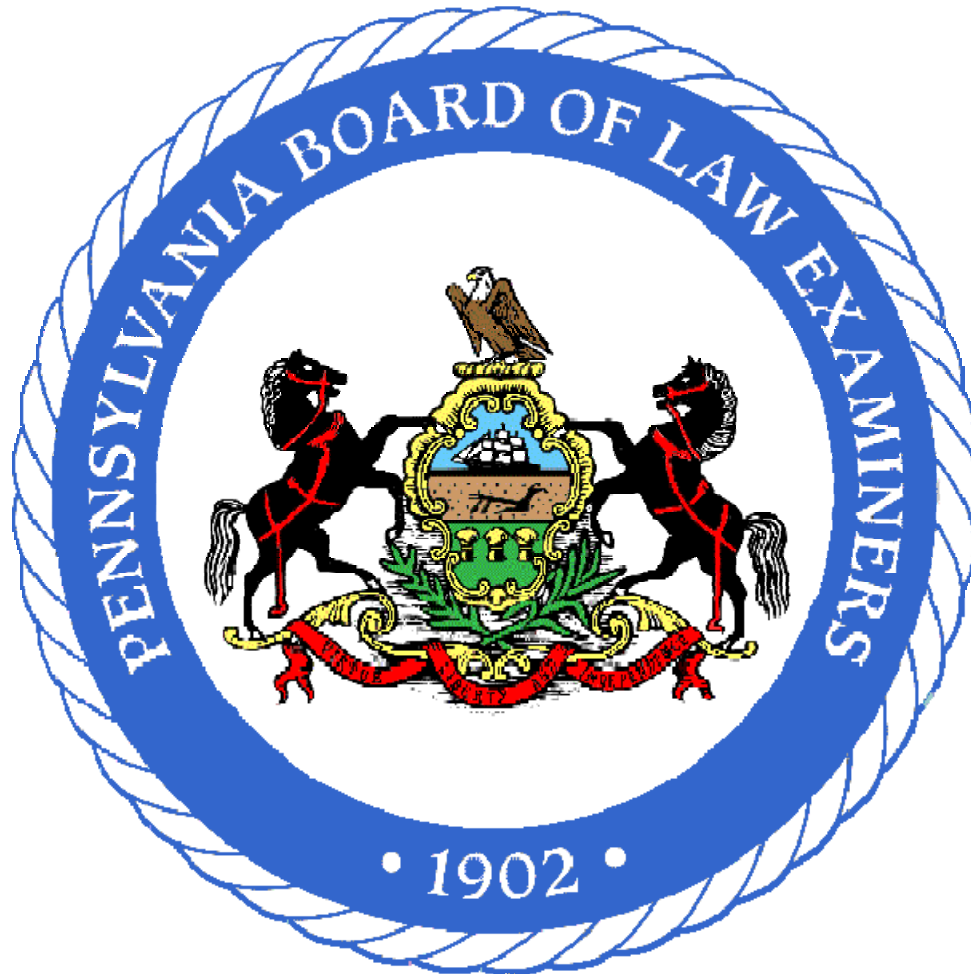


JULY 2009

PENNSYLVANIA BAR EXAMINATION

Sample Answers



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Performance Test: Sample Answer

Date: July 28, 2009
To: Steven Sauer
From: Applicant
Re: Bridge Zoning Appeal

Statement of Facts

The Bridges reside in Madison City (p. 4). The Bridges acquired Lot 15, Avenue B in 1994 and at the time it was a conforming lot as to the area (p. 4). The size of Lot 15 is 5,000 square feet. The Bridges purchased Lot 30, Avenue A in 1995 for investment purposes (p. 5). Lot 30 is 11,000 square feet in size (p.5). The Bridges reasonably believed that Lot 30 would increase in value over time, and could be sold if the Bridges needed additional funds (p.5). The Bridges wished to keep Lot 30 until they retired, where they could sell it and use the proceeds as part of a retirement fund (p.5).

The lots were taxed as separate lots and each lot has a separate tax number (p. 5). Lot 30 has a fence that completely surrounds it, with a gate that is wide enough for a vehicle to fit through to get to Avenue A (p. 5). In 1995, the Bridges installed a gate between Lot 15 and 30, and then installed new fencing down their property lines and then across the side yards to the house, which enclosed the back yard (p.6). The reason for this adjustment was to enable the Bridge's dog to run free out of the back door, and so the new lot could be accessed (p. 6).

Lot 30 also contains a shed, which the Bridges used to store their garden and lawn equipment, mowers, shovels, hoses and other lawn equipment (p. 6). Lot 30 also contains the Bridges garden, which is located behind the shed (p. 6). The garden is watered by the Bridge's sump pump and Lot 30's lawn is watered from a hose bib at the back of the Bridge's house located on Lot 15 (p.6). Lot 30 also contains the Bridge's lawn furniture and the Bridges explained that they often go onto Lot 30 to sit in the sun and that their kids play there as well (p. 6). Further, the shed is powered through a power line that is run to the shed from the Bridge's house.

When the Bridges purchased their house on Lot 15 in 1994, the house was conforming under the statute because the minimum lot size was 5,000 square feet. When the Bridges purchased Lot 30 in 1995, they became owners of two adjacent lots. When the Board enacted Zoning Ordinance 1775 in 1997, Lot 15 became nonconforming because it was less than 7,500 square feet and pursuant to Section 304.3, Lot 15 was merged into Lot 30 in order to create a conforming estate. Mr. and Mrs. Bridge are appealing a ruling from the Code Enforcement Officer, Mr. Eastwood, that the two adjacent lots owned by the Bridges constitute one integrated lot as a result of merger pursuant to Madison City Zoning Ordinance Section 304.3 (p. 1).

The Bridges desire to sell lot 30, but cannot do so if the lot is not a legally separate lot from the lot on which their house is located.

Issue Presented

Whether the properties located at Lot 15 Avenue B and Lot 30, which are both owned by the Bridges, have merged into one integrated lot thereby preventing the Bridge's sale of Lot 30.

Analysis

The Madison city Zoning Ordinance, Section 304.3 enacted in July of 1996, says that "when two or more adjacent lots, one or more of which is non-conforming are held in single ownership such lots shall be merged to create a conforming lot or lots..." (Zoning Ordinance, Section 304.3 pg. 9). There is an exception to this rule which states that if the lots were conforming at the effective date of this ordinance and were held in single and separate ownership at the time the lot(s) became non-conforming, the lots may continue to be developed and used separately in conformity with existing regulations. (Id.). In Madison City, Zoning District R-4 must have a lot size of seven thousand five hundred square feet to be conforming, effective July 2, 1997. (Zoning Ordinance 1775 pg. 9). Before that time, 5,000 square feet was the conforming lot size for all lots in Zoning District R-4. (Zoning Ordinance 1104 pg. 9).

The zoning ordinances do not explain what single and separate ownership is, in order to meet the exception of 304.3. However, there is a case on point. The Commonwealth Court of Pennsylvania, which the Zoning Board must rely on, has said that "the terms 'single' and 'separate'...describe characteristics of ownership which cannot be realized except by some physical manifestation on the land. While an owner can certainly intend to own a lot in a single and separate ownership, he has not achieved his intention until he has, through some affirmative action, made his lot separate and distinct from his other holdings." (*West Goshen Township v. Crater* pg. 12). This means that the owner must in some way, show that the properties are separate. This could be by fencing in one lot and not the other, or fencing the properties as two separate lots. If two lots have been merged, meaning that they have been combined or joined into one single lot, before the adoption of an ordinance like 304.3, the lots will be deemed not to have been held in single and separate ownership. The Commonwealth Court has made it clear that even though title to the two lots may be taken separately at different time, or there are two separate deeds to the property, this will not affect a determination of owning property singly and separately. (Id.)

The Bridge's bought Lot 15, on Avenue B, in 1994. This was before the lot size requirement became 7,500 square feet. Before the modification to the lot size, Lot 15 was conforming. However, since the lot size requirement is now changed, Lot 15 is a nonconforming lot. They also bought Lot 30 before the size requirement changed. Lot 30, however, is a much larger parcel of land and will meet either requirement, thus it is not nonconforming. Lot 30 will merge into Lot 15 in order to make it conforming since it is adjacent to Lot 15. In order for the Bridge's to be able to sell Lot 30 at a future time, they must adhere to the exception in Zoning Ordinance, Section 304.3. Since this ordinance was effective after the date both lots were purchased, and both lots were conforming at the time it became effective (July 1, 1996), then the exception may apply. Here, Lot 15 became nonconforming on July 2, 1997, so Section 304.3 will apply. The Bridge's must have held Lot 30 as single and separately owned from Lot 15 in order to maintain separate ownership and be able to sell it in the future.

At first blush, it may seem that these are two separate properties. The Bridge's had intended to keep the properties separate. They were both fenced separately, and had access to their own sewer, water, gas, and electricity. Each lot is taxed separately and even has its own tax certification number. However, there was a gate installed by the Bridges leading from Lot 15 to Lot 30 and the family often used Lot 30 for their leisure. Electricity ran from Lot 15 to Lot 30, which was put in before the ordinance was enacted (Spring 1997). Mr. Bridge kept several items used on both properties in the shed on Lot 30. While the Bridge's may have intended to sell Lot 30 in the future and keep it as separate from Lot 15, that intention is not controlling. The family's day to day activities which have spilled over onto Lot 30, established that it is not actually separate from Lot 15. It does not matter that the land will not conform to the common scheme of the neighborhood, as aesthetics are not what is important to the showing of single and separate ownership. There is a heavy burden on the Bridge's and from the facts, it seems that they could not meet that burden of showing single and separate ownership. The lots were merged even before Zoning Ordinance section 304.3 was enacted because of the gate, shed and electricity use; and the properties cannot be deemed to have been held separately and singly. There can be no special exception made for the Bridge's.

Conclusion

The ruling from Code Enforcement Officer, Mr. Eastwood, that the two adjacent lots owned by the Bridges constitute one integrated lot as a result of merger pursuant to the Madison City Zoning Ordinance should be affirmed and upheld because the Bridges failed to show, objectively that Lot 15 and Lot 30 were to be held in single and separate ownership as required by Section 304.3(2). Since, 304.3(2) has not been met, Lot 15 should be merged into Lot 30 in order to create a conforming estate, and the single sale of Lot 30 should not be allowed.

Question No. 1: Sample Answer

1. Roger's handwritten list will not be admitted to probate and will not alter the remainder of his will appearing before his signature. In order to be a valid will in Pennsylvania (PA), the will must be written, and signed at the end by the testator. PA does not require that the will be typed or that witnesses be present and sign; thus holographic wills, without a witness are valid. A party may also make a codicil, which essentially is an amendment to a will. It may come after a will and revoke, cancel, or add to any portion of the preexisting will. To the extent inconsistent, the subsequent codicil controls over the prior will. However, the codicil must be valid. Moreover, a codicil or any other addition to a will cannot take place after or below the signature. The signature of the testator must follow any disposition provisions of the will; it must be at the end, except for witness signatures and affidavits.

In this case, the handwritten provision will not be valid or admitted to probate. Roger executed a valid initial will, as it was properly signed and made a disposition. Roger's handwritten statement, though, came after his signature. It does not appear that Roger reexecuted the will or codicil, and did not sign after the statement. Therefore, this addition is an invalid codicil or addition to the initial will. The "equal shares" designation and list will not have any effect on the will. The portion above his signature is still valid and will be admitted to probate.

Overall, since Roger added the terms and list below his signature on the will without validly reexecuting or signing again, that addition is given no effect, though the rest of the will is valid.

2. Roger's estate will be distributed as follows: 1/3 to Nicole, 1/3 to Simon, and 1/3 to Tina. At issue is the distribution of Roger's estate upon his death.

In Pennsylvania, a class gift such as "all my children" includes stepchildren only if they are adopted. Here, Roger's will left 2/3 of his estate "to all my children, in equal shares." Roger had not adopted Alvin. Therefore, Alvin is not considered one of Roger's children for testamentary purposes, and will receive nothing under Roger's will since he is not included in the class gift.

Pennsylvania's Simultaneous Death Act provides that if a testator and the testator's beneficiary die at the same time, and it is impossible to determine who died first, the testator's beneficiary will be treated as predeceasing the testator for the purposes of distributing the testator's estate. Here, Theodore (one of Roger's biological children, and therefore included in the class gift) died with Roger in a plane crash. As they both died instantly, it will be impossible to determine who died first. Thus, for the purposes of distributing Roger's estate, Theodore will be treated as if he predeceased Roger.

Generally, when a beneficiary predeceases a testator, the gift to the beneficiary lapses, meaning that it fails and falls to the residuary. This will be the case unless the lapsed gift is saved by an anti-lapse statute. Pennsylvania has an anti-lapse statute which provides that if the

testator leaves a gift in his will to his issue, and that issue predeceases him, the lapsed gift will be saved if his issue leaves issue. Here, Theodore predeceased Roger. Thus, Roger's gift to Theodore would lapse. However, because Theodore is Roger's issue (Roger's son) and leaves his own issue (his daughter Tina), Pennsylvania's anti-lapse statute applies to save the bequest. Thus, Theodore's share of Roger's estate will pass directly to his daughter Tina.

3. Walter has violated the Pennsylvania Rules of Professional Conduct (PRPC) because he failed to competently and diligently represent Roger and inform him of the status of his representation.

A lawyer has a duty to represent his client with a level of professional competence under the PRPC. Competence may be acquired by learning the law or associating with experienced counsel. The PRPC also require diligence, which means that a lawyer may not prejudice his client's rights or fail to carry out his client's wishes due to unnecessary delay. The PRPC also require a lawyer to maintain communication with a client and inform the client of any major developments in his case. This rule also requires a lawyer to answer bona fide questions posed by a client.

Walter breached his duty of competence by drafting a will that did not effectuate Roger's clear intent, which was to distribute his estate 1/3 to Nicole, and 2/3 to Simon, Theodore, and Alvin. As noted above, the will's use of "children" excludes Alvin, which Walter would have known if he was competent. Walter should have looked up the law or associated with an experienced will draftsman to ensure that Roger's wishes would be properly preserved in the will. Roger even brought his concern to Walter's attention, and Walter failed to research or otherwise ensure that the will would accurately dispose of Roger's property according to Roger's wishes. Walter's failure to respond to Roger's question about the will's text evidences Walter's violation of his duty to keep Roger informed of the status of his case and to answer Roger's bona fide questions. Finally, Walter left for vacation, failing to correct Roger's will, which led to Roger's wishes not be carried out, as Roger died with a valid will that did not conform to his true wishes. Had Walter considered Roger's inquiry or even attempted to correct the will when Walter returned from vacation, Roger's intent may have been correctly written into the will.

Thus, Walter failed his client in multiple ways by failing to exercise proper care, competence, and diligence in drafting Roger's will.

4.(a) Don's use of his property insurance settlement from the destruction of his vacation home for his retirement will result in the insurance proceeds over and above the value of the house itself being treated as a gain that must be included as income on his 2009 tax return.

Income includes an accession to wealth, in any form. An accession to wealth occurs from a sale or other disposition when the benefits of that sale or disposition are "realized;" that is, when the sale is complete and the proceeds have been received by the selling party. So long as an individual has dominion and control over the money or property, it will be treated as income. Income from insurance proceeds received as a result of an involuntary conversion of a property through its destruction is treated as income from the sale of that property and will have

tax consequences as though the property destroyed was sold for the value of the insurance proceeds.

Here, Don's vacation home, which was not a primary residence, was completely destroyed. At the time of its destruction, Don had a basis in the house of \$250,000 purchase price, plus \$250,000 in additions. This gave him a \$500,000 basis in the property. The destruction of the home by Roger's plane operated as a forced conversion or sale of the home, and the subsequent receipt of insurance proceeds was a "realization event" under the IRC. When his basis in the vacation home is deducted, the proceeds from the insurance resulted in a \$1 million gain which would have to be reported by Don.

4.(b) Don could have minimized the tax consequences of his receipt of insurance proceeds had he used the money to purchase another like property.

Although proceeds from the sale of a home that is not a primary residence may not be excluded from income as they could for the value of a home that is primary residence and has been owned by the seller for at least two years, the insurance proceeds from the destruction of a home may be exempted from taxation to the extent that they are used to purchase another home.

Here, had Don used the proceeds from the insurance settlement on the forced conversion of his vacation home to purchase another property, he would be able to exclude his gains.

Question No. 2: Sample Answer

The District Attorney should approve the charge of conspiracy against Bill, as well as all foreseeable crimes of his co-conspirators.

In PA, a conspiracy is committed when two or more people agree to commit a crime and commit an overt act towards committing that crime.

Here, Bill and the others agreed to rob the jewelry store. They planned it out and actually committed the crime. Thus, Bill is liable for conspiracy.

Furthermore, conspirators are liable for all foreseeable crimes their co-conspirators commit in furtherance of the conspiracy. Here, the co-conspirators agreed to use whatever force was required in order to rob the store. It is thus foreseeable that Ted and Lou would tie the employees up in the back room in order to complete their plan. Also, Ted and Lou tied the employees up so that they could escape. Thus, it was in the furtherance of the conspiracy. If a kidnapping was committed, Bill is liable. In PA, a kidnapping is the unlawful substantial movement or confinement for a significant period of time of a person in order to facilitate commission of a felony.

The employees were only confined for five minutes before the police found them. This is not a significant period of time. Also, the employees were tied up in the back of the store. This is not a substantial movement. Because the elements of kidnapping are likely not met, Bill will not be liable for a kidnapping.

2. Roy will likely not be successful in the defense of renunciation to the conspiracy charge, as he did not take steps to thwart the conspiracy. Therefore, he will likely be criminally liable for the conspiracy.

As discussed above, the elements of conspiracy are: an agreement to commit criminal activity, and an overt act in furtherance of the conspiracy. In Pennsylvania, renunciation is a defense to the conspiracy itself, if the circumstances manifest a renunciation of his criminal intent. Renunciation is not present if withdrawal is only based on a fear of getting caught or a desire to postpone the criminal activity, and renunciation may require neutralizing assistance that a co-conspirator has provided to the conspiracy.

In this case, Roy has satisfied the elements of the conspiracy: he has agreed with the others to commit the robbery, and he has committed an overt act in furtherance of the conspiracy: mapping an escape route, and finding a fence to buy the jewelry. A defense of renunciation will not be successful because the circumstances do not objectively demonstrate a desire by Roy to thwart the conspiracy. Although he advised the others that he changed his mind and would no longer participate in the crime, Roy at the same time provided his co-conspirators with a map of the escape route and fence information. Although Roy will argue that he neutralized his assistance by going to a lawyer, this likely will not be sufficient, because neutralizing assistance this far along in the conspiracy will probably require going to the

authorities or actively engaging in conduct that will thwart the conspiracy. Roy's argument that he neutralized assistance by procuring a fence that turned out to be a police informant will also likely be unsuccessful, as it was not known to Roy that his fence was an informant; he thought that he was furthering the conspiracy by providing this information.

For the foregoing reasons, Roy will likely not be successful in the defense of renunciation to the conspiracy charge, as the circumstances do not demonstrate that Roy thwarted the conspiracy. Therefore, Roy will likely be responsible for the conspiracy.

3. The attorney that Roy contacted would have been permitted under the PA Rules of Professional Conduct to call the police prior to the crime being committed at the jewelry store and relate to the police what Roy had told him.

Under the PA Rules of Professional Conduct a lawyer may disclose information, even if it is confidential, in order to prevent imminent serious bodily injury or a crime by the client that would severely affect the financial interests of someone. Confidential information is any information that a client provides to an attorney related to the representation. A prospective client is entitled to the same protection as a client.

Here, whether or not Roy is considered a client at the time of their meeting, the attorney may disclose the information Roy told him about the robbery plan and that guns and force were intended to be used to carry out the plan. This information was relayed on February 22 and the plan was to be carried out the next day. This would likely be sufficient to support a reasonable belief of the likelihood of substantial bodily injury.

4. The court should permit Bill's 2000 robbery conviction to come into evidence for impeachment purposes but should disallow the testimony about Bill's reputation for troublemaking and loud partying.

When a defendant takes the witness stand, he puts his character trait of truthfulness into issue, just like any other witness. Any witness may be impeached with a record of a conviction occurring within the past ten years for any crime that involves lying or dishonesty. Case law has actually held robbery to be such a crime. A witness can also be impeached with opinion evidence in Pennsylvania when that opinion relates to truthfulness. However, the impeachment testimony must go to truthfulness.

Bill has a conviction for felony robbery occurring 9 years ago, which would be admissible for impeachment purposes because it occurred within the past 10 years and could be brought in under the *crimen falsi* exception. However, the evidence of Bill's troublemaking, whether it is opinion or reputation testimony, has no bearing on whether Bill will tell the truth on the witness stand. Thus, it is inadmissible for impeachment purposes. Additionally, the testimony regarding Bill's parties, whether opinion, reputation, or specific acts testimony, has no bearing on Bill's propensity for truthfulness and thus should also be excluded.

Question No. 3: Sample Answer

1. Al should bring a Trespass claim and Defamation claim against Ned.

Trespass

Al should bring a trespass claim against Ned. Under Pennsylvania law, a person trespasses if he intentionally enters onto the land or property of another individual without that individual's permission. At or about 5:30 a.m. on September 23, 2008, Ned entered onto Al's land to hunt for turkeys. Thus, he intentionally entered onto Al's land. Further, he did so without Al's permission and despite Al's many posted signs prohibiting anyone from entering the land or hunting without Al's authorization. Therefore, Al has a cause of action for trespass against Ned.

Al should assert a claim for Defamation. In Pennsylvania (PA), defamation exists where the defendant:

1. uses defamatory language;
2. of or concerning the plaintiff;
3. which is published;
4. damage occurs as a result; and
5. the defendant is at fault

Ned was using defamatory language. Defamatory language is any language which tends to harm the reputation of someone if spoken to ordinary and reasonable people. Here, when Ned claimed that Al has committed burglaries, he was using defamatory language because being accused of burglary is something that an ordinary reasonable person would find objectionable or damaging. As a result, Ned was using defamatory language.

Ned's comment was "of or concerning" Al. A comment is "of or concerning" a plaintiff when an ordinary and reasonable person would believe that the comment referred to that plaintiff. Here, Ned was telling Al's neighbors that Al was the one who was committing the burglaries. As a result, the comments were of and concerning Al, the prospective plaintiff.

Ned's comment was published. Publication occurs when the speech is directed to and heard by any third person. Here, Ned told several neighbors (slander). Therefore, the comment was published.

Ned's comment likely damaged Al. Damage occurs when there is a measurable impact on the plaintiff's economic standing. Here, it might be provable that Al has already been damaged as a result of the comments, though defamation per se would be a more effective route in this case.

Ned is at fault. The intent requirement in PA for fault regarding private citizens is negligence. Here, Ned was not only negligent, but was malicious in stating that Al had

committed burglary. Ned knew that he had committed the burglaries, not Al. Therefore, Ned is at fault.

As a result of meeting these elements, Al should state a claim for Defamation.

In PA, defamation per se exists when speech about a person falls into one of several categories. In such cases, the elements of defamatory language and damage are assumed. One such category is accusing someone of serious crimes. The only things which need be proven beyond speech are that the language was of or concerning the plaintiff, the language was published, and the defendant is at fault. Here, Ned accused Al of burglary nearby, a crime in the community. The other elements have been discussed and met as explained in simple defamation above. As a result Al has an excellent claim against Ned for Defamation and should file a claim.

2. Al's attorney should be prepared to discuss Ian's perception, memory, ability to communicate, and his ability to testify truthfully since his age may render him incompetent to testify.

A person below a certain age may be rendered incompetent to testify unless a proponent attorney is able to demonstrate that the child perceived something helpful to the trier of fact, remembers what he perceived, is able to communicate what was perceived, and appreciates the difference between truthfulness and dishonesty.

Here, Ian observed Ned as Ian was walking down the road to get on the school bus. When Ian saw Ned he ran to Al and told him what he saw. Ian is an excellent student and an active member in his local church. If Al's attorney can establish the above referenced elements, he will be able to demonstrate Ian's competence to testify.

3. If Ned brings a cause of action in negligence against Al, Ned will likely fail. A plaintiff establishes the tort of negligence if he proves that defendant owes him a duty, that the duty was breached, the breach was the actual and proximate cause of injury, and damages resulted. The duty of care owed by the defendant varies with his relationship to the victim and defendant's status as a landowner. A landowner's only duty is to refrain from injuring a trespasser through willful or wanton misconduct. With regard to undiscovered, unanticipated trespassers, a landowner owes them no duty to warn, make safe, or inspect the premises.

Here, Ned was injured by the legal coyote trap that was set by Al to catch a nuisance coyote. This is a manmade, dangerous condition on Al's land. Ned was injured by this instrument which was on Al's farm. However, Ned's claim fails because Ned was an unanticipated trespasser. Al had never previously seen another person on such a remote and secluded area on his land, so he could not have anticipated Ned's presence on the land when he set the trap. Therefore, Ned's claim against Al would fail.

4. In an action for divorce Bertha would have both fault and non fault grounds available to her pursuant to PA law. Under Pennsylvania fault grounds for divorce one can obtain a unilateral divorce where one's spouse is sentenced to imprisonment for 2 years or more. Here, Ned was sentenced to five years in state prison, thus satisfying the fault ground of divorce. This

would be the most efficient and expeditious manner for achieving a unilateral divorce. Further, pursuant to PA law one can obtain a no fault divorce where the parties have been living separate and apart for two years prior to seeking the divorce and the marriage is irretrievably broken. Here, it appears that there is not enough evidence that the parties have been living apart for 2 years to satisfy the elements of a no fault divorce. Bertha could wait the two years required by the statute, or obtain a divorce through the fault grounds as outlined above.

Question No. 4: Sample Answer

1. The issue is whether Alliance will be permitted to intervene in Sam's lawsuit to assert its claim that its first amendment rights were violated when the school refused to allow it to hold its meetings on school grounds. The federal rules of civil procedure allow for two types of intervention, intervention as of right and permissive intervention. In order to qualify as an intervenor as of right a party must show that it has an interest in the action in which the intervention is sought, that it will be adversely affected by the court's decision, and that its interest will be inadequately protected in its absence. If a party does not qualify as an intervenor as of right, the court may permit it to permissively intervene in the action where there is a common question of law or fact in both actions. Here Alliance is seeking to intervene in Sam's lawsuit not to assert its interest in Sam's case, but to assert a cause of action of its own for alleged violation of its first amendment rights. While the causes of action do have some similarities: both involve the first amendment and both involve alleged discrimination against anti-gay conservative viewpoints, they are not sufficiently related to permit intervention as of right, or even to support a permissive intervention. Alliance's claim arises out of separate conduct (refusing to permit it to hold meetings at the school after hours) and different legal standards (Sam is a student at the school, disciplined for conduct committed at school, during school hours, while Alliance is an organization not allowed to meet on school grounds while school is not in session). The court's decision in Sam's case will not affect Alliance's cause of action, because separate conduct is alleged and separate legal standards apply. Alliance will not be successful in intervening.

2. The court is likely to agree with the school's decision and find Sam's First Amendment free speech rights were not violated. Freedom of speech is a very broad right, subject to limited exceptions. When a person's freedom of speech is restricted, the Court will generally use a strict scrutiny analysis and invalidate the restriction unless it is necessary to promote a compelling state interest. Ordinarily, wearing a t-shirt as Sam did is protected speech, but in school speech rights aren't quite so broad. In an educational environment (excluding higher education) a school can restrict speech when it is reasonably necessary to promote legitimate pedagogical interests or to avoid disruption in the school.

Here, discovery showed the school had several disturbances arising from dissension and tension from groups on opposite sides of the local gay rights initiative. The school's policy against wearing clothing with slogans that are derogatory toward others seems reasonably necessary to promote safety and tranquility in the education environment. With evidence of past disturbances, Sam likely will not prevail on his First Amendment claim.

3. Alliance is likely to win its claim because it was denied use of school facilities based on the viewpoint of its speech. The First Amendment provides a right to free speech. Content-based restrictions or infringements on free speech are subject to strict scrutiny. Here, the school opened up its facilities to local organizations to hold meetings for civic purposes. In doing so, the school created a limited public forum which was confined to the legitimate purposes for which it was created. The school denied Alliance the right to use its facilities based solely on the message contained in its speech since the topic was on a matter of community interest. Because

it discriminated based on the viewpoint of speech, this action violated Alliance's First Amendment rights.

4. Toni will not likely succeed in her case because she would have to show discrimination based on the fact that she is a woman, not on the fact that she is openly gay, and therefore she will not likely be successful in her action.

A Title VII action can be brought by a plaintiff against a defendant employer who has 15 or more employees. In a sexual harassment suit an employee must show that he or she was harassed because of his or her gender. Harassment can be by a boss or supervisor, or by co-workers if the employer knew or should have known about the harassment. The harassment must be unwanted, and must be continuous or pervasive creating a hostile work environment. A one time action is not enough. In addition, an employee should show that they brought the harassment to the attention of a supervisor, and nothing was done to stop the harassment. It seems that the school district is likely to be a large enough employer to meet the 15 employee minimum requirement. The harassment that Toni received was pervasive and it did create a hostile work environment, as was evidence by her crying in the lounge. Toni reported the harassment to her principal, and this would meet the requirement of trying to confront the harassment internally before bringing a lawsuit. Even if it was not harassment by a supervisor, not only did Toni tell the principal, but the comments and harassment were so open that the school knew or should have known that it was occurring. The one part of the Title VII claim that Toni has not met is that this harassment seems to be because of Toni's sexual orientation, and not her gender. Gender and sexual orientation are distinct things for Title VII, and gender is protected, while sexual orientation is not. Unless Toni can show that she was being harassed, not for being gay, but because she did not fit a gender stereotype, she will not be successful in her Title VII action against the school.

Question No. 5: Sample Answer

1. Brad's action is not likely to be successful as Brad's conduct constituted an anticipatory repudiation of the contract as between Brad and Cole. Anticipatory repudiation occurs when the repudiating party unambiguously indicates by words or by conduct, to the other party that they are not going to perform under the contract and the repudiating party's performance is not yet due. If a party successfully repudiates, the other party is excused from performance or if the party had started performance, is excused from further performance. An anticipatory repudiation may be retracted if the other party has not materially changed his or her position in reliance on the repudiation.

In this case, Brad's conduct was unambiguous in indicating to Cole that he was not going to perform under the contract by performing in the musical. Brad left rehearsals for the musical and boarded a plane to China, where he intended to begin filming his new role. It was only when Brad received a text message from Cole threatening to sue that Brad decided to return to perform in the musical. Brad is likely to argue that his return constituted a retraction of his repudiation but will be unsuccessful in this argument. Cole, in reliance on Brad's departure to film another movie in lieu of performing in the musical, decided to cancel the entire musical production. His act constituted a material change in position and therefore precludes Brad from retracting his repudiation. Therefore, Brad will not be successful in a breach of contract claim against Cole.

2. Cole will not be successful in recovering lost profits and emotional distress but likely can recover out-of-pocket expenses.

The various damages provisions in Pennsylvania are based on a single premise. That premise is that money damages should protect the party's expectation. The expectation is that the contract would be fully performed. In determining the expectation damages the court must analyze the money position without the breach and the money position with the breach. In order to recover damages, the party seeking recovery must prove the damages with a degree of certainty. A party who has not breached the contract can also recover incidental damages and any consequential (foreseeable at the time the contract was made) damages. The recovering party also has a duty to mitigate damages. Additionally, emotional damages are not recoverable under the principal of expectation described above.

The musical production in this case was a new show and advance sales for the musical were very poor. It will be difficult for Cole to establish the level of profits he would have earned as a result of the musical. Courts are skeptical of start-up businesses and the proposed damages because of the uncertainty of the level of profits. Here, Cole can try to point to comparable shows with comparable actors but a court will not likely award him lost profits unless he can prove those profits with certainty. Because it is unlikely that Cole will be able to prove lost profits with any degree of certainty they will not likely be recovered.

Cole also will not recover for the emotional distress suffered as a result of Brad's breach of contract. Emotional distress damages are rarely recoverable in a contract case because they will put a person in a better position than if the contract was made. Here, expectation damages

will fully compensate Cole for the damage he suffered and to pay him emotional damages in excess of his out of pocket expenses would be to put him in a better position than if the contract had been fulfilled. Therefore, because emotional damages would result in recovering damages in excess of expectation, a court will not grant the emotional damages.

Cole can recover the out-of-pocket expenses. Where there is a breach of a contract the nonbreaching party can recover any incidental damages. Incidental damages include any out of pocket expenses incurred by the nonbreaching party. The recovery of incidental damages would not put Cole in a better position than if the contract had been fully performed. Instead, it would merely put him in the same position as if the contract had never been made.

This is known as restitution damages but importantly, the measure of restitution damages would not allow for recovery in excess of expectation damages. Because incidental damages are recoverable by the nonbreaching party Cole can recover his out-of-pocket expenses.

3. The court should rule in Angie's favor because the deed was properly executed and delivered under PA law.

In PA, a deed is properly executed when it is in a signed writing describing the property to be conveyed.

A deed is delivered when the grantor manifests an intent to relinquish dominion and control over title to the property. This need not require physical delivery or recording, but can be demonstrated by giving the deed to an agent with instructions to presently relinquish title.

Here, Brad signed and acknowledged a written deed to convey a luxury condo to his girlfriend, Angie. Brad then prepaid the recording fee, handed the deed to a title company agent, and said "I'm glad this is done, please record this deed for Angie as soon as possible." At this moment, Brad manifested an intent presently and permanently to relinquish control of title over the condo and the deed was delivered to Angie. Brad's later statement telling the agent not to record the deed is irrelevant because title had passed, and Brad had no authority. Therefore, the court will rule in Angie's favor.

4. Cole and Donna can convey Paradise to Big Yellow Taxi free of Stan's judgment.

A conveyance to a husband and wife in Pennsylvania is presumed to create a tenancy by the entirety. A tenancy by the entirety is a special estate that exists when five unities are met: (1) time, (2) title, (3) interest, (4) possession, and (5) marriage. When the conveyance is made to a husband and wife who are actually married at the time of the conveyance, the marriage element is satisfied and the conveyance is presumed to be a tenancy by entireties provided that the other four unities exist. When the couple takes their property interests at the same time via the same legal instrument in equal shares with rights to possess the whole, the remaining unities are met. A tenancy by entireties may not be sold or encumbered by just one spouse. Both spouses are needed to convey it. Also, a judgment against only one spouse cannot attach to the tenancy by entireties.

Here, Cole and Donna were husband and wife when they bought Paradise. The deed's omission of this fact is irrelevant. Cole and Donna took by the same legal instrument at the same time, and both names were listed on the deed, giving them an equal interest and equal right to possession. Thus, the rule is that a tenancy by entireties is implied by law. Stan's attempt to attach Paradise only through a judgment against Cole is ineffective, and Paradise may be conveyed free of Stan's judgment.

Question No. 6: Model Answer

1. A member of the board of directors of a corporation can be liable if he approves a contract that is in violation of his fiduciary duties of good faith and loyalty. In order for a board member not to be liable, that member must vote against the contract at the meeting. The board member must also put it in writing that he voted against the contract. In this case, Mary urged the board to reject the contract. There is no indication that she or Sal voted against the contract. Therefore Mary and Sal could be held liable.

Mary and Sal should have voted against the contract at the meeting. They should have also made sure to get it in writing that they voted against the contract between Earth and Billy. This written notice should be given to the secretary to ensure that it can be included in with the minutes from the meeting. These actions would have ensured that Mary and Sal would not be liable on the contract.

2.(a) PEI can make out the elements of an implied warranty of merchantability but not for the implied warranty of fitness for a particular purpose. The UCC provides for two implied warranties: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. The implied warranty of merchantability requires the item be purchased from a merchant and that it be fit for its reasonable use. To establish a breach of this warranty, the plaintiff must establish that he bought a product from a merchant and the product is not fit for its ordinary use. A merchant is one who regularly deals with the goods in question.

In this case, Earth is a merchant. Earth sells excavation equipment from a retail location. PEI went to that retail location to obtain backhoes. This is a good that Earth regularly deals with. The backhoe that belonged to Earth was unusable when PEI went to use it. A backhoe's ordinary use is to be used as heavy machinery. Since PEI bought the backhoe from a merchant and the backhoe was not fit for its ordinary use, PEI can establish the breach of the implied warranty of merchantability.

The implied warranty of fitness for a particular purpose requires the plaintiff to establish he had a particular purpose when buying a good, he told that purpose to the seller, and he relied on the seller's skill in choosing an appropriate item. The more knowledgeable the buyer, the less likely this warranty can be established. In this case, PEI wanted two backhoes. There is no particular purpose that PEI had when it went to Earth except to buy two backhoes. There is no indication that PEI relied on the seller's skill in selecting the backhoes chosen. PEI will not be able to make out a breach of the implied warranty of fitness for a particular purpose.

2.(b) PEI will not be successful in suing Earth for breach of the implied warranties. The UCC provides that implied warranties can be disclaimed by words such as "as is" and "with all faults." The disclaimer must be conspicuous. If the disclaimer is sufficient, the buyer will not be successful in asserting a claim for breach of an implied warranty.

In this case, the front page of the purchase agreement, in bold capital letters contained the words: "BOTH BACKHOES ARE USED AND ARE SOLD AS IS ANDWITH ALL

FAULTS." Paul signed the purchase agreement which contained this language. The phrase is conspicuous and sufficient to disclaim the implied warranties under the UCC. Therefore, PEI will not be successful in suing Earth for breach.

3. PEI can try to assert a breach of warranty of title claim against Earth to recover the purchase price of the returned backhoe. Such a warranty cannot be disclaimed by an "as is" provision. By selling backhoes, Earth makes a warranty that it owns the item and is capable of its sale. In this case, Earth did not own the second backhoe but was merely storing it for a customer. Earth did not have the authority to sell the backhoe to PEI. The "as is" clause in the purchase agreement is not sufficient to disclaim this warranty. Therefore, PEI can try to assert a warranty of title claim and may be successful.

4. Oilco should pierce the corporate veil and should be successful in holding Paul liable for the balance owed by PEI. Piercing the corporate veil is an action that allows a court to disregard a corporate structure and hold the shareholders liable. Typically shareholders are not liable for the debts of the company. However, in certain situations a court can disregard this structure and hold the shareholders directly liable. Piercing the corporate veil is available when the shareholder has disregarded the corporate structure and it has caused harm to creditors. Piercing the corporate veil is a fact-intensive exercise because the court must determine whether the shareholder used the corporation for his personal benefit. Things the court considers are the commingling of assets, undercapitalization, use of corporation assets and property, and no corporate structure. The creditor will also have to show that failing to pierce the corporate veil will cause him severe harm.

In this case, Paul is the sole shareholder of PEI. PEI has no bylaws, stocks, letterhead, or tangible assets except for one backhoe. PEI has a checking account with the PEI name on it. However, Paul routinely uses that account for his personal expenses. PEI is now insolvent but Paul has considerable assets. Paul repeatedly purchased oil from Oilco for PEI on credit knowing it was seriously behind in payment. PEI had no corporate structure, there was commingling of assets, and undercapitalization. Oilco should be successful in piercing the corporate veil and holding Paul personally liable.