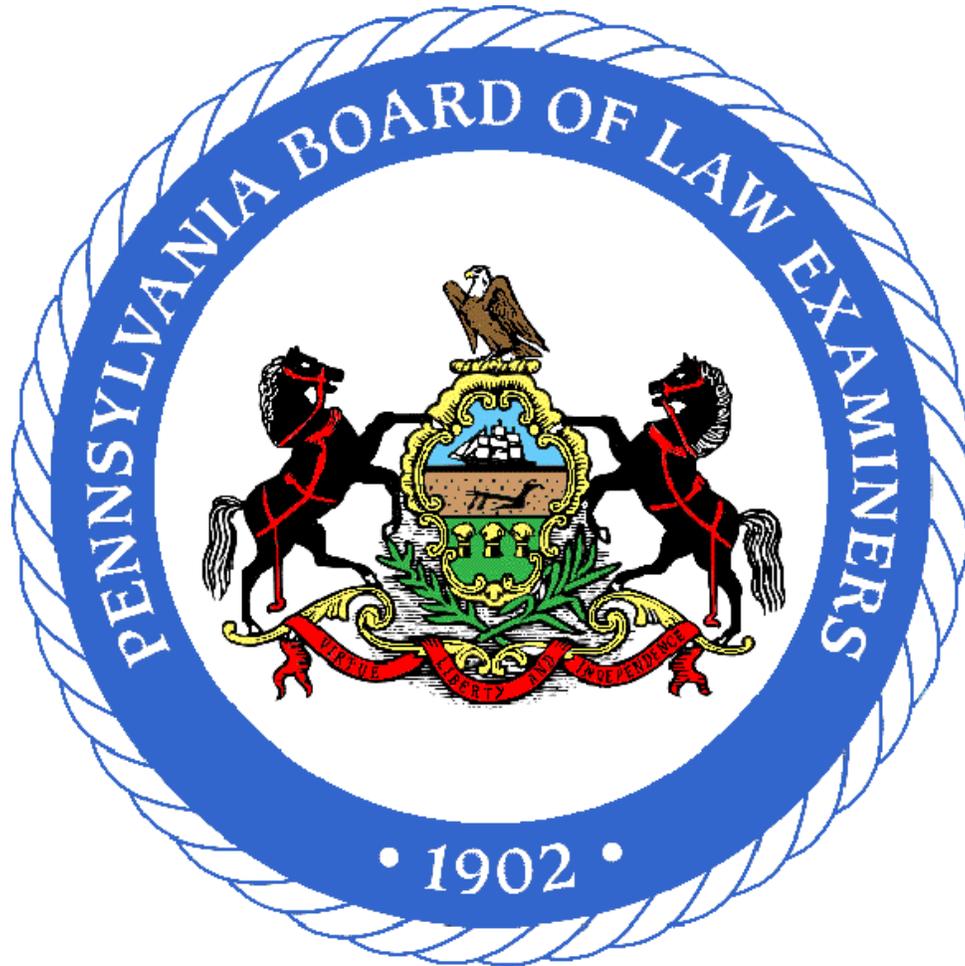


# JULY 2019

# PENNSYLVANIA BAR EXAMINATION

---

## Sample Answers



Pennsylvania Board of Law Examiners  
601 Commonwealth Avenue, Suite 3600  
P.O. Box 62535  
Harrisburg, PA 17106-2535  
(717) 231-3350  
[www.pabarexam.org](http://www.pabarexam.org)

# Performance Test: Sample Answer

## Issue 1

### Memorandum of Law

To: Lilly Reese, Managing Partner  
From: Applicant  
Re: Ethan Aaron Traffic Stop  
Date: July 30, 2019

On July 30, 2019, you requested that I review the documents provided in regards to the criminal charges against our client, Mr. Ethan Aaron. After reviewing the documents provided in the File and Library I was asked to draft this legal memorandum addressing whether we will be able to successfully defend Mr. Aaron against the following charges: (1) Driving Under the Influence (75 Pa.C.S. § 3802(d)(1)); (2) Failing to drive within a single lane on a roadway laned for traffic (75 Pa.C.S. § 3309); and (3) Operation without required financial responsibility (75 Pa.C.S. § 1786(f)). Specifically, you asked me to review (1) what legal standard was required for challenging whether an officer has probable cause or reasonable suspicion to pull someone over and whether the officer lacked probable cause or reasonable suspicion to pull Mr. Aaron over. You also requested that I consider (2) whether we will be able to successfully defend Mr. Aaron against the charges outlined above. I have reviewed the files provided and have included my answers to your questions on each issue below. Please let me know if I can be of further assistance.

## Issue 2

### I. Standard for Traffic Stop and Validity of Aaron's Traffic Stop

The issue is whether Officer Smith lacked probable cause or reasonable suspicion to pull Aaron over. Officer Smith needed probable cause to pull Aaron over and had probable cause because of Aaron's violation of 75 Pa. C.S. § 3309. Therefore, the stop was legal and we will be unable to have the charges dismissed at this time.

The analysis of quantum of cause required for a traffic stop begins with 75 Pa.C.S.A. § 6308(b) which states: "Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number of the driver's license, or to secure such other information as the officer may reasonably believe to be necessary." Further, "Traffic stops based on a reasonable suspicion: either of criminal activity or a violation of the Motor Vehicle Code under the authority of § 6308(b) must serve a stated investigatory purpose." *Commonwealth v. Jesse Ray Bush citing Commonwealth v. Feczko.*

For a stop based on the observed violation of the vehicle code or otherwise non-investigable offense, an officer must have probable cause to make a constitutional vehicle stop. *Commonwealth v. Jesse Ray Bush citing Commonwealth v. Feczko*. Mere reasonable suspicion will not justify a vehicle stop when the driver's detention cannot serve an investigatory purpose relevant to the suspected violation. *Id.* Where the vehicular stop is to determine whether there has been compliance with the Commonwealth's vehicle code, it is incumbent upon the officer to articulate probable cause to believe that the vehicle or the driver was in violation of some provision of the code. *Commonwealth v. Jesse Ray Bush citing Commonwealth v. Slattery*. Under the Pennsylvania Supreme Court, probable cause is, "made out when the facts and circumstances which are within the knowledge of the officer at the time of the stop and of which he has reasonably trustworthy information sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime." *Commonwealth v. Jesse Ray Bush citing Commonwealth v. Martin*. The question is not whether the belief of the officer was correct. *Commonwealth v. Jesse Ray Bush citing Commonwealth v. Martin*. Rather, the Supreme Court requires only a probability and not a prima facie showing of criminal activity. *Id.* In determining whether probable cause exists, the Supreme Court applies the totality of the circumstances test. *Id.* However, Pennsylvania makes clear that a police officer has probable cause to stop a motor vehicle if the officer observes a traffic code violation, even if it is a minor offense. Further, 75 Pa. C.S. § 3309 is a violation of the vehicle code and addresses when driving on a roadway laned for traffic. It states, "A vehicle shall be driven nearly as practicable entirely with a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety."

Here, because Officer Smith's stop was for an observed violation of the vehicle code, 75 Pa. C.S. § 3309, he needed probable cause. His stop was based on 75 Pa. C.S. § 3309 because he states in his report he observed Aaron's car had "swerved into the passing lane in an unsafe manner." However, because PA has made clear a police officer has probable cause to stop a motor vehicle if the officer observes a traffic code violation, here 75 Pa. C.S. § 3309, Aaron's stop was valid. Therefore, the standard for a traffic stop is different depending on the stop. In the case of an observed violation of a vehicle code, probable cause is needed. Further, probable cause is presumed when a police officer observes a traffic code violation, therefore, because Officer Smith witnessed Aaron swerve from his lane in an unsafe manner, Aaron violated 75 Pa. C.S. § 3309. Therefore probable cause was presumed and the stop would be valid.

In conclusion, Officer Smith needed probable cause to pull Aaron over and had probable cause because of Aaron's violation of 75 Pa. C.S. § 3309. Therefore probable cause was presumed and the stop would be valid. Accordingly, the charges will not be able to be dismissed right away.

## **Issue 3**

### **II. Driving Under the Influence**

Mr. Aaron was charged with driving under the influence with trace amounts of the metabolite of THC in his blood stream. Upon police request, Mr. Aaron submitted to a blood test which generated this result. Two weeks prior, on July 15, Mr. Aaron had engaged in a

medical marijuana treatment for his neurological condition. He was properly enrolled in the Pennsylvania Medical Marijuana program, but only engaged in consumption of medical marijuana on two occasions, the last being two weeks prior to being pulled over. The statute that he was charged under makes it a chargeable DUI to operate or be in control of a motor vehicle under the influence of any amount of the metabolite of a controlled substance, this includes THC, the metabolite in marijuana. 75 Pa.C.S. § 3802, 35 P.S. §780-104. There appears to be no current case law as to the status of medical marijuana in Pennsylvania and the DUI laws.

Under the law as written, Mr. Aaron is guilty of the charged DUI offense because he operated a vehicle with the metabolite of a controlled substance in his system. As the statute is written he is guilty and we will not be successful in defending him.

## **Issue 4**

### **III. Failing to Drive within a Single Lane of Travel**

The offense is failing to drive within a single lane of travel. In Pennsylvania, a vehicle shall not move from its lane of travel until the driver has first ascertained the movement can be made safely [ § 3309]. Furthermore, when there are two lanes of travel, a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle more when making a left turn [ § 3309].

Aaron swerved into the center lane twice while driving. He did not do so before looking to assure no cars were in the lane and he did not use his turn signal. Also, he did not move into the center lane with the purpose of passing another vehicle or making a left turn. Therefore, because Aaron swerved into the center lane and did not do so for a lawful reason, he is guilty of failing to drive within a single lane of travel.

## **Issue 5**

### **IV. Whether Mr. Aaron can be convicted of driving without car insurance.**

Mr. Aaron cannot be convicted of driving without car insurance as the traffic code pertains only to the owner of a motor vehicle. 75 Pa.C.S. § 1786(b) & (c) require that each motor vehicle registrant certify that the registrant is financially responsible at the time of registration and states that upon registration the owner of the vehicle is deemed to have given consent to the DOT or police to produce proof of financial responsibility upon request. 75 Pa.C.S. § 1786(f) makes it a summary offense for an owner of a motor vehicle for which the existence of financial responsibility is a legal requirement for its legal operation to operate the motor vehicle or permit it to be operated on a highway without the required financial responsibility.

This summary offense is specific as to placing liability on the owner of the motor vehicle. There is no terminology that would indicate the driver would be found to have committed this offense if the driver was not also the owner. Here, Mr. Aaron was the individual driving the car. Officer Smith was entitled to ask for proof of insurance. However, Mr. Aaron was not the owner

of the car. The owner of the car was his son's friend. Although the car did not have the required financial responsibility, it does not matter regarding liability for Mr. Aaron. Only the owner can be liable for operating a motor vehicle or permitting operation of a motor vehicle without financial responsibility. Mr. Aaron was not the owner of the car. Therefore, Mr. Aaron cannot be convicted of operation of a motor vehicle without financial responsibility.

## Question 1: Sample Answer

### Issue 1

**Yes, if Jen files a procedurally proper petition, the photocopy of Bill's will will be admitted to probate.**

Under the Pennsylvania Probate, Estate and Fiduciaries Code, a will can be revoked in a number of ways. A will can be revoked by a physical act of the testator with the intent to destroy it or by a third party with specific instructions from the testator, or by publishing a new will or codicil. When a will is in the sole possession of the testator and it cannot be found at their death, or is found in a destroyed condition, then the will is presumed revoked by the testator. When the will is in possession of a third party and is destroyed, however, the will is not presumed to be revoked. Instead, a copy of the will may be admitted to probate if it is shown that the copy of the will is an unaltered version of the original and the original was executed properly. To determine if it is unaltered and represents the original will, parties may offer extrinsic evidence to validate that the original is adequately represented by the photocopy.

Here, at Bill's death the original copy of his will has been destroyed by a shredder. It was destroyed by Luke's law office, not by Bill and Bill was not in possession of the will at his death so there is no presumption of revocation. Bill did not direct Luke to destroy the will, but instead it was destroyed due to a clerical error in the office during a move by either Luke, Lisa, or Leo. It is clear from the facts that Bill did not intend to revoke his will. Fortunately, Bill had a photocopy of his will sent to him by Luke. We know that the original was properly executed on May 6, 2018. Therefore, there were no problems with the original. Jen can show that the photocopy of the will is an adequate representation of the original through testimony from the law office who "remember[s] everything" and "can tell the court what's what." Moreover, Jen also has the letter from Luke to Bill stating that the photocopy is a copy of the original will. Because Jen has adequate evidence to show the photocopy of the will represents the original and the original will was executed properly and not revoked by Bill, the photocopy will be admitted to probate.

Thus, the photocopy of the will be admitted to probate.

### Issue 2

**Karen will receive the funds in the bank account following Bill's death because she was the co-owner.**

A joint account is one in which more than one person can make withdrawals and use the account as their own. A joint account comes with survivorship rights, even if no survivorship rights are used in the creation of the account, unless, at the time the account is created, a different intent is expressed by the creator. It does not matter if only one party contributes money to the account or is sole user of the account during their lifetime.

Here, Luke created a joint account with Karen. The creation made Karen a joint owner and when Bill signed forms he named Karen as the co-owner. Moreover, Karen had the right to withdraw funds from the account. From the facts given, Karen is the sole owner of the account after Bill's death as there was no language of intent to not have survivorship rights when the account was created. It does not matter that Bill was the only one to contribute to the \$300,000 in the account. Because it was a joint account, Karen became entitled to the account at the time of Bill's death. Therefore, the funds will not fall into Bill's estate and be received by Jen. Instead, the funds will go to Karen.

Thus, Karen is entitled to the funds in the account.

### **Issue 3**

**Yes, Luke violated the Pennsylvania Rules of Professional Conduct (PRPC) when he assisted Bill, a non-lawyer, in his will drafting business.**

The PRPC governs the practice of law in Pennsylvania. Under the PRPC, a lawyer is not permitted to help a non-lawyer participate in the unauthorized practice of law. A lawyer may supervise and oversee a non-lawyer's work. This is allowable because the attorney is supervising the work and then taking on the work as their own. Ultimately, the responsibility will fall on the attorney in that instance. In addition, a lawyer may provide free classes to non-lawyers to teach them about legal issues without violating the PRPC, but a lawyer may not assist them in making a profit from performing legal work.

Here, Bill asked Luke to help him with a will drafting business. In exchange for helping teach Bill how to draft wills, Luke would be paid \$20,000 by Bill. Luke then coached Bill on the basics of estate planning law, which helped Bill to get paid for preparing 20 wills for clients. Luke's arrangement with Bill clearly violates the PRPC. Luke is taking money from a non-lawyer, for teaching him how to draft wills in order to start a legal business. Luke is not supervising the creation of the will, but instead is teaching Bill how to make them. Moreover, he is aware that Bill is being paid for his work creating wills. As such, this is clearly helping a non-lawyer with the unauthorized practice of law. Luke should not have accepted any meetings with Bill or any money from Bill to teach him the basics of estate planning. Luke was well aware that Bill was trying to make a profit by drafting wills for his clients.

Thus, Luke violated the PRPC when he assisted a non-lawyer with the unauthorized practice of law.

### **Issue 4**

**The \$50,000 commission check should be reported on Bill's estate's income tax return.**

The IRC considers gross income to be income from any source. Gross income must be reported on taxpayer's tax returns, minus any allowable deductions. In determining when a taxpayer needs to report something as gross income on their tax return, depends on whether they are a cash-basis taxpayer or an accrual basis taxpayer. A cash-basis taxpayer is one that

accounts for their income at the time they receive the cash. An accrual basis taxpayer accounts for income at the time that it is earned and the amount is ascertainable. Income received by a cash-basis taxpayer after their death is treated as income for the estate, not the taxpayer. If he received the cash or had access to it before he died then it would be on his final tax return.

Here, the facts tell us that Bill is a cash-basis taxpayer. We also know that Bill died on October 28, 2018 from a heart attack. Then, we learn that on December 22, 2018 Bill's employer, Pennsylvania Life Insurance Company, issued him a check for \$50,000 for his sales commissions that were earned for life insurance and annuity products sold by Bill before he died. Because Bill is a cash-basis taxpayer and received the \$50,000 almost two months after his death, the estate will report the income on the estate income tax return.

Thus, the estate will report the \$50,000 as income on the estate income tax return.

## Question 2: Sample Answer

### Issue 1

**a.** If Al proceeds with his plan to have his new corporation purchase the bakery and the directors and shareholders of GBI learn of the sale after it has occurred, under the Pennsylvania Business Corporation Law the shareholders should assert a breach of Al's fiduciary duties by taking a corporate opportunity from GBI to challenge the purchase. Directors of Corporations have fiduciary duties to the corporation. Those fiduciary duties include the Duty of Loyalty. One way a director can breach the fiduciary duties is by taking a corporate opportunity. The corporate opportunity doctrine states that if a director knows of an opportunity in which the corporation may have an expectancy or interest, the director must first disclose the opportunity to the board, the board of directors must either pass on the opportunity or be unable to engage in the opportunity, and then, with board permission, the director may take the opportunity.

Here, Al has likely breached his duties to GBI. Al is aware that this bakery represents an opportunity in which the corporation arguably has an interest. Al, Ben, and Carl had all discussed purchasing this bakery prior to the deaths of the latter two men. Additionally, Al knows that the corporation should have an interest in this opportunity, GBI would be able to increase its profits by controlling the cost of baked goods. Finally, Al knows that GBI is capable of taking advantage of this opportunity, it has sufficient reserves to pay cash for the bakery. Thus, instead of behaving in good faith and the reasonable best interests of the corporation, Al will have breached his duty by buying the bakery and usurping the corporate opportunity if he fails to disclose it and instead acts out of "anger" and "dissatisfaction." Al is also arguably competing with the corporation by taking profits that should rightfully belong to the corporation all for himself. Therefore, the directors and shareholders should assert a violation of Al's fiduciary duties by taking a corporate opportunity as the substantive argument against Al.

**b.** GBI should seek the equitable remedy of a constructive trust in the corporate opportunity challenge and/or an accounting. A constructive trust is an equitable remedy that may be provided if one party has become unjustly enriched at the expense of another. The name "trust" is not connotative of an actual trust, but rather the fact that a property will be taken from one party and then provided to another party. Constructive trusts can be imposed against actual property or ill-gotten cash gains. The accounting would require the usurping party to account for all profits and pay them to the corporation.

Here, GBI should seek to have a constructive trust imposed against Al containing the bakery and any proceeds Al made from it. Al has unjustly enriched himself by taking a corporate opportunity to which he was not entitled. The corporation was entitled to decide if it wanted the bakery. Additionally, Al was not entitled to any profits derived from the operation of the bakery (except insofar as GBI, as the true owner of the bakery, would use them for distributions to stockholders). Therefore, any profit that Al has derived from his ownership of the bakery should also be placed in constructive trust or accounted for and paid to the corporation.

## **Issue 2**

If Packages seeks to enforce the oral agreement between itself and AI, GBI will likely not be successful in defending itself by asserting that the agreement was not enforceable under the Uniform Commercial Code (UCC). This is because both parties are merchants, and Packages faxed GBI a written and signed confirming memo immediately following the deal that AI read and chose not to respond to within 10 days. Under the UCC, a contract for the sale of goods over \$500 must generally satisfy the statute of frauds. This requires that the contract be in writing, signed, and include the essential terms of the deal (quantity, subject matter, and parties). However, where an oral contract for the sale of goods over \$500 is made between merchants, and a party to the contract subsequently sent a confirming memo in writing and signed immediately following the deal, the contract may nonetheless be enforceable. If the party receiving the confirming memo fails to respond within 10 days the contract will be considered enforceable under the UCC. Additionally, both parties must be merchants in order for this exception to the statute of frauds to apply. A merchant under the UCC is generally defined as a business person who regularly deals in the type of goods at issue or being sold.

Here, the facts establish that AI telephoned Packages regarding the purchase of bags and containers. AI would be considered a merchant because GBI had regularly been purchasing bags and containers used for packing GBI products. Packages would also be considered a merchant because Packages regularly sold and supplied bags and containers. The facts further establish that AI, acting on behalf of GBI, reached an oral agreement with an authorized representative of Packages for GBI to purchase various bags, boxes, and packaging materials at a total cost of \$5,000. Because this agreement constituted a contract for the sale of goods over \$500, it would be subject to the statute of frauds. However, shortly after the oral agreement was made, Packages faxed a confirming memo (which was signed by a representative of Packages) detailing the oral agreement that had been reached, accepting GBI's order, and setting forth the type and quantity of items ordered. AI carefully read the confirming memo upon receipt, but ultimately filed it away without taking further action. While the initial oral agreement would be considered unenforceable under the statute of frauds, because Packages sent a signed, confirming memo containing the essential elements of the deal shortly after the oral agreement, AI was required to then respond to the confirming memo. Specifically, if AI wanted to reject the deal and make it unenforceable, he needed to respond to the confirming memo within 10 days. Because AI did not respond to the memo, GBI will thus likely not be able to successfully assert that the deal is unenforceable under the UCC.

## **Issue 3**

Under the UCC, Packages will likely be able to enforce the interest provision in the confirming memo that was never discussed because the term did not materially alter the deal, the original agreement did not expressly limit acceptance to its terms, and GBI did not object to the term within a reasonable amount of time. Under UCC 2-207, where both parties are merchants to a deal and one party has proposed additional terms in accepting the deal, the additional terms will be included in the underlying contract unless: 1) the additional term(s) materially alters the deal; 2) the initial agreement could only be accepted by strictly adhering to its terms; or 3) the party receiving the proposed term objects to it within a reasonable amount of time. Under the

UCC, a term is considered material if it would surprise or otherwise creates hardship in the event that the deal went forward.

Here, the facts establish that in sending a confirming memo Packages included an additional term which had not been discussed by Al or Packages when they spoke by telephone. Specifically, the proposed term stated "any sums outstanding on this order for more than 30 days from the date of invoice shall bear interest rate of 1.5% per month." Al carefully read the confirming memo, but filed it away without taking any further action. Because Al and Packages are both considered merchants under the UCC, the proposed term would be viewed under the test established by UCC 2-207. Here Packages will likely be able to enforce the proposed term because the inclusion of a modest interest rate of 1.5% per month in the event that GBI did not timely pay would likely not materially alter the deal itself. GBI should not be surprised or experience hardship at such a term in the event that term became a part of the contract. Therefore, Packages will likely be able to enforce the interest provision in the event that GBI fails to pay within 30 days of the invoice.

### Question 3: Sample Answer

#### Issue 1

**Assuming a theft was committed, the facts, if proven, support Thad being charged with robbery and second-degree murder because he caused a death in the course of committing an inherently dangerous felony, and he caused Mary serious bodily harm while in the course of committing a theft.**

In Pennsylvania, a person commits a robbery when, in the course of committing a theft, they cause another serious bodily harm, or they otherwise use force, however slight, on the person being deprived of property.

Here, Thad caused Mary's neck to be impaled on a spike by throwing Mary to the ground in the course of taking her phone from her. Assuming that the seizure of Mary's phone constitutes theft, Thad caused her serious bodily harm in the course of committing a theft. Therefore, the facts support Thad being charged with robbery.

A person is guilty of second-degree murder in Pennsylvania when, in the course of committing an inherently dangerous felony, they cause the death of another. Intent to kill is not required for second-degree murder, only intent to commit the underlying felony. Robbery is an inherently dangerous felony such that it can constitute the underlying felony for second-degree murder.

Here, in the course of committing a robbery, Thad's actions caused Mary's death. Thad threw Mary to the ground, which caused her to impale her neck on a spike resulting in her demise. Assuming that a theft is found, Thad's commission of robbery constitutes sufficient intent for the underlying second-degree murder charge. Because Thad's actions in the course of committing this robbery resulted in Mary's death, the facts support a charge of second-degree murder.

#### Issue 2

**Detective Stan's warrantless seizure of Thad's sneakers was permissible under the PA Constitution because the evidence was in plain view of the officer and immediately incriminating.**

Generally, under the Pennsylvania Constitution a warrant is required to seize tangible evidence when the owner of said evidence has a reasonable expectation of privacy in the evidence. There is an exception to this requirement under the plain view doctrine. Under the plain view doctrine, an officer may seize evidence without a warrant when the evidence is visible 1) from a position that the officer is permissibly allowed to occupy, and 2) the evidence is immediately incriminating upon view. Additionally, the officer must have a lawful right to seize the evidence.

Here, detective Stan saw Thad standing outside on the public street, while Stan was also on that street. Stan may permissibly occupy a public street, and Stan knew from examining the

place of Mary's death that the perpetrator would likely have blood on his sneaker and clothes as the scene showed a bloody sneaker footprint and blood sprayed around the scene. Seeing the blood on Thad, after hearing from Mary that Thad was angrily advancing on her, Stan had sufficient cause to think that this evidence was immediately incriminating. Also the risk of contamination or destruction of the evidence allowed its seizure. Therefore, Detective Stan's warrantless seizure of Thad's sneakers was permissible under the PA Constitution under the plain view doctrine.

### **Issue 3**

**The Commonwealth should respond that Mary's tape-recorded cell phone call falls under the hearsay exception for a present sense impression, and the court should overrule Thad's objection based on this exception.**

Hearsay is an out of court statement used to prove the truth of the matter asserted. Generally, hearsay testimony is inadmissible, but it may be admitted if the statement falls under a hearsay exception. A hearsay exception exists for a statement that is the declarant's present sense impression. An out of court statement satisfies this exception if the individual making it is describing a situation that she is currently witnessing.

Here, Mary's statement that Thad was on the scene was made out of court, and is being used by the Commonwealth to show the truth of what is asserted, i.e. the fact that Thad was at the scene of Mary's death immediately beforehand. It is therefore hearsay. However, Mary made the statement while witnessing Thad's approach, and therefore her statement falls under the hearsay exception for a present sense impression, and is admissible.

### **Issue 4**

**If Stan proves Louise's extramarital affair, it will give Stan a stronger claim for alimony, but it will not affect Stan's claim for equitable distribution.**

Under Pennsylvania family law, a factor to determine if alimony should be required includes marital misconduct. Marital misconduct includes adultery. In determining equitable distribution, however, marital misconduct is not considered.

Here, Stan's spouse has been having an adulterous extramarital affair for two years of which Stan has incontrovertible proof. Therefore, the court will consider Louise's marital misconduct in determining whether to award alimony to Stan. However, it will not consider Louise's marital misconduct in determining equitable distribution between Stan and Louise.

## Question 4: Sample Answer

### Issue 1

KidPop should argue that the State A law is unconstitutional under the doctrine of preemption, and he will likely be successful. The doctrine of preemption is rooted in the Supremacy Clause of the US Constitution. Express preemption provides that if Congress has passed legislation concerning an issue prohibiting the state from regulating in that area, states cannot subsequently pass legislation that is directly in conflict with that issue. If a state law is in direct conflict with a federal law, the federal law supersedes the state law and the state law is unconstitutional. Furthermore, if Congress has indicated an intent to have exclusive legislative authority over a particular field or industry, states are preempted from passing legislation in that field.

In this case, Congress has passed the Fed Ad Law that provides that no state shall impose any requirement or prohibition regarding the advertising of foods based on the inclusion of artificial dyes. State A also passed its State Ad Law, which provides that no foods that contain artificial dyes may be marketed to children under fifteen years old. On its face, the State Ad Law directly conflicts with the Fed Ad Law because Fed Ad Law contains a prohibition on a State restricting or prohibiting the advertising of artificial dyes in food. Because the State Ad Law directly regulates artificial dyes in foods it directly conflicts with the Fed Ad Law. Thus, the court will likely find the State Ad Law is preempted.

### Issue 2

State A is unlikely to be able to properly exercise personal jurisdiction over Smith but is likely to be able to do so over Jones. A court is required to have personal jurisdiction over individuals or companies in actions brought in its courts. In analyzing whether a court has personal jurisdiction two questions must be asked. First, whether the state's laws permit personal jurisdiction, i.e. by a state's long-arm statute, and second, whether exercising jurisdiction comports with due process under the U.S. Constitution. This second question requires analyzing whether the defendant has had minimum contacts with the state such that traditional notions of fair play and substantial justice permit jurisdiction. Personal jurisdiction may either be general or specific. Specific jurisdiction arises when the cause of action occurs within the state where the claim is brought. General jurisdiction for individuals can arise when the defendant is domiciled in the state, has consented to jurisdiction, waives a challenge to personal jurisdiction, or is served with process within the state. An individual's domicile is defined as where the person resides with intent to remain. Determining the intent to remain requires analyzing a defendant's behavior. Factors include where they are registered to vote and drive, whether they have full-time long-term employment, ownership of real property versus renting, or even a defendant's statement.

Here, the facts state that the possibility of personal service to establish personal jurisdiction is to be excluded. Furthermore, the defendants are challenging the action and, assuming it has been challenged properly, the defendants cannot be said to have consented or waived personal jurisdiction. The court also does not have specific jurisdiction over the claim as

the cause of action appears to have arisen in State B as that is where the attack occurred. As such, it must be analyzed whether the state's law permits personal jurisdiction and whether the U.S. Constitution permits it. The state's long-arm statute allows jurisdiction to the extent permissible under the U.S. Constitution. The U.S. Constitution requires minimum contacts with the state that here, likely mean is the defendant domiciled in State A. Smith cannot be said to be domiciled there nor does he have sufficient contacts with State A. He lives and works in State B and has only been to State A once, about ten years ago. Jones, on the other hand is likely to be found to have established State A as his domicile and therefore meet the minimum contacts test. Jones splits his time between State A and State B and does continue to work in State B, however, he has shown an intent to reside in State A while living with his fiancé in State A. He is looking for a house there, his fiancé lives in State A, he has registered to vote there, changed his car registration and driver's license to State A. He is also seeking full-time employment there. All of these factors contribute to a finding that Jones has changed his domicile from State B to State A. As such, State A likely does not have personal jurisdiction over Smith but does over Jones.

### **Issue 3**

a. Khalil can support his claim with the VP's comment to him about Christian values.

In Title VII claims, employees can support their claims by direct evidence or circumstantial evidence. Direct evidence is that which is discriminatory on its face and it requires no inferences to be drawn. Circumstantial evidence is that which appears to be neutral, but if inferences are drawn can show discrimination.

Here, Khalil can support his claim with the VP's comment as direct evidence of discrimination. The VP pointedly said that although Khalil is good at his job, "[they] can't put [him] in a director's position [because] our customer's want to buy American-made products from people who understand their Christian values." This is direct evidence of discrimination. No inferences need be drawn to determine that this comment meant that because Khalil was not Christian, he did not get the position.

b. KidPop can defend the Title VII claim under a mixed motive theory and argue that religion or national origin was only one factor for its decision.

Title VII allows plaintiffs who are in a protected class, which includes religion and national origin, to bring claims against employers who discriminate against them based on that status. Title VII affords employers the ability to defend these claims under a mixed motive theory. Under this theory, the employer asserts that the discriminatory reason was not the sole factor for its decision, but instead only one factor. Essentially, they must show the employee would have suffered the same fate even if the wrong reason wasn't considered. If the employer can show this, the employee's damages will be limited.

Here, KidPop has a strong argument that the wrong factors, national origin and religion, were only one factor in its decision. Khalil has a bachelor's degree in marketing, not a master's

degree, and 12 years of experience as an associate. He has not supervised any employees or managed a department. The positions he applied for ask for a master's degree and management experience as a preference. The people who are receiving the jobs over Khalil all have master's degrees and three-years' experience in management roles. These facts, taken together and without considering the VP's statement, show that KidPop's decision would have been made even without the VP's statement. KidPop would not have hired Khalil because he lacks the formal education and experience managing other employees. Despite this reality, the VP made the comment to Khalil, which as discussed above is direct evidence of discrimination, which amounts to workplace discrimination. Khalil would still have a valid claim against KidPop. But, because KidPop can defend under a mixed motive theory, Khalil's remedies will be limited.

Thus, KidPop should defend under a mixed motive theory arguing the VP's statement were only one factor, but his education and experience were such that it would have made the same decision anyway. This will have the effect of limiting Khalil's remedies.

## Question 5: Sample Answer

### Issue 1

**Tin's suit will be unsuccessful because the Condition Precedent to the contract did not occur.**

A contract is created when an offer is made, and subsequently accepted. A contract may also contain a Condition Precedent clause that suspends the obligation for both parties to perform until the happening of a said event. Until said condition is satisfied, neither party is obligated to perform. A condition precedent can be waived by the party seeking to enforce the condition either expressly or impliedly, and the other party bears the risk of loss when performing prior to said condition occurring.

Here, there is a contract to install new siding that will take effect upon Andy receiving disability insurance. If Andy never receives disability insurance, neither party is obligated to perform absent Andy waiving the condition. When Tin initially showed up to work, Andy stopped him because he had not yet received his disability payments, enforcing the condition precedent as stated in the contract. Tin then set Andy up with an insurance agent, and apparently relied upon that as assurance the claim would be successful. That reliance was Tin's burden to bear, as Andy successfully, and in good faith, stopped Tin from performing prior to the condition precedent being met. Therefore, Tin's suit will be unsuccessful because the condition precedent to Andy's performance was not and cannot be met.

### Issue 2

a. Based on Pete's cashing of the check she sent, Sue should assert the common law defense of accord and satisfaction, which will succeed. Accord and satisfaction occurs where a party to a contract agrees to accept a substitute performance from the other party instead of the previously agreed-on performance and there is a dispute as to the original contract. The agreement suspends the party's right to enforce the original contract until the other party either tenders the substitute performance or fails to do so. Satisfaction occurs when the party tenders the substitute performance and the receiving party accepts it. Thus the contract is satisfied.

Here, Sue genuinely disputed that she owed Pete \$3000, and instead offered to pay him \$1800. The legitimate dispute constituted the new consideration. By enclosing the statement and writing on the check that the \$1800 check was payment in full, Sue was making an offer to Pete to settle the dispute for \$1800. By cashing the check he accepted her offer. Though Pete crossed out her note of "final payment" by his conduct of accepting her offer and cashing it he implicitly agreed to her terms and Sue's obligation was satisfied. Therefore, Pete cannot now claim he is still owed the rest of the \$3000.

b. Sue will not be successful in arguing Pete is limited to the value of the tickets because she never satisfied her duty with the tickets. When parties agree to an accord that will satisfy the outstanding duty, the other party's right to collect the originally agreed on performance is not extinguished, but merely suspended until the substitute performance is done. Upon failure of the other party to satisfy the duty, the non-breaching party may elect to sue for either the original performance or the accord. Here, while Sue could have satisfied her duty with the tickets based on their agreement for the accord, her failure to do so reinstated Pete's right to claim the value of the originally agreed on performance, i.e. \$3000.

### **Issue 3**

Sue should argue that an easement by necessity exists over Lot 1 for the benefit of Lot 2, and will likely be successful.

An easement by necessity is established if (1) the lots were once under common ownership; (2) the easement by necessity existed because of the conveyance of one lot that severed the common ownership; and (3) the servient lot is completely landlocked. "Necessity" in this sense, refers to a strict necessity, where the land in question (the servient estate) can only be accessed through the dominant estate.

Under these facts, the lots were once under common ownership when Andy and Sue owned both of the lots as Woods. When the land was severed by conveyance, Lot 1 passed to Bill and Lot 2 became completely landlocked. The facts state that Lot 2 was completely surrounded on all sides by other tracts of land. The facts state that Lot 1, on the other hand, abuts a public road. Without crossing Lot 1, Lot 2 would be virtually useless since there is no access point to the road. Therefore, Sue will be successful in arguing that an easement by necessity exists.

### **Issue 4**

**Dave will be successful in his suit to recover his cash deposit because Sue breached the time is of the essence clause and did not produce clear title by the closing**

A marketable title is free from liens and encumbrances. A mortgage would make the title unmarketable. Typically, sale of land contracts are considered to be specifically enforceable and relatively lax in terms of fulfilling obligations by the date of closing. However, when a time is of the essence clause exists, it will be strictly enforced.

Here, there is a contract for the sale of land that contains a time is of the essence clause. Further, there is a mortgage on the land that cannot be satisfied out of the proceeds of the sale of Blackacre. Therefore Sue bears the burden of clearing title prior to May 1 and no later considering the time is of the essence clause. When Sue failed to provide a clear, marketable title on May 1, she breached the contract with Dave. While a court would typically allow for reasonable time to clear the title, the contract provided that time was of the essence, rendering Sue's breach material and actionable.

Ultimately, Dave will recover his deposit because Sue breached the sale of land contract that expressly provided time was of the essence by failing to render a marketable title to Blackacre by the date specified.

## Question 6: Sample Answer

### Issue 1

- a. Devin's age does affect the applicable standard of care in Paul's claim against him.

The issue is whether Devin's age affect the applicable standard of care in Paul's claim against him.

Negligence requires that the plaintiff prove duty, standard of care, breach of that standard, actual cause, proximate cause, and damages. When a defendant is a minor PA has special rules in the minor ability to be negligent. A minor 6 years or younger is assumed unable to be negligent, for a minor between 7 and 13 there is a rebuttable presumption that they are not negligent, and a minor older than 14 is presumed to be capable of being negligent that he can rebut. When a minor is being sued for negligence the standard of care is that of a reasonable minor with the same education, experience, knowledge and intellect.

Here, Devin is 15 years old. Based on his age his is presumed capable of being negligent in Pennsylvania. The standard of care owed will be that of which other 15 year old with the same education, experience, knowledge and intellect as Devin. Because he did odd jobs around Paul's house and Paul gave him a key, he would not be able to rebut that presumption.

Therefore, Devin's age does affect the applicable standard of care in Paul's claim against him.

- b. Paul's claim against Devin's parents will likely be unsuccessful.

The issue is what is the likelihood of success of Paul's claim for negligence against Devin's parents.

Negligence requires that the plaintiff prove duty, standard of care, breach of that standard, actual cause, proximate cause, and damages. Generally one does not owe a duty to control others, unless there is a special relationship such as employer/employee, or parent/child. A parent is not liable for their child's negligence unless they had a reason to know that the child had a propensity to do a certain activity, and they could have exercised reasonable control over their child.

Here, Devin's parents are generally not liable for the conduct of their child Devin. Devin is 15 and unless the parents knew that Devin had a tendency to destroy things and they had the opportunity to exercise reasonable control over Devin they will not be liable. The facts do not state that Devin's parents had knowledge of his propensity to destroy things, in fact the facts seem to suggest that Devin was a mature 15 year old if Paul was allowing him to come into his house when Paul was not home.

Therefore, Paul's claim against Devin's parents will likely be unsuccessful.

## **Issue 2**

Under the Pennsylvania Rules of Civil Procedure, Paul could file a motion to compel in order to require Devin to answer, but the court will likely rule in favor of Devin and deny the motion to compel.

Generally everything is discoverable so long as it is not protected by a privilege and is relevant. Something is relevant if it is likely to lead to evidence that will be admissible at trial. Here, Paul is seeking information about anyone who has ever paid Devin for odd jobs in order to determine if anyone else has suffered unexplained property damage who has employed Devin. A party can file a motion to compel if another party is not complying with a discovery request, the party filing must certify that they have made a good faith effort to resolve the dispute without court involvement. This request is over broad. If Paul was to obtain evidence of property damages from past jobs it would likely not lead to evidence that would be admissible at trial because he would not be able to use it in order to show that people who employed Devin in the past suffered unexplained damage so therefore Devin must have been the cause of the damage to his quilt. Paul should file a motion to compel under the Pennsylvania Rules of Civil Procedure, however the court will likely rule in favor of Devin and deny the motion to compel because the information is not likely to lead to evidence that will be admissible at trial.

## **Issue 3**

Evidence is admissible only if it is relevant -- that is, it tends to prove the existence or absence of some material fact more than if the evidence was not produced. Even relevant evidence may be precluded if its prejudicial effect substantially outweighs its probative value. Additionally, the PA Rules of Evidence do not allow a party to present evidence of an action to prove a person's character to show that the person acted in conformity with that character.

Here, the court should analyze the issue of Devin's previous mishap with Dave's lawnmower as a question of character evidence being used to show a Devin acted in conformity with that character in the situation with the quilt project. Further, the court should inquire whether a single instance of breaking a lawnmower and remaining silent about it has relevance to the suit since it may not demonstrate that Devin is generally careless or denies responsibility in general. Paul is clearly intending to use the evidence to show that Devin also acted in a similar fashion in this instance -- this directly violates the character evidence rule. Additionally, the single incident involving Devin breaking something of Paul's has very little relevance in showing a general carelessness, and his silence about the breaking has little relevance in showing he has a tendency to deny breaking things when confronted straight-on. The court will likely conclude that the incident is not admissible as it is character evidence and is of little relevance

## Issue 4

**If Paul invokes the doctrine of res ipsa loquitur Paul will bear the burden of initially proving each element of the doctrine, and Devin will bear the burden of showing that he was not in exclusive control of the quilt.**

Paul will bear the burden of proving each element of res ipsa loquitur. The doctrine of res ipsa loquitur requires the plaintiff prove: 1) that this type of harm cannot occur but for negligent actions at the hands of a party, 2) the defendant had a duty to the plaintiff and 3) other possible causes are sufficiently eliminated.

Paul will begin by arguing that this type of harm cannot occur but for a party's negligent action. Here, Paul completed a valuable quilt. Took a picture of it, then packed it away in a zipped bag to protect it. As far as Paul knew, prior to opening the bag at the competition, the quilt was in pristine condition, as shown in the photograph. If the quilt had stayed in the packaging, a conspicuous tear on the front of the quilt could not have happened. Paul had carefully put the quilt away and was supposedly the last to touch it. This shows that the harm, the tear in the quilt, could not have occurred but for negligence.

Paul will then show that Devin was in exclusive control of the quilt, and Paul's home. No one besides Paul and Devin had access to the quilt. The facts show that Paul lived alone, gave Devin a spare key to the house, studio keys, the code to disarm the security system, and that no one else had access to the keys or code. Additionally, Paul never allows anyone in the basement studio unsupervised, aside from Devin. After showing Devin the blanket, Devin was alone in Paul's house every day. This shows that Devin was in exclusive control and possession of the quilt.

While Devin might argue that something could have happened during the transport, the facts state that Paul carried the quilt rather than check it, he did not place it in the overhead bin or stow it under his seat, it remained in his eyesight, and unopened on the flight and in the cab. No one else was in his hotel room, and he held it himself while transporting it to the competition. At no point did anyone other than Paul have control of the bag.

Thus, other than Paul, Devin had exclusive access to the quilt, and this type of negligence, the tear, cannot happen on its own.

In conclusion, if Paul invokes the doctrine of res ipsa loquitur, he will likely be successful if Devin only denies that he did any damage.