherwise be recoverable by such claimant. 42 Pa. C.S. Section 8553(d). The insurance benefits should be deducted from a jury verdict before the verdict is molded to the statutory limit. *Fernandez v. City of Pittsburgh*, 643 A.2d 1176 (Pa. Cmwlth. 1994). If the statutory language makes no reference to the statutory limit, the deduction should be made before the statutory cap. *Id.*

Here, Mr. Anderson would be entitled to receive damages in an amount not to exceed \$500,000 in the aggregate. Because Pennsylvania law provides this as the limit in which one may receive for a specific cause of action, he would be limited to that amount. Because Mr. Anderson has an insurance policy which provides him with \$100,000 in coverage for lost or stolen events, the insurance amount would need to be deducted from the amount he would be entitled to receive. However, as in the case of *Fernandez*, the amount of insurance proceeds Mr. Anderson receives would be deducted after the jury makes an award of damages and before the statutory cap is put in place to ensure he does not receive in excess of \$500,000 in the aggregate.

Therefore, if Mr. Anderson is successful with a claim of conversion against the Superintendent he will be able to deduct the insurance proceeds from the jury award before the statutory cap of \$500,000 is put in place.

Conclusion

In conclusion, Mr. Anderson may be able to bring a successful claim of conversion against the School District and the Superintendent if he can show that they did not have a lawful justification for their action. As discussed above, the School District and Superintendent will likely have a lawful justification given the asbestos incident at the school that may result in the dismissal of Mr. Anderson's conversion claim. Assuming Mr. Anderson can bring a claim for conversion, he will likely not be successful against the School District because the Superintendent's actions were not negligent, rather they were intentional. Mr. Anderson would also likely not be successful against the Superintendent for a claim of conversion because in his official capacity and he had good reason to close the school. Even if he was successful, Mr. Anderson's insurance policy would be deducted from the amount the jury awards, likely \$700,000 – the value of the watch, before the statutory cap is put in place to ensure he does not receive more than \$500,000 in the aggregate for the conversion claim if successful.

Question 1: Sample Answer

Issue 1

Because Doug died without a will, his estate will be distributed according to PA's intestacy laws. The law divides the property based on who survives the decedent among any spouse, issue (children), or parents, first looking to a surviving spouse. Here, Doug's wife Susan survives him, and has chosen not to seek an elective share. Doug is also survived by his children, Sophia and Max. Sophia is Doug and Susan's child, born in wedlock, so clearly is his issue. Max, although born to another woman out of wedlock, will be considered Doug's child under PA law because his father held him out as his child and both welcomed him into his home and supported him. (There is also clear and convincing evidence that Doug is his father through the DNA test.) When there is a surviving spouse and surviving issue not the issue of the surviving spouse, half of the estate passes to the spouse, here, Susan. The other half will be divided equally per stirpes to his children Sophia and Max - his descendants who are of the same degree of relation to Doug - so each will take one quarter of the estate.

Issue 2

Max should file an action for breach of the duty of loyalty by the trustee, Susan. He is very likely to succeed with this claim.

A trustee has fiduciary duties owed to the beneficiaries of the trust. One of these duties is the duty of loyalty. This requires the trustee to act in the interest of the beneficiaries, and to treat the beneficiaries equally unless the trust document directs otherwise. The trustee also has a duty to follow the orders and carry out the intent of the trust. Here, the trust document directs "My trustee shall make distributions from the trust for the undergraduate education of my grandchildren. For purposes of this trust, "grandchildren" shall mean the children of my son, Doug." The trust does not say anything that would show any preference is to be shown to any grandchild. As discussed above, Max is Doug's child under PA law, so he is a "grandchild" under the trust definition and should be treated equally with all other beneficiaries. Susan did not do this because she made a distribution to Sophia to cover her 2020 undergraduate tuition, but refused to make a similar disbursement to Max's 2020 undergraduate tuition. Additionally, the trust does not make it discretionary for the trustee to disburse trust funds because it states the trustee *shall* make distributions.

Because Susan has violated these duties as trustee, Max will likely be successful in his action.

Issue 3

Tax - Involuntary Conversion. Max needs to report \$24,900 (\$25,000 realized gain minus the \$100 basis) on his 2019 federal income tax report.

The Internal Revenue Services requires taxpayers to report all income, irrespective of the

source of the money. Thus, insurance proceeds on a damaged item (referred to as "involuntary conversion") must be reported as gross income on a taxpayer's income tax. However, the reporting of insurance proceeds as gross income may be deferred if the taxpayer uses such insurance proceeds to repurchase or replace the item within two years. The two-year time limit on this option begins in the year following the involuntary conversion. The income would then only be reported when disposed of and assuming that there is a realized gain. A gain is realized by the amount received for the item via involuntary conversion minus the basis price - the price a person bought the item for. Cash-basis taxpayers report income as they receive the income. Here, Max would likely have to report the \$25,000 insurance proceeds because he used the money for college expenses. Max could have deferred reporting the \$25,000 had he repurchased or replaced the item for which he received the insurance proceeds by the end of 2021 - two years after receipt of the proceeds, but he spent the money on his tuition. Thus, Max needs to report \$24,900 (\$25,000 realized gain minus the \$100 basis) on his 2019 federal income tax report.

Issue 4

Both of Allen's communications with Max about the accident violated the Pennsylvania Rules of Professional Conduct. First, by making an improper solicitation to a non-family member for his own pecuniary gain and subsequently contacting Max after he expressly requested not to be contacted.

Under the Pennsylvania Rules of Professional Conduct (RPC) an attorney must not make solicitations to non-clients or non-former clients for services when those individuals are not family members. Solicitation includes person-to-person, live telecommunication or intermediary communication directly to a non-client or non-former client for the pecuniary gain of attorney. The practice of ambulance chasing to find potential clients is not permitted. While use of direct mail is allowed under the RPC, telecommunication for pecuniary gain is not permitted especially if made after permission to communicate was expressly denied.

As applied, Allen violated the RPC when he initially contacted Max. Allen had no prior contacts with Max and contacted him for his own pecuniary gain. He stated hire me and I will get us both a lot of money evidence of his self-seeking intent to gain money from the contact. Further, after Max replied that he was not interested and not to contact him again, he sent a follow-up letter in violation of RPC. While normally written communication would be allowed, it is not when Max told Allen not to communicate with him again. Thus, both of Allen's communications with Max violated the PA RPC rules on improper solicitation for his own pecuniary interests to a non-client or former-client.

Question 2: Sample Answer

Issue 1

The fact that Woods is being affected negatively, among other factors discussed below, support the filing of a derivative action by Chris. Chris would need to be a shareholder at the time of the alleged wrong, remain a shareholder during suit, and make a demand on Woods Board of Directors to act in the best interest of the corporation.

Under the Pennsylvania Business Corporations Law, a derivative action may be brought by a shareholder on behalf of the corporation. In a derivative action, the shareholder is essentially asserting the rights of the corporations. Any benefits are not for the shareholder, but for the corporation. To bring a derivative action, the shareholder must have had shares when the alleged wrong occurred, the shareholder must retain their shares during the suit, and the shareholder must make a demand on the board prior to filing suit. A shareholder will be excused from making a demand on the board where it would be futile or cause irreparable injury.

Here, Chris is a shareholder who is trying to assert the rights of Woods, not his own. Chris received notification that the board's actions to terminate the firewood operations would have a negative effect on Woods; profits. Chris may properly bring a derivative action because he had shares in Woods when the alleged wrong occurred. The facts provide that he inherited one-fifth of Wood's issued and outstanding stock from their mother in 2010. Chris must keep his shares through the course of the suit. Additionally, Chris must make a written demand on the board of directors (Al, Ben, and Ed) to enforce Wood's rights. Chris did not make a written demand on the board but only called Al and Ben to discuss the decision and told them "You have failed to act in the best interest of Wood and its shareholders."

Therefore, the fact that Woods is being affected negatively, among other factors discussed, support the filing of a derivative action by Chris. Chris would need to be a shareholder at the time of the alleged wrong, remain a shareholder during suit, and make a written demand on Woods Board of Directors to act in the best interest of the corporation.

Issue 2

The court should afford due deference to the special litigation committee's recommendation, and the court will likely dismiss the derivative suit.

Under the Pennsylvania Business Corporations Law, a court that reviews the actions and recommendations of a special litigation committee should give the committee due deference. The job of an independent and disinterested special litigation committee is essentially to determine whether the board of directors exercised their fiduciary duty of care in making decisions. The duty of care provides that directors shall act in the best interests of the corporation and with the good faith that a reasonable prudent director would. The business judgment rule typically shields directors from liability where they act in good faith. When a court agrees with a committee that the directors acted in the best interests of the corporation, or

at least in good faith, the court will usually dismiss a suit.

Here, the special litigation committee is independent, disinterested, and capable of exercising objective judgment. They extensively reviewed all relevant facts and determined that the suit should be dismissed. The court should give the committee's recommendation due deference, assuming that the special litigation committee found that Al, Ben, and Ed complied with the duty of care and acted in the best interests of Woods in making their decision. Woods' board likely acted in good faith because Ben, with the aid of Woods' CPA, analyzed Woods' firewood sales and concluded that Woods could be more profitable if it were not in the firewood business. Ben and the rest of the board were acting on legitimate information and analyses.

Therefore, the court should afford due deference to the special litigation committee's recommendation, and the court will likely dismiss the derivative suit.

Issue 3

Under the Uniform Commercial Code (UCC), merchants to a contract for the sale of goods must meet the "perfect tender" rule. In short, when a contract is made, a seller must send perfectly conforming goods to the specifications identified in the contract. If non-conforming goods are sent, the buyer can choose to (1) reject all of the goods, (2) accept all of the goods, or (3) reject some of the goods and accept some of the goods. However, the buyer loses his or her right to reject the goods once he or she has accepted the goods (except in limited circumstances).

Here, the issue is whether Sheds, as the buyer, has the right to reject the goods given the non-conforming delivery and how Sheds must protect and exercise those rights. Here, there is a valid and enforceable contract for treated lumber. Sheds, as the buyer in a contract between merchants who received non-conforming goods, does have the ability to reject all of the goods, accept them, or reject some and accept some. 40% of the goods are non-conforming because the contract specified treated lumber and 40% of the lumber is untreated.

To exercise its rights, Shed must promptly notify Wood if it intends to reject any or all of the goods as the result of the non-conforming delivery. Shed must be careful not to accept the goods and to do this within a reasonable time so that Wood does not have any argument that Shed accepted the good and therefore can no longer reject them.

Under the UCC, after receiving the rejection notice, Wood has a right to cure and send the conforming goods within the time for performance of the contract if it promptly notifies Shed. Here, however, there is likely not enough time to do this given that the lumber arrived yesterday and the performance must have been completed by today. Wood cannot claim that it sent these non-conforming goods as an accommodation because it did not do so in writing before sending the goods and there is no history between the parties that would indicate Wood thought Shed would accept the non-treated lumber.

Shed is fully within its rights to reject the goods and should do so within a reasonable time by notifying Shed promptly.

Issue 4

Shed must hold or resell the lumber not accepted by Sheds.

Under the Code, a merchant buyer has certain duties if they do not accept all of the goods. A merchant is one who ordinarily does business in the type of goods sold, or claims to have business knowledge of the goods. Here, both Wood and Shed are merchants because they deal in the sales of goods as a seller of sheds and a seller of lumber.

When a merchant buyer does not accept the goods, they have certain duties to the merchant seller. This is especially true because Al told Sheds that Wood has not sold any products in Sheds' area and had no office or agent there, which triggers some of the duties under the Code. Because Wood does not have any agent or office there, Sheds must notify Wood and see if Wood has any instructions for them. Wood may require Sheds to send back the goods at Wood's cost.

Moreover, Sheds must hold onto the non-accepted goods for a reasonable amount of time. If Sheds paid value for the goods, they have a security interest in the goods. If Sheds has to spend money to store, they can account for those expenses later.

If Sheds does not hear anything specific from Wood, Sheds can resell the rejected goods on account of Wood. Sheds can deduct the expenses of holding on and reselling the rejected goods.

Nevertheless, even though Wood did not provide perfect tender, Sheds still owes Wood some duties to the goods that were not accepted by Sheds. Here, Sheds must notify and act accordingly to whatever Woods says or does not say.

Question 3: Sample Answer

Issue 1

The most serious homicide crime that Mary Beth should be charged with is 1st degree murder, and it is likely that she will be found guilty of the crime because poisoning someone is considered an intentional killing.

In PA, first-degree homicide is an intentional killing. Intentional killing can be found when the killing was not only intentional, but also willful and premeditated. The planning to kill an individual will meet such requirements. Finally, in PA criminal statutes, poisoning someone is considered 1st degree homicide as it tends to show the intent of the defendant to intentionally bring about the death/kill the victim. First-degree murder must be one where there was an intent to kill, and death of actually occurs to the victim, and that is the defendant was the cause of the death.

Here, the facts state clearly that Mary Beth wants to formulate a plan to get rid of her husband. While wanting to formulate a plan is not enough, carrying through her plan and succeeding in killing Brian will be determinative. Mary Beth planned to kill Brian with rat poison, made sure to confirm its toxicity, and continuously poisoned him over two weeks. Not only do the facts show that she intended to do this, but the repeated nature of her action will likely lead any jury to determine that she is guilty of intentionally killing her husband. Further, Mary Beth bought an insurance policy on her husband and named herself as beneficiary. A court would like find this as no coincidence, and instead, as a continuation of her plan to get rid of him. Finally, the fact that there was no rat infestation in the house, empty cans of the poison that was determined to have killed Doug, as well as testimony from friends about her plan, this case will likely be proved beyond a reasonable doubt. Therefore, it is likely that Mary Beth will both be charged and convicted of first-degree murder.

Issue 2

The Commonwealth must establish that Rachel has the specialized knowledge, skill, and intelligence beyond an average layperson and her testimony will assist the trier of facts to determine a fact in issue. Rachel's methodology and opinion must be generally accepted in the medical community and should be delivered with a reasonable degree of certainty.

Under Pennsylvania law, an individual is qualified as an expert if she has specialized knowledge, skill and intelligence beyond an average layperson in the specific field and the expert's testimony will assist the triers of fact in determining a fact at issue. Additionally, the expert's methodology must be generally accepted in the field. The expert is also required to disclose the evidence that led to the basis of her opinion, even if inadmissible at trial, when she testifies.

Here, the Commonwealth can qualify Rachel as an expert because Rachel is a board-certified forensic pathologist with twenty years of forensic pathology experience and she

possesses the requisite training to rule upon effects of poison in the human body. Rachel's training and experience gives her knowledge beyond that of an average layperson. Additionally, Rachel's method of taking tissue samples from Brian's body to test them for the concentration of arsenic is generally accepted in the forensic pathology field. Lastly, Rachel's testimony will assist the triers of fact to determine whether and how Brian was poisoned and to convict Mary Beth of first-degree murder based on the method she used.

Therefore, the Commonwealth must establish that Rachel has specialized knowledge, skill, and experience beyond an average layperson and her methods must be generally accepted in the forensic pathology field. Her testimony as an expert will likely be admissible.

Issue 3

Unlike the federal rules, Pennsylvania only permits *crimen falsi* crimes to be admissible for impeachment of a witness. These crimes pertain to a witness's dishonest nature, and include crimes such as embezzlement, robbery, theft, and burglary. Additionally, evidence of a crime must occur within 10 years of conviction or release, whichever is later. If the crime occurs outside the ten-year window, it can only come in if the evidence of the conviction outweighs the danger of unfair prejudice.

Here, DUI is not considered a *crimen falsi* crime because it does not pertain to a witness's truthfulness. Therefore, the DUI offense, regardless of when it was committed, will not be admissible.

Second, the burglary conviction is a *crimen falsi* crime. However, Mary Beth was convicted in 2005 and there is no evidence she was released inside the 10 year window. Therefore, the prosecutor will need to show that the conviction outweighs the danger of unfair prejudice. Because the robbery conviction is already admissible to show untruthfulness, and there is no substantial need to admit the burglary conviction, the court will most likely not admit the burglary conviction.

Third, the robbery conviction is a *crimen falsi* crime that pertains to the witness's truthfulness. Additionally, the conviction occurred in 2014, well within the 10-year window. Therefore, the Commonwealth will have no problem having this conviction admitted.

In conclusion, the DUI offense is not admissible because it is not *crimen falsi*, the burglary conviction is not admissible because it occurred outside of ten years and the probative value does not outweigh the danger of unfair prejudice, and the robbery conviction is admissible because it is a *crimen falsi* crime which occurred within ten years.

Issue 4

PA requires a person to be domiciled in PA to file a divorce action here. They also have to be domiciled here for at least 6 months to file a divorce action. Domiciled means that they have a physical presence in the state and intends to permanently reside here. Here, L has a physical presence in PA because she moved to C county and the facts state that she intends to permanently

reside in C county.

L has also lived in PA for more than 6 months. The clock started to run on November 1, 2019. Six months later would be May 1, 2020. Thus, Pa has jurisdiction over the divorce action.

The rule concerning what venue will lie for a divorce action is that the venue has to be the one where the Plaintiff is domiciled. Here, L is domiciled in C County so venue is proper in C County.

Question 4: Sample Answer

Issue 1

To challenge the Smalltown School District practice of performing an Easter program every year similar to the ARISE program, the Cohens should raise on Dave's behalf a claim under the United States Constitution's First Amendment's Establishment Clause.

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting the establishment of religion." This is known as the Establishment Clause. While the 1791 Amendment applied originally only to the Federal Government (*see Barron v. City of Baltimore*), the Establishment Clause, like nearly all other Bill of Rights provisions, has been selectively incorporated (via cases like *Cantwell*) to apply against the states via the Due Process Clause of the Fourteenth Amendment ("No state shall deprive a person of life, liberty, or property without due process of law" (emphasis added)). The Clause also applies against the derivatives of the states that are state actors. This includes cities, municipalities, public school boards, and public school officials, themselves, in their official capacities. Turning to the Clause itself, the much-maligned but still controlling test for the majority of Establishment Clause claims is the *Lemon* Test, which provides that state action must be (1) for a secular purpose, (2) neither advance nor inhibit religion, and (3) not foster excessive entanglement between the government and religion. If state action violates any one of these prongs, the action violates the Establishment Clause and must cease. Relatedly, the Court sometimes adjudges religious claims via an endorsement test. That is, the state action will fall if it impermissibly endorses religion.

Here, the Establishment Clause applies to State A via incorporation. Moreover, it applies to State A's derivative that are also state actors. This includes Smalltown School District, its Superintendent when in his official capacity, and Smalltown High School and its employees in their official capacities. ARISE ("musical") violates all three prongs of the *Lemon* Test as well as the Endorsement analysis. The musical includes twelve songs based on Christian teachings about the Christian beliefs in life, death, and resurrection of Jesus Christ. Some of the songs include words of worship and invitations to follow the very teachings of Jesus. There is a slideshow playing in the background that shows Christian symbols including a cross, empty tomb, Jesus performing miracles, and individuals in prayer. Christian scriptures were even recited in between the pieces, and the printed program included Christian clergy's phone numbers and invitations to call to hear the Easter Story. All these facts indicate the purpose of the musical was not secular but, instead, was to promote Christianity and, specifically, the Christian teachings around the Christian holiday of Easter. Purpose can, however, be difficult to concretize on occasion, and some Courts have been wary of assigning purpose to state actors. Here, that wariness is unnecessary given the abundance of evidence, but, even if it were, the Effect prong is also violated. The effect of the musical is to advance religion. Specifically, it is to advance Christianity and Christian teachings about Easter, Jesus Christ, miracles, and resurrection. It even encourages those attending to phone local Christian clergy to learn more about Easter messages. As a result, it implicitly inhibits other religions. Thus, the second prong is violated. The third prong, Excessive Entanglement, is also violated because in having to decide which religion is

promoted, how that religion is promoted, which religious holiday is promoted, what parts thereof are promoted, which version of resurrection theology is to be promoted among the sects within Christianity, which parts of Christian scripture are to be read and when, and which Christian clergy have their numbers placed in the program. These are acts that bind up the state with religion in a way wholly, well, anathema to the Establishment Clause. Thus, even though only one prong of *Lemon* need be violated for the state action to be unconstitutional, this action violates all three and is, thus, unconstitutional. Moreover, even if the endorsement test is used, for the same reasons under the Effect prong that the state action violates *Lemon*, the action also fails under the endorsement test. The Cohens are Jewish and can easily show their belief is sincere by their Complaint, raising, belonging to a synagogue where they regularly attend, and their observation of Jewish traditions and holidays. Finally, the case is not moot because Dave is only a sophomore, so he is likely to be forced to endure this again because he has more years in high school, the school forces members of the chorus to participate, and the Superintendent says it will continue every year with no change.

Issue 2

In order to have Ann's claims for violation of Title VII and State A's religious discrimination statute heard in federal district court, RMG should take the action of removing the case to the federal district court in State A. Assuming RMG acts within the required time limits, RMG will likely succeed in having both of Ann's claims heard in federal district court because there is subject matter jurisdiction over both claims.

The issues here are whether and how a defendant can remove an action from state court to federal court and, here, whether there is subject matter jurisdiction over the claims.

First, Removal is an action that a defendant can take to remove an action from state court and have it transferred to federal court. The removal must occur within a set time period (typically 30 days) from service of the complaint, and the defendant must file a notice of removal in the federal district court. Importantly, to succeed in removal to federal court, the federal court must have subject matter over at least one claim in the case. Federal courts are courts of limited jurisdiction, and to have subject matter jurisdiction in federal court, a claim must be based in diversity jurisdiction, federal question jurisdiction. Notably, a defendant who was sued in the state in which it resides cannot remove a case if the basis for jurisdiction would be diversity jurisdiction. Here, the in-state defendant rule should not apply to bar removal because RMG's subject matter jurisdiction would be based on federal question over the Title VII claim and supplemental jurisdiction over the state law claim. Therefore, RMG can take the action of filing a notice of removal and remove the court to the appropriate federal district court in state A.

Second, the removal will not be successful unless there is appropriate subject matter jurisdiction over the claims (as mentioned above). Diversity jurisdiction requires citizens of separate states and an amount in controversy over \$75,000, and, as noted above, there can be no violation of the in-state defendant rule for removal based on diversity jurisdiction. Here, there is no diversity because RMG and Ann are both citizens of State A, and even if they were not, removal would be prevented based on the in-state defendant rule. Federal question jurisdiction requires that a claim in a complaint (not a defense to a claim) be based on a federal right or

federal statute, such as Title VII here. Supplemental jurisdiction exists, generally (and applicable here), when a state law claim arises out of the same transaction or occurrence as the federal question claim and from the same nucleus of common facts.

Applying the above rules, RMG can remove the action to the federal district court in State A by filing a notice of removal. RMG will have success regarding having both of Ann's claims heard in federal court. The first claim, RMG's termination of her employment violated Title VII, qualifies for federal question subject matter jurisdiction. The second claim, that RMG's termination of her employment violated State A's Religious Discrimination Act, qualifies for supplemental jurisdiction because it arises out of the same occurrence -- Ann's alleged improper firing based on her religion -- and the same underlying facts support this state law claim.

Issue 3

Assuming Ann has established her prima facie case for Title VII for failure to accommodate a religious practice, RMG should raise the defense that any accommodation would be an undue hardship for them. They likely will succeed in avoiding liability with this defense.

When a prima facie case for Title VII, failure to accommodate a religious practice, has been established, the defendant can raise a defense that any accommodation of that individual's religious practice would be an undue hardship on them. The standard for proving an undue hardship is that it would be "more than a de minimis cost" to the employer.

Here, RMG has a very good claim that accommodating Ann's religious practice in any way would be an undue hardship for them. The purpose of RMG hiring Ann was because of new federal regulations that strictly limit deadlines to submit reimbursements requests for government-funded healthcare. These new deadlines require that data be inputted between 5:00 pm Friday and 5:00 pm on Saturday. However, Ann, due to her religion, cannot work at all from sundown on Friday to sundown on Saturday.

Furthermore, if RMG did not have the data inputted in that timeframe, they would lose hundreds of thousands of dollars in revenue and risk fines. It would be extremely expensive for them to hire a second employee to perform that work, and they do not have another qualified employee who could do this Saturday shift within 100 miles. Thus, it is clear that it would cost RMG more than a "de minimis cost" in order to accommodate Ann, as accommodating Ann's religious practice would cause them to be unable to get the data in on the specified timeframe. RMG therefore has a very good defense that any accommodation would be an undue burden and this will likely absolve them of liability for the Title VII claim.

Question 5: Sample Answer

Issue 1

(a) Charles created a fee simple subject to a condition subsequent with his conveyance of Blackacre to Big City. Upon creating this Charles retained the right of re-entry in the case that Blackacre was no longer used as a park.

When transferring land, a grantor can create different types of estates. One such type is a fee simple subject to a condition subsequent. This type of estate is generally created when the deed contains language such as "upon the condition that." Where a fee simple subject to a condition subsequent is created, the grantor retains the right of re-entry and can re-enter and take possession if the condition in the deed is broken.

Here, Charles transferred Blackacre to Big City with a deed that stated "in fee simple upon the condition that Blackacre be used as a park." This is conditional language and signals a fee simple subject to a condition subsequent has been created. The deed further states that Charles "may re-enter the property." Which further shows this is a fee simple subject to a condition subsequent. Accordingly, Charles maintains a right of re-entry in the situation that Blackacre is no longer used as a park.

Therefore, Charles created a fee simple subject to a condition subsequent with his conveyance of Blackacre to Big City. Upon creating this condition subsequent, Charles retained the right of re-entry in the case that Blackacre was no longer used as a park.

(b) Nile is the current owner of Blackacre because Sarah did not exercise her right of re-entry.

A right of re-entry is devisable. Additionally, in order to exercise the right of re-entry the holder of the right must actually assert the right. If the condition is broken and the right of re-entry is not exercised, the holder of the right of re-entry does not regain possession of the land.

Here, Charles left his entire estate to his daughter Sarah. As the right of re-entry is devisable, this right was transferred to Sarah upon Charles' death. Nile broke the condition upon which Blackacre was granted to Big City as it stopped using the land as a park. This would allow Sarah to assert her right of re-entry. However, Sarah failed to do this. Accordingly, ownership of the land will remain with Nile.

Therefore, Nile is the current owner of Blackacre because Sarah failed exercised her right of re-entry.

Issue 2

Third-Party Beneficiary Rights. A court will likely hold that Rosebud has a valid claim to

collect money owed by Walt from Sarah because it is a third-party beneficiary to their contract.

A third-party may be a "third-party" beneficiary to a contract if the person is named in a contract between different parties and is entitled to some tangible benefit (e.g. payment). Moreover, Pennsylvania also holds that a third-party beneficiary can be created without being explicitly named in the contract if the circumstances are compelling and naming the person or entity as a third-party beneficiary was within the parties' intent. Pennsylvania will hold a third-party beneficiary in this situation because it is necessary to effectuate the original parties' intent in their contract.

Here, Rosebud has a claim against Sarah directly because they were a third-party beneficiary despite not being named explicitly in the Sarah and Walt's contract. Walt told Sarah that he was going to contract with Rosebud to print yard signs and flyers advertising the sale and distributing signs and flyers throughout Big City. Moreover, Sarah agreed to using Rosebud for printing when she said: "That's fine by me. I like Rosebud's work. If I were doing this myself, I would have contracted with Rosebud." This shows both Walt and Sarah's intent that Rosebud be a third-party beneficiary. On top of that the written contract stated that Sarah would "bear any printing costs incurred by Walt." These circumstances would be considered compelling enough to treat Rosebud as a third-party beneficiary because clearly Walt and Sarah's contract intended for Rosebud to be a third-party beneficiary. Thus, in Pennsylvania, a court will likely hold that Rosebud has a valid claim to collect money owed by Walt from Sarah.

Issue 3

It is highly likely that Sarah will be able to rescind the sale of the coin to Jed under the defense of mistake because even though it was a unilateral mistake, she will be able to demonstrate that Jed knew of the mistake and therefore she will be able to rescind the contract.

Under Pennsylvania law, an adversely effected party may be able to claim the defense of mistake, even though it was a unilateral mistake, if the adversely affected party does not bear the risk of the mistake, the mistake has a material effect and the other party knew of the mistake or caused the mistake. In order to rescind a contract under mutual mistake, the party must demonstrate that there was a mistake of fact that existed at the time the agreement was made, the mistake was related to a basic assumption of the contract and had a material impact on the deal and the party asserting the defense of mistake did not bear the risk of the mistake. A person bears the risk of mistake if 1) they are assigned the risk of mistake under the agreement, 2) at the time the contract was made the party new she had insufficient information relating to the facts of the mistake or 3) risk was assigned to the party by the court because it was reasonable to do so.

Sarah will be able to rescind the contract for the sale of the coin to Jed because she can prove all of the required elements, there was a mistake of fact at the time the agreement was made, the price was mistakenly listed for sale at \$10,000 not \$100,000 as advertised, the mistake was related to a basic assumption of the deal, the sale price, and had a material impact on the deal, it was supposed to be sold for 10 times the amount is was sold for. Sarah did not bear the risk of the mistake because the agreement between Jed and her did not assign the risk to either party, she had adequate knowledge of all the information related to the mistake and a court would

not assign her the risk because it would not be reasonable to do so. Lastly, because Jed knew that the \$10,000 price was a mistake because he had seen that the coin was for sale for \$100,000 on social media, Sarah will be able to rescind the contract.

Issue 4

(a) Because Jed and his wife, Mary owned Xanadu as tenants by the entirety, Jed's unilateral conveyance to Foster is not valid.

Under Pennsylvania property law, there is a presumption that property owned by a married couple is owned as tenants by the entirety and the property can only be conveyed by divorce, death of one of the spouses or by mutual consent.

Because Jed and May own Xanadu as tenants by the entirety, neither of them can convey their share of the property or the property as a whole without the permission of the other. Because Jed conveyed the property to Foster without Mary's knowledge and permission, the sale to Foster is void.

(b) If Jed and Mary were divorced before Jed conveyed his interest in Xanadu, Foster-Kane & Co., Jed and Mary would own Xanadu as tenants in common.

Tenants in the entirety must be married. When a couple who own property as tenants in the entirety get divorced, their ownership interests convert into a tenancy in common. Both have a right to possession of the whole, but there is no right of survivorship. When someone owns property as a tenant in common, his interest is alienable, devisable, and descendible. A tenant in common is free to sell his interest, devise his interest in a will, or have his property go to his or her heirs if he or she dies intestate. When one tenant in common sells his interest in the property, the buyer becomes a tenant in common with the other tenants.

Here, when Jed and Mary were divorced, their tenancy in the entirety converted to a tenancy in common. As a tenant in common, Jed could freely sell his interest in Xanadu to Foster-Kane & Co. Foster-Kane & Co. bought Jed's interest in the property, which he held as a tenant in common. Jed only sold his interest in Xanadu, not Mary's. Therefore, Mary still possesses part of Xanadu but, following the divorce and Jed's unilateral conveyance of his interest, Foster-Kane & Co. owns one-half interest in Xanadu and Mary owns the other half, both as tenants in common.

Question 6: Sample Answer

Issue 1

Pete should assert against Dave the tort cause of action of negligence, and Pete's likelihood of success thereon is high.

Negligence is proven by showing the defendant had a duty to the plaintiff, that the defendant breached that duty, that that breach was the actual and legal (i.e. proximate) cause of the resulting harm, and the resulting harm is in the form of damages. A business invitee is one who is coming on the defendant's premises for the economic benefit of the defendant. This also includes a defendant's duty to inspect. The paradigmatic example of an invitee is a restaurant patron. The duty owed to an invitee is one of either remedying or giving an adequate warning about all reasonably knowable or known dangers.

Here, Pete was an invitee to Dave's because he was coming onto Dave's premises for the economic benefit of Dave. That is, he came to Dave's to make a purchase therefrom. As an invitee, Dave owed Pete the duty to either remedy or give an adequate warning about all reasonably knowable or known traps and to make reasonable inspections to find said traps. Here, Dave had been told by several customers that the blacktop curbing is virtually invisible at night given the lighting that exists outside Dave's store. His store is open from 6:00 a.m. to midnight seven days each week, so Dave also knew customers could be walking in his parking lot at night. He also knew that customers typically exit their vehicles and step right onto the sidewalk that runs along the storefront rather than walking across the parking lot behind the other parked cars, so he knew they were likely to walk near the very curbs he had been warned were hard to see. And, after all, he had had the curbs installed for the very purpose of preventing cars from blocking the sidewalk that was adjacent to the parking lot. Thus, Dave knew his curbs were a danger to his customers, who were invitees. This is a duty he breached by neither remedying the known danger or warning customers about it; he did not paint them bright colors, increase the lighting in the parking lot, or put up signs to warn his customers. His breach of his duty was the actual and proximate cause of Dave's fall. But for Pete's breach, Dave would not have fallen, and Pete, as a customer, is a foreseeable party that could be injured by Dave's breach. Finally, there was an injury caused by the breach: Pete has a broken ankle and wrist, which required hospital treatment and overnight stay therein. This injury is a harm for which damages may be sought. Thus, Dave is liable for negligence because he had a duty to Pete that he breached, causing Pete's damages.

In sum, Pete should assert against Dave the tort cause of action of negligence, and Pete's likelihood of success thereon is high.

Issue 2

Under the PA Rules of Civil Procedure, Dave's counsel must raise the issue of venue in his preliminary objections, the objection will likely be successful, and the case can then be transferred to the correct county as a remedy.

Under the PA Rules of Civil Procedure, if the defendant has an objection to the venue in which the case has been filed, he must raise it in his preliminary objections, before his answer, or the objection will be waived. There are certain objections which must be filed in the preliminary objections or they are waived - venue is one of them. Thus, Dave's counsel must raise the issue of improper venue in his preliminary objections.

Assuming the objection to venue is properly raised, there is a high likelihood of success that the objection to venue will be sustained. Venue in PA is proper where the cause of action arose or where any defendant can be served. Here, the case was filed in P County. The cause of action arose in D County, where Dave's Market is located. Furthermore, Dave resides in an apartment above the store in D County and never travels outside D county. Thus, the only proper venue location is D County, as that is where the cause of action arose and the only place where Dave can be served.

If Dave's objection is sustained, which it likely will be here, the remedy will be that the P County court will transfer the case to D County, the correct venue. When venue is improper, the case must either be transferred to the correct venue or stayed/dismissed. When a court is able to transfer the case to the proper court (i.e. when it is the same sovereign - all courts of common pleas), they should do so. Thus, here, the P County court will likely transfer the case to the D County court, the correct venue.

Issue 3

Under the Pennsylvania rules of evidence, an expert witness is permitted to answer a hypothetical question as long as there is evidence during the trial to support the hypothetical facts. Here, Whitman is going to testify about proper safety measures for public parking lots and the lack of safety measures at Dave's parking lot. Pete's attorney wants to question him about Whitman about this based on the assumption that the nighttime illumination of Dave's parking lot was measured by Lumen. Pete's attorney can make these technical measurements known to Whitman as a hypothetical at trial, while testifying, because an expert is allowed to testify regarding hypothetical questions as long as those hypothetical facts will be supported at some point during the trial.

Here, Whitman answering a hypothetical question about measurements, about whether this indicates the lighting was safe or not, would be admissible as long as Lumen testifies later regarding the facts underlying the hypothetical question. Dave's expert Lumen will testify later in the trial about the facts underlying the hypothetical question and so Whitman's testimony answering the hypothetical question would be admissible. The court will permit Whitman to answer this hypothetical question.