Applicant Number

BOARD OF BAR EXAMINERS

OF THE DELAWARE SUPREME COURT

2016 BAR EXAMINATION

Monday, July 25, 2016

9:30 a.m. – 12:30 p.m.

Questions 1-4

QUESTION #1

Dice and Ranny are next door neighbors. Dice owns Delaware Ice Company Enterprises ("Delaware Ice"), a Delaware sole proprietorship. Delaware Ice operates out of a warehouse in Wilmington, Delaware.

Ranny owns the Race Company, also a Delaware sole proprietorship, which organizes large running events, including the post-race festivities. Race Company operates out of a store in Newark, Delaware.

Dice discussed expanding his business with Ranny. After some negotiation, in 2013, the men entered into a written agreement pursuant to which Dice, doing business as Delaware Ice, agreed to supply ice for all events organized by Ranny, doing business as Race Company.

Race Company organizes the largest running event in Delaware, the "First State Race." Based on previous years, more than 1,000 runners are expected. For his services, Ranny receives a percentage of the vendors' sales at the post-race party. Ranny makes 50% of his annual profit from this event alone.

The First State Race was held on July 3, 2013, an extremely hot day. Dice went to New York City the night before the race and didn't return to Delaware until the day after the First State Race and did not deliver ice to the event. Because there was no ice for the vendors to sell cold drinks, vendor sales were down 95% from previous years.

1. Ranny hired Joseph Smith, Esquire to file suit in Delaware Superior Court against Dice for breach of contract. What documents must be filed to initiate the action? Describe the purpose of each document and what must be included in each. What is the applicable pleading standard for the complaint?

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2. Ranny's complaint for breach of contract is filed on Tuesday, July 5, 2016. Is the filing timely? Explain the basis for your answer.

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Dice lives alone and spends a lot of time on the road making ice deliveries. After the sheriff's office made several attempts to serve Dice at home, the sheriff returned service as undeliverable. Thereafter, the Court granted Ranny's motion for the appointment of a special process server, who is given the address for the Delaware Ice warehouse. When the process server arrives at the warehouse, Dice is not there. The process server leaves the complaint and summons with the temporary receptionist and tells her to give the papers to Dice. The receptionist, busy checking social media, drops the complaint and summons in the trash with her unfinished lunch and forgets to tell Dice about the papers.

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3. Explain how service of process on an individual may be made under Delaware Superior Court Civil Rule 4. Was service of process on Dice effective? Analyze and explain your answer.

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Regardless of your answers to Questions 1 and 2, assume that the action against Dice proceeds and that Dice hires Michael Wilson, Esquire to represent him. An answer is timely filed and discovery commences. After receiving permission from the Court, Ranny files an amended complaint on September 1, 2016 to assert an additional claim against Dice for fraud based on Ranny's August 1, 2013 purchase of a 1965 Corvette Stingray from Dice for $50,000. A week after he purchased the car, Ranny learned that the car was not an authentic 1965 Corvette Stingray, but rather was a replica made in 2012 and was worth only $10,000.

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4. Dice filed a motion to dismiss the fraud claim. On what grounds can Dice assert that the fraud claim should be dismissed and what arguments can Ranny assert in opposition to the motion? Explain the basis for Dice's and Ranny's arguments. How is the Court likely to rule?

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At his deposition, Dice testifies that he did not deliver ice to the First State Race because he received a call from Ranny the day before the race saying that due to the extreme heat expected, the race was being canceled out of concern for the runners' health. At his deposition, Ranny testifies that he did not tell Dice the race was canceled. Rather, Ranny testifies that he told Dice to make sure he had lots of ice available because it was expected to be extremely hot and more ice would be needed to keep runners from getting overheated during the race. The parties agree that the calculation of lost profits from the First State Race was $60,000. At the conclusion of discovery, Ranny files a motion for summary judgment based on his testimony that he did not tell Dice the race was canceled.

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5. What standard will the court apply to the motion for summary judgment and what is each side's burden on the motion? What will each side argue? How is the Court likely to rule? Explain your answers.

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Assume for purposes of this question that Judge I. M. Smart of the Superior Court states her ruling on the record at oral argument on November 3, 2016, granting Ranny's motion for summary judgment. The Court enters an Order granting judgment in Ranny's favor on Friday, November 4, 2016, which provides:

"For the reasons stated on the record, judgment is hereby entered in favor of Ranny in the amount of $60,000."

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6. On November 11, 2016, Dice files a motion for reargument to reiterate that there is a dispute of fact which prevents the Court from granting summary judgment. Is the motion for reargument timely? What is the standard that applies to the motion? How is the Court likely to rule? Explain your answers.

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Assume that Judge Smart entered an Order denying the motion for reargument on December 12, 2016. Dice wants to appeal the Court's November 4 Order granting summary judgment to Ranny.

7. What is the time within which an appeal must be taken? When does the appeal period begin to run? What information must be included in the Notice of Appeal and in what court is it filed?

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QUESTION # 2

Paula owns and operates a small catering company called Paula's Picnics that specializes in barbeque events. Paula needs a large volume of meat on a weekly basis, so she enters into a contract with a wholesale meat supplier, Donovan's Delicacies ("Donovan's").

Under the terms of their contract, Donovan's agrees to supply Paula with 100 pounds of pork on a weekly basis for one year, beginning in January. The contract defines this as the "Regular Order." The weekly price for the Regular Order is $2/pound, payable on delivery. Under the contract, Donovan's agrees to deliver the orders to Paula each Thursday by noon.

The contract contains the following provisions:

> Section 8. Quantity Changes. Should Paula's desire to increase or decrease the quantity of its order for a given week, Paula's must notify Donovan's, in the manner prescribed by Section 10 of this Agreement, no later than the Monday before a scheduled weekly delivery. Any adjustment to the size of the order will result in a corresponding adjustment to the amount invoiced, based on the $2/pound price. Donovan's guarantees the availability of up to ten (10) times the Regular Order upon the notice described in this Section 8.
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> Section 9. Time of Essence. Each of the parties hereto hereby agrees that, with regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.

Section 10. Notices. All notices and other communications hereunder shall be in writing and shall be deemed given if delivered in person or sent by email to the below addresses:

If to Donovan's: DonovansDE@meatsuppliers.com

If to Paula's: PaulasPicnics@gmail.com

Section 11. Termination. Either party may terminate this Agreement, with or without cause, by giving the other party thirty days' written notice, pursuant to Section 10.

In January and February, Donovan's delivered the Regular Order every week and Paula paid each invoice. Word began to spread about the high quality of Paula's food, and she began booking more and more events. Beginning in March, she needed to increase the Regular Order nearly every week. At first, she emailed Donovan's on Mondays as provided in the contract. But by the end of March and early April, she had become so busy cooking and planning events that she began calling Donovan's and communicating her quantity changes orally to the supply manager directly. Donovan's happily accepted the additional business, particularly because the market price of pork had dropped by 25% since the parties entered into the agreement, but Paula still paid the agreed-upon rate without complaint.

In May, Paula called each Monday and increased her order quantities, but in June and July, she began calling on Wednesdays. Donovan's always met her additional needs.

On a Wednesday morning in late August, Paula got a call from Everett, an event planner coordinating a 600-guest convention scheduled for the coming Saturday. The scheduled caterer had fallen ill and Everett wanted Paula to step in

and cater the convention. Paula was thrilled because it would be by far the largest event she had ever catered. Paula told Everett she was interested but needed to confirm that she would be able to get enough food for the convention.

Paula called Donovan's later that morning and spoke with Margaret, the supply manager on duty. Paula asked if she could increase her weekly delivery to 10 times her Regular Order. Donovan's had hired Margaret in June, but she did not usually work Wednesdays, so she did not know Paula and was not familiar with her contract.

When Margaret joined Donovan's, she revamped some of the company's ordering processes. For example, she had discovered that several of the company's competitive barbeque customers placed the same orders for their weekend barbeque competitions, consisting of 25 pounds each of brisket, chicken, and ribs. She started calling this "the regular," and the barbeque competition clients began to describe their orders using the lingo as well. When Paula asked to increase her order, Margaret assumed that Paula was a competitive barbequer and meant 10 times "the regular." Margaret advised Paula that they could meet her request. Paula thanked Margaret, hung up, and accepted Everett's offer to cater the large weekend convention.

Paula emailed Everett her catering contract for the convention, with terms and pricing that were consistent with her prior events, adjusted for the number of guests. The catering contract provided that payment would be due "no later than seven (7) days after the convention." That afternoon, Everett responded that Paula's quote was higher than the convention organizer, Carmen, was expecting to pay, but that Carmen recognized he was in a bind and didn't have any other options. Everett's email concluded "Thanks for working with us. We are looking forward to Saturday. Everett" and attached the contract signed by Carmen. Wanting to avoid any potential conflict, Paula called Everett to make sure that he

and Carmen were comfortable with the arrangement. Everett assured her that even though the cost was higher than Carmen was expecting, Carmen was excited about the convention and the catering, and that Everett would make sure Paula got paid timely.

Thursday afternoon at 3:30 p.m., Donovan's delivered 250 pounds each of brisket, chicken, and ribs. Paula was making coleslaw for the convention and did not inspect the delivery when it arrived. Instead, she asked the delivery driver to move it into the walk-in refrigerator and she would check it later. Before the driver left, Paula signed the invoice acknowledging the accuracy of the delivery.

When Paula finished making her coleslaw at 5:00 p.m., she discovered that the delivery order was not what she expected, and that she had received none of the 1,000 pounds of pork she needed for the convention. She immediately called Donovan's, but their voicemail recording informed her that they were closed for the day and would reopen at 7:00 a.m. Friday morning. She left a message that they had delivered the wrong food and that she would leave the kitchen door unlocked so they could pick it up and deliver the proper food first thing Friday morning.

Paula felt stressed and opened a bottle of wine while she formulated a plan. She was distraught, worried about losing all she had worked for with her business. Paula realized that she could not wait until the following morning because she would lose too much prep time, so she quickly walked to see another supplier, Larry's Last Minute Meats. She explained the situation to Larry, who agreed to sell her 1,000 pounds of pork, but for $10/pound –five times her contract price with Donovan's.

When Paula asked why the price was so high, Larry replied, "You need the pork, don't you? Where else are you going to go?" Outraged, Paula initially refused, but ultimately agreed once she realized the damage her reputation would

suffer if she had to back out of the convention. Larry agreed to deliver the pork that evening. As Paula stumbled to the door, clutching the now empty wine bottle, Larry offered to call her a cab. Paula waved her hand at him, bumped into the door on her way out, but ultimately made it home. The pork delivery was waiting when Paula returned home, and she promptly signed for it and agreed to Larry's standard payment terms, which required payment within 72 hours of delivery. Before starting to prepare the food for Carmen's convention, Paula emailed Larry to apologize for being flippant and to thank him for helping her out on short notice.

Paula prepared the food for Carmen's convention, but when she arrived at the venue on Saturday, Carmen told her that he had decided to cancel the convention because of low registration and no longer needed the food. Paula donated the food to the Emmanuel Dining Room. Carmen failed to pay Paula.

1. Identify and discuss any claims that Paula can assert against Carmen and any defenses potentially available to Carmen (including whether those defenses are likely to be successful and why). Assume the Uniform Commercial Code does <u>not</u> apply.

2. Is Everett liable to Paula as a guarantor based on his representations about Paula getting paid? Explain why or why not. Assume the Uniform Commercial Code does <u>not</u> apply.

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Donovan's does not pick up the brisket, chicken, and ribs from Paula's kitchen, and instead sends Paula an invoice for the order. Paula refuses to pay it and Donovan's sues her for breach of contract.

3. Identify any defenses potentially available to Paula (including whether those defenses are likely to be successful and why). Assume the Uniform Commercial Code does <u>not</u> apply.

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Despite her frustration with Donovan's, Paula called the following Tuesday to place another order. Donovan was very upset that Paula had given business to his competitor Larry. Donovan told Paula that he was terminating her contract and would never sell her pork again. Spurned, Paula entered into a similar contract with Ralph's Replacement Meats for the remainder of the year, but at a price of $3/pound.

4. Is Donovan's purported termination of his contract with Paula valid? Explain why or why not. Assume Paula's telephonic change orders did not constitute a material breach. Assume the Uniform Commercial Code does <u>not</u> apply.

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After the one-year term expires on her contract with Donovan's, Paula sues Donovan's for breach of contract for the termination and failure to supply her with pork for the remainder of the year. The jury finds Donovan's liable.

5. Describe the damages the jury could award Paula and any arguments Donovan's can make to mitigate any damages award (including whether those arguments are likely to be successful and why). Assume the Uniform Commercial Code does <u>not</u> apply.

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Paula does not pay Larry for the pork.

6. In addition to breach of contract, does Larry have a valid claim against Paula in quasi-contract? Explain why or why not. Assume the Uniform Commercial Code does <u>not</u> apply.

7. **Identify any defenses potentially available to Paula (including whether those defenses are likely to be successful and why). Assume the Uniform Commercial Code does <u>not</u> apply.**

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QUESTION # 3

Patty Parent's son, Steve, was playing in his high school soccer game in Delaware. After a corner kick, Steve attempted to head the ball into the goal. When Steve jumped into the air, a member of the opposing team, Darren Defender, intentionally bumped into Steve's legs in order to disrupt Steve's attempt to score. With his legs taken from under him unexpectedly, Steve came down awkwardly and dislocated his shoulder. The referee called a foul on Darren but did not give him any other warning or eject him.

Patty Parent was standing about 30 feet away and saw the grotesque injury that left Steve's arm hanging about 6 inches out of place. As a result, Patty immediately became nauseous and vomited. While Patty was regaining her composure, Vicky Volunteer, a parent of one of Steve's teammates, yelled, "Is anyone here a medical professional?" After hearing no response, Vicky popped Steve's arm back into its socket. Vicky did not have any medical training but had seen a team trainer do the same thing for Vicky's son after he suffered a similar injury the prior season.

Still feeling queasy but worried about her son, Patty walked with Steve away from the field and to the car, with the intent of taking Steve to the hospital. In a hurry, Patty pulled the car out of the parking lot and onto a public street without coming to a complete stop or looking both ways, despite a stop sign at the end of the parking lot. At the same moment, Willy Waterman, an employee of the Town of Millville, Delaware, was driving a Department of Public Works vehicle on that public street. Although the speed limit on the street was 25 miles per hour, Willy was driving 29 miles per hour because he was on his way to a leaking fire hydrant.

Despite Willy slamming on the brakes, without enough space to stop, Willy's vehicle struck the rear of Patty's vehicle, causing $5,000 in damages to

Patty's vehicle and $2,500 to the Town's vehicle. After the crash, Patty's vehicle was not operable, so Willy drove Patty and Steve to the hospital. A doctor then re-set Steve's shoulder, which involved dislocating the shoulder again because Vicky Volunteer had not set the bone in proper alignment. The doctor indicated that there would not be any lingering effects from Vicky's actions; however, Steve had to bear the physical pain of the second dislocation. Another doctor at the hospital treated Willy, who suffered two cracked ribs in the accident. Willy could not work for 2 weeks while the ribs healed. Afterward, he returned to his job.

At the time of the automobile crash, a parent who was late arriving for the game, Fred Father, was in the parking lot. When Fred got to the sideline to sit with the other parents, Fred told another parent, Rebecca Reporter, that Fred thought the driver of the Public Works vehicle was "probably drunk." Although Fred was not aware of it, Rebecca Reporter worked for the local newspaper. For the next day's paper, Rebecca wrote an article about the accident and quoted Fred as indicating that Willy Waterman was "probably drunk" at the time.

1) **What cause(s) of action can Steve assert against Darren Defender? Identify each cause of action, including its elements, and discuss whether Steve is likely to prevail. What defenses, if any, can Darren Defender use?**

2) **What cause(s) of action can Patty Parent assert against Darren Defender? Identify each cause of action, including its elements, and discuss whether Patty is likely to prevail. What defenses, if any, can Darren Defender use?**

3) What cause(s) of action can Steve assert against Vicky Volunteer? Identify each cause of action, including its elements, and discuss whether Steve is likely to prevail. What defenses, if any, can Vicky Volunteer use?

4) What cause(s) of action can Willy Waterman assert against Patty Parent? Identify each cause of action, including its elements, and discuss whether Willy is likely to prevail. What defenses, if any, can Patty Parent use?

5) What cause(s) of action can Willy Waterman assert against Fred Father? Identify each cause of action, including its elements, and discuss whether Willy is likely to prevail. What defenses, if any, can Fred Father use?

6) What cause(s) of action can Willy Waterman assert against the Town?

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QUESTION #4

Seller has lived in a Wilmington, Delaware subdivision for over 20 years. The subdivision's deed restrictions (the "Original Restrictions") prohibit homeowners from constructing swimming pools on their properties. Wanting a home with a pool, Seller decides to sell her house (the "Property"). Seller locates a buyer for the Property (the "Buyer") with whom she enters into a written purchase agreement (the "Agreement"). Among other things, the Agreement provides that the parties will close the sale by a date certain (the "Closing Date") because the Buyer's lease at his prior residence expires on that date. On the Closing Date, the Buyer will pay the specified purchase price in cash in exchange for the Property, for which the correct legal description is given in the Agreement.

The board of the subdivision's homeowners association (the "Association"), which is responsible for creation and enforcement of the deed restrictions, thereafter properly adopts a set of amended deed restrictions (the "Amended Restrictions") to supersede the Original Restrictions. One of the changes is to delete the prohibition on swimming pools. The change leads Seller to reconsider her decision to sell the Property; one month before the Closing Date, Seller tells Buyer that she will not go through with the sale.

Buyer, who remains ready, willing and able to purchase the Property pursuant to the Agreement, files an action in the Delaware Court of Chancery

seeking specific enforcement of the Agreement, along with a motion seeking to have the action expedited so that the Court of Chancery can adjudicate it before the Closing Date.

1. For the purposes of this question, assume that Seller's statement to the Buyer constitutes an anticipatory breach of the Agreement:

(a) What elements will Buyer need to prove to win on his request for specific performance? What facts should he argue in support of his argument that those elements are satisfied?

(b) What elements would Buyer need to establish for the Court of Chancery to grant the motion to expedite? What facts should Buyer argue in support of the motion?

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The sale of the Property to Buyer closes. Buyer decides to install a pool in his backyard at a cost of $50,000. Shortly before construction begins, Buyer discovers that the Amended Restrictions were never recorded in the Property's chain of title; the Original Restrictions, containing the prohibition on pools, remain referenced in the deed. In response to Buyer's inquiry, the Association sends Buyer a letter stating that the Amended Restrictions were not recorded in the chain of title due to a clerical oversight on the Association's part, assures Buyer that the Amended Restrictions apply to the Property, and therefore he may proceed with

construction of a pool. Buyer does so. Construction of the pool takes several weeks, during which time all of the members of the Association's board of directors see that the construction is occurring.

Upon learning that Buyer intends to be the first homeowner in the subdivision to build a pool, Neighbor, whose property adjoins Buyer's, complains to Buyer that water will splash from the pool onto Neighbor's property and damage his prizewinning lawn. To promote neighborly harmony, Buyer assures Neighbor that Neighbor may use the pool whenever he wants.

Although they never discuss the subject again, Neighbor uses the pool dozens of times after construction is completed, never complaining about the modest amount of water that splashes onto Neighbor's lawn whenever the pool is in use. However, a few months later, Neighbor and Buyer have a falling out; Buyer bans Neighbor from using the pool.

After Neighbor complains to the Association, the Association sues Buyer in the Court of Chancery, seeking an injunction ordering Buyer to remove the pool on the basis that the Original Restrictions, which prohibit pools, remain applicable to Buyer's property.

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2. What equitable defenses could Buyer raise based on his correspondence with the Association? What elements would Buyer need to establish to succeed on each such defense and what facts should he argue in support? Assume for the purposes of this question that the Association's action is timely under the statute of limitations and laches, and that the dispute has already been mediated (unsuccessfully) pursuant to 10 *Del. C.* § 348.

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In a separate action filed in the Delaware Court of Chancery, Neighbor sues Buyer alleging that the water splashing onto his yard from the pool constitutes a private nuisance. As relief, Neighbor seeks a permanent injunction prohibiting Buyer from using the pool, damages and attorney's fees. There is no statute specifically authorizing an award of attorney's fees in an action of this nature.

Based on the evidence submitted at trial, the Court of Chancery finds that each time the pool is used, water from it splashes onto Neighbor's property. Although the amount of water intruding onto Neighbor's property is *de minimis*, the Court finds that it nevertheless constitutes a private nuisance, and therefore finds in favor of Neighbor and against Buyer on the issue of liability. However, the Court finds that Neighbor did not prove the amount (if any) of damages caused by the nuisance and therefore declines to award any damages.

3. (a) **What elements need to be shown before the Court will issue a permanent injunction?**

(b) **What should Neighbor argue in favor of his request for a permanent injunction? Do not discuss the balancing of the equities.**

(c) **What should Buyer argue in opposition to Neighbor's request for a permanent injunction? Do not discuss the balancing of the equities.**

4. **Identify the three bases on which Neighbor could potentially seek an award of attorney's fees from the Court of Chancery in the absence of a statute specifically authorizing an award of attorney's fees in an action of this nature.**

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GENERAL INSTRUCTIONS

The Essay Section of the 2016 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

2016 BAR EXAMINATION

Monday, July 25, 2016

2:00 p.m. – 5:00 p.m.

Questions 5-8

QUESTION #5

Tom Trucker ("Trucker") drives his truck northbound to a four-way intersection with stop signs for traffic approaching from each direction. After coming to a complete stop at the intersection, Trucker proceeds into the intersection. His truck is hit by a westbound sports car driven by Sam Sporty ("Sporty"), who, instead of stopping at the stop sign controlling his direction of travel, accelerated to try to beat Trucker through the intersection. Wendy Witness ("Witness") watches the collision and then immediately calls 911 . Witness tells the Police Dispatcher ("Dispatcher"): "I just saw a truck run a stop sign and hit a sports car!" Witness then tells Dispatcher the time and location of the collision and provides a description of Trucker (and Trucker's truck), and a description of Sporty (and Sporty's sports car). Dispatcher then reads his notes back to Witness and asks Witness to confirm that they accurately reflect what she told him. Witness responds, "you know, now that I think about it some more, I think the driver of the sports car really stepped on the gas to try to beat the truck through the intersection." Dispatcher makes a note of that before the call ends.

Neither Trucker nor Sporty are injured in the collision. Sporty is very angry and starts shouting and cursing at Trucker for damaging his sports car. Sporty becomes so angry that he punches Trucker once in the head. Sporty then immediately apologizes to Trucker for losing his temper. Witness, who is still on the phone with Dispatcher, says, "I can't believe it, the driver of the sports car just punched the driver of the truck!"

Sporty calms down and he and Trucker examine the damage to the vehicles. Witness, in the meantime, moves over to the location of the vehicles to wait for a Police Officer to arrive. While examining the vehicles, Trucker accuses Sporty of not paying attention while driving and failing to stop at the stop sign. Sporty

immediately offers Trucker $1,000 if Trucker will agree not to report the collision to their respective insurance companies. Trucker declines the offer. Witness hears this exchange.

ASSUME THAT THE DELAWARE RULES OF EVIDENCE APPLY TO THE QUESTIONS SET FORTH BELOW.

Trucker sues Sporty. Sporty denies liability for both the collision and for any injury to Trucker caused by Sporty's punch. The judge schedules a civil trial. Sporty intends to call Dispatcher to testify at trial. Sporty's trial exhibit list includes, as Sporty's Exhibit A, page 1 of Dispatcher's handwritten notes made during his phone conversation with Witness. This page 1 includes the statement from Witness that she "just saw a truck run a stop sign and hit a sports car!" This page does not include the statement that Witness gave later in the call that, "I think the driver of the sports car really stepped on the gas to try to beat the truck through the intersection." That later statement appears on page 2 of Dispatcher's handwritten notes. The handwritten notes were secured from the police file by subpoena.

1. Explain what objections Trucker's counsel should make to the introduction of page 1 of the Police Dispatcher's handwritten notes, and how Sporty's counsel can respond. Explain any other reasons why the handwritten notes should or should not be admitted into evidence.

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Sporty's counsel decides to try to get Witness's statement that she "just saw a truck run a stop sign and hit a sports car!" into evidence through Witness, directly, instead of through Dispatcher's notes reflected in Sporty's Exhibit A.

Sporty's counsel calls Witness to the stand, and asks her if she told Dispatcher that she "just saw a truck run a stop sign and hit a sports car". Trucker's attorney objects and says that Sporty's question calls for hearsay. The judge calls Trucker's and Sporty's attorneys to the bench and, so that the jury cannot hear the discussion, asks Sporty's attorney how he intends to get this hearsay statement into evidence. Trucker's attorney approaches the bench and brings with him a full copy of Dispatcher's notes, including both pages one and two.

2. **Explain how Trucker's attorney can get the statements contained on page two admitted into evidence. How should the Court rule?**

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Later in the trial, while cross examining Sporty, Trucker's attorney asks, "isn't it true that you offered to pay Trucker $1,000 if Trucker would agree not to report the collision to your respective insurance companies?" Sporty's attorney objects.

3. Explain what grounds support Sporty's attorney's objection, the responses available to Trucker's attorney, and how the Court should rule on the objection.

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Trucker calls Deborah Doctor ("Doctor") to testify to her conclusion that Trucker's punch caused Trucker a slight concussion that has resulted in his difficulty sleeping, and significant pain and suffering. Doctor testifies that she has worked as an emergency room doctor for 8 months, and has seen 3 or 4 patients who were punched in the head and suffered minor concussions. She testified that, based on conversations with those individuals' primary care physicians, that they

all had difficulty sleeping in the months after being punched in the head. Doctor testifies that, in her medical opinion, Trucker will never fully recover and will always have trouble sleeping as a result of his head injury. Sporty's attorney objects to Doctor's testimony.

4. Explain what grounds support Sporty's attorney's objection, the responses available to Trucker's attorney, and how the Court should rule on the objection.

* * * * *

Trucker seeks $5,000 in damages—which Trucker claims was the cost to fix his truck. Trucker produced a carbon copy of a mechanic's invoice during discovery. The bottom of the invoice, dated February 29, 2015, shows a total of $5,000. The middle of the produced invoice is unreadable, because, Trucker explained in his production letter, he spilled coffee on it. During Sporty's testimony at trial, Sporty offers into evidence a printout of Trucker's Facebook page. The printout includes Trucker's name at the top of the page, along with his picture. It also includes (in the "Photos" section) a picture, dated March 20, 2015, of Trucker's truck, with a comment from Trucker beneath the picture that says: "I figured I might as well get a brand new, $1,000 stereo installed while my truck was being fixed." Trucker objects to the introduction of the printout of his Facebook page. Trucker claims the printout is not actually his Facebook page, and that the invoice is the most reliable evidence of what it cost to fix his truck.

5. Explain what grounds support Trucker's attorney's objection, the responses available to Sporty's attorney, and how the Court should rule on the objection.

QUESTION # 6

ABC, Inc. is a Delaware corporation. ABC's certificate of incorporation provides that the board of directors has the power and authority to amend the corporation's bylaws. ABC's bylaws provide for a three member board of directors and further provide that directors are elected by a plurality of the votes represented by shares present, in person or by proxy, at a meeting of stockholders. One of the three directors currently serving on ABC's board is ABC's Chief Executive Officer and the other two are independent directors (*i.e.*, directors who are not officers or employees of ABC). ABC has only one class of authorized stock, common stock, and has 25 record holders of common stock. The common stock is not publicly traded or listed on a stock exchange.

ABC's bylaws contain the following provisions:

> Section 1. Indemnification. The Corporation shall indemnify, to the full extent permitted by applicable law, any person made a party to any civil action, suit, or proceeding (hereinafter, an "Action") by reason of the fact that such person is or was a director or officer of the Corporation.
>
> Section 2. Advancement of Expenses. If a person is made a party to any Action by reason of the fact that such person is or was a director or officer of the Corporation, the Corporation shall pay the expenses (including attorneys' fees) reasonably incurred by such person in defending such Action in advance of its final disposition.

> Section 3. Defenses. No person shall be entitled to indemnification under these bylaws unless he or she acted in good faith and in or not opposed to the best interests of the Corporation.

ABC's bylaws do not specify a date for an annual meeting of stockholders.

Chris was ABC's Chief Financial Officer until he was terminated for providing confidential information about ABC's operations to ABC's largest competitor in exchange for the competitor making cash payments to Chris in the form of "consulting fees." ABC's board of directors believes that the confidential information enabled the competitor to win business away from ABC, resulting in a reduction in ABC's revenues. ABC commences an action against Chris in the Delaware Court of Chancery, alleging that Chris breached his fiduciary duties as an officer of ABC.

Chris sends a letter to ABC demanding advancement of his legal fees and expenses incurred to date in connection with his defense of ABC's claims. The demand is accompanied by a copy of an invoice from Chris's counsel, setting forth counsel's fees and out-of-pocket expenses incurred to date in connection with the defense of the litigation.

ABC's board of directors denies Chris's demand for advancement. Chris then files a separate action against ABC in the Court of Chancery, seeking a court order requiring ABC to advance his reasonable attorneys' fees and expenses. ABC defends its denial by contending that it should not be required to advance Chris's legal fees and expenses because Chris acted in bad faith and contrary to the interests of ABC when he provided confidential information to a competitor.

1. Is Chris entitled to advancement of his reasonable fees and expenses incurred in connection with his defense of the breach of fiduciary duty litigation? Explain your answer, and discuss as part of your answer the merits of ABC's defense that Chris acted in bad faith and contrary to the best interests of ABC.

* * * * *

Chris, who is also a stockholder of ABC, sends a letter to ABC demanding that ABC hold an annual meeting of stockholders to elect directors. ABC has not held an annual meeting of stockholders in over 3 years. During that time, ABC's stockholders have not acted by written consent in lieu of an annual meeting. Chris advises that he intends to nominate himself and two of his friends for election to the board of directors at the meeting he has demanded ("Chris's Slate"). Chris also advises that he will solicit proxies for the election of his slate, and that, if his slate is elected, the new board will act to dismiss the breach of fiduciary duty suit against Chris. ABC declines to schedule an annual meeting of stockholders.

Chris commences an action in the Court of Chancery under Section 211 of the Delaware General Corporation Law, seeking an order compelling ABC to hold an annual meeting of stockholders within 20 days. ABC argues that the Court should not order the corporation to hold a meeting of stockholders because Chris breached his fiduciary duties while an officer of ABC and because Chris is seeking to compel an annual meeting for an improper purpose – namely, to elect directors who will act immediately to dismiss strong breach of fiduciary duty claims against Chris. ABC further argues that it cannot schedule and hold an annual meeting of stockholders within 20 days because it needs more time to adequately inform stockholders of recent developments, including the circumstances of Chris's

termination, and to solicit proxies in favor of the re-election of the current directors.

2. Will the Court of Chancery order ABC to hold an annual meeting of stockholders for the election of directors? What legal standards will guide the Court of Chancery in determining whether to order ABC to hold an annual meeting, and, if one is held, when to hold it? Explain your answer, and discuss as part of your answer the merits of ABC's defenses.

* * * * *

Chris and ABC agree to settle the Section 211 action, and ABC schedules an annual meeting of stockholders.

Several days before the annual meeting, ABC's three existing directors (the "Existing Directors") learn that Chris likely has solicited sufficient proxies from other stockholders to elect Chris's Slate as the new directors of ABC. The Existing Directors are concerned that, if Chris's Slate is elected, the new board will cause significant harm to ABC by dismissing the breach of fiduciary duty action against Chris and thus jeopardize a valuable corporate asset – the likelihood of a significant damages award against Chris. To protect ABC from this perceived harm, the Existing Directors amend ABC's bylaws to increase the size of the board to six directors. The board is aware that Chris likely will not have time to nominate any additional director candidates and solicit proxies for their election before the annual meeting. The board therefore believes that the steps it has taken will ensure that there will be six nominees (the Existing Directors and Chris's Slate) for six board seats and that all of them will be elected by plurality vote of the stockholders at the annual meeting. As a result, Chris's Slate will not be the only

directors and will not be able to authorize the dismissal of the breach of fiduciary duty litigation without the support of at least one other director.

As expected, six directors are elected at the annual meeting: Chris's Slate and the Existing Directors. Chris commences an action in the Court of Chancery seeking to set aside the results of the election. Chris alleges that the Existing Directors breached their fiduciary duties by increasing the size of the board of directors shortly before the annual meeting and thereby improperly interfered with the stockholders' right to vote on who should constitute the members of ABC's board of directors. The board argues that its action was permissible because the board was acting in good faith and in a manner the board reasonably believed was in the best interests of ABC and its stockholders.

3. What standard of judicial review will the Court of Chancery apply to Chris's claim that the Existing Directors breached their fiduciary duties by increasing the size of the board of directors shortly before the annual meeting? Describe that standard, explain why it applies, and discuss who will have the burden of proof under that standard.

* * * * *

ABC, Chris, and the Existing Directors ultimately enter into a settlement to resolve all the litigation among them, and Chris agrees to resign as a director.

ABC's board approves the sale of all of ABC's assets to XYZ Corporation in exchange for stock of XYZ. The board calls a special meeting of ABC's stockholders, and the stockholders holding a majority of ABC's voting stock approve the sale of assets. Upon consummation of the asset sale, ABC becomes the owner of 40% of the outstanding stock of XYZ, and ABC has no other assets.

Several stockholders commence litigation in the Delaware Court of Chancery contending that ABC failed to afford stockholders appraisal rights under Section 262 of the Delaware General Corporation Law in connection with the sale of all of ABC's assets. The stockholders argue that appraisal rights are available because ABC sold all its assets in exchange for stock of XYZ, which they contend amounts to a *de facto* merger for which appraisal rights are available. ABC's certificate of incorporation and bylaws do not contain any provisions relating to appraisal rights.

4. Are ABC's stockholders entitled to appraisal rights under Section 262 of the Delaware General Corporation Law in connection with the sale of all of ABC's assets in exchange for stock? Explain your answer, and discuss as part of your answer the stockholders' argument that the transaction amounted to a *de facto* merger giving rise to appraisal rights.

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QUESTION # 7

On March 10, 2016, Anthony and Bill spent the afternoon playing video games. That evening they decided to take a walk to purchase some marijuana. As they walked along Main Street in the city of Wilmington, they observed four individuals hanging out on a corner. All four wore jeans with a green bandana tied to a belt loop, and each wore identical black canvass high top sneakers with dark green laces. One of the four, Steve, called out to Anthony and Bill and asked if they were they looking to purchase drugs. In response, Anthony and Bill nodded.

The four walked toward Anthony and Bill. As they approached, Anthony and Bill noticed that Steve had a framing hammer hanging from a tool belt on his waist. A second individual, Wayne, had his left hand in his jacket pocket; it appeared that Wayne was holding a weapon in his pocket. The other two men, Kelvin and Melvin, were physically large and imposing. Kelvin and Melvin's faces were mostly concealed; the two were wearing black hooded sweatshirts with the hoods covering their heads and the drawstrings tightened.

When Steve, Wayne, Kelvin and Melvin got within a few feet of Bill and Anthony, Wayne, with his left hand still in his jacket pocket, asked how much money they had, and what they wanted. Anthony said he had $20 and wanted marijuana. In response, Wayne pointed his left hand, still within his jacket pocket, in Anthony's direction and told Anthony and Bill to empty their pockets. Anthony responded that he only had $20. Bill had no money, but he did have a smartphone and a folding knife with a 4" blade in his pocket.

Steve became impatient and removed the hammer from his waistband and raised it in the air as if to prepare to strike Anthony and Bill. He told them that this was not a joke, and that Wayne's "hammer" could cause even more damage. Anthony and Bill understood "hammer" to be a slang term for a handgun.

Kelvin and Melvin then physically grabbed Bill and pulled him away from Anthony. They repeatedly punched Bill in the head and knocked him unconscious. Bill regained consciousness after a few seconds as Kelvin was going through his pants pockets. Kelvin pulled out the cellphone and the folding knife.

Wayne removed his left hand from his pocket and was holding what appeared be a gun. He pointed it at Anthony's head, and pulled the trigger. No bullet discharged. Steve then grabbed Anthony and reached into his pockets and took all of his money. Steve found $150 in Anthony's pocket. Realizing that Anthony had lied to him, Wayne, with his gun still aimed at Anthony, pulled the trigger a second time. The gun fired and a bullet struck Anthony in the center of his chest. Steve, Wayne, Kelvin, and Melvin fled on foot.

In response to the gunfire, a resident of a nearby home called 911 to summon police. When the police arrived, they found Bill conscious but disoriented. An officer took Bill to the hospital for treatment. Bill sustained permanent injury to his head. Officers found Anthony bleeding but alive; his pulse was weak and he was barely breathing. Paramedics loaded Anthony into the ambulance; he died before he arrived at the hospital.

Police investigators found a single shell casing at the scene, indicating that Anthony may have been shot by a semi-automatic firearm. Police also found a green bandana on the ground. The police believed that the green bandana evidenced the assailant's association with the "Late Night Posse."

Bill was released from the hospital within 12 hours of admission. He was interviewed at the police station, and gave the police detailed descriptions of all four suspects.

After the shooting, Wayne went to his cousin, Mary's, apartment a few blocks from the scene. Wayne did not know that Mary was on probation. Wayne excitedly told Mary that he just killed a guy, and that it was not his first. He

showed her the black, semi-automatic handgun he used to shoot Anthony. He told Mary that the gun did not fire the first time he pulled the trigger. He explained that he pulled the trigger again because the "dude lied and disrespected me." He told her that Steve and a couple other guys were with him, and that they split the money they took from Anthony. Wayne stayed the night and in the morning he asked Mary to help him get rid of the gun. Mary drove him to the Brandywine River and watched him throw the black gun as far as he could into the water.

Later that day, Mary contacted her probation officer and told him that she had information into Anthony's murder. Her probation officer contacted police investigators. She then went to the police station and provided the investigating detectives a video recorded statement. She told them that Wayne told her that he killed a person. She relayed how he described the gun misfiring and then shooting "someone looking for weed" after he was "disrespected." She also told the police how Wayne described the Late Night Posse, and how the organization was going to receive money and a smartphone. Mary expressed concerns about testifying against Wayne, and feared that if she had to testify against him in court, she would end up as his next "body." Mary did not tell the police she drove Wayne to the Brandywine River and saw him dispose of the gun. Detectives believe Mary has a legitimate reason to be concerned for her safety, given the violent reputation of the Late Night Posse. The lead detective sends an email to Mary's probation officer, explaining that she was helpful in solving a murder and that she would like to move, but can't because her probation requires her to remain in New Castle County. Sometime between the arrest and the time of trial, the lead detective ran into Mary. Mary told him her probation officer wrote to the Judge, requesting she be discharged from probation one week after she gave her initial statement to police. Mary also told the detective she wants to move away for her safety. The detective gave Mary the number of a personal friend, named Jack, who rents

property in Lewes. Jack gave Mary a generous rate on a rental in Lewes after she told him she knew the detective, and she immediately moved to Sussex County.

1. The prosecutor assigned to this case has asked you to review these facts. For defendants Steve, Wayne, Kelvin, Melvin and Mary, identify:

(a) the crimes you recommend they be charged with (if an identified crime is broken down into degrees, identify the specific degree of each offense);

(b) the elements of those crimes (if you have concluded that more than one defendant should be charged with the same crime as another defendant, only identify the elements of that crime once).

2. The case against Wayne is proceeding to trial. Please identify and explain any legal obligation(s) the prosecutor has regarding disclosures the prosecutor may be required to make to defense counsel.

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QUESTION # 8

Molly Mathematician ("Molly") develops new software that identifies patterns in financial data and automatically executes stock trades based on those patterns (the "Trading Software"). Molly shows the Trading Software to her friend, Financial Friend ("Friend"), who works in the financial services industry. He runs a number of tests on the Trading Software, which indicate that the Trading Software generates significantly above average market returns. Friend asks Molly if she would like to start a business selling the Trading Software to investors.

Molly and Friend orally agree that they will be 50-50 partners in a new business that they will call "Trading Software Partners" (the "Partnership"). In addition, they orally agree to run the Partnership as follows: (1) the Partnership will be a Delaware business entity; (2) Molly will contribute all of her rights to the Trading Software in exchange for her 50% interest in the Partnership; (3) Friend will receive a 50% interest in the Partnership, but he will not be required to make a contribution to the business in exchange for that interest; (4) Molly and Friend will not enter into any contract on behalf of the Partnership unless the contract is in writing and signed by both of them; and (5) the Partnership will purchase state of the art computers for use in running the Partnership but the computers will be the personal property of Molly. Molly and Friend do not file any documentation with the Delaware Secretary of State's office or any other governmental authority.

Soon after their initial agreement, Molly and Friend decide that they need an advertising expert to make the business a success. They hire their mutual friend, Advertising Agent ("Agent"), pursuant to the following written contract:

PERSONAL SERVICES CONTRACT

Section 1. Services. Agent agrees to provide her advertising services to the Partnership.

Section 2. Compensation. In exchange for the services described in Section 1 above, the Partnership agrees to pay Agent $30,000 per year plus 10% of the Partnership's profits.

Signed: Agent

Signed: Trading Software Partners
By: Molly
Friend

Agent starts work with the Partnership later that same day.

1. Is the Partnership a validly formed partnership? Explain your answer.

* * * * *

Regardless of your answer to Question 1, assume for the remainder of the questions that the Partnership is a validly formed Delaware partnership.

* * * * *

2. Based only on the facts above, explain whether each of Molly, Friend, and Agent is a partner? Assume that all of the persons are adults with capacity to contract.

To help the Partnership get started, Friend loans the Partnership $100,000 pursuant to a written loan agreement. Molly and Friend sign the loan agreement on behalf of the Partnership, and Friend signs the loan agreement a

second time on behalf of himself. After signing, Friend deposits $100,000 in the Partnership's bank account and the Partnership purchases the state of the art computers using a portion of the loan proceeds. The instrument of transfer for the purchase of the state of the art computers specifically states that the seller "hereby transfers title to the state of the art computers to Trading Software Partners."

With Agent's assistance, the Partnership conducts a broad advertising campaign. Numerous members of the general public purchase copies of the Trading Software as a result of this advertising campaign. One such person is Cold Caller ("Caller"), who calls the Partnership's office and speaks with Friend and Agent for about an hour. Among other things, Friend and Agent tell Caller everything they know about the Trading Software and the history of the Partnership, including Friend's statement that "I started the Partnership with my two friends, Agent and Molly. Molly is my other partner but couldn't join this call because she is on vacation." Eventually, Caller says he is willing to purchase a copy of the Trading Software, but on one condition: Caller wants a trial period with the Trading Software. Specifically, he offers to pay twice the Partnership's asking price if he has not suffered any investment losses during a six-month trial period, but, if he suffers investment losses, the Partnership must reimburse him for his losses.

Friend and Agent think that Caller's offer sounds like a fair and potentially very lucrative deal for the Partnership. They attempt to discuss the offer with Molly, but are unable to reach her. Eager to make the sale, Friend and Agent agree that Molly would approve of Caller's offer and decide that the Partnership should accept Caller's offer. Later that day, the Partnership and Caller sign a written contract for the six-month trial period on Caller's proposed terms. Friend signs the contract on behalf of the Partnership.

During the six-month trial period, a fatal bug in the Trading Software causes it to crash. Caller is using the Trading Software when it crashes and suffers significant losses. When the Partnership fails to reimburse him for his losses, Caller sues the Partnership for breach of contract to recover his investment losses. The Partnership argues that it is not required to reimburse Caller for his investment losses because Molly did not sign the agreement and Molly and Friend had agreed not to enter into any contracts on behalf of the Partnership unless in writing and signed by both of them.

3. Does Molly's failure to sign the contract with Caller render the contract unenforceable against the Partnership? Explain why or why not.

* * * * *

Regardless of your answer to Question 3, assume that Caller prevails in his lawsuit and obtains a judgment against the Partnership for breach of contract in the amount of his losses for the Trading Software crash. The judgment has not yet been paid, the assets of the Partnership are sufficient to satisfy the judgment, and the Partnership has no other liabilities.

4. Can Caller levy execution against the state of the art computers to satisfy his judgment against the Partnership? Explain your answer.

* * * * *

Before the Partnership has reimbursed Caller for the amount of his investment losses, the $100,000 loan that Friend made to the Partnership becomes due by the terms of the written loan agreement, but the Partnership refuses to repay

it. Friend sues the Partnership for breach of the loan agreement. The Partnership defends against his claim solely on the basis that Friend is a partner and is not entitled to a return of capital until the Partnership's other creditors are satisfied.

5. Is that defense likely to succeed? Explain your answer.

* * * * *

Assume for this Question 6 only that the Partnership originally was formed as a general partnership as a result of the partners executing a written partnership agreement and filing a statement of partnership existence with the Delaware Secretary of State's office.

6. Can the Partnership now become a limited liability partnership and, if so, how?

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GENERAL INSTRUCTIONS

The Essay Section of the 2016 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.