Applicant Number

BOARD OF BAR EXAMINERS

OF THE DELAWARE SUPREME COURT

2011 BAR EXAMINATION

Monday, July 25, 2011

9:00 a.m. – 12:00 p.m.

Questions 1 - 4

QUESTION 1

One morning, following a heavy snowstorm, Adam looks outside to see that his car, which is parked on the street in front of his house, is covered to the roof with snow. He spends hours shoveling it out before leaving for an errand.

Dr. Ben cannot believe his luck as he spies the empty parking space in front of Adam's house. He is running late for a meeting and parks in the space that Adam has vacated. When Dr. Ben returns, there are long scratches on both sides of his car that appear to have been caused by a car key. The driver's side window is broken, and Dr. Ben's briefcase, containing his checkbook and a prescription pad, is gone. The damage to the car is $2,000.00, and the value of the stolen briefcase is $750.00.

While talking to the police, Dr. Ben learns that they have received a report of an intruder entering his home. Fortunately, the intruder was scared away by neighbors and the only thing missing from the house is a pistol. Dr. Ben's television, valued at $1,500.00, is found outside.

Over the next several weeks, Dr. Ben receives several telephone calls, all threatening to kill him unless he stops cooperating with the police. Additionally, Dr. Ben learns that a $500.00 check from the stolen checkbook has been cashed, and a prescription from the stolen prescription pad has been filled for a narcotic pain medication.

After an exhaustive police investigation, Adam is arrested. The police allege that he is responsible for all of the above crimes. Insisting that he is innocent of all charges, Adam hires Charles to represent him. After reviewing the materials provided by the prosecution in discovery, Charles is convinced of Adam's guilt.

Charles has a number of conversations with the prosecutor in which he tries to convince the prosecutor to make Adam a favorable plea offer. Each time the prosecutor makes a plea

offer, Adam rejects it, maintaining his innocence. At Charles' final pretrial meeting with the prosecutor, the prosecutor makes his last, best plea offer. Charles rejects it saying, "Adam always says he didn't do it. I know he won't accept this plea. The answer is no."

Convinced that the evidence of Adam's guilt is overwhelming, Charles devises a trial strategy he believes will minimize the possible punishment in the event Adam is convicted. Charles wants to present a defense of guilty but mentally ill, and tells Adam that he thinks that the jury will believe that when Adam saw his parking space occupied after all of his hard work digging it out, it triggered a psychotic reaction that resulted in him committing all of the crimes with which he is charged. Charles explains that if this strategy works, Adam will be sent to a psychiatric hospital and will be released as soon as the doctors determine he is no longer mentally ill. Adam disagrees with Charles' approach and wants to contest the charges on the merits.

At trial, Charles pursues the strategy he has chosen over Adam's objection, including refusing to call Adam as a witness in his own defense. Adam is convicted of all charges and receives a lengthy prison sentence. Charles and Adam discuss appealing Adam's conviction to the Delaware Supreme Court. Charles tells Adam that, after reviewing the record carefully, he has determined that there are no arguable issues for appeal and declines Adam's request to file the appeal.

Two years after sentencing, while still incarcerated, Adam seeks out a new attorney to advise him what, if any, legal remedies may be available to him to set aside his conviction.

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

2. **Identify and discuss any remedies potentially available to Adam to set aside his conviction.**

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QUESTION 2

Abigail owns and operates "A Fine Affair" ("Affair"), a well-established and highly successful event planning firm located in Dover, Delaware. Although it maintains its only office in Dover, Affair regularly plans and caters events throughout the State. Affair is well-regarded for its ability to deliver high quality entertainment acts, but is best known for its catering services, owing in large part to the culinary talents of well-known Executive Chef and Director of Banquet Services, Bernard, who is also Abigail's significant other.

Having initially avoided Abigail's repeated demands that he execute a written agreement with Affair, several months into his employment, following dinner and several bottles of wine with Abigail, Bernard relents and signs an employment agreement with Affair (the "Employment Agreement"). Among other things, the Employment Agreement contains a provision prohibiting Bernard "from owning or operating a catering business within the State of Delaware during and for a period of eighteen months following the termination of his employment with Affair." The Employment Agreement further recites that "in the event of a breach of the foregoing covenant, the parties agree that Affair's remedy at law is inadequate and that Affair shall be entitled to injunctive relief, in addition to any other remedies available at law."

In January 2011, Affair enters into a written agreement with Charity to cater and provide entertainment for Charity's annual fundraiser (the "Fundraiser") scheduled for June 1, 2011. Having raised net proceeds of close to $1,000,000 in each of the past five years, the Fundraiser is Charity's largest and most successful fundraising event. The terms of the parties' written agreement provide that Affair shall be responsible for all items related to catering the Fundraiser, including food preparation and service, in exchange for which Charity agrees to compensate Affair. The agreement further provides that, subject to Charity's express approval, Affair shall

secure the entertainment for the Fundraiser in exchange for which Charity agrees to pay Affair a flat fee. In the event of a breach of the agreement by Affair, or if the specified services are not performed to Charity's complete satisfaction, the agreement provides that Affair shall pay Charity the sum of $3,000,000.

Following execution of the agreement, Abigail calls Melvyn the Magnificent, ("Melvyn"), a local magician with whom she has previously worked, to assess his interest in performing at the Fundraiser. Abigail and Melvyn discuss the Fundraiser details, and Abigail tells Melvyn that while the terms of the engagement will be memorialized in a forthcoming written agreement, she anticipates his compensation will be within the range of $2,000-$3,000. At no point does Abigail tell Melvyn that his employment for the Fundraiser is conditioned upon Charity's approval. Based upon his conversation with Abigail and at her request, Melvyn spends hours mastering new magic tricks and purchases new props and costumes for his performance at the Fundraiser.

Shortly following her meeting with Melvyn, Abigail contacts Charity to seek approval to retain Melvyn for the Fundraiser. Charity declines to approve Melvyn's retention and suggests Abigail hire Jungle Jayne ("Jayne") instead. After signing an agreement with Jayne, Abigail informs Melvyn that she will not need his services for the Fundraiser, and no written agreement is executed.

A little more than a month before the Fundraiser, Abigail and Bernard end their relationship, and Bernard terminates his employment with Affair. Shortly thereafter, Bernard opens Extraordinary Events ("Events"), a full service catering company located in Newark, Delaware. Bernard sends to all of his contacts a mailer offering special discounts and extremely low prices. Subsequently, several of Affair's customers known to Bernard to have existing

contracts with Affair, terminate their contracts with Affair and execute new agreements with Events, resulting in lost profits to Affair of $100,000.

The Fundraiser occurs as scheduled on June 1, 2011. George, the caterer that Abigail hires to replace Bernard, arrives nearly an hour late and, owing to his tardiness and lack of preparation, there are no appetizers and dinner is served cold. As a result, many of the guests leave without donating, and several demand a refund of the event fee. At the end of the Fundraiser, Charity has raised barely enough to cover its costs for the event.

1. Identify and discuss any claims that Affair can assert against Bernard and/or Events, any defenses potentially available to Bernard and/or Events, and any damages or other remedies potentially available to Affair.

2. Identify and discuss any claims that Melvyn can assert against Affair, any defenses potentially available to Affair, and any damages or other remedies potentially available to Melvyn.

3. Identify and discuss any claims that Charity can assert against Affair, any defenses potentially available to Affair, and any damages or other remedies potentially available to Charity.

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QUESTION 3

Consolidated Corporation ("Consolidated") is a Delaware corporation which manufactures widgets. Its Board of Directors is composed of two individuals, Andrews and Baxter. Andrews is the Chairman and CEO of Consolidated. Baxter is an outside director. Consolidated has not held an annual meeting of stockholders or elected directors since February 2010. There is currently no annual meeting of stockholders scheduled for 2011.

Consolidated's Certificate of Incorporation contains a provision stating that Consolidated's directors are exculpated from liability to Consolidated and its stockholders to the maximum extent permitted by the Delaware General Corporation Law.

Consolidated's Bylaws contain the following provisions, among others:

> 1. Advancement of expenses. The reasonable expenses, including attorneys' fees, of a director incurred in defending a civil action shall be paid by Consolidated in advance of the final disposition of the action, provided that the director delivers an undertaking to repay the amount advanced if it is ultimately determined that he or she is not entitled to be indemnified by Consolidated.
>
> 2. Stockholder action. No action shall be taken by the stockholders except at a meeting of stockholders called in accordance with the Bylaws. No action shall be taken by the stockholders by written consent.

The Certificate of Incorporation is silent as to the above two topics.

In 2010, Consolidated bought all of the shares of another Delaware corporation, Quality Materials, Inc. ("Quality"), for $20 million. Quality was one of Consolidated's primary suppliers of the raw materials that Consolidated uses to manufacture its widgets. As a result of its acquisition of Quality, Consolidated will no longer have to purchase its raw materials from a third party. Moreover, Consolidated can sell any excess raw materials to other widget producers.

You represent Plaintiff, a hedge fund, which has been a holder of record of 10,000 shares of Consolidated common stock continuously since 2005. Plaintiff informs you that: (i) Andrews was the majority owner and a director of Quality before it was purchased by Consolidated; (ii) Andrews had substantial debts and thus needed the money—approximately $17 million—that he would receive from the purchase of his Quality stock by Consolidated to make payments on those debts; (iii) Consolidated did not create a special committee of the Board to consider the terms of the transaction—rather, Andrews participated in Consolidated's Board of Directors' deliberations; (iv) Consolidated did not obtain the opinion of an investment banker as to the fairness of the price that it paid for Quality's stock; and (v) Consolidated paid a 40% premium above the most recent trading price in acquiring all of the shares of Quality, which Plaintiff knows is substantially higher than premiums paid in acquisitions of comparable companies in Quality's industry.

Plaintiff writes a letter to Consolidated, signs it under oath and delivers it to Consolidated's registered agent in Delaware for the service of process. The letter expresses Plaintiff's concerns about the purchase of Quality based on the facts set forth above and demands that Plaintiff be allowed, during regular business hours, to inspect and copy Consolidated's books and records relating to the purchase of Quality, and the Board's deliberations concerning the purchase. The letter states that the purpose of Plaintiff's demand is to investigate whether the Board of Directors is liable for mismanagement in connection with the acquisition of Quality so that Plaintiff may determine whether to commence a stockholder derivative action to address any wrongdoing in connection with the acquisition. Five days later, Consolidated sends a letter to Plaintiff denying Plaintiff's demand to inspect books and records.

You file an action on Plaintiff's behalf in the Delaware Court of Chancery seeking an order pursuant to 8 *Del. C.* § 220 compelling Consolidated to grant to Plaintiff the inspection and copying demanded in Plaintiff's letter. In its answer to the complaint, Consolidated admits that Plaintiff has satisfied each of the elements of a books and records claim except the requirement that Plaintiff state a proper purpose (i.e., a purpose reasonably related to Plaintiff's interest as a stockholder), which Consolidated disputes.

1. A. Who would have the burden of proving whether Plaintiff has stated a proper purpose to inspect the books and records?

B. What standard would the Court apply to determine whether Plaintiff has stated a proper purpose (i.e., a purpose reasonably related to Plaintiff's interest as a stockholder) to inspect and copy the books and records?

C. What arguments should you make in support of a claim that Plaintiff has satisfied that standard?

* * * * * *

The parties settle the litigation concerning the books and records. In accordance with the settlement, Consolidated provides Plaintiff with certain responsive books and records. From those records, Plaintiff learns that, before the merger with Quality, Baxter owned options to acquire shares of common stock of Quality. Those options vested upon the merger with Consolidated, thus entitling Baxter to receive $2 million. Baxter was also a member of Quality's Board of Directors before the transaction with Consolidated.

At Plaintiff's instruction, you file for Plaintiff a derivative suit in the Delaware Court of Chancery against Andrews and Baxter on behalf of Consolidated, which is named the nominal defendant, alleging the facts described in the preceding paragraph (the "Derivative Action").

The verified complaint alleges that Andrews and Baxter breached their fiduciary duties of loyalty in connection with the purchase of Quality.

2. A. What standard of review would the Court apply to the fiduciary duty claim against Andrews and Baxter, and why?

B. What are the elements of that standard of review?

C. Who would have the burden of proof with respect to the fiduciary duty claim?

D. Can either Andrews or Baxter successfully raise the exculpation from liability provision found in Consolidated's Certificate of Incorporation as a defense to the claims asserted against them in the Derivative Action? Explain.

* * * * * *

Even after the purchase of his Quality stock, Andrews still has considerable debts, and is unable to pay for his own defense in the Derivative Action. After the Derivative Action is filed, Andrews delivers to Consolidated a demand that it pay his legal expenses incurred defending the Derivative Action pending its resolution. In connection with the demand, Andrews also provides a written undertaking promising to repay, in the event that it is ultimately determined that Andrews is not entitled to indemnification, all funds so advanced.

3. Plaintiff asks your opinion whether Consolidated is obligated to advance reasonable legal expenses to Andrews even though (i) Andrews is alleged to have breached his duty of loyalty, and (ii) Andrews does not have the funds to repay Consolidated any amounts advanced to him. What would you tell Plaintiff in response to this inquiry? Explain.

* * * * * *

Plaintiff believes that the circumstances surrounding Consolidated's acquisition of Quality demonstrate that Andrews and Baxter are unfit to serve as directors. Plaintiff therefore wants to remove them from the Consolidated Board of Directors and replace them with two new directors.

4. In July, 2011, Plaintiff asks your advice about two options for removing Andrews and Baxter from the Board and replacing them with two new directors:

A. Does Plaintiff have any basis to seek a Court order compelling Consolidated to hold an annual stockholders' meeting? Explain.

B. May the stockholders of Consolidated act by written consent to remove Andrews and Baxter from the Board of Directors? Explain.

* * * * * *

Under pressure to hold an annual meeting of stockholders, Consolidated schedules its annual meeting for September 2011. Plaintiff nominates two individuals to replace Andrews and Baxter as directors. Plaintiff sends Consolidated another letter, also signed under oath and delivered to Consolidated's registered agent in Delaware for the service of process, demanding a copy of Consolidated's list of stockholders. The stated purpose of the demand is that Plaintiff wants to communicate with stockholders to solicit proxies in connection with Plaintiff's efforts to replace Andrews and Baxter as directors. Five days later, Consolidated denies the demand.

5. If Plaintiff brings an action in the Delaware Court of Chancery to compel Consolidated to provide Plaintiff with a list of its stockholders:

A. Who would have the burden of proof regarding the propriety of Plaintiff's purpose for seeking the stock list?

B. Would Plaintiff be likely to prevail in the action? Explain.

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QUESTION 4

Bill Biker and Sara Scooter are long time companions and share an enthusiasm for riding their motorcycles in a couples touring club. Each has been married before, but they are not interested in marrying again.

One night while riding his bike near the Delaware coast, Bill collides with a deer. Seriously injured, he is taken to Georgetown Hospital for treatment. Bill is told by the emergency room physicians that, even though he has no head trauma, his internal injuries are life-threatening. Sara is informed that she should consider bringing in Bill's family.

Fearing the end is near, Bill asks Sara to contact J.D. Lawyer, his longtime friend and lawyer, to come to the hospital and help prepare a will for him. Sara does so, and J.D. agrees to come to the hospital.

After discussing the situation with J.D. in the presence of his attending physicians and staff, Bill tells J.D. how he wants his estate distributed, and asks J.D. to be the personal representative of his estate. J.D. does not object to the prospect of being named in the will as personal representative and quickly prepares a will on his laptop, has it printed, and presents it to Bill for signing.

The will that J.D. prepares reads:

LAST WILL AND TESTAMENT

OF

BILL BIKER

KNOW ALL BY THESE PRESENTS that I, BILL BIKER, of Rehoboth Beach, Sussex County, Delaware, being of sound and disposing mind and

memory, do make, and publish this paper writing as and for my Last Will and Testament, hereby revoking all former wills by me at any time heretofore made.

FIRST. It is my will and desire that my Executor hereinafter named pay all of my just debts, including doctors' bills and burial charges as soon after my decease as may be convenient.

SECOND. I give, devise and bequeath certain items of tangible personal property by handwritten note, signed by me, and enclosed with this Will identifying the legatees and items of personal property in accordance with the provisions of 12 Del. C. Section 212.

THIRD. To my good friend and lawyer, J.D. LAWYER, I give, devise and bequeath my pin collection from my motorcycle travels and touring.

FOURTH. All the rest, residue and remainder of my estate, whether real or personal and wheresoever situated, I give, devise and bequeath to my companion, SARA SCOOTER, absolutely in fee simple.

FIFTH. I hereby nominate, constitute and appoint my attorney, J.D. LAWYER, to be the Executor of this my Last Will and Testament, without the necessity of giving bond except as the law may make mandatory. If J.D. LAWYER shall be unable or unwilling for any reason whatever to commence or complete his duties as Executor, I appoint SARA SCOOTER, as alternate Executrix.

IN WITNESS WHEREOF, I do hereunto set my Hand and affix my Seal, this 15th day of July A.D. 2011, in the presence of these three witnesses, who sign the same in my presence, at my request, and in the presence of each other.

Witness _____ BILL BIKER _____(SEAL)

Witness _____

Witness _____

When J.D. presents the will to him for signing, Bill is not able to read it himself because of his deteriorating condition. J.D. asks a nurse to read it to him. Bill agrees that the will J.D. prepared for him disposes of his assets as he desires. When asked to sign, he is unable to do so because of his injuries. Bill asks the nurse who read it to him to sign for him and she does. The will is witnessed by J.D., Bill's doctor, and an orderly. The will is given to Sara for safekeeping.

Bill dies the following day. Sara gives J.D. the will to begin settling the estate.

J.D. takes the will to the Sussex County Register of Wills, it is admitted to probate, and letters testamentary are granted. After notices of the granting of letters testamentary to J.D. have been published and J.D. begins the work of settling Bill's estate, he receives a call at his office from a woman who says her name is Lorna Biker. She claims that she is Bill's estranged wife, that they are not divorced (as Bill had previously told J.D.), and that she is the mother of Bill's only child, Harry.

Lorna declares that she wants all the estate for herself and for Harry and threatens to file objections to the will being admitted to probate, to J.D.'s appointment as executor, and to the distribution of estate assets to anyone except her and Harry.

J.D. retains you as his attorney to defend any possible contest of the will. J.D. asks you to review the events as described above, analyze the facts of the case, and then answer

the following questions. For purposes of responding to these questions, assume that Lorna was legally married to Bill at the time of his death and that Harry is his son, as she claims.

1. Does Bill's will comply with the formal requirements for the making of a will under Delaware law? Explain your answer.

2. Identify any issues raised by J.D.'s involvement in the drafting of the will and by his acceptance of a bequest from Bill. Explain your answer.

3. If Lorna contests Bill's will, what arguments can she make that the will is invalid, and will she succeed in contesting it? Explain your reasoning and the burdens of proof Lorna may be required to meet.

4. For purposes of this question, assume the will is valid. What share of the estate will each of the following persons receive?

(a) Sara;

(b) Lorna;

(c) Harry.

Explain the basis for your answers.

5. For purposes of this question, assume the will is <u>not</u> valid. What share of the estate will each of the following persons receive?

(a) Sara;

(b) Lorna;

(c) Harry.

Explain the basis for your answers.

6. A year later, while the estate issues are still in litigation, the hospital continues to have unpaid medical bills for its treatment of Bill during his last days. Does

the hospital have any claims against Bill's estate? If so, describe the procedures that the hospital must follow to preserve any such claims.

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GENERAL INSTRUCTIONS

The Essay Section of the 2011 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 the subject matter of the question may receive a zero or a very low grade close to zero. 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

2011 BAR EXAMINATION

Monday, July 25, 2011

1:30 p.m. – 4:30 p.m.

Questions 5 - 8

QUESTION 5

Unity, Inc. ("Unity") is a local civic group based in Diamond City ("City") that seeks to promote tolerance and understanding and greater interaction among peoples of different cultures and countries.

As part of its mission, Unity sponsors the popular Friendship Festival every year in Liberty Park ("Park"), a public park owned and maintained by the City. The City allows members of the public to hold events in the Park, if they first apply for and obtain a permit. The permit grants the holder exclusive use of the Park's amphitheatre, but expressly states that it does not grant the permit holder exclusive control over the entire park. Unity has applied for and obtained this permit every year it has held the Friendship Festival.

To help defray the costs of the Friendship Festival and raise funds for Unity, the Friendship Festival has a number of official participants who pay fees to Unity in order to be official participants and have a booth, display, or other dedicated space at the Friendship Festival.

Bold, Inc. ("Bold") is a well-known local anarchist group that has long been publicly opposed to Unity's mission. Several months before the Friendship Festival, Bold applies to Unity to become an official exhibitor, so that it can have a booth from which it plans to distribute anti-tolerance literature and converse with festival attendees to convey its message. Unity rejects Bold's application. After Bold threatens to sue the City and Unity, the City tells Unity that it will revoke Unity's permit if Unity does not approve Bold's application to become an official participant. Unity files an action in court seeking an order prohibiting the City from revoking its permit.

1. Does Unity have a right under federal constitutional law to reject Bold's application to be an official participant at the Friendship Festival? Explain your answer.

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Assume that instead of seeking to be an official exhibitor, Bold decides its members will stroll the Park grounds during the Friendship Festival, passing out anti-tolerance literature, carrying signs with anti-tolerance slogans, and engaging other festival attendees in dialogue. Unity files an action in court seeking an order directing the City to exclude Bold from the Park grounds during the Friendship Festival.

2. Does Unity have a right under federal constitutional law to have the City exclude Bold from the Park grounds during the Friendship Festival under these circumstances? Explain your answer.

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Assume that the judge denies Unity's request to have the City exclude Bold from the Park grounds during the Friendship Festival, and that Bold attends. During the festival, Bold's members become disruptive, using bullhorns, singing loudly, and displaying large signs that impede the ability of festival attendees to see the amphitheatre's stage, as well as standing in the middle of the park pathways and disrupting the flow of pedestrian traffic to vendors and exhibitors. In addition, a couple of Bold's members hurl abusive and nasty insults at some of the festival attendees. Concerned about the safety and convenience of festival attendees, the City contacts the State police, and State police officers ask Bold's members several times to move their activities away from the stage and pathways and to leave the festival attendees alone. After Bold's members ignore those requests, the State police arrest Bold's members for disorderly conduct and refusing to obey police orders. All criminal charges are ultimately dismissed, but Bold files suit in federal court on behalf of its members against the State, the State police officers, and the City, claiming that they impermissibly restricted Bold's members' right to free speech under the First Amendment to the

United States Constitution. The defendants respond by arguing that (i) Bold lacks standing, (ii) they have sovereign immunity from Bold's claims, and (iii) the State police officers' actions were justified under applicable federal constitutional law.

3. **Evaluate the merits of each of the defendants' arguments. Explain your answer.**

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QUESTION 6

Dan drives into an intersection in Wilmington, Delaware and collides with a car driven by Paul, which was entering the intersection perpendicular to Dan's car. Dan gets out of his car, runs to Paul's car and says: "I didn't see you. Don't worry, if you are hurt I'll pay for everything."

Wally, a witness, (who did not overhear Dan's statement to Paul) calls 911. When police officer Mary arrives 15 minutes later, Wally calmly explains to Mary that: (i) the traffic light was yellow when Dan entered the intersection; and (ii) Paul was stopped at a red light, then drove into the intersection before the traffic light turned green.

After the collision, Dan calls his wife Susan from his cell phone while sitting alone in his car. During the conversation, Dan tells Susan that he thinks that he ran a red light and that the accident was his fault. Unbeknownst to Dan, Susan is participating in the call using a speaker phone, and three of her friends overhear the conversation.

Paul sues Dan in a Delaware state court for various injuries that Paul sustained in the accident and for the damage to his vehicle.

On the eve of trial, Paul discovers that Dan was convicted of vehicular homicide in the second degree, a felony, 11 years prior. The conviction arose from Dan's failing to stop at a stop sign and, as a result, hitting a pedestrian crossing the intersection. Dan served his sentence and was released from prison 9 years ago.

The intersection where the collision occurred has a camera which is supposed to record each car that runs a red light and to transmit electronically a time-stamped photograph of each such car to a central police database. The central police database has no record of a photograph of Dan's car during the relevant time period. Dan wants to introduce evidence that a photograph

of his vehicle is not included in the central police database for the relevant time period. Dan also wants to introduce testimony from technician Tom, who operates a different red-light camera system in New Jersey, maintains a New Jersey central police database for photographs, and has previously been qualified as an expert concerning the New Jersey camera system. Tom intends to testify regarding his opinion that the absence of a photograph of Dan's car in the central police database conclusively establishes that Dan did not run a red light.

1. During the direct examination of Paul, he testifies that Dan told him, "Don't worry, if you are hurt I'll pay for everything." Dan's lawyer objects. Explain why Paul's testimony is or is not admissible into evidence to prove Dan's liability.

2. At trial, Wally testifies that the traffic light was red when Dan entered the intersection. Dan wants to introduce Wally's statements to officer Mary and calls her as a witness. Explain why Wally's statements to officer Mary may or may not be used to prove the truth of the matter asserted.

3A. At trial, Paul's attorney calls Dan's wife Susan (who is willing to testify) to the witness stand. Paul's attorney asks Susan to testify concerning the content of her telephone conversation with Dan following the accident. Dan's attorney objects. Explain why Susan's testimony is or is not admissible into evidence.

B. Assume that prior to trial, Dan learns that Susan's friends overheard his telephone conversation concerning the collision and assume further that Dan has a conversation with one of them concerning his statements during the call. Paul's attorney learns about Dan's conversation with the friend. Do these facts impact whether Susan's testimony is or is not admissible into evidence? Explain your answer.

4. During the cross examination of Dan, Paul's attorney attempts to introduce Dan's conviction into evidence. Explain why the conviction is or is not admissible into evidence.

5A. Explain why evidence that a photograph of Dan's vehicle is not included in the central police database is or is not admissible. If the central police database has no record of a photograph of either Dan's car or Paul's car at the time of the accident, does that fact impact whether the evidence that a photograph of Dan's vehicle is not included in the central police database is or is not admissible into evidence? Explain your answer.

5B. Explain why Tom's opinion is or is not admissible into evidence.

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QUESTION 7

Ken wants to start his own garbage hauling service, but cannot get financing for the dump truck he needs for the business. He calls his sister, Cher, who runs a construction equipment sale and leasing business. Cher agrees that Ken can use a pickup truck and a mini "dump" trailer that she has on the lot until he can afford to buy his own truck. Cher tells Ken that the truck does not have a trailer hitch attached, but offers to install one for him. Cher also tells Ken that the use of the truck and trailer is not a gift and that she wants them back in good shape within six months.

Cher instructs her mechanic to install the trailer hitch on the truck for Ken. However, unbeknownst to Cher, the hitch she installs for Ken has a small fracture preventing it from supporting any reasonably loaded trailer.

Following his call with Cher, Ken heads to a local work release center and signs up an inmate, Jay, to serve as his crew. Owing to a long history of speeding violations, Jay's driver's license has been revoked, although Jay doesn't tell Ken. The paperwork that Ken signs upon taking Jay on as an employee states that Jay has no driver's license, but Ken never asks why.

On the first day of work, Ken instructs Jay to go to a construction site, collect all the debris and take it to a nearby landfill. Ken tells Jay to take the interstate from the construction site to the landfill, and to stay off the back roads. Above all, Ken tells Jay he should get back to the construction site "ASAP, and that means fast!"

Jay attaches the trailer to the truck and then loads it. On top of the pile, he throws large chunks of lumber that he finds scattered around the construction site. No tarps, ropes or cords are used to secure the load in the trailer bin. Once the trailer is fully loaded, Jay heads for the landfill.

Jay is aware of the instructions given to him by Ken, but desperately wants a cold drink and takes a different route to the landfill via a narrow back road that runs past a small convenience store. Jay knows that the back road is only paved in stretches and is pocked with large potholes. However, given Ken's emphasis on speed, Jay is anxious to make good time and is travelling 35 mph in a 25 mph zone over a gravel stretch of roadway when the trailer begins to sway. Jay loses control of the trailer, and the outside tires of the trailer move onto the unfinished shoulder of the roadway. The trailer begins bouncing, and the faulty hitch gives way causing the trailer to disconnect from the truck. The trailer drifts into the oncoming lane of traffic and collides head on with a car, occupied by Will and his daughter Helen. Neither Will nor Helen is wearing a seat belt. Large pieces of lumber fly off the trailer and through the windshield of Will's car, striking the occupants. The trailer's impact crushes the front end of the car and traps Will inside the vehicle.

Helen frees herself from the vehicle and runs to get help. A few hundred yards down the road, Helen comes upon a long driveway leading to a farmhouse. A large, boldly lettered sign at the front of the driveway states "Private Property - Keep Out." Being in a largely rural area, and not seeing any other buildings nearby, Helen disregards the sign, proceeds down the driveway and bangs hard on the door of the farmhouse. Fred, the owner of the farm, answers the door. Unmoved by Helen's plea for help, Fred sends her on her way. Still shaken from the accident, and desperate to tend to her father, Helen cuts across Fred's corn field, which gives her a shorter route to the accident scene. The corn stalks obscure from view a large irrigation ditch that runs parallel to the roadway. Fred watches Helen run into the field in the direction of the ditch but makes no effort to warn her. Emerging from the corn field at a full run, Helen does not see the ditch in time and falls into it, fracturing her ankle.

The Country Volunteer Emergency Squad ("CVES") receives a call about the accident and heads to the scene. Emergency Medical Technician Larry is a CVES volunteer and is called by CVES to respond. Living very near the accident scene, Larry arrives ahead of the CVES crew. Although Larry knows that CVES is equipped with the "jaws of life" to cut victims out of crushed cars, he is afraid that Will's car might erupt in flames and attempts to free Will, who is unconscious, from the vehicle. Because of the pressure of the crushed dash board on Will's legs, Larry has to twist Will to free him from the car and dislocates Will's right knee in the process.

1. **In an action by Will against Cher asserting claims related to the defective trailer hitch, do the facts present a *prima facie* case for strict liability? Explain.**

2. **Identify and discuss any claims that Will can assert against Ken and/or Jay and any individual or common defenses or mitigating factors potentially available to Ken and/or Jay. For purposes of this question only, assume that Will's injuries would have been much less severe had he been wearing a seatbelt.**

3. **Identify and discuss any claims that Will can assert against Larry and any defenses or mitigating factors potentially available to Larry.**

4. **Identify and discuss any claims that Fred can assert against Helen and any defenses or mitigating factors potentially available to Helen.**

5. **Identify and discuss any claims that Helen can assert against Fred and any defenses or mitigating factors potentially available to Fred.**

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QUESTION 8

Charlie owns property in Delaware Chase, a deed restricted community. When Charlie purchased his property, he read the Delaware Chase Deed Restrictions (the "Deed Restrictions") and signed a document acknowledging that he had read them. One of the provisions of the Deed Restrictions requires property owners to seek the approval of the Board of Directors (the "Board") of the Delaware Chase Homeowners Association (the "Association") for the building of any structures on any property and prohibits property owners from building any structures on any property without the prior written approval of the Board. The Deed Restrictions also state that the Board has the right to protect the property owners from any harm that may be caused by any other property owners.

One day at a barbecue at his house, Charlie tells several of his neighbors that he intends to build a shed on his property. Charlie tells his neighbors that he plans to buy all the necessary materials the following weekend. One of the neighbors asks Charlie if the Board has approved the building of the shed. Charlie states that no one takes the Deed Restrictions seriously and that he does not intend to request the approval of the Board.

Barb is the President of the Board and is Charlie's next door neighbor. Barb is in attendance at Charlie's barbecue and hears the entire conversation about the shed.

The following day, at a regularly scheduled meeting of the Board, Barb tells the other members of the Board about Charlie's plans for the shed. Because Charlie has not yet taken any steps to build the shed, the Board decides not to take any action at this time and to wait and see what, if anything, Charlie does.

The following Saturday, Charlie buys the materials that he needs to build the shed. He stores all the materials in his driveway, but he is unable to do any work on the shed that weekend because it is raining.

Barb sees the materials in Charlie's driveway and attempts to convene an emergency meeting of the Board to discuss potential legal steps that may be taken to prevent the building of the shed. Because several of the members are on vacation, Barb is unable to gather a quorum for a meeting, and no meeting occurs.

Barb is able, however, to talk with some of the members of the Board who suggest that she take some of the materials from Charlie's driveway so that he cannot finish the project. During the night, Barb takes some of the materials and puts them in her trash can. The trash collectors take Barb's trash the next morning.

The following weekend, Charlie starts to build the shed as Barb watches from her window. During the building process, Charlie clears some bushes from his property. While doing so, he damages a fence owned by the Association which separates his property from the common area. Because it begins raining, Charlie does not finish the job that weekend.

During the next week, Barb is able to convene a meeting of the Board. As a result of the meeting, the Association immediately files a lawsuit in the Delaware Court of Chancery against Charlie seeking (i) a preliminary injunction requiring Charlie to cease any further building of the shed on his property pending trial on the merits; (ii) specific performance of the provision in the Deed Restrictions requiring Charlie to seek the approval of the Board; (iii) damages for the necessary repairs to the Association's fence and (iv) punitive damages. The complaint filed by the Association also demands a trial by jury of twelve.

For purposes of all the following questions, assume that (a) the Deed Restrictions are enforceable; (b) Charlie is bound by the Deed Restrictions; (c) all of Barb's actions or inactions are actions or inactions of the Board and the Association; and (d) the provisions of 10 *Del. C.* § 348 requiring mandatory mediation of disputes regarding deed restrictions do not exist.

1. **Can the Court of Chancery exercise jurisdiction over each of the claims (i) through (iv) asserted by the Association? Explain your answer for each.**

2. **Does the Association have a right to a trial by jury of twelve in the Delaware Court of Chancery? Explain your answer.**

3. **Is the injunction the Association is seeking a mandatory or prohibitory injunction? Explain the difference between the two types of injunctions and the basis for your answer.**

4. **Should the Court issue a preliminary injunction? In your answer, identify the elements of an application for a preliminary injunction and analyze those elements based on the facts provided above. Identify any defenses that Charlie can raise. What arguments would each side make?**

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GENERAL INSTRUCTIONS

The Essay Section of the 2011 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 the subject matter of the question may receive a zero or a very low grade close to zero. No credit will be given for discussion of irrelevant issues or statements of general principles that are not responsive to the question.