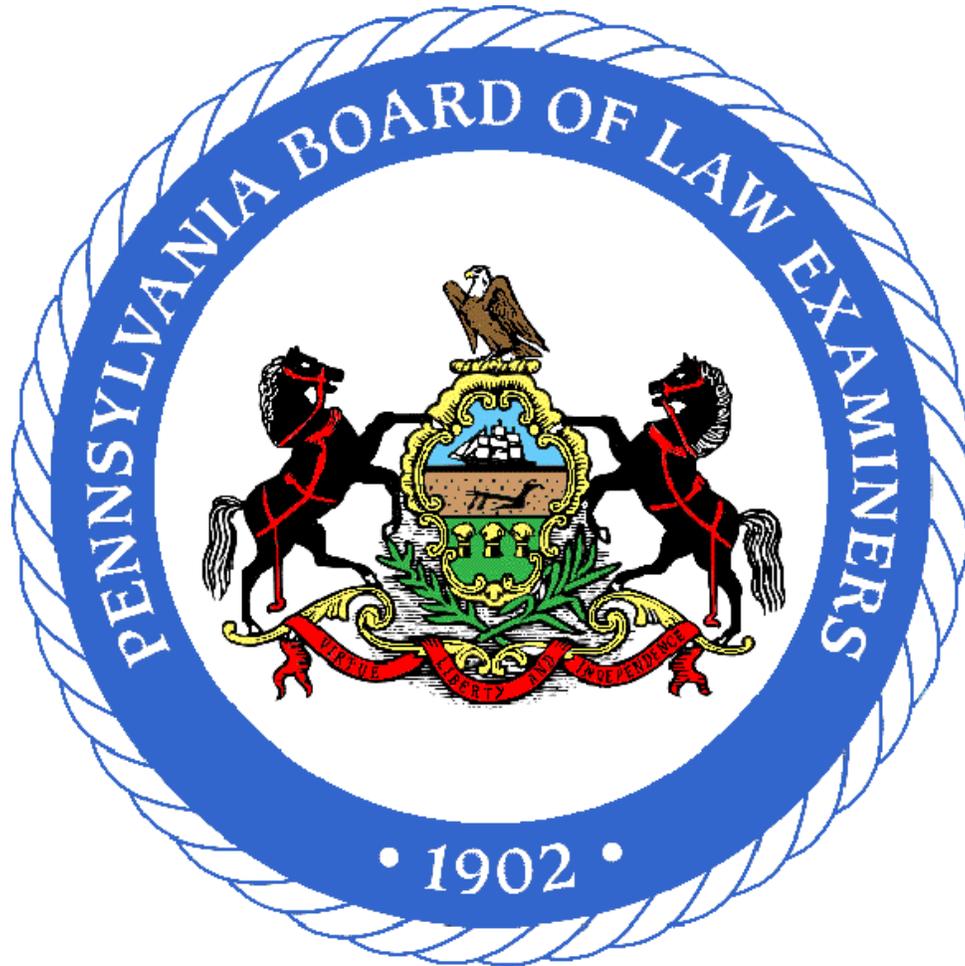


JULY 2017

PENNSYLVANIA BAR EXAMINATION

Sample Answers



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Performance Test: Sample Answer

Issue 1

Memorandum of Law

TO: Mackenzie Meyers, Assistant District Attorney
FROM: Applicant
RE: Assignment to draft Legal Memorandum concerning Paul Presley
DATE: July 25, 2017

I've been tasked with addressing two issues: first, whether the medical evidence gathered from Mr. Presley will be suppressed under Article 1 section 8 as a result of the relationship between the two warrants issued for Mr. Presley's search, and 2: whether the Commonwealth can successfully prosecute Mr. Presley under a REAP charge given his alleged mistake of fact. Based on my research, the evidence will likely be suppressed and a REAP charge will likely fail.

Mr. Presley is charged with REAP for hitting a man dressed as a statue for performance purposes, believing that he was the Rocci Statue and intending to hit said statue with a tire iron. The two warrants you've asked me to discuss were serial warrants; the first warrant is presumed invalid, and the second one is presumed to be adequately supported by probable cause. The relationship between the two warrants is as follows: Officer Colandro obtained a warrant unsupported by probable cause, and subsequently Officer Anderson filed an affidavit for a search warrant and included the existence of the improper warrant in said affidavit.

The Evidence Obtained As A Result of the Second Warrant Will Likely Be Admitted

Under the Pennsylvania Constitution Article 1 §8, "the people shall be secure in their persons... and no warrant to search any place or seize any person or things shall issue without describing them as nearly as may be, nor without probably cause, supported by oath or affirmation subscribed by the affiant." Taking DNA from an individual constitutes a search for PA constitutional purposes. *See Henderson*. Generally, a search warrant is not reasonable for PA constitutional purposes unless it is supported by probable cause. *Id.* If evidence is gathered without probable cause, the evidence obtained as a result of the unlawful search will be suppressed. *See e.g. Henderson*.

Where serial search warrants were issued, the court in *Henderson* struck a compromise between two competing approaches to determine whether evidence gathered under the second search warrant will be suppressed. The first approach was the traditional approach. Traditionally, "evidence tainted by illegal police conduct may still be admitted into evidence if the evidence can fairly be regarded as having an origin independent of the unlawful conduct." *Henderson*. To be independent for suppression purposes, the independent source must be "truly independent from both the tainted evidence and the police or investigative team which engaged in the misconduct by which the tainted evidence was discovered." *Id.* Contrarily, another approach exists, derived from *Murray*, in which evidence will be admissible, despite previous police misconduct, if (i) the misconduct was not willful, (ii) the second warrant was not "prompted by

something obtained as a result of unlawful government conduct," and (iii) the issuing magistrate for the second warrant was informed of the improperly obtained information.

In Henderson, the court adopted a hybrid approach, holding that "where such [police] malfeasance is not exploiting the fruits of their own willful misconduct, we agree . . . that the Murray standard whether the decision to seek a warrant was prompted by something attained as a result of unlawful government conduct, and whether the approving magistrate had been informed of the improperly obtained information" strikes the appropriate balance." Henderson. Further, the court held that the "true independence" test would apply only in situations where the first warrant was issued as an act of willful misconduct. Id.

Therefore, where the first warrant in a series was defective through no willful misconduct, a second warrant may be issued so long as the magistrate is informed of the improperly obtained information and there is an independent basis apart from the unlawful conduct to support probable cause. Id.

Here, your assigning memorandum states that there was no malfeasance on part of Officer Colandro in obtaining the original search warrant. His warrant was too vague, seeking to search for "any and all evidence of criminal activity," but this request did not rise to the level of willful misconduct. Therefore, the Murray standard should apply, and the evidence obtained as result of the second warrant will be admissible if the issuance of the second warrant was (i) not reliant on willful misconduct, and (ii) the approving magistrate was informed of the improperly obtained information. Here, the second warrant is supported by probable cause, and the affidavit given in support of the search warrant makes sufficient mention of the improper first warrant issued as a result of Officer Colandro's overly broad warrant. Therefore, the court will likely not suppress any evidence gained as a result of the serial warrant. An argument can be made that the mention of the warrant did not mention its impropriety, and therefore does not meet the Murray standard, but this will likely be unsuccessful

The Reckless Endangerment of Another Person (REAP) Charge Will Likely Not Succeed.

A person is guilty of Recklessly Endangering Another Person (REAP) when he "recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." 18 Pa.C.S. §2705. Recklessness is defined as conscious disregard of an unjustifiable risk. 18 Pa.C.S. §302(b). Ignorance or mistake of fact is a defense where the "ignorance negatives the . . . recklessness . . . required to establish a material element of the offense" or the law so provides. 18 Pa.C.S. §304. "It is well-established that a bona fide, reasonable mistake of fact may, under certain circumstances, negate the element of criminal intent. It is not necessary that the facts be as the actor believed them to be; it is only necessary that he have a bona fide and reasonable belief in the existence of the facts which, if they did exist, would render an act innocent." *See Scott*. The prosecution will retain the burden of proof and must demonstrate a lack of reasonable mistake to defeat a "mistake of fact" defense. Id.

Here, Paul Presley's mistake is likely a reasonable mistake of fact that will negate the mens rea of negligence for a REAP offense. "the victim appears to be a nearly identical replica of the real

"Rocci" statue." See Colandro Affidavit. Although there were tourists taking a picture of the real statue, this does not necessarily negate the reasonableness of the mistake, as there is no evidence that Mr. Presley actually saw those tourists or the statue. Further, there is substantial evidence here that Mr. Presley intended to destroy the statue, rather than injure a human. On his website, he "stated that he would destroy the statue if it were ever moved to the top of the stairway again." See Anderson Affidavit. Presley's mistake is arguably reasonable, and if the facts were as he believed them to be at the time (i.e. that he had actually been hitting the statue) his act would have been innocent.

Issue 2

Will the medical evidence obtained pursuant to the second warrant be suppressed under Article 1, Section 8 of the PA Constitution?

The medical evidence obtained pursuant to the second warrant secured by Don Anderson will not be suppressed under Article 1, Section 8 of the PA Constitution. Article 1, Section 8 of the PA Constitution states, "The people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to the affiant." Under the *Mason* rule, evidence tainted by illegal police conduct nevertheless may be admitted into evidence if the evidence can be fairly regarded as having an origin independent of the lawful conduct. *PA v. Henderson*. This rule then subsequently evolved in *Commonwealth v. Melendez* that the independent source is one "truly independent from both tainted evidence and the police or investigative team which engaged in the misconduct by which the tainted evidence was discovered." Since these two cases lie outside of the PA Constitution, the rules contained there represent a form of prophylactic judicial lawmaking. That means that appellate courts are to consider this rule in various factual guises and expand or contract the rule as justice requires. In the *Henderson* case the court ruled they were unwilling to enforce the "true independence rule" also known as the independent source doctrine as applied under Article 1, Section 8 of the PA Constitution, and derived from the *Mason* case. The court was hesitant to require true independence in the absence of police misconduct and on pain of the Commonwealth being forever barred from obtaining non-evanescent evidence. *PA v. Henderson*. The *Henderson* court said that suppression is not required on the account of two detective's status as members of the same police department. However they deemed it appropriate to limit the independent police team requirement to situations in which the police exploit the fruits of their own willful misconduct. With no malfeasance present, the court applied the *Murray* standard, which states "whether the decision to seek a warrant was prompted by something attained as a result of unlawful government conduct and whether the approving magistrate had been informed of the improperly obtained information. The court held this was an appropriate balance.

Here applying the facts presented to us along with the affidavits provided we can start by saying that just because Don Anderson and Jack Colandro were not members of the same department there is no need for suppression under that rule. Also there was no malfeasance by Jack Colandro so then the *Murray* standard would apply. The *Murray* standard, which states

"whether the decision is to seek a warrant was prompted by something attained as a result of unlawful government conduct and whether the approving magistrate had been informed of the improperly obtained information. Here the need to attain a second warrant was a result of the 1st warrant being suppressed, so the first prong of the test is met. Since Anderson was not involved with the prior investigation it is safe to say that he did not obtain the evidence based upon the first one. There is no mention of disclosure to the judge but it is clear that his affidavit had the probable cause necessary to obtain a warrant and as such the evidence should not be suppressed. The procurement of the pacemaker information is not highly intrusive unlike taking blood work so the evidence should not be suppressed on those grounds.

Accordingly, the second warrant should not be suppressed.

Issue 3

REAP Charge and Defendant Presley's Defense

Initial REAP Charge

REAP is defined as a defendant "recklessly engag[ing] in conduct which places or may place another person in danger of death or serious bodily injury." 18 PA.C.S. § 2705. For a defendant to be guilty of an offense, the defendant must have acted "intentionally, knowingly, recklessly, or negligently" with respect to each material element of a crime. 18 Pa.C.S. § 302(a). A defendant meets the element of recklessness if they "consciously disregards a substantial and unjustifiable risk" that an element exists or will result from his conduct. 18 Pa.C.S. § 302(b)(3). The risk must involve a "gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation." *Id.*

Here, the evidence shows that Presley drove to the Philaburg Museum of Art, stopped his vehicle, grabbed a tire iron from the trunk of his car, ran to the top of the stairway, and struck the victim with the tire iron, who then suffered a broken leg. The defendant then hesitated, threw the tire iron into nearby trees, ran back to his car, and left the premises. A tire iron, which is a steel bar, creates an unjustifiable risk of serious bodily injury when it is used to strike a human being; i.e. it places the human in danger. Here, because Presley hit the victim with the tire iron, he recklessly placed the victim in danger of serious bodily injury, which further resulted in the victim's leg breaking. Here, hitting someone's leg with a tire iron is a gross deviation from the conduct of a reasonable person because it places that individual in danger of harm. Therefore, the Commonwealth will be able to successfully support an initial charge of REAP against Defendant Presley, which may be refuted by a defense by the Defendant.

Defendant Presley's Defense

A defendant may raise as a defense ignorance or mistake as to a matter of fact necessary for a REAP charge, if "the ignorance or mistake negatives the intent, [or] . . . recklessness . . . required to establish a material element of the offense." 18 Pa.C.S. § 304; *Comm. v. Scott*. A mistake of fact can disprove the required element of criminal intent if the mistake of fact is bona

fide and reasonable and which, if true, would render an act innocent. *Comm. v. Scott*. This issue of reasonableness is analyzed when determining whether a defendant had a reasonable belief that certain facts existed, and not as to whether the belief itself was reasonable. *Id.* When evidence of a mistake of fact is introduced, the Commonwealth retains the burden of establishing the requisite criminal intent beyond a reasonable doubt to convict a defendant by showing either that there was an absence of a bona fide, reasonable mistake, or that the mistake alleged would not have negated the intent necessary to prove the crime charged. *Id.*

Here, Defendant Presley raises the defense of a mistake of fact by arguing that when he swung the tire iron, he believed he was hitting a statute and not the victim. Specifically, Presley saw the victim, who was located at the top of the stairway, and believed that the actual statute of Rocci had been moved from the bottom of the stairway to the top of the stairway. Defendant Presley has a public website whereby he has promoted the banishing of the actual Rocci statute, citing it as a "disgrace" to the city. Aff. of Prob. Cause Officer Anderson. He has further noted that if the statute were ever moved from the bottom of the stairway to the top of the stairway, he would destroy the statute. *Id.*

Here, Defendant Presley had a clear intent to hit the victim with the tire iron. Whether Presley's defense of mistake of fact will be successful turns on whether his mistake was bona fide and reasonable, and whether it would actually negate the intent necessary to prove the crime charged. Because both Officer Colandro and Officer Anderson note that the victim appeared to be a "nearly identical" replica of the real "Rocci statute", the defendant's mistake of fact was likely reasonable. *Id.* The Commonwealth could argue that believing that the statute had been moved was unreasonable because if the statute had in fact been moved there probably would have been some kind of media coverage and so Defendant Presley would have become aware of the move. However, because the reasonableness element is in regards to whether the defendant reasonably believed certain facts to be in existence, i.e. the victim was a statue, the argument would likely fail. Further, the defendant's mistake of fact was likely bona fide, because he has noted on his website that he would "destroy" the statute if it was ever moved to the top of the stairway. There is also evidence that the defendant "hesitated" after hitting the victim, which indicates that the defendant likely had a bona fide belief that he was hitting the statute with the tire iron and was surprised when the believed to be statute was actually injured. *Id.* Finally, if a mistake of fact exists in a case where the requisite intent is recklessness, it does negate the intent necessary to prove the crime of REAP.

Therefore, defendant's defense of a mistake of fact will likely be successful, and the Commonwealth will not be successful in a REAP charge against the defendant.

Question 1: Sample Answer

Issue 1

The will that was dated June 22, 2017, will control in this scenario because Deb created a new will that expressly revoked the will dated May 5, 2017, and the facts show that there testamentary intent to do this by Deb.

Under the Pennsylvania Probate Code and other Pennsylvania ("PA") law, a will has some formalities that need to be done before it can be a valid will. In PA, a testator must have testamentary intent, meaning she intended to create the will, intended the document to dispose of her property at death, and knew where her property would be distributed on her death. It also must be signed by the testator at the end. A holographic will, a handwritten one, is also valid in PA if the same formalities are met, even if written on a napkin, as long as the formalities are met and it is signed by the testator at the end. If the testator signs on her own behalf, there is no need for witnesses in PA. A new will, or codicil (modification), can expressly revoke a will, but the courts should look to the language and the intent of the new will. A revocation can be by a subsequent writing (new will), or by a physical act, such as burning, obliterating, tearing, destroying, or canceling.

In this scenario, Deb created a valid will on May 5, 2017. It disposed of her property; it left it to her husband on the condition that he survived her. Otherwise, the property would go to the PA Humane Society. Deb intended to go to Linda to make the will, knew that the document was a will, and disposed of all of her property in the event of death. When her husband, Sam, told her about the gift he made to Fred by cancelling half of the debt Fred owed to the company, Deb became enraged and wanted to change her will immediately. On a piece of company stationary, she created a new valid will which disposed of all her property, and even expressly revoked the prior will as evidenced by the language "I revoke my prior Will and declare this to be my Last Will." This express revocation of the May 5th will is effective and the new will created on June 22, 2017, is valid. There are no other facts which would bring the validity of the new will into question, so Sam's challenge to the will not be successful.

Therefore, the will dated June 22, 2017, will control the distribution of Deb's estate.

Issue 2

Sam Can Claim an Elective Share from Deb's Estate if the June 22 Will is Found to Be Valid

The issue here is how Deb's probate estate will be distributed if Sam takes action to claim against the estate and what action should he take.

Sam has the option to file for an elective share option of Deb's estate. In cases where the surviving spouse has either been left out of the will or feels like they have received too small of a share under the will, they have the option of claiming an elective share. An elective share allows

a surviving spouse to claim 1/3 of the probate estate. In order to claim an elective share, a spouse must file the claim with the court as a probate proceeding within 6 months of the decedent's death or 6 months from the date that the will is probated.

Here, Deb's June 22, 2017, will, left Sam out of the will completely. However, as Deb's spouse, Sam can still pursue an elective share. If he is successful, he will receive 1/3 of Deb's estate, which is likely sizeable given her accumulation of a "significant net worth." This will allow Sam to still collect from Deb's estate. This is the best way for Sam to receive a share of Deb's probate estate.

Therefore, Sam can claim an elective share of 1/3 of Deb's estate by filing a claim for an elective share with the court. The other 2/3 of Deb's estate will go to the Pennsylvania Humane Society.

Issue 3

The circumstances strongly indicate that the \$25,000 cancellation of Fred's debt was a gift by Sam; therefore, Fred would not have taxable income as the result of Sam's \$25,000 gift. Generally, when one party is indebted to another and pays a lesser amount to satisfy the debt in full, the difference between the amount of the original debt and the amount satisfying the debt would be reported as cancellation of indebtedness income under Internal Revenue Code section 61(a)(12). However, amounts received as gifts are exempt from reported income. In order to be considered a gift, the donor must have a "detached and disinterested generosity" towards the donee.

Although Sam accepted the \$25,000 in satisfaction of the \$50,000 debt, it was accompanied by the clear intent by Sam that this would constitute a gift to Fred. Sam told Fred to "consider it a wedding present," and he told Deb that he was "happy he could do something special for the wedding" by accepting a smaller amount than the contract price. This appears to be true disinterested generosity on behalf of Sam, who treated the cancellation of debt as a wedding gift for his best friend. Therefore, this should be considered a gift by Fred and should not result in a taxable event on Fred's 2017 income tax return.

Issue 4

Linda's payment of the \$700 to Fred is a violation of the PA RPC as a lawyer may not split fees with a non-lawyer.

The PA RPC have explicit rules regarding with whom a lawyer may split fees. Generally a lawyer may not split fees with a non-lawyer. A lawyer may not split a fee with anyone who is not a lawyer or give a fee to anyone who acts as a "finder."

Here, Sam asked Fred for a recommendation of a good lawyer. Fred, who doesn't seem to have a job, recommended Linda as the best lawyer in town. Sam and Deb went to Linda to

prepare their wills. She was paid \$2,100 to prepare the wills and then sent \$700 to Fred saying, "Thank you for recommending my services to Sam and Deb, here is your one third share of their fee." This is a clear violation of the RPC.

Question 2: Sample Answer

Issue 1

Ed as the administrator of Val's estate should bring a survival action on half of Val's estate and should bring a wrongful death action on behalf of the surviving family members. For the survival action, Ed may seek damages for pain and suffering, for loss of income from the date of her death through her expected lifetime, for medical expenses and all damages that Val could have brought herself. For wrongful death action, Ed may seek for the family members loss of service, loss companionship, loss resulting from damages for not having Val's income and contribution.

Under Pennsylvania law two cause of actions are available at the death of a person that resulted from another's person negligence. First, the administrator of the estate may bring a survival action against the negligent party. A survival action is an action that arises from the deceased himself, it allows for collections of damages that the deceased could have collected had the deceased had remain alive. Damages of such sorts include pain and suffering the deceased experience as a result of the negligent action, the loss of income, and medical expenses. On another hand, the decedent's personal representative may also bring a cause of action on behalf of the surviving family members under the wrongful death action. This cause of action is an attempt to make whole the surviving family members who have suffered a loss as a result of the negligence. This includes the contribution the deceased provided for the family and services the deceased provided to the family. Under Pennsylvania law both actions should be brought together, but double recovery is not allowed. Therefore the estate and the family members may only collect for medical expenses under one of the cause of action not both.

Here, there are sufficient grounds to seek damages for a survival action which must be filed by Ed as the administrator of Val's estate. As standing in the shoes of the testator, Ed may seek to recover for the severe pain Val experience during the three months following the accident prior to her death. Further Ed may seek damages for the emotional distress Val experienced which was evidenced by Val's reaction every time she was visited by her children, grandchildren, and her husband. Ed may also seek damages for the unreimbursed medical expenses of more than \$200,000.

Further, Ed may bring a wrongful death action against Cathy for the surviving family members, which would include Ed and Beth. Under this cause of action Ed may seek damages for the contribution Val provided to the household. The loss of Val's income caused Ed to have to sell his home and move into a small apartment. Further, on behalf of Beth, Ed may seek damages for the Val's contribution to taking care of the children, which now has forced Beth to pay for child-care.

Therefore, based on the foregoing Ed as the administrator should file both a survival action and a wrongful death action jointly.

Issue 2

In addition to denying negligence, Rose should assert the PA good samaritan law as a defense. Rose will likely be successful, unless she is deemed to have acted with gross negligence or intentional misconduct.

The PA good samaritan law provides civil action immunity to licensed medical professionals (including nurses) for providing emergency medical care as a good samaritan. The accident victim cannot recover for negligence for actions that the nurse took while providing emergency care. The medical professional cannot be held liable for negligence unless they acted with gross negligence or intentional misconduct.

Here, Rose is a licensed nurse, which is the only requirement under the PA law. Rose provided care to Val. There are no facts to suggest that Rose acted with gross negligence or intentional misconduct. Rather, Rose rendered minor assistance to Val for the bloody gash, realized there was no more she could do, and waited with Val until the EMT arrived. Unless, it can be shown that she acted with gross negligence, unlikely here, Rose's defense under this law will be successful.

Issue 3

The Court would likely grant the motion to strike Cathy's demand for a jury trial as it was requested too late. In PA, a jury trial must be demanded no later than 20 days after service of the last pleading. The facts indicate that Cathy's attorney requested a jury trial at a pre-trial conference three months after the last pleadings were served and a mere five days prior to trial. No party, not even Defendant Cathy herself, had demanded a jury trial prior to this time in any of the pleadings. Plaintiff's attorney will likely succeed in her motion to strike Cathy's demand for a jury trial because it was too late. The Court should sustain the motion to strike.

Issue 4

The court will likely rule that Rose's testimony regarding detecting the odor of alcohol on Cathy's breath is inadmissible because while such evidence is relevant, it would be barred under PA Rule 403 as being unduly prejudicial.

Under the PA Rules of Evidence, all relevant evidence is deemed admissible unless barred by the Rules of Evidence, statute, or Constitution. Relevant evidence is any fact that is of consequence in the action that has the tendency to make the existence of a fact at issue more or less probable. However, relevant evidence relating to the observations of a witness be deemed inadmissible if the probative value is outweighed by its prejudicial effect.

Here, Rose arrived on the scene of the accident shortly after the collision. While at the scene, Cathy came over to speak with Rose. Rose detected the odor of alcoholic beverages on Cathy's breath while she was speaking with Cathy. Normally, this observation would be

admissible at a civil trial because it is the result of the personal observation of a witness who was present at the scene of the accident. However, the facts show that shortly after Cathy and Rose spoke with one another, the responding police officer engaged with Cathy. The officer observed that Cathy demonstrated no signs of intoxication, he did not have her perform a field sobriety test, and he did not have blood-alcohol tests conducted. Additionally, no alcohol-related charges were filed against Cathy. While detecting the smell of alcohol on a driver's breath is certainly relevant in a negligence cause of action, the testimony should not be admitted because its probative value is outweighed by the prejudicial effect. As such, if the court were to admit Rose's suspicions and testimony, Cathy would be unfairly prejudiced during the trial.

Question 3: Sample Answer

Issue 1

Frank should be charged with first degree murder under the PA Criminal Code under the doctrine of transferred intent.

First degree murder is the intentional killing of another human being with malice aforethought. Malice aforethought can be surmised from wickedness of disposition, hardness of heart, cruelty, or recklessness of consequences. Intent can be gathered from the circumstances, as when a person lies in wait to commit a killing and/or uses a deadly weapon on a vital organ (like using a gun and shooting at the head). The doctrine of transferred intent applies to intentional acts that are the actual cause of the subsequent injury, as when the act with intent to cause the harmful contact ends up injuring someone else, not the target. The defendant then may be tried for attempt with regard to the intended subject, and with the crime that resulted against the actual victim. The mens rea transfers to the actual victim.

Here, Frank joined a gang and had to kill Lucas as part of his initiation. He "obtained" a gun, found out where the subject was supposed to be, proceeded to that place with the gun, aimed at Lucas' head, and by accident hit Angela. Thus, the intent to kill is manifest; because the doctrine of transferred intent will apply here, Frank can be tried for first degree murder for the death of Angela.

Issue 2

The Commonwealth should respond to the hearsay objection by asserting the dying declarations exception to the hearsay rule, and would likely be successful in doing so.

Hearsay is an out-of-court statement made by a declarant that is being offered to prove the truth of the matter asserted. As a general rule, hearsay is inadmissible in Pennsylvania unless another exception excludes the statement from the hearsay rule. One exception to the hearsay rule is the dying declaration exception, which provides that statements made by a now unavailable declarant during a time where the declarant believed death to be imminent and concerning the cause of the believed imminent death are admissible.

Here, the statements made by Angela to Mark are in fact hearsay. Angela, the declarant, was out of court when she made the statements. Further, the statements are now being introduced to prove the truth of the matter asserted, which is that Frank shot her. However, aside from excited utterance or present sense impression, Angela's statements to Mark qualify as valid dying declarations. Angela is no longer available to testify because she died as result of being shot. Further, being shot in the chest would lead a reasonable person to believe that she was probably going to die, especially given the large pool of blood forming around her. The statements by Angela pertain to who shot her and inflicted her ultimate death.

Therefore, the statements made by Angela should be admissible and the defense counsel's objection should be overruled.

Issue 3

The Commonwealth should argue that Louise made a valid search incident to arrest. It will likely be successful.

The Fourth Amendment to the United States Constitution requires government searches to be reasonable. This generally means that they require a warrant unless a special exception applies. One exception, recognized by both the U.S. Supreme Court and the Pennsylvania Supreme Court under the PA constitution, is the search incident to arrest. When a police officer makes a valid, legal arrest, he may also search the arrestee's person and anything within his "wingspan." The logic behind this rule is that it prevents the suspect from destroying evidence or threatening the safety of the police.

The Commonwealth should argue, and the court should conclude, that Louise's search was a valid search incident to arrest. The facts tell us that Frank's arrest was lawful. Louise searched only "Frank's person," which is in the scope of what is permitted. Furthermore, even if Frank were to argue that his whole person should not have been searched because his hands were restricted, Louise would certainly have been permitted to search any pockets near where his hands were because Frank could have used a weapon in a back pocket to endanger himself, Louise, or others or he could have tampered with evidence in his back pockets. That is exactly where the handgun was found, in a back pocket "immediately next to" his hands. Thus her search of Frank falls squarely both within the letter and spirit of the search incident to arrest exception and no warrant was required.

Issue 4

Willy should argue several grounds for his alimony award, including his need for the money, Sarah's ability to pay, Willy's contribution to the household, and the time it will take for him to find suitable employment. Because these factors overwhelmingly favor Willy, he will be successful in his alimony claim.

Alimony is a form of spousal support awarded after parties are divorced. Alimony is typically only awarded when necessary. Accordingly, it is not available for ex-spouses whose conduct creates the ground for divorce. Marital courts have broad discretion in their ability to distribute alimony. To that end, courts consider several factors: (1) the financial resources of the party seeking support, (2) the health and age of the party seeking support, (3) marital misconduct, (4) the standard of living to which the spouse seeking support is accustomed, (5) contributions by the spouse seeking support during marriage, (6) the spouse seeking support's need for the money versus the paying spouse's ability to pay, and (7) the time it will take the spouse to acquire suitable employment.

In this case, Willy will likely be able to establish sufficient grounds for alimony. Importantly, he did not create the grounds for divorce. He discovered that Sarah was having an

extramarital affair. He should argue several points. First, he should argue that he does not have suitable financial resources. The facts note that "[i]t is undisputed that Willy will not receive enough assets through equitable distribution to provide for his reasonable needs." This paints a bleak picture of Willy's financial situation. Second, Willy should argue that his age (fifty-nine years old) makes him an unattractive job candidate. Third, he should argue that he is accustomed to a high standard of living. Sarah earns approximately \$500,000 each year; the parties drove a 2016 Cadillac Escalade; and Sarah earned enough to allow Willy to stay at home to take care of the house. Fifth, Willy should argue that he contributed to the marriage. He should argue that Sarah's success was in part due to his taking care of the home. The facts note that Sarah did not mind that Willy stayed home because "she always returned at the end of the day to their clean, million-dollar home with hot food on the table." Sixth, Willy should argue that he needs the money. He is a high-school graduate with low skills, and the facts note that he will be unable to provide for himself. On the other hand, Sarah will still have \$250,000 of disposable income after paying all of her bills. Finally, Willy should argue that it would take him a while to find suitable employment. The facts note that Willy's job hunt has been "unsuccessful due to his limited education and the lack of jobs in the region."

Willy should make several arguments about his ability to earn enough money to support himself, including his need for money, Sarah's ability to pay, Willy's contribution to the household, and the time it will take for him to find suitable employment. Because the factors weigh heavily in his favor, he will likely be successful in this claim.

Question No. 4: Sample Answer

Issue 1

1(a.) Conclusion: XYZ and Red City can file a motion to dismiss for failure to state claims upon which relief can be granted any time up through trial. The court's standard for determining whether to grant this motion will be based on the facts that the plaintiff pleads. The plaintiff must plead sufficient facts to state a plausible claim. In looking at the plaintiff's pleaded facts, the court will not consider the plaintiff's legal conclusions.

Rules: A Rule 12b6 motion to dismiss for failure to state a claim is a pre-answer motion under the Federal Rules of Civil Procedure. A 12b6 motion is one of the ways in which to end a case before it gets to trial. This particular motion should be raised pre-answer, but it is not waived if not raised pre-answer. A motion for failure to state a claim upon which relief can be granted can be raised at any time up through trial without risking waiver.

Conclusion: XYZ and Red City can bring a Rule 12b6 motion pre-answer, but it is not waived and can be made anytime including at trial

1(b.) The legal standard for a motion to dismiss pursuant to 12(b)(6) is that, taking the allegations contained in the Complaint as true and resolving all doubts in favor of the non-movant, the Complaint has failed to plausibly state a claim upon which relief can be granted by the Court. Thus, the Court should grant a motion to dismiss if there is no legal basis for which it should grant the Plaintiff relief.

Issue 2

The court should deny Red City's motion because Mia's complaint indeed states a claim upon which relief may be granted. The First Amendment protects the fundamental right of freedom of speech, association, and religion. The First Amendment protects not only verbal and written speech, but also expressive speech (such as Mia's kneeling during the national anthem). Courts have previously held that similar requirements, such as to say the national anthem in unison, or to "respect the flag" are unconstitutional requirements.

Here, the Red City Athletic Handbook required all participants in recreational sports to "stand respectfully during the National Anthem." Because the Athletic Association is run by Red City itself, there is governmental action. Thus, the government is requiring participants to engage in this activity (standing during the anthem) despite any reasonable objection thereto, and in frustration of the participant's first amendment rights NOT to stand during the anthem. Expressive and symbolic speech is a fundamental right that entitles Mia to choose when, or if, she will stand during the national anthem. Red City cannot dictate otherwise or else it violates the US Constitution's First Amendment. As a restriction on a fundamental right, strict scrutiny applies. In order to demonstrate that the requirement is valid, Red City bears the burden of demonstrating that the regulation is necessary to achieve a compelling governmental interest and that there are no less-restrictive alternatives. This is an extraordinarily difficult burden to meet and one which, based on the facts, Red City will not be able to satisfy. When the court views Mia's complaint in a light most favorable to Mia, it will deny Red City's motion because she has stated a viable claim for Red City's violation of her First Amendment rights when it required her to stand during the national anthem. It should also determine there are other ways for Red City to promote city unity and community pride.

Issue 3

XYZ will claim that it is a private entity and therefore the requirements of the First Amendment do not apply to it because there is no governmental action. The court will likely sustain XYZ's motion. In order for a violation of the First Amendment to be found, there must be governmental action interfering with one's exercise of one's First Amendment rights. Here, XYZ is not a governmental entity. There is nothing in the facts that indicates that XYZ is government owned, operated, or subsidized. As a private entity, XYZ is entitled to restrict the conduct of its employees as it desires. Therefore, when the Court analyzes Mia's complaint in the light most favorable to Mia, the fact will remain that XYZ's actions are private actions. The Court should grant XYZ's motion to dismiss Mia's claim against XYZ regarding violation of her First Amendment rights for failure to state a claim upon which relief may be granted.

Issue 4

How the court will rule on XYZ's motion that there is no prima facie case of retaliation.

The final issue is how the court will rule on XYZ's motion to dismiss on Liz's retaliation claim. Under Title VII, an employer may not retaliate against an employee. An employer under Title VII is a person who has 15 or more employees who work 20 full work weeks per calendar year. An employee is someone who works for an employer. In order to establish a prima facie case for retaliation, a plaintiff must show that she took a protected action, that the employer knew of the plaintiff's protected action, and that the employee suffered an adverse employment action as a result of taking the protected action. An adverse employment action is an action by an employer that has a materially adverse effect on the employee, such as reducing hours, reducing material responsibilities, or termination. A protected action under Title VII retaliation claims encompasses reporting sexual harassment.

Here, the court will likely deny XYZ's motion because there are sufficient facts to support a prima facie case of retaliation under Title VII. Joe was Liz's supervisor with the power to determine work schedules, and due to this power, he is an agent of the employer. Thus, Joe's actions are covered under Title VII. By filing a written complaint of harassment against Joe, Liz took an action protected under Title VII's retaliation prohibition. Moreover, Joe's statement that he was gone "thanks to you girls," which he made the day he returned, shows that Joe was aware of Liz's complaint. Moreover, by then taking Liz off the work schedule immediately following his return to work suggests that Joe took the action as a result of Liz's written complaint. Additionally, reducing hours for Liz may be considered an adverse employment action because it has a materially adverse effect on her by reducing her income and responsibilities at work. Because each element of a prima facie case of retaliation is met, the court will likely deny XYZ's motion.

Therefore, the court will likely deny XYZ's motion to dismiss because there are sufficient facts to support a prima facie case of retaliation under Title VII.

Question No. 5: Sample Answer

Issue 1

Chuck should assert the property-law theory of adverse possession. Based on this theory, Chuck will likely be successful, and his claim quiet to title to the portion of Whiteacre that the putting green and sand traps are located on will likely be successful.

The elements of adverse possession include that the possession be (i) continuous for the statutory period (in Pennsylvania the statutory period for adverse possession is 21 years), (ii) open and notorious (meaning that the true owner had the opportunity to see the possession, if they took such an opportunity), (iii) adverse (meaning the possession is exclusive, and not being possessed with the true owner), and (iv) hostile (meaning without the consent of the true owner). If a plaintiff can establish these elements, they will be entitled to be found the true owner of the portion of land that they adversely possessed for the statutory period. Additionally, adverse possessors are entitled to "tack," under the doctrine of tacking, if the following conditions are met: (i) they are in privity to the original adverse possessor, and (ii) they have continued to use the adversely possessed land in the same manner as the previous adverse possessor.

Chuck will be able to make a valid claim for adverse possession because he can properly establish the elements of adverse possession AND can properly establish the elements of "tacking" which will enable him to use both Arnie's period of adverse possession and his period of adverse possession in order to come to the statutory period required under Pennsylvania law.

Starting with the elements of adverse possession. Chuck can show that both he and Arnie (i) made a continuing use of the premises for the statutory period (this requires a showing of "tacking" which will be discussed below). Arnie began adverse possession of the premises in 1994, and the use was continued by Chuck until 2017, which is over the 21 year period required under Pennsylvania law. Second, Chuck can show that the possession was open and notorious, since the facts indicate that "Arnie openly used the encroached area as if he owned it on a continuous basis." Additionally, the facts indicate that Chuck used the encroached land in the same way as Arnie. Third, Chuck can show that the possession was adverse by both him and Arnie, since they used it exclusively, and no one else used the land, as noted in the facts. Fourth, Chuck can show that the use was hostile, since neither he nor Arnie ever had permission or consent from Bob to use the land.

Additionally, as briefly noted above, Chuck will be able to satisfy the "tacking" requirements, since (i) Arnie properly granted the land to Chuck by valid deed, and (ii) the facts indicate that Chuck has continued to use the land in the same manner as it was used by Arnie.

Therefore, Chuck can successfully assert a quiet title claim by adverse possession.

Issue 2

2(a) Arnie's conveyance gave Chuck a life estate and gave Don a vested remainder interest.

An estate in land lasting for the duration of the owner's life is called a life estate. A remainder interest is one that becomes possessory upon the natural expiration of another interest, such as a life estate.

The gift to Chuck ends when Chuck dies, thus creating a life estate. The property then automatically passes to Don without any action by Don. Don has a vested remainder because Don was alive when the life estate was created and he doesn't have to do anything to take possession.

2(b) Don's claims against Chuck will fail.

A remainderman's interest does not become possessory until the preceding estate ends. A holder of a life estate is permitted to use the property in any way he pleases so long as it does not interfere with the future rights of the remaindermen (for example by committing waste). Don does not share an interest with Chuck, he has no right to possess the property until Chuck's life estate expires, thus he has no entitlement to Max's rent and he has no right to use the property, it all belongs to Chuck until Chuck dies.

2(c) Chuck cannot recover the costs of the improvements.

Unless the grantor specifies otherwise, an owner with a present possessory interest is responsible for all the upkeep expenses of the property. If there is an extraordinary maintenance expense, the present possessor may be entitled to contribution, but this is only so where the work must be done in order to maintain the property. In this case Chuck's improvements were not necessary to keep the building functional, rather they were upgrades to the HVAC systems. Since these were not necessary to keep the property usable in the condition Arnie deeded it, Chuck made them at his own expense and it entitled to no contribution.

Issue 3

It is likely that Max will be able to recover under an implied-in-fact contract theory

In order for a contract to be enforceable, there must be an offer, acceptance and consideration. An offer is an objective manifestation by the offeror of his willingness to enter into the contract. An offer must have clear and definite terms, and the offeree must know of the offer in order to accept. An acceptance is the offeree's objective manifestation of willingness to be bound by the terms of the offer. Consideration is the bargained for exchange in legal position of the parties. A party that cannot recover under an express contract theory may be able to recover under an implied-in-fact contract if the parties' intent to contract can be inferred from their actions.

In this case, the police were benefitted by Max's services, but there is no evidence that the police ever entered into an express agreement with Max. Max should be able to recover under an implied-in-fact contract theory, because he towed and stored the vehicles, he was in the business of doing so, and the police asked him to do so. Thus, Max will be able to recover under an implied-in-fact contract.

Issue 4

Gloria has a meritorious contract defense on the ground of unconscionability.

In order for a contract to be valid, it must not be unconscionable. There are two types of unconscionability: procedural and substantive. Procedural unconscionability occurs when the process by which the contract was made was substantially unfair. This may include a great difference in bargaining power between the parties, or an overwhelming or rushed time to read and comprehend the material. Contracts of adhesion are also held to be procedurally unconscionable. Adhesion contracts are those given on a "take it or leave it" basis. Substantive unconscionability looks at the substance of the contract itself. A contract will be held to be substantively procedurally unconscionable if the terms are so one-sided and substantially favor one party. Contracts of adhesion are also held to be unconscionable

Here, Don gave Gloria a lengthy form loan agreement printed in small type and written in hard-to-understand language to sign. Gloria only had a ninth-grade education, which suggests that she may have a great deal of difficulty reading and understanding a complicated loan agreement. The agreement was long and in small type, which enhances its difficulty. When Don asked Gloria about a default on a job-training loan she thought had been a grant, it was clear to Don that Gloria had no understanding of credit and finance. Before signing, Don even assured Gloria that this was a good deal for her. These facts suggest the procedure in obtaining Gloria's signature were procedurally unconscionable, especially because Don was likely aware of Gloria's inability to understand it.

Gloria lived paycheck to paycheck on a part-time, minimum-wage job. She was in desperate need for food and rent so she applied for a \$200 loan from EZ. She was a single mother whose annual income placed her family below the federal poverty line, she had no savings account, and no access to alternate sources of credit. These facts suggest that Gloria truly had no other choice but to consult EZ for a loan in order to support herself and her children. Further, Don told Gloria that the deal is the only deal that [he'd] give [her]." These facts suggest that the contract constitutes a contract of adhesion, because Gloria had no choice but to sign the agreement as given or else she could not provide for herself and her family.

Substantive unconscionability is also likely met. Gloria was to make twenty-six, bi-weekly, interest-only payments of \$60, followed by numerous other payments that totaled up to \$1,820, representing a cost of credit of \$1,620 and an annual percentage interest rate of 838.45%. These terms are substantially one-sided in favor of EZ, and they were also buried in the long loan agreement. Therefore, the contract is likely substantively unconscionable as well.

Question No. 6: Sample Answer

Issue 1

Under the PA professional rules of conduct, Able should probably not accept the offer to go into business with his client Al. Under the RPC, a lawyer has a duty to refrain from conflicts of interest. This includes conflicts between his own interests and those of his client. He should not get into business with a client unless he tells the client in writing to get separate independent counsel, the business deal is fair to the client and he has informed written consent from the client. Here, Able should tell Al and Beds to get their own attorney to review this business deal. Independent counsel is needed since Able is one of the parties to the deal, he may make the deal to benefit him only. The deal seems fair since he would be only getting 10% of the shares in the LLC. However, the facts state Able is getting a value of \$10,000 while the legal fees he would charge would be \$4,000, so it may not be reasonable. Therefore, Able should probably not accept the deal.

Issue 2

2(a.) Under the PA BCL law, directors may oppose motions of the board but must make sure their dissent is recorded. Jim and Donna should make a written dissent on the motion at and/or immediately after the board meeting, they must ensure that the Secretary records their dissent in the meeting minutes and they must vote against the proposal.

2(b.) The children's changing their vote after their father leaves the meeting will not have any effect. The PA BCL provides that the right to dissent doesn't apply to a director who voted in favor of a motion.

Thus, if the children vote in favor of the proposal then they are forgoing any right to dissent later. The children must vote against the proposition in meeting for their dissent to have any effect.

A director is not permitted to change their vote in this manner.

Issue 3

Under the UCC, Bill may avoid the contract due to the destruction of the goods or he may accept the partially conforming goods at a reduced price from Al.

Article II of the UCC governs all transaction of goods. Goods is defined as all things movable at the time of identification for contract between buyer and seller. Here, the beds are a good under the UCC. Also, merchant under the UCC is defined as a person who regularly deals

with the goods in question. In a destination contract, which is typically evinced by language "FOB buyer's place of business" risk of loss does not pass onto the buyer until the goods are delivered at that place. The destruction must result from an unforeseen event, the event must not be the fault of either party, and the party seeking to avoid the contract must not have assumed the risk of loss. If the goods are completely destroyed, then the buyer may avoid the agreement completely. If the goods are only partially destroyed prior to the risk of loss passing, the buyer may avoid the contract altogether, or he may accept the undamaged goods at a reduced price from the seller releasing the seller from any other claim.

Al is a merchant of mattresses for he regularly sells the mattresses. Bill contacted Al expressing the need for low-costs beds for his new bed and breakfast. Because Al was offering Bill a discount, Bill agreed to purchase 15 outdated mattresses despite only needing 14 in order to have one as a spare. The beds being at the discounted rate served as the basis of the bargain because Bill expressed that he was on a tight budget. The one-page confirmatory memo from Al indicated that the delivery was to be "F.O.B. Bill's bed and breakfast." The contract did not mention the terms for risk of loss, and it indicated that payment was due within 10 days of delivery. Since it was a destination's contract, the risk of loss did not pass unto Bill until the goods were delivered at his place of business. However, that night a tree fell on the truck holding seven mattresses and rain damaged all seven of the mattresses in that truck.

Upon learning of the loss of the seven mattresses due unforeseeable event, i.e., the lightning storm that caused a tree to fall on the truck, Bill has the option of avoiding the contract completely. Alternatively, Bill may inspect the mattresses and accept the remaining conforming goods at a reduced price. Because the risk of loss has not passed onto Bill yet, upon learning that the goods were partially destroyed, Bill may accept the conforming goods at a reduced price from Al and Bill must release Al from any future claim.