Applicant Number

BOARD OF BAR EXAMINERS

OF THE DELAWARE SUPREME COURT

2015 BAR EXAMINATION

Monday, July 27, 2015

9:30 a.m. – 12:30 p.m.

Questions 1-4

QUESTION 1

Pat is a homeowner in New Castle County, Delaware. Pat wants to host a party for a number of friends to watch the upcoming last episode of a popular television show. Pat enters into an oral agreement (the "Agreement") with Devon to install a new home theater system in Pat's house (the "Install"), for which Pat pays Devon $14,500 in advance. Because the finale is to take place one week from the date of the Agreement, Pat asks Devon to complete the Install within the next six days. Devon says that a lot of other people have asked for home theater installation during the next week, but Devon would try to complete the install within six days.

On the evening on the sixth day after entering into the Agreement, Devon shows up at Pat's house to begin the Install. After installing most of the theater components, Devon begins to use a power saw to cut holes in Pat's drywall through which to feed audio/visual cables to hook up the various home theater devices. While doing so, Devon cuts through a pipe, causing water to gush onto the floor. Hearing Devon's surprised cry, Pat runs downstairs to see what happened. Seeing the pool of water on the floor, Pat orders Devon to leave the house immediately. Devon leaves without completing the Install.

Pat decides to sue Devon because Devon did not complete the Install before the party. Pat intends to file a one-count complaint for breach of the Agreement seeking damages of $14,500 plus $750 in prejudgment interest.

* * * * *

1. In which court or courts of the State of Delaware could Pat file the complaint? Explain the relevant jurisdictional requirements of the court or courts.

* * * * *

Assume for the remainder of this question that Pat files the complaint in the Justice of the Peace Court in New Castle County, and that the Justice of the Peace Court has jurisdiction over the complaint. After trial in the Justice of the Peace Court, the Court enters judgment in favor of Devon. As Pat is preparing to file an appeal, Pat remembers the water damage caused when Devon cut through the water pipe. Pat timely files the documents necessary to initiate an appeal in the Court of Common Pleas, including a notice of appeal and complaint. Count One of Pat's complaint in the Court of Common Pleas, like the complaint in the Justice of the Peace Court, alleges that Devon breached the Agreement and seeks damages of $14,500 plus $750 in prejudgment interest. The Court of Common Pleas complaint also contains a Count Two, in which Pat alleges that Devon's negligence proximately caused water damage, for which Pat seeks $15,000 in additional damages. Devon moves to dismiss the appeal on the grounds that the inclusion of Count Two is improper.

* * * * *

2. What arguments and supporting analysis should Devon make in support of that motion? (Your answer should disregard the statute of limitations or laches.) What is the likely outcome?

* * * * *

Assume, for the remainder of this question, that Devon's motion to dismiss is denied and the case proceeds in the Court of Common Pleas.

* * * * *

3. May Devon demand a trial by jury in the Court of Common Pleas? Provide your analysis. (Your answer should disregard whether such a demand would be timely.)

* * * * *

The following exchange takes place during Devon's deposition in the Court of Common Pleas case and is recorded in the transcript:

> QUESTION BY PAT'S COUNSEL: Did you install other home theater systems earlier in the day, before you went to install the system at Pat's house?
>
> ANSWER [DEVON]: Well, I—
>
> DEVON'S COUNSEL: Devon, I instruct you not to answer that question. And you [gesturing], go on to your next question. You can ask some questions, but get off of that. It's irrelevant. I'm tired of you asking irrelevant questions.
>
> PAT'S COUNSEL: Let's just take it easy. The question—
>
> DEVON'S COUNSEL: Hurry up. We'll be here all day if you keep asking irrelevant questions.
>
> PAT'S COUNSEL: It's a fair question. There's no reason for—
>
> DEVON'S COUNSEL: Come on. Quit talking. I don't care what you have to say. Ask another question. Devon's not answering that nonsense. I instruct the witness not to answer.
>
> PAT'S COUNSEL: We're trying to continue the deposition.
>
> DEVON'S COUNSEL: Well, go on then. What are you waiting for?

At the time of the deposition, the Court of Common Pleas had not entered any orders concerning the permissible scope of discovery or evidence. At no time did Devon ever file a motion with respect to the deposition. Pat's counsel believes that it was improper for Devon's counsel to instruct Devon not to answer the question.

* * * * *

4. What motion could Pat bring to obtain Devon's answer to the question? What arguments and supporting analysis should Pat make in support of the claim that it was improper for Devon's counsel to instruct Devon not to answer the question?

5. Devon opposes Pat's motion referenced in Part 4. Pat wants to request that the Court order Devon's counsel to pay the attorney's fees Pat incurred bringing the motion. What arguments and supporting analysis should Pat make in support of the request? What is the likely outcome?

* * * * *

Devon files a motion for summary judgment, which is granted by the Court of Common Pleas. Specifically, the Court of Common Pleas enters judgment holding that, as a matter of law, Devon did not breach the Agreement. Pat files a timely notice of appeal to the Superior Court of New Castle County.

* * * * *

6. What standard of review will the Superior Court apply to Pat's appeal and why?

* * * * *

The Superior Court affirms the judgment of the Court of Common Pleas. Unsatisfied, Pat files a complaint against Devon in the Delaware Court of Chancery, in which Pat alleges that Devon failed to complete the Install in violation of the Agreement and that Pat has no remedy at law for Devon's conduct. As relief for the alleged breach, Pat seeks specific performance of the Agreement. The complaint in the Court of Chancery does not mention any of the prior litigation between Pat and Devon.

Devon files a motion dismiss the Court of Chancery complaint under Court of Chancery Rule 12(b)(6) based only on the prior litigation in the Justice of the Peace Court, the Court of Common Pleas and the Superior Court.

* * * * *

7. What should Devon argue in support of the motion to dismiss the Court of Chancery complaint?

* * * * *

Devon files a brief in support of the motion to dismiss and attaches the judgments of the Justice of the Peace Court, the Court of Common Pleas and the Superior Court to the brief.

* * * * *

8. May the Court of Chancery consider the attached documents in connection with deciding Devon's motion to dismiss under Rule 12(b)(6)? Provide your analysis.

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QUESTION 2

ASSUME DELAWARE LAW APPLIES

Peter, who operates a business located in Delaware specializing in producing children's events, needs help running his business. He finds an ad on the internet for "TCB: Taking Care of Business," which turns out to be a one-person Delaware corporation. Peter meets with Alison, the owner and sole employee of TCB, and she informs him that her corporation "conducts any business that the client needs." During their meeting, the two discuss Peter's business needs, but the meeting ends without any express agreement being reached.

Afterwards, Alison sends Peter the following email: "Peter, It was good speaking with you yesterday about the possibility of our working together. Should you wish to enter into the relationship we discussed yesterday, please respond promptly to this email. If I do not hear back from you by close of business tomorrow, I will assume that you have agreed to the enclosed terms, and I will look forward to working with you over the next two years." Compensation was not discussed previously or addressed in the email. The email is blocked as spam; Peter never reads it. That same day, Peter tells his wife -- Wilma, who is also his receptionist-- to hire Alison if she calls back. Neither Peter nor Wilma hears from Alison, but when Peter's newest client calls, Wilma nevertheless informs the client that she is Peter's wife and that "Peter's new assistant Mary will be handling the details" and passes along Alison's phone number. The client thereafter calls Alison's number. When the client asks for Mary, Alison states that her name is Alison but she knows Peter. Alison then commits Peter to producing a children's event for the client.

* * * * *

1. Applying principles of agency law, what arguments exist that an express agency relationship has been established between (i) Peter and (ii) TCB and/or Alison. Provide your analysis.

2. Applying principles of agency law, what arguments exist that an express agency relationship has not been established between Peter and TCB. In answering this question, you may rely on and need not repeat the agency principles or any analysis you presented in your answer to 1. Provide your analysis.

3. Assuming Alison and TCB are not Peter's express agents, what arguments exist that Peter would be bound to produce the children's event that Alison committed Peter to produce for the client. Provide your analysis.

4. Assuming Alison and TCB are not Peter's express agents, what arguments exist that Peter would not be bound to produce the children's event that Alison committed Peter to produce for the client. Provide your analysis.

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Peter emails TCB that he needs Alison's assistance in transporting some confidential personal files to his lawyer. When she arrives at his office, Peter gives Alison the keys to his van and instructs her "to take Straight Street to my lawyer's office, no excuses, no delays and no detours. You have to get these to the lawyer's office as soon as possible because we have a filing deadline today of 5:00 p.m. Feel free to take your little sister Sarah along if you think it might help."

As sleet begins falling, Alison and her fifteen-year-old sister Sarah drive along Straight Street. Up ahead is an accident, which has clogged traffic, and Alison, knowing the city streets well, takes a right onto Side Street. Driving down Side Street, Alison hits a patch of ice and the van strikes a pedestrian. Alison stops the van and gets out to help the pedestrian. Unable to reach Peter on her cell phone to receive guidance, Alison hands Sarah the keys and instructs her to deliver Peter's personal files to the lawyer, while she helps the pedestrian. While Sarah is driving to the attorney's office, the van slides on the ice and strikes a parked car. When the police arrive at the scene, they give Sarah a citation for driving underage without a license. Peter's personal files are not delivered to Peter's lawyer before the filing deadline.

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5. Applying principles of agency law, what arguments exist on behalf of the pedestrian that Peter is vicariously liable for Alison's collision with the pedestrian? Do not address Sarah in your answer. Provide your analysis.

6. Applying principles of agency law, what arguments exist on behalf of Peter that Peter is not vicariously liable for Alison's collision with the pedestrian? Do not address Sarah in your answer. Provide your analysis.

7. Applying principles of agency law, what arguments exist on behalf of the owner of the parked car that Peter is vicariously liable for Sarah's collision with the car? Provide your analysis.

8. Applying principles of agency law, what arguments exist on behalf of Peter that Peter is not vicariously liable for Sarah's collision with the car? Provide your analysis.

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QUESTION 3

Amy Owens is a twelve (12) year-old middle school honor student who lives on a residential street in a neighborhood with a posted 25 mile-per-hour speed limit. There is also a "Children Playing" sign 50 feet from the end of her driveway. Rarely do more than ten cars pass by Amy's home each day.

Amy considers herself an amateur dog trainer. Her dog, Buzz, can sit, stay, and play dead. She works with Buzz for nearly an hour each day in her front yard to demonstrate his tricks to other neighborhood children. On the day in question, Amy takes Buzz into the front yard and is showing three (3) friends how Buzz can catch a ball in his mouth and bring it back to her.

Chris, a forty (40) year-old attorney who is driving the speed limit, is on his way to meet a client who lives in Amy's neighborhood. Chris is not only late for his appointment he also realizes that he is lost. As he navigates his new SQE model car ("SQE" stands for "Super Quiet Electric") he is frantically looking down at the GPS map on his mobile phone and does not see the "Children Playing" sign. Just as Chris looks up, he sees Amy as she darts into the street to retrieve the ball that she threw to Buzz. Chris strikes Amy with the front bumper of his car. Amy suffers multiple injuries including a broken arm, a broken pelvis, and deep cuts to her face and head. One of the neighborhood children, Nancy, sees the accident and faints, and hits her head on the concrete sidewalk. She suffers facial lacerations as well as subsequent chronic pain and nightmares.

ASSUME ALL EVENTS OCCUR IN DELAWARE, THAT DELAWARE LAW APPLIES, AND THAT THE APPLICABLE DELAWARE MOTOR VEHICLE STATUTE(S) PROVIDE AS FOLLOWS:

> No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and without having regard to the actual and potential hazards then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway, in compliance with legal requirements and the duty of all persons to use due care.
>
> The driver of every vehicle shall, consistent with the requirements of subsection (a) of this section, drive at an appropriate speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway and when a special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.
>
> Where no special hazard exists, the following speeds shall be lawful, but any speed in excess of such limits shall be absolute evidence that the speed is not reasonable or prudent and that it is unlawful [for] all types of vehicles . . . (2) 25 miles per hour in any residential district.

* * * * *

1. Given the foregoing facts, and the statute at issue, discuss Amy's potential claims against Chris and discuss whether they will be successful. Where applicable, identify, discuss, and analyze the elements of each claim and defense as well as the burden of proof associated with each claim.

2. Assume that Chris is liable for the accident involving Amy. If Chris had consumed enough alcohol to raise his Blood Alcohol Limit ("BAC") over the legal limit, discuss whether it would result in punitive damages against him. Provide your analysis.

3. Discuss any potential claims that the neighborhood children who witnessed the accident may have against either Chris or Amy. Where applicable, identify, discuss, and analyze the elements of each claim and defense as well as the burden of proof associated with each claim.

4. Assume that Buzz bit one of the three children, Vicki, prior to the accident. Analyze the liability of Buzz's owners, the Owens, to Vicki, given that they believe Vicki provoked Buzz by teasing, tormenting or abusing him.

In answering the question, assume that 7 Del. C. § 1711, provides:

> The owner of a dog is liable in damages for any injury, death or loss to person or property that is caused by such dog, unless the injury, death or loss was caused to the body or property of a person who, at the time, was committing or attempting to commit a trespass or other criminal offense on the property of the owner, or was committing or attempting to commit a criminal offense against any person, or was teasing, tormenting or abusing the dog.

Further assume that 25 Del. C. § 1501, provides:

> No person who enters onto private residential or farm premises owned or occupied by another person, either as a guest without payment or as a trespasser, shall have a cause of action against the owner or occupier of such premises for any injuries or damages sustained by such person while on the premises unless such accident was intentional on the part of the owner or occupier or was caused by the willful or wanton disregard of the rights of others.

Finally, assume that 7 Del. C. § 1711 was enacted after 25 Del. C. § 1501.

QUESTION 4

ASSUME DELAWARE LAW APPLIES

James Owner ("Owner") owns Water, Inc. ("Water"), a company that manufactures and sells water analysis and treatment products. Water's proprietary products are made by mixing chemicals, some of which are corrosive, in large mixing tanks.

From its inception in 2000, Water rented from Landlord, Inc. ("Landlord") a unit (the "Unit") in a warehouse, which was constructed three years before Water took possession of the Unit. The lease provided that the Unit was to be returned in as good of a condition, less normal wear and tear. During the term of the lease, Water made no complaints to Landlord, and Landlord's representatives had no occasion to enter the Unit while Water occupied it. Water's lease expired by its own terms, and Water vacated the premises on June 30, 2014.

When Landlord inspected the Unit the day after Water vacated the premises, it appeared to be in good condition. However, upon closer examination, Landlord observed that the drop ceiling support grids had rusted and had been painted. Landlord also discovered a system of PVC pipes above the drop ceiling in the Unit. Landlord promptly marked Water's account in its computer system as a "litigation" account.

After Water vacated the Unit, Landlord sent Water a letter stating: "You were required to leave the Unit in good condition and you did not. Landlord intends to seek full recovery from you." Not knowing what damages Landlord was referring to, Owner sent an email to Landlord asking for an opportunity to inspect the alleged damages. Landlord never responded.

Landlord proceeded to get estimates from third party contractors to work on the Unit. One contractor, Acme Company, provided a written estimate which stated "It appears that the sprinkler heads on the fire system have been painted, which is not permitted by the fire code." It took Landlord several months to get estimates for all the repairs. Thereafter, Landlord sent Water a letter stating: "You damaged the Unit. The cost to repair the Unit is $100,000. Demand is hereby made for payment of $100,000." Owner again responded to Landlord by email, stating that he did not know what damage Landlord was alleging and requesting an opportunity to inspect the damages. Landlord responded by email stating: "It's too late for an inspection because the repairs have started."

Two days later, Landlord started with the repairs, which included replacing the drop ceiling grid, removing the PVC pipes above the drop ceiling, and replacing all the sprinkler heads. Landlord took some photos of the ceiling grid, but did not take any photos of the PVC pipes or the sprinkler heads. Landlord discarded everything that was removed from the Unit during the repairs.

After all the work was completed, Landlord sued Water for the damage to the Unit. During his deposition, Owner testified that he had no idea that there were PVC pipes above the drop ceiling because he never had an occasion to look above the drop ceiling. Owner further testified that the rust on the drop ceiling grid was there when he took possession of the Unit. He also testified that prior to Water renting the Unit, there had been a car wash/detailing business in the Unit. Owner believed that the car wash caused the rust and it used the PVC pipes as part of a vacuum system hanging from the ceiling he recalled seeing in the space. When Water was

preparing to move out of the Unit, Owner had the ceiling grid painted so that they were in better condition than when Water took possession of the Unit. Finally, Owner testified that no one painted the sprinkler heads.

Landlord's Rule 30(b)(6) witness, Manager, testified that he believed that Water was responsible for the repair work because Water was the first to rent the Unit. Manager also testified that Landlord's records only went back to 2005, when he joined the company, because at that time Landlord changed computer programs and old files were not transferred into the new system and no backup files were retained. His testimony regarding the lack of a prior tenant in the Unit was based on his conversations with others who previously worked for Landlord. Thus, it was Landlord's position that it delivered the Unit to Water in new condition. Manager also relied on Acme Company's written estimate, to support his testimony that the sprinkler heads had been painted.

* * * * *

1. You represent Water in a lawsuit brought by Landlord for damages to the Unit. You need to determine what Water can do about some evidence not being available. Discuss what evidentiary motions are available, the standards that would apply and the likely outcome. Provide your analysis.

2. You are preparing for Manager's trial testimony, and expect him to testify as he did at his deposition. Describe the evidentiary objections Water can make to his testimony, the basis for each objection, and how the court is likely to rule. Provide your analysis.

* * * * *

Landlord identified one of its maintenance staff as an expert ("Expert"). In his deposition, Expert testified that he has 25 years of experience in maintenance of commercial rental units and has supervised repairs to commercial rental properties many times over the years. In addition, he testified that he receives training in maintenance and repairs of commercial properties and managing costs of such properties by attending annual seminars conducted by a nationally recognized company that specializes in such issues. He does not hold any specialized educational degrees or certifications. In his experience, he had never seen rust in a unit like he had seen in the Unit after Water vacated the premises. He further testified that all of the work performed cost Landlord $100,000 and that the work was necessary for Landlord to be able to rent the Unit to another tenant. He also testified that he did not know the nature of Water's business, but that he had reviewed an unidentified textbook on chemical reactions after Water vacated the Unit. He opined that, given that the Unit was fairly new when Water took possession of it, Water caused the rust, installed the PVC pipes and painted the sprinkler heads.

* * * * *

3. You want to exclude Expert's opinions. Explain: (1) the basis of the motion to exclude (2) any arguments that may be raised in opposition; and (3) the likely outcome. Provide your analysis.

* * * * *

A former employee of Water ("Employee") was also deposed. He testified that he started working for Water in 2005, right out of high school. He quit two weeks before Water vacated the Unit. He had quit on previous occasions and Owner hired him back each time after a few days. This time, however, Owner did not offer to rehire Employee. After he quit, Employee was out of work for several months. He is now employed, but is making less than half of what he had been making while working for Water.

Employee testified that after he quit, he called Manager because he "felt it was his duty to let Landlord know what had occurred in the Unit." Employee testified that he supervised the installation of the PVC pipes, which Water used in its operations. He also testified that the rust was caused by the "off gassing" of chemicals during the blending process. Employee could not say how much "off gassing" occurred or the amount of chemicals that would need to be released in order to cause rusting on metal surfaces.

When asked why Employee called Manager instead of bringing his "concerns" to Owner, Employee testified that Owner would often yell at customers and was mean to the employees, so Employee did not think "it would do any good" to talk to Owner.

After Employee's deposition, Owner tells you that Employee was not telling the truth. Employee was never involved in mixing the chemicals and in fact, was often out at customer locations when Owner performed the product mixing. Owner also tells you that Employee worked odd jobs after he quit. You learned through discovery that Employee did not report this income on his tax return. Owner also tells you that fifteen years ago Employee had been convicted of selling illegal drugs and that Employee did not disclose this felony conviction on his employment application submitted to Water, despite an express question asking for disclosure of such crimes. Owner is very upset by Employee's lies because Owner had helped Employee over the years -- paying his rent when he was short on cash and hiring him back each time after he quit. Owner wants the jury to see what kind of person Employee really is.

* * * * *

4. You are preparing for Employee's trial testimony. Employee will be called by Landlord and is expected to testify as he did at his deposition. Describe and analyze the evidentiary objections Water can make to Employee's testimony, the basis for each objection, and how the court is likely to rule. Provide your analysis.

5. Owner wants you to use the information he provided to cross-examine Employee. Describe and analyze the objections Landlord can make, the basis for each objection, and how the court is likely to rule. Provide your analysis.

GENERAL INSTRUCTIONS

The Essay Section of the 2015 Delaware Bar Examination consists of eight questions. This booklet contains the four essay questions which must be answered during this morning session of the Examination. The time allotted for this session is three hours. Each of the four questions is of equal weight, although some questions may take more time to read and answer than others. Accordingly, your time should be budgeted carefully. In addition, the subparts in the questions are not necessarily equally weighted.

Answers to the essay questions are graded by the Examiners. Answers are graded in accordance with certain general standards, including the applicant's ability to (i) recognize the issues; (ii) analyze the issues accurately; (iii) reason logically; (iv) demonstrate a thorough knowledge of the fundamental principles of law and their application; and (v) express concisely and accurately an answer that is directly responsive to the question. A response that does not answer a question or gives no semblance of issue recognition, analysis or discussion relevant to subject matter of the question may receive a very low grade. No credit will be given for discussion of irrelevant issues or statements of general principles that are not responsive to the question.

Applicant Number

BOARD OF BAR EXAMINERS

OF THE DELAWARE SUPREME COURT

2015 BAR EXAMINATION

Monday, July 27, 2015

2:00 p.m. – 5:00 p.m.

Questions 5-8

QUESTION 5

Zero Corp. is a Delaware corporation that was founded by Ann and Bill. Zero Corp.'s certificate of incorporation and bylaws were validly adopted when it was formed and have never been amended. Zero Corp.'s only outstanding stock is common stock, the shares of which are not publicly traded. Ann and Bill are each record owners of 25% of the outstanding common stock. The other stockholders are current and former employees of Zero Corp. Ann is not involved in the management of Zero Corp. Bill is Zero Corp.'s Chief Executive Officer and its sole director. The company's bylaws fix the size of the Board at one director.

Recently, Ann has been disappointed with the financial performance of Zero Corp. and Bill's efforts to expand its business. Ann views the expansion efforts as risky and believes Zero Corp. should be sold to a third party so that the stockholders can cash out their investments. Ann asks Bill to commence a sales process, but Bill declines. Ann then discusses her concerns with several other Zero Corp. stockholders who, she learns, share her concerns and support a sale of Zero Corp.

The annual meeting of Zero Corp.'s stockholders is scheduled to be held in three months. Ann decides to seek election to replace Bill as Zero Corp.'s sole director. Zero Corp.'s bylaws require stockholders to provide Zero Corp. with notice of their intent to nominate candidates for election as directors. The provision states:

> No stockholder shall have the right to nominate persons to be considered for election as directors at any meeting of the stockholders unless such stockholder has first provided timely written notice to the corporation containing the information required by this provision. For notice to be timely, it must be received by the corporation (by delivery to its Secretary or Chief Executive Officer at the principal office of the corporation) by no later than (i) 30 days before the meeting of stockholders at which such nominations will be made, or (ii) if notice of such meeting is

> first given to stockholders fewer than 45 days before the meeting, 15 days after notice of the meeting is first given to stockholders. To be in proper form, a stockholder's nomination notice must set forth: (a) the stockholder's name and address, (b) the name, age, address, and principal occupation of each person the stockholder intends to nominate, and (c) a short statement of the stockholder's reasons for nominating such person(s).

Ann does not want to give advance notice of her intention to nominate herself because doing so would give Bill more time to take actions in advance of the meeting to oppose her nomination and election.

* * * * *

1. Is the bylaw provision relating to advance notice of nominations valid and effective under Delaware law? Provide your analysis.

* * * * *

Ann decides to comply with the bylaw and provides timely written notice of her intent to nominate herself as a candidate for election as director. The notice complies in all respects with the timing and other requirements of Zero Corp.'s bylaws.

Ann wishes to solicit other stockholders to vote to elect her as Zero Corp.'s sole director, but she does not know the identity of all of Zero Corp.'s stockholders. Ann makes a written demand under oath pursuant to Section 220 of the General Corporation Law of the State of Delaware (the "DGCL") to inspect (i) the current stocklist of Zero Corp., (ii) all Board minutes for the past three years, and (iii) the general ledger for the past three years. Ann plans to use the stocklist to identify the stockholders of Zero Corp., communicate with them regarding her concerns and sale proposal, and to seek their support to elect her as the new sole director. Ann

seeks to inspect the Board minutes and general ledger to investigate possible mismanagement or wrongdoing by Bill. Ann does not have evidence of wrongdoing, but suspects that Zero Corp.'s poor financial performance could be the result of mismanagement or wrongdoing by Bill.

* * * * *

2. Does Ann have a proper purpose (within the meaning of Section 220 of the DGCL) for seeking inspection of the stocklist? Provide your analysis and discuss who should have the burden of proof regarding Ann's purpose in seeking to inspect the stocklist. Assume for purposes of this response that Ann's written demand satisfies all other requirements of Section 220 of the DGCL.

3. Does Ann have a proper purpose (within the meaning of Section 220 of the DGCL) for seeking inspection of the Board minutes and the general ledger? Provide your analysis and discuss who should have the burden of proof regarding Ann's purpose in seeking to inspect the minutes and general ledger. Assume for purposes of this response that Ann's written demand satisfies all other requirements of Section 220 of the DGCL.

* * * * *

Bill takes steps to ensure that Ann will not be elected. Acting as the sole director, Bill adopts resolutions creating a new Series A preferred stock and authorizing the issuance of shares of the Series A preferred stock to himself for $100 per share. Zero Corp. files a certificate of designation with the Delaware Secretary of State, rather than a certificate of amendment to the certificate of incorporation. The certificate of designation contains the terms of the Series A preferred stock as set forth in the resolutions that Bill adopted as the sole director.

The certificate of designation provides that each holder of Series A preferred stock is entitled to vote on all matters upon which stockholders are entitled to vote generally (including the election of directors) and to exercise 10 votes per share of Series A preferred stock. Based on his shares of common stock and Series A preferred stock, Bill now holds 52% of the outstanding voting power. The Series A preferred stock is entitled to a preferential dividend of $10 per share per year, which must be paid before any dividends may be paid to the common stock. The preferred stock must be redeemed by the corporation in two years at $100 per share.

In a letter to stockholders, Bill explains the reasons he created and issued the new Series A preferred stock:

> I took this action because the possibility of Ann becoming the new sole director of Zero Corp. poses a serious threat to Zero Corp. and all its stockholders. Ann desires to conduct a sale process and to sell Zero Corp. This is an inopportune time to sell the Company. The Company's current value is artificially depressed by the recent downturn in its financial performance and the Company is engaged in efforts to expand its business. If those efforts are successful, the value of the Company should be greater in coming years. Also, due to Ann's outside employment, she will not be able to devote the time and energy required to manage Zero Corp.'s business. For these reasons, I determined it was in the best interests of Zero Corp. and all its stockholders to issue the Series A preferred stock to myself for a short time (it is redeemable in two years) to provide Zero Corp. sufficient time to carry out its expansion plans without a threat of a change in board composition and potential sale at an inadequate price.

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Zero Corp.'s certificate of incorporation contains a provision that reads as follows:

> The total number of shares of capital stock that the corporation shall have authority to issue shall be 10,000 shares of common stock, par value $0.01 per share, and 5,000 shares of preferred stock, par value $0.01 per share. The preferred stock may be issued from time to time in one or more series. The Board of Directors is expressly authorized to provide by resolution for the issuance of each series of preferred stock and, with respect to each such series, to fix the number of shares, the designations thereof, and the powers (including voting powers), preferences, and relative participating, optional, or other special rights thereof. The Board of Directors shall not be entitled to alter or change the powers, preferences, or special rights of the shares of common stock so as to affect them adversely without first obtaining approval of the holders of a majority of the common stock, voting separately as a class.

* * * * *

4. Did Bill, acting as sole director, have authority under Delaware law to create the Series A preferred stock without obtaining stockholder approval to amend Zero Corp.'s certificate of incorporation pursuant to Section 242 of the DGCL? Provide your analysis. Do not address any fiduciary duty issues in this answer.

5. If Ann were to file litigation alleging that Bill breached his fiduciary duties by issuing the Series A preferred stock, what standard of judicial review would apply to Ann's breach of fiduciary duty claims? Describe that standard, explain why it applies, and discuss who will have the burden of proof under that standard.

QUESTION 6

Last year, Delaware enacted a new law, the Protecting Police Act (the "PPA"), which will become effective on January 1, 2017. The PPA provides:

> To protect State law enforcement officers from the reputational injury associated with false allegations of police brutality, the Attorney General may enjoin members of the press from publishing or otherwise reporting any criticism of the conduct of a State law enforcement officer.

Reporter, a well-known magazine columnist, has for years made a living reporting on police misconduct. Reporter files a lawsuit against the Governor and other State of Delaware officials in federal district court alleging that the PPA is unconstitutional because it violates Reporter's free speech and free press rights, and because it is not clear exactly what types of publishing and/or reporting the Attorney General may enjoin under the PPA.

* * * * *

1. Analyze whether there is a justiciable case or controversy before the federal district court.

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Assume the case moves forward.

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2. What standard of judicial scrutiny will the court apply in evaluating Reporter's free speech and free press challenge? Analyze what standard of judicial scrutiny applies in these circumstances and who will have the burden of showing that the standard is or is not met.

3. **Analyze whether the PPA is constitutional and what arguments are available to Reporter based on the types of publishing and/or reporting the Attorney General may enjoin under the PPA?**

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Professor is employed by State University, a publicly funded state university, as a pre-law professor. Professor previously held a similar job at City College, but accepted this new job with State University because Professor was assured continued employment for at least two years with a potential for tenure. Professor gives Student a poor grade on the pre-law final exam. Angry over the poor grade, Student sends an anonymous letter to the Dean of State University, which says that Professor is a drug addict. Not wanting to risk public scandal, Dean immediately terminates Professor's employment.

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4. Did the manner in which Dean terminated Professor's employment violate any of Professor's rights under the U.S. Constitution? Provide your analysis.

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Earlier this year, the Keep Food Safe Act ("KFSA"), went into effect in Delaware. Enacted in response to a recent food poisoning outbreak linked to produce sent from a farm in a neighboring state to a number of Delaware residences, Section 1 of the KFSA provides:

> To ensure that produce shipped to Delaware residences is safe for human consumption, farms located outside of Delaware shall not ship produce directly to customer residences located within Delaware unless such farm first pays for and obtains a license from the Department of Produce, which requires an initial inspection by the Department of Produce. The Department of Produce shall also

> be responsible for periodic random inspections of such licensed farms. A licensee consents to such periodic inspections and the Department of Produce is empowered to revoke the license of any farm that refuses a periodic inspection.

You should assume that the United States government has not enacted any laws directly addressing the interstate shipment of produce.

Del and his sister Mary run small vegetable farms on opposite sides of the Delaware/Maryland border. For many years, each of them has sold and shipped award-winning produce to Delaware residents. Mary does not think the KFSA is fair, and wants to continue to sell and ship her Maryland produce directly to Delaware residents. The Department of Produce currently has a six month wait list for initial inspections of farms in connection with applications for licenses under the KFSA. Concerned that her farm will not be able to keep up with Del's farm, since Del will be able to ship his Delaware produce directly to Delaware residents because he is not forced to comply with the KFSA licensure requirements, Mary decides to challenge the enforcement of the KFSA against her farm.

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5. What constitutional challenges should Mary assert against the enforcement of the KFSA? Provide your analysis, including any arguments the State could make in response to any challenges.

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Section 2 of the KFSA provides:

> Any farm located in Delaware that is owned by a non-United States citizen is subject to the same licensure requirements as imposed by Section 1 on farms located outside of Delaware.

French is a non-U.S. citizen who recently started a green bean farm in Delaware. French does not want to have to comply with the KFSA's licensure requirements in order to ship green beans within Delaware, and decides to file suit against the State of Delaware to challenge the constitutionality of the KFSA.

* * * * *

6. What constitutional challenges can French assert against the enforcement of the KFSA? Provide your analysis, which should address the relevant standards or burdens of proof for such challenges, and any arguments the State could make in response to any challenges.

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QUESTION 7

ASSUME THAT ALL OF THE EVENTS DESCRIBED IN THE FOLLOWING FACT PATTERNS TAKE PLACE IN DELAWARE AND THAT ALL OF THE QUESTIONS CALL FOR THE APPLICATION OF DELAWARE LAW.

Producer is in the business of producing plays and selling theater tickets for profit. His current play is about a flying superhero, and the actor who plays the superhero frequently will be suspended by ropes and a harness above the stage and over the audience while performing wildly entertaining (and also dangerous) acrobatic stunts.

Producer offers the role of the superhero to Child Actor. Child Actor is 17 years old, but he looks much older and Producer does not know Child Actor's age. In offering Child Actor the role, Producer explains that the job has the following terms: Child Actor must attend a month of rehearsals and then perform in seven shows a week for a full calendar year. In exchange, Producer will pay Child Actor $65,000 in monthly installments of $5,000 throughout the one month of rehearsals and full year of performances. Child Actor says he has to think about it, to which Producer responds, "Take as much time as you want, so long as you're at the first rehearsal."

Unknown to either Producer or Child Actor, a special stage performers' statute recently went into effect. The statute makes it illegal for any person under the age of 18 to act in a theatrical performance if the minor's role involves being suspended in the air or otherwise performing dangerous acrobatic stunts.

Producer does not hear from Child Actor again until Child Actor shows up for the first rehearsal. For the month of rehearsals and the first three months of performances, Child

Actor performs consistently with how Producer described the job. For his part, Producer gives Child Actor a check for $5,000 at the end of each month during this period. Child Actor thanked Producer for "paying me" after receiving each check.

But then, two days before Child Actor's 18th birthday, Child Actor tells Producer he will not perform anymore. Child Actor also gives back all of the $5,000 checks he had received, none of which had been deposited yet. At no point had Producer and Child Actor signed a written contract.

Producer looks for a replacement actor but is unable to find one because the role of the superhero is too difficult to learn without a full month of rehearsals. Producer determines that it would not be economical to hold another month of rehearsals and cancels the rest of the performances. Producer then sues Child Actor for breach of contract.

* * * * *

1. Putting aside any potential defenses that Child Actor might have, have the elements for contract formation been met? Identify and explain Producer's legal arguments as to the formation of a contract.

2. Identify and explain Child Actor's defenses under state law to the formation of an enforceable contract based on the following key facts:

a) Child Actor is 17 years old;

b) The special stage actors statute has taken effect; and

c) Child Actor never signed a written agreement.

* * * * *

Producer now is casting his next play. To increase ticket sales, he wants to hire a popular actor to star in the leading role. Indeed, in his professional experience, a play with a well-known actor in the leading role usually sells more tickets than a play without a well-known actor. Nevertheless, Producer also knows that every play is unique in its own way, which makes it difficult to predict in advance what ticket sales will be for any particular play and difficult to determine after the fact why ticket sales were high or low for any particular play. For example, Producer has produced some plays with well-known actors that have not been profitable at all, and he has produced other plays with no well-known actors that were extremely successful. Still, Producer has produced this same play before in other cities across the country, and every performance with a well-known actor was more profitable than the performances without a well-known actor.

Producer asks Actor, a well-known actor of both plays and Hollywood movies, to consider starring in the leading role. She is willing to do so, but only if Producer will spend a significant amount of money promoting Actor and her unique acting talent. Producer is willing to do this because promoting Actor generally should improve ticket sales even though such promotion does not specifically mention her role in the play. But, Producer insists that Actor act exclusively for him in the geographic area where he will be advertising his play for a certain period of time following his promotional spending. Producer explains that his reasoning for this insistence is that it would be unfair for him to incur costs to promote Actor in and around the city where his theater is located if she then performed for someone else and did not perform exclusively in Producer's play. Actor agrees to this demand. Eventually, Producer and Actor enter into a written contract that contract contains the following "Exclusive Services" provision:

Promotional Spending; Exclusive Services. Producer shall spend at least $100,000 promoting Actor and her unique skills. In exchange, for one (1) year starting on the date of this Agreement, Actor agrees to provide her acting services exclusively to Producer within 50 miles of Producer's play.

A couple of months before the premiere, after Producer has spent the agreed-to amount promoting Actor, Actor informs Producer that she will not perform in his play after all because the producer of a competing show, located in the theater next door to Producer's theater, has offered her more money to perform in the competing show. Producer tells Actor she can't do that because they have a contract, but Actor says her decision is final. Producer would be able to use the understudy for the leading role in the play, but the understudy is not well known.

Producer files a lawsuit in the Court of Chancery against Actor for breach of contract and requests an order of specific performance compelling Actor to perform in Producer's play. As an alternative, Producer requests an injunction prohibiting Actor from performing in the competing show based on the Exclusive Services provision of the contract. There is enough time remaining before the premiere for the Court to address the merits of the lawsuit.

* * * * *

3. Assuming Producer proves that Actor breached the contract, is Producer likely to prevail on his request for specific performance compelling Actor to perform in Producer's play? Provide your analysis.

4. Assuming Producer proves that Actor breached the contract, is Producer likely to prevail on his request for an injunction prohibiting Actor from performing in the competing show based on the Exclusive Services provision? Provide your analysis.

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Now assume that instead of filing a lawsuit before the play's premiere, Producer decided to proceed with the play using the understudy in the leading role. Ticket sales for Producer's play are less than he believed they would be if Actor had played the leading role. After the play ends its run, Producer sues Actor in Superior Court and requests money damages equal to his lost profits based on his estimate of what ticket sales would have been had Actor played the leading role.

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5. Assuming Producer proves that Actor breached the contract, is Producer likely to recover those damages under the available facts? Provide your analysis.

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QUESTION 8

ASSUME THAT ALL OF THE EVENTS DESCRIBED IN THE FOLLOWING FACT PATTERNS TAKE PLACE IN DELAWARE AND THAT ALL OF THE QUESTIONS CALL FOR THE APPLICATION OF DELAWARE LAW.

Ace Automotive fires Ben and Charlie after discovering they were doing work after-hours using Ace's equipment and pocketing all of the money. After the firing, Ace's manager changes all of the locks on the business, but does not change the passcode to operate the automatic garage door. After stewing about their termination, Ben suggests to Charlie that they torch Ace Automotive in the middle of the night. A week after their firing, using the passcode number to open the automatic garage door, Ben and Charlie each carry several sticks of dynamite, place the dynamite throughout the inside of the business, and set the igniters on fire as they escape out the automatic garage door.

As they are leaving, Ben notices Ace's business credit card and customer vehicle keys near the garage door and takes them. Ben and Charlie split up the vehicle keys and eventually are able to open and start one of the customer's cars and flee. By this time Ace Automotive is fully engulfed in flames.

Ace Automotive has a smoke detector that automatically contacts the fire department. The department responds to a full blaze. In their efforts to extinguish the fire, one of the firefighters suffers severe smoke inhalation and is rushed to the local hospital.

Ben suggests to Charlie that they stop at BigWorld Appliance store, a 24 hour consumer warehouse, and stock up on some televisions and video games. They both put electronics and games into the cart. When they go to check out, Ben hands Charlie the Ace Automotive credit card, and Charlie signs his former boss' name on the $3,200.00 charge. Ben then drops Charlie off at home. Charlie thanks Ben for showing him a good time and for the new video games. Ben joyrides for another hour and leaves the customer car undamaged a couple of blocks from his home with the car keys still in the ignition. The next day he barters the televisions he purchased at BigWorld on the street; he receives twelve (12) grams of cocaine and $500.00 cash.

The police, after viewing surveillance video from a neighboring business, immediately identify Ben and Charlie as their suspects. Ben is arrested and immediately tells the police he wants a lawyer and the police stop questioning him. The records reveal that Ben, who is forty-two (42) years old, has previously been convicted of Burglary Second Degree in 2013, Assault Second Degree in 2011, and Conspiracy Second Degree in 2010.

At the time of Charlie's arrest, he is only sixteen (16) years old, has a severe learning disability, is enrolled in special education classes, and has never been in trouble with the law. He is taken into police custody and is transported to the police station. After waiving his Miranda rights, he answers questions and gives a full confession. The police do not contact his parents until after his arrest and confession.

A week after the fire at Ace Automotive, the firefighter dies as a result of the smoke inhalation. After an exhaustive investigation, the prosecutor indicts both Ben and Charlie in the same Indictment in Delaware Superior Court and notifies defense counsel that the State does not intend to seek the death penalty.

* * * * *

1. Identify and discuss by reference to the elements, each crime with which Ben and Charlie could be charged. If a crime is divided into degrees, specify the appropriate degree.

2. You have been appointed to represent Charlie, identify and discuss any pretrial motions that you would file on Charlie's behalf.

3. After trial in Delaware Superior Court, Charlie is convicted on all charges and the Court sentences Charlie to spend the rest of his life in jail, without the possibility of probation or parole. If you are Charlie's Superior Court trial counsel, describe what motions or applications you would file in light of that sentence and why?

4. Ben is convicted in Superior Court on all charges. Assume you are the prosecutor, describe what motions or applications you would file prior to sentencing and the reasons that support the Court ruling in your favor.

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GENERAL INSTRUCTIONS

The Essay Section of the 2015 Delaware Bar Examination consists of eight questions. This booklet contains the four essay questions which must be answered during this afternoon session of the Examination. The time allotted for this session is three hours. Each of the four questions is of equal weight, although some questions may take more time to read and answer than others. Accordingly, your time should be budgeted carefully. In addition, the subparts in the questions are not necessarily equally weighted.

Answers to the essay questions are graded by the Examiners. Answers are graded in accordance with certain general standards, including the applicant's ability to (i) recognize the issues; (ii) analyze the issues accurately; (iii) reason logically; (iv) demonstrate a thorough knowledge of the fundamental principles of law and their application; and (v) express concisely and accurately an answer that is directly responsive to the question. A response that does not answer a question or gives no semblance of issue recognition, analysis or discussion relevant to subject matter of the question may receive a very low grade. No credit will be given for discussion of irrelevant issues or statements of general principles that are not responsive to the question.