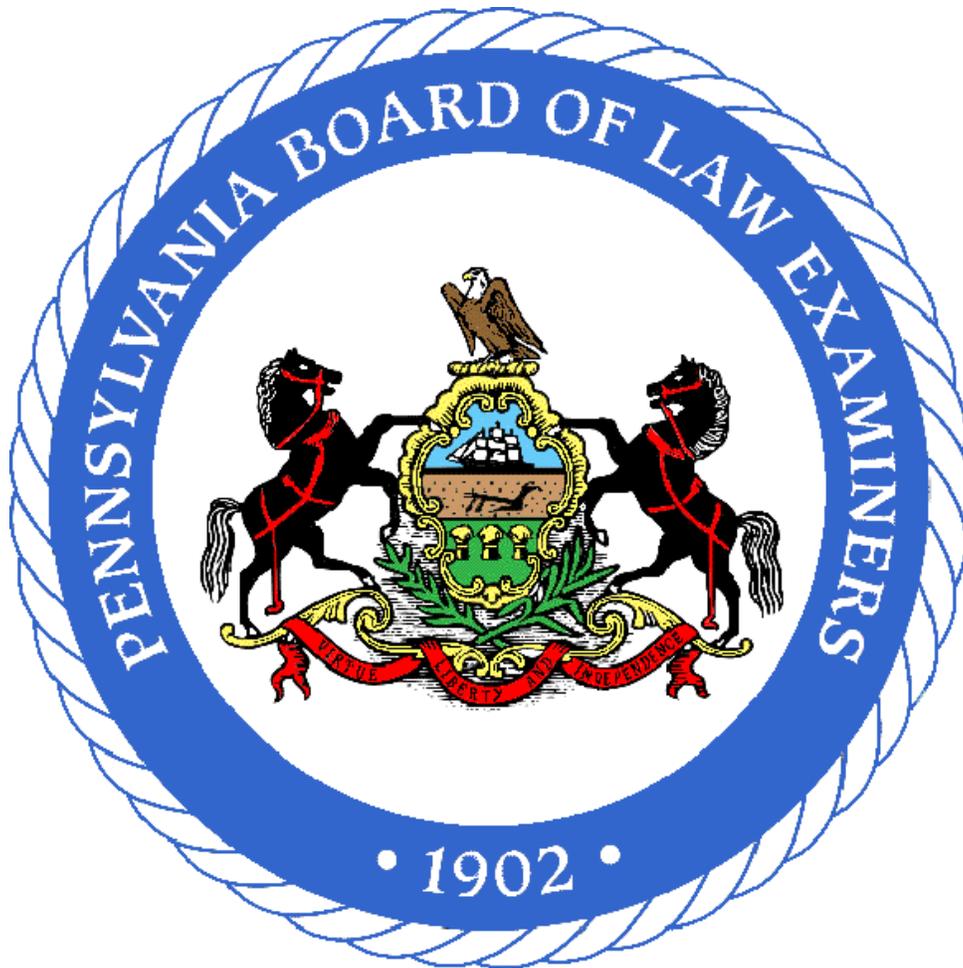


JULY 2016

PENNSYLVANIA BAR EXAMINATION

Sample Answers



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Performance Test: Sample Answer

Issue 1

PLAINTIFF'S MOTION TO REMAND

Plaintiff, Peter Pratt, hereby files a Motion to Remand this case from the United States District Court for the Northern District of Pennsylvania, where it is now pending, to the Court of Common Pleas of North County, Pennsylvania on the basis of improper removal under 28 U.S.C. § 1446, § 1441, and § 1332, and in support thereof aver as follows:

I. Removal is not proper because it was untimely under §1446(b), as it was not filed within 30 days after the receipt of service by the defendant.

1. 28 U.S.C. § 1446 requires a defendant seeking removal to file notice within 30 days after the receipt of service. 28 U.S.C. § 1446.
2. Defendant First, was served with the complaint on June 6, 2016. *See* Defendant's Notice of Removal, Paragraph 2.
3. Defendant First filed its Notice of Removal on July 10, 2016, which is more than 30 days from when it was served with the complaint. *See* Defendant's Notice of Removal.
4. Thus, removal is not proper because it was not timely.

II. Removal was not proper under § 1441(b) because Dunn is a citizen of Pennsylvania, the State in which the action is brought.

5. Plaintiff incorporates each and every allegation of this Motion by reference as if fully set forth herein at length.
6. Section 1441(b) will bar removal of a claim on the basis of diversity of citizenship "if any party in interest properly joined and served as a defendant is a citizen of the State in which the action is brought." *Roche* p. 4.
7. The jurisdictional prerequisite to a case being removed is absolutely vital and non-waivable, and, as such, the federal removal statute is to be strictly construed, with "all doubts resolved in favor of remand." *Warner* p. 2.
8. Defendant Dunn is a citizen of Pennsylvania. *See* Plaintiff's Complaint, Paragraph 3.
9. Thus, removal is not proper because Defendant Dunn is a citizen in the State in which the action is brought.

III. Removal is not proper because complete diversity of citizenship does not exist between the parties, and thus the federal court lacks original jurisdiction.

10. Plaintiff incorporates each and every allegation of this Motion by reference as if fully set forth

herein at length.

11. Under section 1441(b), removal is proper only if the federal district court would have had original jurisdiction. 28 U.S.C. § 1441.
12. Jurisdiction is proper under 28 U.S.C. § 1332 when there is complete diversity between all plaintiffs and all defendants, and the amount in controversy exceeds \$75,000. *Roche* p. 3.
13. Plaintiff, Peter Pratt, is a citizen of Pennsylvania. *See* Plaintiff's Complaint, Paragraph 1.
14. Defendant Dunn is a citizen of Pennsylvania. *See* Plaintiff's Complaint, Paragraph 3.
15. Thus, removal is not proper under section 1332 because there is not complete diversity, as Plaintiff and Defendant Dunn are both citizens of Pennsylvania.

IV. Defendant failed to meet its heavy burden to show that Defendant Dunn was fraudulently joined because it has not shown that there is no reasonable basis supporting the claim against her or that there was no real intention in good faith to prosecute the action against her.

16. Plaintiff incorporates each and every allegation of this Motion by reference as if fully set forth herein at length.
17. In order to avoid remand, a removing defendant bears the heavy burden of persuasion to show that a party was fraudulently joined, and if there is even the slightest possibility that the state court might find that the complaint states a cause of action against a resident defendant, "the federal court must find that joinder was proper and remand the case to state court." *Warner* p. 2.
18. Joinder is fraudulent where "there is no reasonable basis in fact or colorable ground supporting the claim ... or no real intention in good faith to prosecute the action against" the resident defendant. *Warner* p. 3.
19. In order to plead a negligence action, the plaintiff must show: (1) a duty; (2) defendant's failure to conform to that duty, or a breach thereof; (3) causation; and (4) actual loss or damages. *Actovitz* p. 2.
20. In this case, Defendant First has failed to meet its burden because it only alleged a blank assertion that Dunn is not a proper party to this action and was only joined to defeat diversity. *See* Defendant's Notice of Removal, Paragraph 7.
21. Defendant alleged no facts to show that there was no reasonable basis to support the claim against her, or that there was no real intention in good faith to prosecute the action against Dunn.
22. On the contrary, Plaintiff alleged negligence against Defendant Dunn and laid out its specific contentions in its complaint. *See* Plaintiff's Complaint.
23. Specifically, Plaintiff alleged that as the adjuster assigned to its claim, Dunn had a duty to properly handle Plaintiff's claim, pursuant to Pennsylvania law. *See* Plaintiff's Complaint Paragraph 15.

24. Dunn failed to perform her duty, and instead frequently and incorrectly cited to someone else's medical records, had a complete lack of disregard for Plaintiff and his injuries, never talked to Plaintiff, negligently mishandled Plaintiff's claim, negligently failed to adjust the claim, and negligently failed to pay the policy limits. *Id.* at Paragraphs 17-20.
25. Plaintiff pled that this breach was a cause of his damages and that damages resulted. *Id.* at Paragraphs 20-22.
26. As such, the Plaintiff pled the elements necessary for a negligence cause of action.
27. Thus, Defendant First has failed to meet its burden to show that Defendant Dunn was fraudulently joined because there is a reasonable basis supporting the claim against her.

WHEREFORE, Plaintiff respectfully requests that this honorable court remand this action from the United States District Court for the Northern District of Pennsylvania, to the Court of Common Pleas of North County, Pennsylvania.

Issue 2

Plaintiff Moves to Remand on the Ground that Defendants' Notice of Removal Was Untimely.

1. Defendant's notice of removal was untimely. Under 28 U.S.C. § 1446(b), a defendant may file a notice of removal of a civil action "within 30 days after the receipt by the defendant, through service or otherwise" of the initial pleading. (§ 1446).
2. Notice of removal was not made within 30 days of receiving service or otherwise being apprised of the action.
3. Pratt filed his complaint with the Court of Common Pleas in North County, Pennsylvania on June 1, 2016. Service was properly made on both Defendants, First Insurance Company ("First") and Deborah Dunn, on June 6, 2016.
4. Defendants had 30 days from the date of service to remove the action to federal court. Accordingly, Defendants were required to file their notice of removal by July 6, 2016.
5. Defendants did not file a notice of removal until July 10, 2016, which was more than 30 days since receiving service, making the notice of removal untimely.
6. Defendants' removal was untimely pursuant to section 1446(b) because it was not made within 30 days of receiving service. Therefore, Plaintiff requests the Court remand the action to the state court in which the complaint was originally brought.

Issue 3

Removal is not proper because complete diversity of citizenship does not exist between the parties; thus the federal court lacks original jurisdiction.

7. Plaintiff incorporates each and every allegation of this Motion by reference as if fully set forth herein at length.
8. Under section 1441, removal is proper only if the federal district court would have had original jurisdiction. 28 U.S.C. § 1441.
9. Jurisdiction is proper under 28 U.S.C. § 1332 when there is complete diversity between all plaintiffs and all defendants, and the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332; *Roche*.
10. Plaintiff, Peter Pratt, is a citizen of Pennsylvania. *See* Plaintiff's Complaint, Paragraph 1.
11. Defendant Dunn is a citizen of Pennsylvania. *See* Plaintiff's Complaint, Paragraph 3.
12. Thus, removal is not proper under section 1332 because there is not complete diversity as Plaintiff and Defendant Dunn are both citizens of Pennsylvania.

Issue 4

One of the Defendants, Defendant Dunn, is a citizen of Pennsylvania, the forum State, and, as such, the removal was improper because 28 U.S.C. § 1441 does not allow removal when a Defendant is a citizen of the forum State.

13. On a motion to remand, the removing party, as the party urging the existence of jurisdiction, bears the burden of proving that jurisdiction exists. *Warner v. Mutual Life Ins. Co. of New York*.
14. Defendants filed a Notice of Removal and, therefore, are the removing parties and have the burden of proving that subject-matter jurisdiction exists. Notice of Removal.
15. The United States Supreme Court held that defendants may remove an action on the basis of diversity of citizenship if there is complete diversity between all named plaintiffs and all named defendants, and no defendant is a citizen of the Forum State. *Lincoln Property v. Roche*.
16. Defendant First Insurance Company is not a citizen of Pennsylvania and this is not at issue in this Motion to Remand. Notice of Removal.
17. Defendant Deborah Dunn is a citizen of Pennsylvania and Defendants do not dispute this fact. Complaint; Notice of Removal.
18. The cause of action was filed in Pennsylvania making Pennsylvania the Forum State. Complaint.
19. As such, this motion to remand should be granted because Defendant Dunn is a citizen of the forum State, Pennsylvania, and thus, Defendants improperly removed on the basis of 28 U.S.C. § 1441.

Issue 5

20. On a motion to remand, the removing party bears the heavy burden of proving that jurisdiction exists in the federal court. *Warner*, 15
21. When a non-diverse party has been joined as a defendant, in the absence of federal question jurisdiction, the removing party may only avoid remand by demonstrating that the non-diverse party was fraudulently joined. *Warner*, 15. Joinder is fraudulent "where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment." *Warner*, 15. If there is even the possibility that the state court would find a colorable cause of action against any resident defendant, the federal court must find joinder proper and remand the case to state court. *Warner*, 15. A finding of a colorable cause of action may not be based on the federal court's view of the merits of the plaintiff's claims or defenses. *Warner*, 15.

22. A successful negligence action must plead (1) the existence of a duty or obligation on the part of the defendant to conform to a certain standard of conduct, (2) a breach of that duty by failing to conform to the conduct, (3) a causal connection between the breach and plaintiff's resulting injury, and (4) actual loss or damage suffered by the plaintiff. *Atcovitz*, 18.
23. Joinder of Defendant Dunn is not fraudulent here, as she is properly alleged to have owed a duty of care to Plaintiff to properly handle his claim. Pl's complaint.
24. This duty was independent of First's duty, and therefore a colorable cause of action separate from that against First. Pl's complaint.
25. Dunn failed to perform this duty by incorrectly handling Pl's claim by incorrectly citing someone else's medical records and refusing to speak to Pl. Pl's complaint.
26. This breach was the cause of Pl's claim failing to be adjusted, and Pl subsequently sustaining significant financial harm. Pl's complaint.
27. This cause of action in negligence is separate from that against First, alleging negligence in hiring/failing to pay Pl's claim and bad faith. Pl's complaint, count 1; Pl's complaint, count 11.
28. Based on the above facts, the USDC for the ND of PA should find that Plaintiff holds a colorable cause of action against Defendant Dunn, and thus Dunn was not fraudulently joined or joined without the good faith intent to prosecute. Therefore, removal was improper, and this case must be remanded to state court.

Wherefore, Plaintiff respectfully requests the case be remanded to the CCP of NC, PA.

Question No. 1: Sample Answer

Issue 1

The court will likely rule that the devise to Peg in Roger's will and the appointment of Peg as Roger's Executrix has been revoked by means of divorce.

Under Pennsylvania law regarding wills and estates, a divorce works to revoke any provisions in a will of the former spouse which benefits the other former spouse, including the appointment of the former spouse as executrix. This is so unless the will shows that the testator intended for the provisions to survive the divorce. A former spouse is treated as if she predeceased the testator after a divorce. Also, the principle that a divorce revokes will provisions favoring the ex-spouse takes effect in no fault divorce proceedings once the grounds for divorce have been established even if the only matter left to decide is division of the marital estate. Grounds for divorce are established when affidavits of consent to divorce are signed and filed.

Here, Roger left one-third of his estate to his wife at the time the will was prepared, Peg, and also appointed her as executrix in June of 2013. In March of 2015 divorce proceedings between Roger and Peg were commenced for a no fault divorce. In July of 2015 both Peg and Roger agreed to bifurcate the proceedings and obtain a no fault divorce and leave the issues of equitable distribution of the marital estate to a later determination. Both Peg and Roger were bona fide residents of Pennsylvania and properly filed affidavits with the court consenting to the divorce. This established grounds for divorce in Pennsylvania and will revoke the will provisions benefiting Peg unless the will shows a contrary intent. There is nothing in the facts to suggest that Roger intended Peg to take after the divorce. The provision in the will states "to my wife Peg." This shows that Roger intended the gift to Peg in her capacity as his wife.

Therefore, Roger's will provisions that benefit and appoint Peg as executrix were revoked.

Issue 2

Roger's estate would be distributed as follows: Peg would receive one-third of the estate, Wanda would receive one-third of the estate, and Michael's two children would receive equal shares of Michael's one-third of the estate, which is one-sixth of the estate to each. Under Pennsylvania law, when a devisee predeceases the testator, his share of the estate may lapse. However, Pennsylvania implements an anti-lapse statute where the predeceased's share passes to his issue. Issue is the descendent of the beneficiary child of the testator and not a spouse. As such, when a beneficiary child of the testator dies before the testator, his share of the estate will pass in equal shares to his issue if any exist.

Here, Michael predeceased Roger, as he was killed before Roger's death. As such, Michael's share would generally be considered to lapse. However, the anti-lapse statute would apply as Michael left issue to receive his share; his two children. As such, Michael's two children would receive equal shares of Michael's share, specifically they would receive equal shares of Michael's one-third share. Therefore, Peg would receive one-third of the estate, Wanda would receive one-third of the estate, and Michael's two children as his issue would receive equal shares of one-sixth of the estate.

Issue 3

As a result of their bartering exchange, Larry would have \$2,000 in income and a \$2,000 deduction, while Roger would have \$2,000 income.

A cash basis taxpayer has income when received and makes deductions when the amount is paid. Income is income from whatever source derived. The amount of income is typically easy to assess when it is cash, but when it is services it is based on the fair market value of the services at the time which they are rendered. This amount can be agreed on by the taxpayers, which is presumed to be the fair market value if there's no evidence to the contrary. Deductions are allowable for ordinary and necessary business expenses and must be taken for a cash basis tax payer in the year in which they were made.

Larry and Roger exchanged legal services for cleaning services during the tax year. The parties agreed that the value of Roger's cleaning services was \$2,000 and that the value of Larry's legal services was also \$2,000. Which means that the fair market value of each of these services is \$2,000, which should be reflected as income on their respective taxes. Both of the men had income from this transaction because it is income for their personal services; Larry for his legal service, and Roger for his cleaning service. The amount of the income is \$2,000 equivalent to the fair market value of the service received as there are no facts showing the agreed amount is not the fair market value. Larry also has a deduction of \$2,000 because the cleaning for his office was a business expense. Office cleaning is an ordinary and necessary business expense and so qualifies as a deduction for Larry. Roger does not have a deduction for the legal services provided, because personal expenses are not deductible. Thus, Larry has \$2000 in income and a \$2000 deduction, while Roger has \$2,000 in income and no deduction.

Issue 4

Angela violated the Rules of Professional Conduct, specifically the conflict of interest provision, when she accepted Sam's supplemental payments for Peg's divorce without Peg's knowledge or consent.

A lawyer who is working on behalf of his or her client may not accept payment from a third party unless the lawyer's client is made aware of the third party's payment to the lawyer and consents to such payment. If the third party's payment to the lawyer impacts the client's case in any way, such third party payment is not permitted. If the lawyer does not inform his or her client that the lawyer is accepting third party payments on the client's behalf, the lawyer is violating the conflict of interest provision of the rules.

Here, Peg confided in her boss, Sam that she needed a good divorce lawyer, but she knew they were expensive. Sam told Peg he knew of an excellent lawyer, Angela. Sam then telephoned Angela to ask her to quote Peg a reduced hourly rate and stated he would pay any additional amount Angela would ordinarily charge. He also instructed Angela not to tell Peg about their arrangement. Angela complied with Sam's request and did not tell Peg about the arrangement. Thus, Angela was accepting payment from Sam, a third party, in order to represent Peg, Angela's client. Peg was unaware of the arrangement between Sam and Angela and so did not consent to it. Sam paid Angela substantial money for Peg's legal fees.

Thus, Angela violated the Rules of Professional Conduct by accepting Sam's supplemental payments for Peg's divorce without informing Peg and getting Peg's consent.

Question No. 2: Sample Answer

Issue 1

Barb should raise a cause of action against both FF and Home Hearth based upon strict product liability due to Friendly's Fire defective product which caused Barb's injuries and she will likely succeed in such an action.

A cause of action against a manufacturer for strict liability for a design defect may be brought when a defect in the product existed while in the manufacturer's control and was not changed after leaving the manufacturer's control and the defect caused the harm. A suit may be brought against all sellers in the chain of selling the product, including the retailer and the manufacturer. When a product is defectively designed and that defect existed when it left the manufacturer's control, the manufacturer will generally be strictly liable for all injuries caused to a plaintiff due to the design defect. Under Pennsylvania law, a plaintiff can prove a design defect through either or both the risk utility test or the consumer expectation test. The consumer expectation test is a determination that a regular consumer of the product would not expect to be harmed, that is to say that, the harm is unknowable and unacceptable. The risk utility test is a balancing test which weighs the cost of fixing the product defect against the risk of harm to the consumer.

Here, Home Hearth is a local retail store that sells a product manufactured by FF. Since the product produced by FF caused Barb injuries, she may properly bring a strict product liability action against both the manufacturer and retailer. The pins were easily broken and this was as designed when the fireplace left the manufacturer's control. Barb can also show that she properly used the fireplace, had it maintained, did not misuse it, yet it caused her injuries. To determine if the product was defectively designed using the consumer expectation test Barb would be able to show that she could not know that the pins would break so easily and cause the untreated portion of the log to burn causing noxious smoke and her injuries. This risk of harm would be unacceptable to the consumer. So the consumer expectation test is met. Also under the risk utility test, the facts indicate FF's cost to repair the defect to protect the consumer from harm is \$1.50 cost per unit, which is minimal in comparison to the fact that the fireplaces sell for \$900. The minimal cost of changing the pins in the fireplace weighed against the unreasonable risk of harm to the consumer will also allow Barb to show that the design was defective. Additionally Barb suffered injury to her health and belongings.

Accordingly, Barb should bring an action for strict products liability against HH and FF as seller and manufacturer of the product, and she will likely succeed against both.

Issue 2

The issue here is whether Barb is able to collect damages for the property damage, and what damages she may collect.

Once a party establishes negligence or strict liability against another party, the defendant is liable for all foreseeable damages resulting from his or her conduct. When that damage is to property, the calculation of damages is the fair market value of that property at the time it was destroyed.

Here, Barb will recover general money damages in the amount of the fair market value of her property at the time it was destroyed. Although Barb has asserted that it will cost \$35,000 to replace these items, it is not clear that the fair market value of those items equated to \$35,000 at the time the fireplace malfunctioned. Barb will likely be able to recover damages from both FF and HH, jointly and severally or for the amount that each of them are found liable.

For these reasons, Barb will be able to recover money damages from FF and HH that equate to the fair market value of her property at the time it was destroyed.

Issue 3

To qualify Gary as an expert witness Barb's attorney must show that his testimony will assist the trier of fact to determine a fact as issue or understand evidence and that he is qualified through skill, experience, or training, or his methods are generally accepted and would usually be relied on in experts of that field. Barb will be successful in qualifying Gary as an expert.

Opinion testimony is restricted in civil actions, lay opinions can only be given on a limited number of subjects and expert opinions must be qualified as such in order for the jury to hear from the expert. An expert's testimony must assist the trier of fact to understand a fact in issue or the evidence. The expert must also be qualified through some sort of experience or education that makes his opinion trustworthy on the topic that is being discussed. The expert must also show that his methods are reliable in that they are based on generally accepted methods based on common practice in his field.

Gary's testimony will only be admissible if he is qualified as an expert witness. Gary's opinion is relevant and would assist the trier of fact because through his inspection he was able to identify the cause of the fire and smoke and link that cause to the defective design when he identified that the logs were not properly interlocked as a result of the broken pin. He also would be able to show the defect caused the burning of the decorative surface which caused the smoke that harmed Barb. Gary is qualified because he is a manufacturer-certified technician and he has nine years of experience working with vent-free fireplaces such as the one that caused Barb's injury. Gary's testimony is reliable because it is based on an inspection of the fireplace, the logs and the charring patterns, utilizing the usual and generally accepted methods of fireplace safety. Thus, because Gary relied on information that is usually relied on this field his opinion would be admissible. Gary should be qualified as an expert and his testimony should be admissible.

Issue 4

If a case has been filed and was timely and properly served and the defendant does not file a pleading or otherwise defend the action within 20 days, then the plaintiff may file for a default judgment. A default judgment acts as a judgment on the merits of the case. First, plaintiff must give 10 days' notice to defendant that plaintiff will be filing a default judgment. If defendant does not respond during that time, then the plaintiff may go to the prothonotary and ask for an entry of default to be filed. After that, if the damages are a sum certain (e.g. if damages are known to be \$35,000), then the plaintiff may ask the prothonotary to file a default judgment awarding the sum certain damages. Otherwise, if the damages are not a sum certain, then the plaintiff must ask the court to file a default judgment and the court will usually hold a trial just on the damages to determine the damages and then enter a default judgment.

Here Barb's counsel should give notice to Ray that she will file for entry of default. If Ray does not respond, then Barb's counsel should go to the prothonotary and ask for entry of a default judgment. As there is not a sum certain for the damages, Barb's counsel must go to the court for a trial on only the damages due.

Question No. 3: Sample Answer

Issue 1

The facts in this case most support a charge of third degree murder.

In Pennsylvania, murder is the killing of another with malice aforethought. First degree murder is that which is premeditated and deliberate. Second degree murder is that which is committed in the course of a felony. Third-degree murder is that which evidences a "malignant heart" - an intentional act that indicates a reckless and wanton disregard for the value of human life. For third-degree murder, the defendant is not required to have the specific intent to kill; the requisite malice may be inferred from the defendant's intent to cause significant bodily injury.

In this case, the evidence does not show that Josh (J) had the specific intent to kill Pat (P). J only wanted to "beat up" P to "send a message." Because of this lack of intent, J cannot be convicted of first-degree murder. Additionally, there is no evidence of a felony that would support a charge of second-degree murder. J's actions do evidence a reckless and wanton disregard for the value of human life, however, in that J was willing to beat P with a 2x4 about P's head and torso in order to "teach him a lesson." Because of that intent, and because J actually beat up P, J may be charged with third-degree murder under the circumstances.

Therefore, the facts in this case support a third-degree murder charge.

Issue 2

The district attorney should defend the legality of the search citing Rachel's consent to the search. The court will likely rule against the motion requesting suppression.

A search warrant is generally needed for a valid search; however, a warrant is not needed where consent is given to search a premises. A person is able to give consent in a place where they have actual or apparent authority to give consent. If the defendant is first asked and said no then the police could not then go to his wife and ask her. However, the police do not need to ask both persons that live in the home. One consenting person is enough.

In this case, after the police arrested Josh they traveled to his home. They knocked on the door and Rachel answered. They asked if they could search the premises and Rachel understood the request and voluntarily agreed to it. Rachel also lived in and co-owned the home so she had actual authority to allow the officers to search the home. They did not need Josh's permission as well. Josh also had not objected to the search before the police went to Rachel. When in the house they found the 2 x 4 described by the witness in the kitchen, a common area. These actions make the search legal.

Issue 3

The district attorney should argue the clergy/communicant privilege does not apply, and the court will likely overrule the defense counsel's objection.

The clergy/communicant privilege protects confidential communications when the communicant seeks spiritual counseling from a clergy member. The holder of the privilege is the communicant, not the clergy member.

The district attorney should argue that the privilege does not apply here because Josh did not seek spiritual counseling from Father John. Josh is not a member of any religious faith, so he didn't confess to cleanse his soul. Furthermore, Josh made the statement to Father John at a bazaar, not in a confidential setting. Thus, this communication was not a confidential communication made for the purpose of spiritual counseling. As such, it does not qualify under the clergy/communicant privilege.

The district attorney should argue the clergy/communicant privilege does not apply, and the court is likely to overrule defense counsel's objection.

Issue 4

Lawyer Jones should advise Rachel that her objections to the prenuptial agreement will not be successful. A prenuptial agreement is a contract between two parties executed contemplating marriage, and it will be controlling if they separate. A prenuptial agreement will be found to be valid even if it is fundamentally unfair as long as there was not misrepresentation and it was not executed under duress. Although having an attorney review the prenuptial agreement is a good idea, it is not required. What matters is that the party made a full and fair disclosures of assets, and that the party agreeing to it understood it and voluntarily signed it. Here, Rachel had two weeks to go over the agreement. She could not hire a lawyer to review it, but that does not affect the validity of the agreement. The facts clearly state that she carefully reviewed the agreement, understood it, and voluntarily signed it two days before the wedding. Therefore the prenuptial agreement is valid and will stand.

Question No. 4: Sample Answer

Issue 1

The court should analyze the merits of the case under intermediate scrutiny because the ordinance regulates content neutral speech in a public forum.

Speech is a protected right under the first amendment and therefore when a law regulates or inhibits speech, it may violate the first amendment. However, not all speech is protected and certain speech can be regulated depending on the type of speech and manner in which it is being regulated, and where the regulation is occurring. Content based speech regulation is when the government regulates speech based on its viewpoint. This type of regulation needs to pass a strict scrutiny based test (i.e. the law must be necessary to serve a compelling state interest, and it must be the least restrictive means necessary). If the law regulates content neutral speech, then the law only needs to meet intermediate scrutiny (i.e. be substantially related to an important government interest, and be narrowly tailored). However, the Supreme Court has established that it's ok to have a time, place, and manner restriction when it comes to regulating neutral speech if there are other available avenues for communication and it benefits an important government interest. Additionally, the forum that is being regulated is important. When it is a public forum, a forum normally open to the public, protected speech cannot be regulated unless it meets one of the above tests.

Here, it can be established that the park is a public forum. It is a public park where people walk through on their way to work and school all the time, plus it's the only public park in the city. Next, the law prohibits "all leafletting," making this a content neutral regulation because it regulates any message on a leaflet. Leafletting is a form of protected speech. Therefore, the applicable test is the intermediate scrutiny test. We must determine whether the regulation is a valid time, place, or manner restriction, if not then it violates the speech rights. The interest the city has is protecting the park from an increase in litter. Although health and aesthetics in this regard can be considered an important government interest, given that the ban is in effect at all times of the day and that there is not another park available to pass out leaflets, this does not seem to be a valid time, place, and manner restriction. The city could always find an easier way to prevent littering.

Therefore, the court will likely find the ordinance to be unconstitutional because it does not meet the intermediate scrutiny test applied.

Issue 2

Andrew would likely succeed in a claim of racial discrimination under Title VII. Title VII prohibits discrimination on the basis of race, national origin, religion, and sex and applies to employers with more than 15 employees. In order to make out a prima facie case of discrimination, the plaintiff would have to show that he was a member of a protected class, was qualified for the position he was working in, suffered an adverse employment action, and similarly situated individuals of another race were treated more favorably. If the plaintiff can satisfy these elements, a presumption of discrimination arises and the burden shifts to the defendant to show a legitimate non-discriminatory (LNDR) reason for the adverse employment

action. If the defendant can show a LNDR for the adverse action, the burden then shifts again to the plaintiff to prove that the LNDR is just pretext and the adverse action was really motivated by discrimination. If the plaintiff can prove the LNDR was pretext, he will succeed on his discrimination claim.

In this case, A Corp is an employer that would fall under the purview of Title VII because it has 100 employees. Andrew would be able to make out a prima facie case for discrimination because he is a member of a protected class because he is African American. Andrew was qualified for the position he was in because he was considered by his boss to be a good employee and always received above-average evaluations. Andrew suffered an adverse employment action when he was fired. Andrew was fired, but Tom, who is white and did the same job, was not – so Andrew can show he was treated differently than Tom who was similarly situated. As a result, Andrew would be able to make out a prima facie case for discrimination and the burden would shift to A Corp to assert a LNDR. A Corp would state that its LNDR for firing Andrew was his failure to meet a deadline that caused the loss of a major client, C Corp. However, the LDNR would likely fail because only Andrew was fired and Tom was not, even though Tom also worked on the same project. Additionally, Andrew's boss stated upon his firing that, "We don't need people like you working here, Andrew." Andrew would likely be able to show that the LNDR was not valid and was just a pretext for discrimination. Andrew's boss's statement would support that assertion. Andrew could argue that "people like you" refers to African American people, especially considering that Andrew was the only African American person A Corp employed. Also, the racist emails Andrew's boss sent during the six months prior to his firing would also weigh heavily in favor of Andrew being fired for a racially discriminatory reason. As a result, Andrew would be able to show that his firing was a result of discrimination and his Title VII action would be successful.

Issue 3

The court will most likely rule to grant A Corp's Motion and not exercise supplemental jurisdiction.

When a federal court has original jurisdiction over a claim in a case it may hear other non-original jurisdiction claims that are related to the original jurisdiction claim. A federal court can have either diversity jurisdiction or federal question jurisdiction over a claim. Diversity jurisdiction arises when the plaintiffs and defendants are from different jurisdictions and the amount in controversy is greater than \$75,000. A federal court has federal questions jurisdiction over a case when the complaint raises an issue under federal law.

In this case, the initial Title VII claim raises federal question jurisdiction because Title VII is a federal statute. Unfortunately however, the negligence claim does not invoke either diversity or federal question jurisdiction.

When a federal court is attempting to hear an additional claim but does not have federal question or diversity jurisdiction over that claim, it can decide if it has supplemental jurisdiction. Supplemental jurisdiction allows for a federal court to have jurisdiction over an additional claim when it arises out of the same transaction or occurrence as the original cause of action. This does not necessarily mean that the two issues need to be about exactly the same thing, they need only be the type of issue that one would expect an individual to raise at the same time and they must arise out of a common nucleus of operative facts.

In this case, A corp is attempting to dismiss Andrew's negligence claim by claiming that the court should not exercise supplemental jurisdiction because the negligence claim did not arise from the same transaction or occurrence. The original claim under Title VII arose as a result of Andrew's boss firing him and Andrew claiming the firing was due to his race. The negligence claim arose because after Andrew was fired, he was leaving A Corp and slipped on a patch of untreated ice in the parking lot. It is likely that a court would determine that these two incidents did not arise out of the same transaction or occurrence. While it is true that the two incidents arose at the same time, they are completely unrelated in subject matter. These are not the types of claims that an individual would expect to be litigated at the same time. The difference between the subject matters would make this too complicated of a case to hear together. Finally, the negligence case occurred outside of the building and therefore has the possibility of bringing in additional defendants who A Corp may claim are liable which would make the lawsuits too confusing to litigate all at once. The negligence claim also did not arise out of the Title VII claim – it did not arise out of a common nucleus of operative facts.

In light of the differences in subject matter and locations of the incidents it is likely that a court would rule against exercising supplemental jurisdiction and would dismiss the negligence claim.

Question No. 5: Sample Answer

Issue 1

Don and Big City Charitable Trust each own a one-half undivided interest in Blackacre following Ted's death. Blackacre was owned by Ted and Don as joint tenants with a right of survivorship prior to his death. A joint tenancy with the right of survivorship gives both parties a right of ownership of the whole property and upon one joint tenant's death, the joint tenant's share becomes the property of the surviving joint tenant. However, a joint tenancy with a right of survivorship can be severed if one of the parties executes a mortgage on the property. Pennsylvania is a title state, therefore the execution of a mortgage on the interest of one of the joint tenants serves as the passing of title and will sever the joint tenancy with the right of survivorship. Once the joint tenancy with the right of survivorship is severed, the parties become tenants in common. A tenancy in common is similar to the joint tenancy with a right of survivorship except there is no survivorship right and each party's interest is freely alienable. As a result, Ted was able to devise his interest in Blackacre to Big City Charitable Trust in his will and Big City Charitable Trust would take Ted's interest upon his death. Once Ted died, his undivided one half interest in Blackacre validly passed to Big City Charitable Trust and Don retained his undivided one half interest in Blackacre.

Issue 2

Don's action will not be successful to quiet title against Carly. Ted validly conveyed Whiteacre to Carly and delivered a valid deed which Carly accepted. Delivery and acceptance is all that is required for a property to be validly conveyed, recording the deed is not required. As a result, Carly validly owned Whiteacre. Ted then attempted to convey Whiteacre to Don after a falling out with Carly over Don's campaign. In Pennsylvania, consideration is not required for a conveyance of land, however, the party receiving the land would then be considered a gratuitous donee. Don would have the status of a gratuitous donee after Ted's conveyance of Whiteacre to him for "mutual love and affection." However, the properly executed deed to Don would not be valid because Don could not claim the protection of Pennsylvania's race-notice recording statute. A race-notice recording statute provides that no interest shall be good against a future bona fide purchaser for value without notice, unless the deed is first recorded. On the facts, it would appear that Don would be able to reap the protection of the race-notice status of Pennsylvania because Carly did not record her deed, Don had no notice of Ted's prior deed giving Whiteacre to Carly, and Don immediately recorded his deed after receiving it from Ted. However, because Don is a gratuitous donee, he is not a bona fide purchaser for value. A bona fide purchaser for value is a purchaser that expended actual value for the property, i.e. cash. Don did not provide any value for the purchase of Whiteacre, the property was given to him in exchange for "mutual love and affection." Moral consideration does not make Don a bona fide purchaser for value and so he would not be able to seek the protection of the race-notice recording statute against Carly. Thus Don's action to quiet title against Carly would fail.

Issue 3

Karl will prevail because he successfully completed performance of a unilateral contract.

A contract consists of an offer, an acceptance, and consideration. There are usually two kinds of contracts: unilateral and bilateral. A bilateral contract is an offer and acceptance with mutual bargaining between two parties and can be accepted in various ways. A unilateral contract is an offer that does not require mutual bargaining but rather is an offer that is only accepted upon completion of performance. In order to accept any offer, bilateral or unilateral, the offeree must have knowledge of the offer. Knowledge of the offer does not have to occur prior to the beginning of performance in a unilateral contract, but it must occur before the performance has been completed. Additionally, the offeree's completion of the performance after gaining knowledge of the offer is enough to form the contract.

Here, there is a unilateral contract because the offer of free beer to anyone who had the most questions correct on trivia suggest that acceptance only occurs by performance, which would be playing trivia and getting the most questions correct. Thus, the advertising would be the offer of a unilateral contract. Additionally, even though Karl was unaware of the offer of the unilateral contract when he began playing trivia, he became aware before the trivia contest was completed; he learned of the contest before answering the very last question. Therefore, he was able to accept the contract by completing his performance of playing trivia. Additionally, while the manager thought he was only playing for fun, that is irrelevant because Karl had no obligation to tell the manager of his intent to complete performance to accept the contract. His acceptance was by completing the trivia contest after he became aware of the contest.

As such, Karl will prevail on his suit.

Issue 4

The court will likely rule the evidence inadmissible based on the parol evidence rule.

A written agreement generally provides the terms of a contract. If a writing is intended to be a complete agreement and is evidenced by an integration clause, terms will not be admitted into evidence that contradict or conflict with the writing. The parol evidence rule applies to prior or contemporaneous statements that change a term in the agreement or add to or subtract from an agreement, and will bar admission into evidence of the additional evidence. Exceptions occur if a party asserts there was a fraud, accident or mistake in the contract.

In this case, in a breach of contract claim, Don attempted to introduce at trial terms that contradicted the final writing. Specifically, the writing provides for a 5% commission. Don alleges that just prior to signing the contract, the parties agreed to a 3% commission. However, this directly conflicts with the agreement. The parties intended the agreement to be final because it contained an integration clause. Moreover, there were extensive negotiations for the fees, and both parties carefully reviewed the final draft agreement and then signed. None of the exceptions apply. Thus, the parol evidence will act to bar admission of this evidence.

Question No. 6: Sample Answer

Issue 1

As the attorney for KI, Able owes his duty to KI, not to AI or to any of the members of the board, thus Able can disclose the actions to the whole board and to the shareholders if necessary and in the best interest of KI.

An attorney for a corporation owes its duty to the corporation itself. While this can get confusing because the corporation is not a person, it means that the attorney has a duty to report any suspected wrong doing to the board for them to take action. If the board fails to take action the attorney can bring the misbehavior to the attention of the shareholders. If the attorney feels that he can no longer serve as the attorney for the corporation based on a failure to fix the misbehavior, then the attorney may withdraw as representative for the corporation.

Upon becoming aware of the contract, which was not in the best interest of the company and was clearly in the self-interest of the board members, Able made the right decision by confronting AI. Able represents the corporation and it is his responsibility to uphold his duty to the corporation to serve in its best interest. AI's failure to remedy the problem gives Able greater authority to divulge the information and seek action to cancel the contract and seek a remedy in the best interest of KI. AI's instruction that Able works for AI is incorrect and Able should correct this misconception. Able should inform AI that he works for the Corporation, which includes acting in the best interest of the corporation. He should go to the whole Board and inform the Board of the issue and ask the Board to reconsider. If that is ineffective, he should inform the shareholder. AI's threat to fire Able are not good cause for Able not to speak up to the board or shareholders. The contract finders fee is completely inappropriate, a violation of the board's fiduciary duties and harms the corporation in terms of lost profits and greater expenses. Able has grounds to continue climbing to seek redress of this contractual issue in the best interest of his client, KI. Since the board was all party to this agreement, Able likely will be able to bring the issue to the attention of the shareholder, Carl, who is not a member of the board, would hopefully take action against the board to protect the company.

Issue 2

Carl may bring a shareholder's derivative action against the corporation. He will need to add the directors as defendants, as well as KI, and will need to allege in his complaint that he is a shareholder at the time of the alleged conduct and now, and that he demanded that the directors address the issue, or why it was futile to do so.

A shareholder ("SH") may bring a SH derivative action on behalf of a corporation. A SH derivation action is different than a personal claim because it is enforcing the claim of the corporation itself. Under PA rules of civil procedure, Carl must allege in his complaint that he was a SH at the time of the conduct/action of the suit, and that he is currently a SH. In his complaint, he must also allege that he demanded that the Board address the issue and the Board refused, unless he can show that making the demand would cause irreparable injury to the corporation. A successful SH derivative suit awards the damages to the corporation.

Here, he can likely show that a demand will be futile (i.e. irreparable injury to the corporation) because he will essentially be required to demand that the Board cancel the deal and require all Board members to return the finder's fees to KI. If Carl did make the demand, the Board might have an opportunity to cover up its wrong-doing or other conduct that would injure the corporation. Al, Ben, and Al's son are the only members of the Board, and all participated in the Supplier deal that has negatively affected KI's profits and will significantly reduce future profits and distributions. The Board members breached their duty of loyalty owed to the corporation because part of this deal included a monthly "finder's fee" to be paid to the directors each month. In any event, Carl can bring this action, provided that the above is satisfied. In this way, he will be able to recover the lost profits as a result of the deal, and KI will be entitled to damages caused as a result of the directors action.

Issue 3

Boxes will most likely be able to enforce the interest provision in its confirming memo pursuant to 13 Pa.C.S. § 2207 (UCC 2-207).

Under the UCC for a sale of goods, there is no mirror image rule like in common law contracts that requires the acceptance to mirror the offer. Instead, UCC 2-207(1) provides that when an offer is made and there is a definite and seasonable expression of assent between the parties, a deal will be formed, even if the acceptance or confirming memo - demonstrating a definite and seasonable expression of assent - contains different or additional terms (unless the acceptance states that it is "expressly conditional upon assent" which is not the case here). Section 2-207(2) explains how such different or additional terms will be treated. When the parties to the contract are merchants, 2-207(2) provides that additional terms will become part of the contract unless they materially alter the terms of the contract, the offeror conditioned the offer by its terms exclusively, or the offeror rejects the additional terms within a reasonable time. The official comments to UCC 2-207 specifically state that provisions providing for interest for late payments are of the type that do NOT materially alter a contract, as they are usually standard in business deals and provide no surprise or major change in the rights of the parties.

Here, the facts explain that an agreement was reached between Boxes and KI, and that the confirming memo satisfied the statute of frauds, but also contained the interest on late payments owed beyond 30 days provision. Thus, an agreement was formed under 2-207(1), and there is an additional term. Both KI and Boxes are merchants, as they deal with goods of the kind at issue and are generally considered "businesses" and thus will be merchants under the UCC. Accordingly, under 2-207(2), the additional interest provision will most likely become part of the contract, because it does not materially alter the contract, KI did not object or reject the term, and KI did not explicitly condition its offer to the offer's terms. Thus, Boxes will most likely be able to enforce the interest provision.

Issue 4

Betty's sister can assert a claim for breach of an express warranty, and will be permitted to bring such an action by 13 Pa.C.S. § 2318.

An express warranty is created when a seller makes a promise or affirmation to a buyer about a good, either orally or in writing or by using a sample or model, which becomes part of the basis of the bargain for the sale of the good. Even if implied warranties are disclaimed, express warranties are enforceable. Mere puffery is not an express warranty, but the

knowledgeable guarantee by the seller or her agent about a good will rise to the level of an express warranty if it becomes the basis or part of the basis of the bargain. Furthermore, in Pennsylvania, 13 Pa.C.S. § 2318 deals with privity issues, and provides for who can bring a claim for a breach of warranty under the UCC if the injured person is not the buyer (who is in direct vertical privity with the seller). Pennsylvania is an "Alternative A" jurisdiction and thus its version of the code allows a person who is not a buyer to bring a suit against the seller when she has been injured in her person by the product and is a family member, or guest in the house of the buyer.

Here, Betty went to KI's showroom and explained to KI's salesman that she wanted to use the bowl to heat food in her microwave. The salesman showed her several bowls and guaranteed that any of the bowls would be suitable and safe for use in the microwave. Based on this conversation, Betty then bought one of the bowls. KI's salesman has most likely created an express warranty by his words to Betty during the transaction. He guaranteed that the bowl would be safe in the microwave, and since Betty questioned him about this fact it was clearly part of the basis of the bargain for the bowl purchase. Thus, an express warranty was formed.

Furthermore, Betty's sister was personally injured at Betty's house when she used the bowl to microwave food and it shattered. Under § 2318, Betty's sister can be considered either a family member (sister), or if not a family member because she is not a nuclear family member, she is at the very least a guest in Betty's house and therefore has privity to sue KI (the seller) under section 2318. She was injured in her person by the breach of the express warranty, and thus can assert a claim under the code against KI.