

Applicant Number

BOARD OF BAR EXAMINERS

OF THE DELAWARE SUPREME COURT

2019 BAR EXAMINATION

Monday, July 29, 2019

9:30 a.m. – 12:30 p.m.

Questions 1-4

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Question 1

Amy lives next door to her daughter-in-law, Bess, in Wilmington, Delaware. Both Amy and Bess survive their spouses, Yeats and Zeb (respectively) who both died in 2015. Living in such proximity to one another and losing their spouses in the same year have made Amy and Bess's relationship a particularly close one. Many observers say that Amy loves Bess like her own daughter.

Amy has three children other than Zeb, Clyde, Donna and Edith, and her grandchildren – who are the minor children of Bess and Zeb – Fred and Gertrude.

In the years since Yeats passed away, Amy has become physically frail. She often relies on Bess and her other neighbor, Nelly, to drive her places, keep track of her appointments, make her meals, and maintain her house and property. Typically, either Bess or Nelly, or both, see Amy daily. Amy's other children appreciate this support as they live further away and cannot visit Amy as often as they would like.

In the years since Zeb passed away, Bess has come to rely on Amy's friendship and advice. With Fred and Gertrude being so young, Bess worries how she will be able to continue to support her family financially without Zeb's salary. Bess frequently expresses her concerns to Amy, and has at times mentioned her fear of having to move closer to her family in Maine to have support raising Fred and Gertrude so that she can return to working full time.

At the time of Yeats' death, Amy had a will that she had initially executed on January 4, 1989 ("1989 Will"). This Will was prepared by an attorney, and was signed at her law office in the presence of staff serving as the two witnesses and notary to both the Will and a self-proving affidavit. Amy's 1989 Will provides:

I hereby declare this to be my Will and revoke all prior Wills and Codicils. I leave the residuary of my estate to Yeats, or if Yeats is not living at the time of my death, to my issue, per stirpes. I hereby name Yeats to serve as Executor hereunder, or if he is unable or unwilling to serve as executor, I name my son, Zeb, as alternate.

On October 12, 2015, a few months after Yeats' passing but before Zeb had passed away, Amy executed a Codicil with the assistance of the attorney who prepared her 1989 Will ("2015 Codicil"). Amy executed the 2015 Codicil and self-proving affidavit in the attorney's office with staff serving as witnesses and notary once again. Amy's 2015 Codicil provides:

I hereby declare this to be a first Codicil to my Will dated January 4, 1989 and provide as follows: (a) I give my house to Nelly; (b) I give my stock in ABC, Inc. to my son, Zeb; (c) I name my son, Zeb, to serve as Executor hereunder; and (d) I hereby ratify and confirm my Will in all other respects.

By July 2018, Amy had become homebound due to her deteriorating health. Instead of returning to the attorney's office to update her Will as a result of Zeb's passing, Bess offered her help. On July 14, 2018, Amy executed a second Codicil that she and Bess prepared using the 2015 Codicil as a template ("2018 Codicil"). Amy executed this Codicil at her home with Bess and Nelly serving as witnesses. Bess and Nelly arranged for another neighbor to serve as notary. Because none of Bess, Nelly or the notary had ever been present for the signing of a Will or Codicil before, there was a bit of confusion over where their respective signatures should go. Ultimately, Amy, Nelly and Bess signed the self-proving affidavit, which the notary then notarized. No one signed at the end of the 2018 Codicil itself. Amy's 2018 Codicil provides:

I hereby declare this to be a second Codicil to my Will dated January 4, 1989 and provide as follows: I give my estate to Bess. I hereby ratify and confirm my Will in all other respects.

In October 2018, Amy sold her home and moved into a residential facility. Amy died in February 2019. Because the original of the 1989 Will could not be found, Bess took a copy of the 1989 Will, the original of the 2015 Codicil and the original of the 2018 Codicil to the Register of Wills to probate and open Amy's estate.

- 1. Of the three documents (the 1989 Will and both Codicils), which should the Register of Wills admit to probate? Explain your answer as to each.**
- 2. Assume all three documents (the 1989 Will and both Codicils) are validly admitted to probate. Who should be named as personal representative of the Estate? Explain your answer.**
- 3. Assume all three documents (the 1989 Will and both Codicils) are validly admitted to probate. How should Amy's estate be distributed? Explain your answer.**

4. Before any relevant statute of limitations has passed, Clyde, Donna and Edith file a petition with the proper court challenging the 2018 Codicil arguing that it was the result of Bess's undue influence. What arguments can they make in support of their claim? In your explanation, set forth the elements of an undue influence claim, the burden they must meet as petitioners, and the facts to support your conclusions.

5. Assume the Petitioners' challenge to Amy's 2018 Codicil is upheld and the 2018 Codicil is found to have been the result of Bess's undue influence. Explain how the Court should order the residuary of Amy's estate be distributed.

* * *

QUESTION 2

ChemCorp operates a chemicals refinery in Delaware. Ace, an investigative reporter, publishes the following article in a local newspaper:

ChemCorp Dumps Hazardous Waste Into Local Drinking Water

A source speaking on the condition of anonymity has provided this reporter with evidence that ChemCorp's refining methods routinely discharge Toxiosludgite-4, commonly known as "toxic sludge," into local groundwater. Groundwater is the principal source of drinking water in the region.

Toxic sludge is a common by-product of chemical refining, and trace amounts are present in public drinking water systems across the United States. Nevertheless, according to standards established by the U.S. Environmental Protection Agency, the presence of toxic sludge in drinking water above 0.75 parts per million (ppm) is generally considered unsafe to human health. According to confidential company documents obtained from my anonymous source, environmental tests conducted by ChemCorp employees routinely found the presence of 3.75 ppm of toxic sludge in local groundwater, significantly above the safety limits established by the EPA.

ChemCorp is the only producer of toxic sludge in the region.

ChemCorp conducts an internal investigation into the source of the press leak. That investigation uncovers circumstantial evidence that Whistleblower, an

employee in ChemCorp's environmental compliance group, might have been Ace's source. Whistleblower's employment agreement with ChemCorp contains a covenant prohibiting the disclosure of any confidential company documents to the press. ChemCorp sues Whistleblower for breach of the employment agreement. (Assume the case is properly brought in a Delaware State court in compliance with all jurisdictional requirements.)

During its case-in-chief, ChemCorp calls Ace as a third-party witness and asks whether Whistleblower was the anonymous source. Ace refuses to answer, asserting under oath that disclosure of the source's identity would violate an express understanding with the source under which information reported in the article was obtained. ChemCorp asks the Court to order Ace to answer the question or be held in contempt.

1. How should the Court rule on ChemCorp's request to order Ace to testify? Explain your answer.

* * *

Assume that the Court rightly or wrongly (i.e., without affecting your answer to Question 1) does not order Ace to answer ChemCorp's question. Whistleblower then asks the Court for a jury instruction that no adverse inference be drawn from Ace's refusal to answer. ChemCorp objects to Whistleblower's request.

2. How should the Court rule on Whistleblower's request for a jury instruction? Explain your answer.

* * *

Meanwhile, Victim develops a very rare illness linked to exposure to toxic sludge. Victim sues ChemCorp, alleging that ChemCorp's negligent dumping of toxic sludge into the local water supply caused Victim's injuries. (Again, assume the case is properly brought in a Delaware State court in compliance with all jurisdictional requirements.)

During discovery in Victim's lawsuit, ChemCorp produces the environmental testing reports referenced in Ace's article and which revealed the presence of 3.75 ppm of toxic sludge in local groundwater. Victim also takes the deposition of Officer, a person designated by ChemCorp to testify on its behalf. Officer testifies that the reports reflect the findings of environmental tests conducted by scientists employed by ChemCorp. Officer further testifies that each report was made contemporaneously with the test discussed in the report, that each report was authored by the lead scientist who conducted the applicable test, that the environmental tests were routinely conducted in the ordinary course of ChemCorp's business, and that the reports were made and kept in the same ordinary course of ChemCorp's business. However, Officer also testifies during the deposition that Officer is not a scientist, does not know the scientific methods used to conduct the

environmental tests, and does not know the significance of the scientific findings contained in the reports. The Court admits Officer's deposition into the trial record.

At trial, Victim proffers the environmental testing reports and moves that the environmental testing reports be admitted into evidence as proof of the presence of 3.75 ppm of toxic sludge in local groundwater. ChemCorp objects, arguing (a) no foundation has been laid for admitting the environmental testing reports into evidence and (b) the environmental testing reports contain inadmissible hearsay.

3. How should the Court rule on ChemCorp's objection that no foundation has been laid for admitting the environmental testing reports into evidence? Explain your answer.

4. How should the Court rule on ChemCorp's objection that the environmental testing reports contain inadmissible hearsay? Explain your answer.

* * *

Victim then calls Pathologist to the stand as an expert witness.

(Assume Pathologist satisfies all conditions necessary under applicable law to qualify as an expert.) On direct examination, Pathologist testifies that the only known cause of Victim's illness is exposure to toxic sludge.

On cross-examination, ChemCorp’s counsel asks if Pathologist is familiar with the medical treatise, “The Definitive Guide to Rare Illnesses.” Pathologist admits to being familiar with the treatise and that it is generally considered reliable within Pathologist’s field of expertise.

“The Definitive Guide to Rare Illnesses” includes the following passage:

Many experts believe toxic sludge is the only known cause of several rare illnesses. Although there is data supporting that view, it has never been definitively proved because ethical considerations prevent verifiable human studies. Furthermore, there is other evidence indicating that toxic sludge might lack certain molecular properties necessary to cause illness in humans. Therefore, this treatise is unable to take a definitive position whether toxic sludge is a cause of any rare illnesses.

ChemCorp’s counsel asks the Court for permission to read the passage into evidence and moves that a copy of “The Definitive Guide to Rare Illness” be received as an exhibit. Victim objects, arguing that the Court should neither permit ChemCorp to read the passage into evidence nor admit the treatise as an exhibit.

5. How should the Court rule on Victim’s objection to (a) reading the passage into evidence and (b) admitting the full treatise into evidence? Explain your answers.

* * *

Later in the trial, ChemCorp calls CEO, the company's chief executive officer, as a witness. On direct examination, CEO testifies that, at the time Victim contracted the rare illness, ChemCorp utilized the safest available environmental precautions against discharging toxic sludge into local groundwater.

On cross-examination, Victim's counsel asks CEO the following question: "Isn't it true that ChemCorp has implemented superior environmental precautions after Ace's article was published?" ChemCorp objects to the question.

6. Should the Court direct CEO to answer the question or sustain ChemCorp's objection? Explain your answer.

* * *

At the conclusion of trial, Victim asks the Court to give a jury instruction that, if the jury does not find any direct evidence of ChemCorp's negligence, they may nevertheless draw an inference of negligence from circumstantial evidence under the *res ipsa loquitur* doctrine. ChemCorp objects to that jury instruction, arguing it impermissibly shifts the burden of proof on the issue of negligence because Victim has alleged and attempted to proffer evidence of specific acts of negligence.

7. How should the Court rule on ChemCorp's objection? Explain your answer. Your answer must address whether Victim's attempts to proffer

evidence of specific acts of negligence precludes an inference of negligence under the *res ipsa loquitur* doctrine.

* * *

Assume that the Court rightly or wrongly (i.e., without affecting your answer to Question 7) overrules ChemCorp's objection and decides to give the requested jury instruction. You are the judge's law clerk. In chambers, the judge hands you the following incomplete draft of the jury instruction:

Victim has alleged that ChemCorp was negligent, and that this negligence caused Victim to develop a very rare illness. On the issue of negligence, one of the questions for you to decide is whether Victim's development of the very rare illness occurred under the following conditions:

- [Note to Law Clerk: Please fill in the elements of the *res ipsa loquitur* doctrine]

If you find that all of these conditions exist, you may conclude that a cause of the occurrence was some negligent conduct by the defendant, even if you are unable to find any direct evidence of the defendant's negligence.

8. List each of the elements of the *res ipsa loquitur* doctrine necessary to complete the judge's draft jury instruction.

* * *

QUESTION 3

Alex, Blake, and Casey meet in college. After graduation, Alex pursues an MBA in Operations Management, Blake goes to culinary school, and Casey becomes a professional investor. They remain close friends throughout the years.

After several years living around the world, they all find themselves residing in Delaware. On February 13, while having lunch at a Delaware restaurant, Alex and Blake decide to open a French restaurant in Delaware. Alex and Blake orally agree that they will be equal partners in the restaurant, equally share in the profits and losses, and that the restaurant will be called "Restaurant." They also orally agree that Alex will use prior operations management experiences to handle the business and management aspects of Restaurant while Blake will utilize professional culinary skills to run the kitchen and design the menu.

1. Did Alex and Blake validly form a Delaware partnership on February 13? Explain your answer.

* * *

On February 15, eager to get Restaurant up and running, Blake contacts Devin, an organic farmer in Delaware. Blake informs Devin that Blake and Alex are partners in Restaurant. Blake asks Devin to provide Restaurant fresh produce daily. The next day, Devin and Blake sign a three-year contract whereby Devin will be the exclusive provider of produce for Restaurant.

On the morning of February 17, Alex is alone at Restaurant when Devin attempts to deliver that day's produce. Alex refuses to accept the produce. Shocked, Devin reminds Alex of the February 16 contract. Alex then tells Devin that Alex never agreed to a contract with Devin. Frustrated, Devin leaves and thereafter sues Restaurant for breach of contract.

2. Assume Alex and Blake formed a valid general partnership. Are Blake's actions sufficient to bind the partnership?

3. Assume Devin obtains judgment against Restaurant. Can Devin collect the judgment from Alex? Explain your answer using principles of partnership law.

* * *

After dispensing with Devin's lawsuit and realizing they will need more cash to run the business, Alex and Blake reach out to Casey. Casey agrees to become a partner in Restaurant and invest \$5 million on two conditions: (i) protection from personal liability and (ii) the investment will be the only involvement. On September 3, Alex, Blake, and Casey execute the following written agreement:

**LIMITED LIABILITY LIMITED PARTNERSHIP
AGREEMENT**

This Agreement is entered into by and among Alex, Blake, and Casey. The parties hereby agree that each is a partner in Restaurant Limited Liability Limited Partnership ("Restaurant LLLP") d/b/a "Restaurant" as of September 3. The purpose of Restaurant LLLP is to develop, market, and sell French cuisine.

This Agreement shall be governed by Delaware law.

After executing the agreement, the three agree that Alex and Blake will prepare and file all the necessary paperwork with the Secretary of State. Alex and Blake execute

and file a certificate of limited partnership for “Restaurant LLLP,” with all requisite information, on September 3.

4. Assume that Alex, Blake, and Casey formed a valid partnership on September 3. Was the partnership (a) a limited partnership, (b) a limited liability partnership, or (c) a limited liability limited partnership? For each form of entity, explain your answer. For purposes of answering this question, do not discuss conversion principles in your analysis.

5. Regardless of your answer to Question 4, assume that Alex, Blake, and Casey formed a valid Limited Liability Limited Partnership on September 3. Explain the type of partner each became and their fiduciary duties.

6. Assume Alex and Blake filed a Statement of Qualification with the Secretary of State. What must the statement contain?

* * *

Question 4

Weber Automotive, Inc. (“Weber”) manufactures unique automobiles. Weber sells vehicles only at dealerships that it owns and operates. Weber desires to expand its business into Delaware. However, a Delaware statute (the “Statute”) intended to protect Delaware-based automobile dealership operators from competition makes it unlawful for a manufacturer of automobiles to own or operate a dealership in the state.

In 2019, Weber opens a showroom (the “Showroom”) in Wilmington, Delaware. The Showroom contains floor models of Weber automobiles available for test-drive, and is staffed by Weber employees prepared to discuss pricing and financing options available at dealerships located in other states. Weber believes, based on careful consideration of the language of the Statute, that the activities carried on at the Showroom do not violate the Statute because no sales of Weber automobiles take place at the Showroom or anywhere else within the State of Delaware.

The Showroom is located on a busy commercial avenue next to a popular restaurant (the “Restaurant”) that sells food only from its drive-thru window. Since the Restaurant opened in 2000, whenever it is busy—which it often is—the line of cars waiting to use the Restaurant’s drive-thru backs up out of the Restaurant’s driveway, into the road, and blocks the entrance to the neighboring property where

the Showroom is located. Indeed, the entire time Weber executives were on site before buying the property on which the Showroom would be built, the driveway was obstructed by vehicles waiting for the Restaurant's drive-thru.

For several hours every day, vehicles—such as test-drivers and visitors—cannot enter or exit the Showroom's parking lot. Weber's reputation is negatively affected by press reports and numerous postings on online review platforms about the Showroom being inaccessible, or test-drives being delayed, by the traffic. Despite diligent investigation, Weber is unable to determine how many potential visitors to the Showroom were dissuaded by the traffic, nor is it able to quantify the damage to its reputation.

Weber files an action in the Delaware Court of Chancery against the Restaurant alleging that the recurring backup of vehicles blocking its driveway constitutes a nuisance. Assume that the Verified Complaint states a claim for nuisance that would survive a motion to dismiss under Court of Chancery Rule 12(b)(6). Weber files a motion for a temporary restraining order ("TRO") requiring the Restaurant to close the drive-thru unless and until it can be operated without traffic obstructing access to the Showroom.

1. What elements must Weber show to be granted a TRO?

2. Putting aside any defenses the Restaurant might offer, are the merits of Weber's nuisance claim strong enough to support receiving a TRO?

Why or why not?

3. What arguments should Weber make in support of its claim that it would suffer irreparable harm in the absence of a TRO?

4. In response to the motion for a TRO, the Restaurant contends that Weber has unclean hands because the Showroom is, in practical effect, an automobile dealership in violation of the Statute. The Court decides that it will not adjudicate whether the Showroom violates the Statute at this stage of the proceedings, and therefore directs the parties to address unclean hands assuming that operating the Showroom violates the Statute. What is the standard for unclean hands? What arguments could Weber make to oppose the application of unclean hands at this stage?

5. What arguments should the Restaurant make that the balance of the equities tip in favor of denying a TRO? Your answer to this question should not discuss unclean hands.

* * *

Weber and the Restaurant enter into a written agreement to settle their litigation (the “Settlement Agreement”), after which the litigation is dismissed. Pursuant to the Settlement Agreement, the Restaurant renovates its driveway to accommodate longer lines of waiting vehicles. The Restaurant agrees that, going forward, it will pay Weber \$100 each time that a vehicle waiting for the drive-thru blocks the Showroom’s driveway. The parties agree to file any subsequent litigation related to the Settlement Agreement in the Delaware Court of Chancery (the “Forum Selection Clause”).

For a time, the renovations abate the traffic problems. But over time, the Restaurant grows ever more popular, and again vehicles waiting for the drive-thru block Weber’s driveway with increasing frequency. Weber invoices the Restaurant each time it occurs. After a few months, the problem is worse than it was before the renovations, occurring over 50 times every day. The Restaurant eventually stops paying any of the fees when invoiced. Weber discovers that the Restaurant is insolvent.

Weber files another action against the Restaurant in the Delaware Court of Chancery regarding the daily backup of vehicles blocking its driveway. Assume that the Verified Complaint states a claim that would survive a motion to dismiss under Court of Chancery Rule 12(b)(6). Weber seeks only injunctive relief.

The Restaurant files a motion to dismiss under Court of Chancery Rule 12(b)(1) asserting that the Court of Chancery lacks subject matter jurisdiction over the action on the grounds that Weber has an adequate remedy at law.

6. What arguments should the Restaurant make in support of the motion to dismiss?

7. What arguments should Weber make in opposition to the motion to dismiss? Your response to this question should not include any discussion of the Forum Selection Clause.

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GENERAL INSTRUCTIONS

The Essay Section of the 2019 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

2019 BAR EXAMINATION

Monday, July 29, 2019

2:00 p.m. – 5:00 p.m.

Questions 5 - 8

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QUESTION 5

FreshFood Corp. (“FreshFood”) is a publicly traded corporation with more than 900 million shares outstanding, and it operates grocery stores nationwide. FreshFood has been struggling financially, and its share price has dropped by 25%. On June 16, 2018, Stockholder Stan (“Stan”) buys 4,000 shares in FreshFood.

The Board of Directors of FreshFood (the “Board”) wants to issue 5,000 stock options to each of the directors. The directors’ current compensation consists of \$10,000 for every Board meeting they attend, and the Board typically meets four times a year. The FreshFood directors’ compensation is higher than other similar companies’ directors’ compensation. The Board is concerned that its approval of the issuance of the stock options may be challenged by FreshFood stockholders, and the Board retains you to provide advice regarding the approval of the issuance of the stock options to the directors.

1. Identify any statutes governing the Board’s ability to approve stock options and discuss the factors a Court will consider when reviewing the Board’s decision. Include in your answer a discussion of the risks that are inherent in such a decision and identify steps the Board could take to mitigate those risks.

In January 2019, FreshFood and Ace Grocery, Inc. (“Ace”) enter into merger negotiations in which Ace will acquire FreshFood. Ace is a Delaware corporation,

and it owns 10% of FreshFood. During the merger negotiations, the Board consists of five directors (1) Clara E. Owen (“Clara”), FreshFood’s Chief Executive Officer (“CEO”); (2) Harry, Clara’s husband and former CEO of Wholesome Food Market; (3) Ellen, FreshFood’s Chief Operating Officer (“COO”); (4) Gary, an outside director who is employed and was appointed to the Board by Ace; and (5) Larry, an outside director who teaches food supply chain at Harvard. Clara’s employment agreement (executed on January 1, 2019) with FreshFood provides that she is entitled to \$40 million if FreshFood is acquired by another company (the “\$40 Million Payment”).

2. List the steps that FreshFood and Ace must take under the Delaware General Corporation Law to effectuate a long form merger between FreshFood and Ace.

3. The Board is considering forming a special committee to negotiate the merger.

Part A. What steps would the Board need to take to form a special committee, and what powers could that committee exercise?

Part B. Would you recommend that the Board create a special committee to negotiate the merger? Explain your reasoning and discuss the standards of

review that may be implicated if breach of fiduciary duty claims are filed against the Board.

Part C. Assume the Board decides to form a special committee. Who should serve on the special committee?

* * *

The Board ultimately decides not to form a special committee to negotiate the merger. Ellen takes the lead in negotiating the merger with Ace, including her continued employment as Ace's COO if the merger is consummated and a \$3 million retention bonus. Ellen also negotiates for provisions that will result in Clara receiving 450,000 shares of Ace stock in exchange for signing a voting agreement in which Clara agrees to vote her FreshFood stock in favor of the merger. Ace also promises to make either Harry or Clara a director on its board following consummation of the merger.

During FreshFood's negotiations with Ace, Wholesome Food Market makes a bid to acquire FreshFood. The Board rejects Wholesome Food Market's bid.

On May 1, 2019, FreshFood announces that the Board approved the Ace merger on April 30, 2019. Ace will acquire FreshFood for \$100 million in cash. Clara's \$40 Million Payment will be deducted from the \$100 million merger

consideration and will reduce the consideration received by FreshFood's stockholders. The merger is expected to close in December 2019.

4. What duty does the Board owe to FreshFood's stockholders under Delaware law when communicating regarding the merger and how can the Board comply with that duty in this case? Include in your answer a discussion of the elements of the duty identified and any remedy that may be available to stockholders if the duty is breached.

* * *

Stan continues to own his 4,000 FreshFood shares, and he is concerned that Ellen and Clara acted in their own self-interest when approving the Ace merger based on the incentives offered to them by Ace. Stan has decided to file a breach of fiduciary action against the Board based on its approval of the merger. Stan is considering whether to make a demand pursuant to Court of Chancery Rule 23.1 ("Rule 23.1") before filing his breach of fiduciary duty action.

5. Assume that Stan's claims are derivative. Should Stan make the Rule 23.1 demand? Why or why not? Include in your answer a discussion of the content and purpose of Rule 23.1.

* * *

Stan decides to make a Rule 23.1 demand. In response to Stan's Rule 23.1 demand, the Board formed a Special Committee (the "Special Committee"), which was comprised of two directors—Larry and Ellen. The Special Committee spent roughly six hours over two weeks investigating the purported wrongdoing and claims alleged by Stan in his Rule 23.1 demand.

During that time, the Special Committee questioned FreshFood's existing outside counsel, interviewed Clara, Harry and Gary and reviewed minutes from Board meetings wherein the Ace merger was discussed. The Special Committee did not review any officer or director emails and chose not to discuss the matter with Ace. The Special Committee concluded FreshFood should not pursue the claims set forth in Stan's Rule 23.1 demand. The Special Committee did not prepare a written report—it simply advised the Board during a Board meeting that it did not believe pursuing the claims would be worth the cost, risk and expense of litigation. The Special Committee informed Stan that the Board refused his demand, and FreshFood would not be pursuing breach of fiduciary duty claims against the Board.

6. Assume that Stan's claims are derivative. If Stan pursues his breach of fiduciary duty claims notwithstanding FreshFood's refusal of his Rule 23.1 demand, will the Court of Chancery give the Special Committee's determination deference if FreshFood files a motion to dismiss pursuant to Rule 23.1? Explain your answer.

QUESTION 6

Marc owns K&C Construction, LLC (“K&C”), a Delaware limited liability company that specializes in kitchen and bath renovations and remodels. Marc formed K&C in 2008, after several years performing construction work as a sole proprietorship. He lives just over the Delaware state line in Chester, Pennsylvania.

Sheila is a dentist who lives and works in Middletown, Delaware. In the spring of 2018, Sheila’s son becomes engaged to be married, and asks Sheila if the wedding ceremony can be held at her house that September.

In light of the upcoming nuptials, Sheila decides to renovate her kitchen. She interviews several potential contractors, including Marc at K&C.

During the interview process, Sheila expresses a number of concerns to Marc. Her primary concern is timeliness. In order for her to host the wedding, the kitchen renovations must be completed no later than September 15. She also is concerned about the cleanliness of the job site, as she often invites her grandchildren for visits and she does not want any of them to be injured by construction debris.

Marc assures Sheila that the renovation will be completed by September 15. He also explains to her K&C’s “broom clean” policy, which requires all job sites to be free from debris and swept clean by no later than 4:00 p.m. each work day. Sheila

thanks him for the information, and tells him that those considerations are very important to her in coming to a decision on which contractor to hire.

After extensive negotiations, Sheila enters into a contract with K&C and agrees to a “total price (labor and materials)” of \$80,000. The contract does not contain a breakdown listing the assumed costs of materials, and Sheila and Marc have not separately discussed the assumptions that go into the estimate. The final agreement between Sheila and K&C does not mention the “broom clean” policy, but includes (among other things) the following terms:

PAYMENT. K&C agrees to perform all work specified in this agreement for a total price (labor and materials) of \$80,000. 50% of the price is due upon signing the agreement, with the balance due at project completion.

LIQUIDATED DAMAGES. K&C acknowledges that Homeowner requires all work performed pursuant to this agreement to be completed no later than September 15, 2018. To ensure that K&C meets this requirement, K&C agrees that if it has not completed the renovations on or before September 15, it will pay \$10,000 to Homeowner each day, starting September 16 and continuing until the renovations are complete.

AMENDMENTS; ENTIRE AGREEMENT. This agreement may only be amended by a separate writing signed by the parties. This agreement represents the entire agreement between the parties with respect to the subject matter herein described.

CHOICE OF LAW. This Agreement shall be governed by and in accordance with the laws of the State of Delaware.

In late June, K&C begins performing the renovation. Work starts off slowly, and Sheila is concerned that K&C will not meet her September 15 deadline. She also is disappointed with how dirty the work site remains at the end of each day. Tools are left out, sawdust is collecting on the floors, and Sheila has to keep her grandchildren away from the entire first floor of her house.

1. If Sheila sues K&C for breach of the “broom clean” policy, what defenses can K&C assert? How should the Court rule?

* * *

Rather than file suit against K&C, Sheila brings her concerns directly to Marc. He comes to visit the site and agrees with her that the work needs to speed up and that his crew needs to do a better job keeping the work site clean. As a show of good faith, Marc says that he will “make sure that the ‘broom clean’ policy is followed.”

2. Is Marc’s statement enforceable? If your answer is “yes,” explain why. If it is “no,” explain what Sheila should do to make that statement enforceable.

* * *

Following Marc and Sheila's discussion, work on the kitchen renovation improves. K&C's work crew does a better job keeping the work site clean, and progress continues such that by late July it appears that K&C will complete the job by early September.

Notwithstanding the apparent progress, Sheila remains concerned and decides to spend a week at the beach to help combat her growing anxiety. She rents a home in Bethany Beach, Delaware. Darren, the owner of her rental property, stops by to check on things during her stay. He mentions in passing that he owns the vacant lot next door, and has listed that property for sale for \$250,000. Sheila decides that she would like to own the land, and says "I'll take it." Darren is ecstatic, the two of them shake hands and Darren leaves to "just put our agreement down in writing."

While Darren is gone, Sheila begins to have second thoughts. She worries that the list price is too high, and that she is financially overcommitting herself by paying that amount in the midst of her renovations and planning for her son's wedding. When Darren drops off a contract (already signed by him) later that day, she tells him that she needs to review it and will mail it back to him. After he leaves, she crosses out the \$250,000 purchase price Darren had included and replaces it with a purchase price of \$210,000, which she feels she can afford even with all of her other commitments. She then adds her signature next to Darren's and drops it in the mail back to him.

3. Do Darren and Sheila have an enforceable oral contract at the \$250,000 purchase price? Why or why not? Describe the elements of an enforceable oral contract in your answer.

4. Do Darren and Sheila have an enforceable contract at the \$210,000 purchase price? Why or why not?

* * *

When Sheila returns from vacation in late August, Marc has bad news for her. The K&C subcontractor that was hired to build her custom cabinets has delivered cabinets, and they are not at all what Sheila had ordered. Correcting the problem is expected to take thirty days, meaning that the renovation will not be done in time for Sheila to host her son's wedding.

Furious, Sheila orders Marc and his crew off of her property, and tells him that she will not be making the final \$40,000 payment (the 50% payment that was due upon contract completion) to K&C. She hires a different contractor to finish the project at a cost of \$50,000. The contractor finishes the work on September 21. As for her son's wedding, Sheila spends \$20,000 renting a local ballroom and having the event fully catered.

K&C files suit against Sheila in the Delaware Superior Court for breach of contract. As damages, K&C seeks \$40,000 (the 50% payment that was due upon contract completion). In the alternative, K&C asks for \$32,000, which it claims is the value of its labor and the costs it incurred in performing the contract up to the day that Sheila removed K&C from her property, over and above the amount Sheila paid at signing. Sheila files counterclaims against K&C, arguing that its failure to finish the kitchen prior to September 15 represented a breach of contract. As damages, Sheila asked the Court to award her \$100,000, made up of (i) \$10,000 for her incremental cost in hiring a new contractor; (ii) \$20,000 for the cost of a horse-drawn carriage that she purchased for transportation to her son's wedding; (iii) \$60,000 as enforcement of the Liquidated Damages provision of the agreement (i.e. \$10,000 per day for each of the six days beyond September 15 that the kitchen remained unfinished); and (iv) \$10,000 for emotional distress caused by K&C's actions.

5. In the lawsuit, Shelia argues that K&C's actions permitted her to cease performing her obligations under the contract and hire an alternative contractor. Is she correct? Why or why not?

6. If K&C is successful in proving its claim of breach, what damages should the court award? Explain your answer. Assume for purposes of this question only that K&C did not commit any breach of the agreement.

7. If Sheila is successful in proving her claim of breach, what damages should the court award? Explain your answer. Assume for purposes of this question only that Sheila did not commit any breach of the agreement.

* * *

Question 7

Bubba believes his friend Charlie has money hidden in his house and Bubba plans to take it. Bubba makes his plan. He will go to Charlie's house during the day because he knows Charlie is working and the house will be unoccupied. He has a very realistic toy gun and decides to bring it with him, just in case. He arrives at the house around 3 p.m. As he kicks in the back door of Charlie's house, a security camera captures video of Bubba. The video shows a tall, bald, white man. The video also captures a picture of a black sports car with a red stripe.

After Bubba enters Charlie's home while carrying his toy gun, he is confronted by Charlie's 68 year old mother, Victoria. Undeterred, Bubba wrenches her arm behind her back with one hand while he points the gun at her with the other and demands money. In pain, Victoria tells him that she has \$80 in her purse, which she points to sitting on the kitchen counter. Bubba grabs Victoria's purse and flees the residence.

Victoria immediately calls the local police. Officer Able reports to the scene to investigate and takes a report from Victoria. She tells him that a tall, bald, white man kicked in the back door of her home, wrenched her arm behind her back and demanded money. She also reports that the man threatened her with a gun and that she is in great pain; she believes her shoulder is dislocated as she cannot raise her arm above her shoulder (although by the next day her arm is fine, just a little bit

sore). Victoria tells Officer Able that there is a security camera near the back door. The video from the camera shows a clear picture of Bubba as well as video of a departing black sports car with a red stripe; on it is a Delaware vanity tag bearing the name "BUBBUB."

Officer Able does a registration check on the tag which comes back with Bubba listed as the registered owner of the black sports car. He pulls up Bubba's Delaware driver's license photo on the computer in his patrol car and confirms that it shows a man who looks like the bald, white man in the security camera video. He puts out a police dispatch advising that officers should be on the lookout for a black sports car with a red stripe bearing a license plate reading "BUBBUB" being driven by a bald, white man.

The next day, Officer Diaz sees a black sports car matching the description in the dispatch. He confirms its tag reads "BUBBUB." The car is being driven by a small, dark haired woman; she is the car's sole occupant. Officer Diaz activates his lights and siren and pulls behind the black sports car which stops on the side of the road. The driver gets out of the car and Officer Diaz immediately cuffs her and places her under arrest. She asks him why she was pulled over. He does not answer her because he has not observed her violate any traffic law. She tells him her name is Ellen.

After cuffing the woman, Officer Diaz observes an open can of beer in the center console of the car. He places Ellen in his patrol car and proceeds to search the sports car. He finds several empty alcohol bottles on the floor in front of the passenger seat, 40 grams of marijuana in the console and a 9 millimeter handgun on the driver's seat under a woman's purse. Officer Diaz confiscates the beer, the bottles, the marijuana and the handgun. He takes all the evidence and Ellen back to the police station. Ellen cries the whole way, protesting that she has never been in trouble before and pleading for Officer Diaz to let her go.

While Officer Diaz is doing the paperwork necessary to arrest Ellen (who has not stopped crying), she begins to bang her head against the table to which she is handcuffed. Officer Diaz is alarmed by Ellen's conduct and concerned by her lack of stability. He does a computer search and discovers that she was hospitalized in a mental institution four years ago at the age of 20. After Officer Diaz manages to calm Ellen, who finally stopped crying after nearly two hours, he asks her to take a breathalyzer test. After Officer Diaz properly administers the test, Ellen blows a .09 on the test.

In the meantime, Bubba has been thinking about how he treated Charlie's mother. He becomes so remorseful that he goes to the police station the next day with the intention to turn himself in. He meets Officer Able on the sidewalk in front of the police station before he enters the station and identifies himself. Concerned

that Bubba reportedly had a gun during the events at Charlie's house, Officer Able immediately demands Bubba tell him where he has hidden the gun and how much money he took from Victoria. Bubba is very remorseful and admits to everything; he hands the toy gun over to Officer Able who then handcuffs Bubba and together they go into the station. Officer Able reports the confession to Officer Diaz who confronts Bubba with questions of his own regarding why Ellen was driving the black sports car. At that point, Bubba invokes his right to counsel.

1. What offenses may Bubba be charged with committing? Identify the elements of each. If a given charge has various degrees of severity, specify the appropriate degree and class and identify the factors pertaining to each as well as any facts supporting an enhanced sentence.

2. What offenses may Ellen be charged with committing? Identify the elements of each. If a given charge has various degrees of severity, specify the appropriate degree and class and identify the factors pertaining to each as well as any facts supporting an enhanced sentence.

3. On what basis could Ellen file a motion to suppress? How should the State respond?

4. On what basis could Bubba challenge his arrest? How should the State respond?

**5. On what basis could Bubba move to suppress his confession?
How should the State respond?**

* * *

QUESTION 8

Bobby is six years old and lives with Mom. One day, Bobby went outside to play while Mom stayed inside to watch TV. Bobby noticed Electrician working on a nearby telephone line and stopped to watch him work. Electrician, seeing that it was nearly noon, decided to take a lunch break. He gathered his tools, lit a cigarette, waved to Bobby, and got into his truck and drove away. Unbeknownst to Electrician, the matches he used to light his cigarette fell out of his pocket and into the grass near his truck. Bobby saw something fall out of Electrician's pocket and walked over to investigate.

Bobby was excited to find that the dropped item was a matchbook. He knew that matches could be dangerous, so he decided to be very careful when playing with them. He also knew that Mom would not approve of him playing with matches, so he walked down to the next house which was owned by his Neighbor. Bobby saw a pile of leaves on the side of Neighbor's house and decided that it would be fun to light them, one by one. He did so until he ran out of matches. When he was done, he then gathered some grass and dirt to put on top of the burned leaves to make sure that the fire was out and ran back inside his house. Despite Bobby's efforts to make sure no fire remained, the grass caught fire and burned quickly, catching Neighbor's house on fire.

Neighbor was not home when the fire started but came home to see his house engulfed in flames. He jumped out of his car and ran into the burning house in an attempt to save his cat. Neighbor's former best friend who lived next door, George, was just waking up from his lunchtime nap when he happened to look out the window and see Neighbor race into the burning home. Neighbor and George had not spoken in months due to a debt of \$500 that George had failed to repay Neighbor. George desperately wanted to help his friend and also hoped that if he did, his debt to Neighbor would be forgiven. With these thoughts in his mind, George dialed 911 to report the fire and raced into Neighbor's house to save him.

Once in the house, George saw Neighbor struggling to get towards the door. George ran towards his friend intending to pick him up and carry him out of the house. Because of all the smoke, however, George could not see very well. George tripped and fell into Neighbor, knocking him directly into the flames.

The fire department arrived and Firefighter raced into Neighbor's burning house with her team. She grabbed George and dragged him out and ran back into the house to retrieve Neighbor. Neighbor was badly burned. On the way out, a piece of burning ceiling fell on Firefighter, injuring her leg. The cat was unharmed by the fire.

Neighbor was placed into an ambulance and taken to the nearest Hospital. When he arrived at the Hospital, he was still conscious and able to respond to questions. The intake clerk at the Hospital asked Neighbor for proof of medical insurance. Neighbor did not have his wallet, so he called his employer and asked them to fax proof of insurance to the Hospital. It took several hours for the fax to arrive and during that time the Hospital administered no care to Neighbor. Evidence suggests that the delay in care worsened Neighbor's injuries. While in the Hospital, Neighbor developed an infection and died from his injuries. Neighbor is survived by his Wife, who is also the administrator of Neighbor's estate.

Back at the scene of the fire, local news had arrived to cover the events and interviewed Neighbor's friend, George. During the interview, the news Reporter noted that he heard that a neighborhood child accidentally started the fire. George became incensed and said, "I knew it! It must be Mom's kid, Bobby! She never keeps an eye on that kid because of all the men she has around at all hours of the night!" George's remarks about Mom were aired on the evening news and published in the local newspaper.

While the interview was happening, Mom, who had largely been ignoring the goings on outside and watching TV with Bobby, glanced out the window and saw the Reporter on her front lawn interviewing George, the neighborhood gossip. Mom rushed outside to tell the Reporter and George to get off her lawn. She ran towards

them and startled Reporter, who raised his microphone defensively. Mom believed that Reporter was going to strike her with the microphone so she reacted by pushing him in the chest. Reporter tripped and fell, breaking his ankle.

1. What cause(s) of action, if any, can Firefighter assert against George?

Identify each cause of action, its elements, and discuss whether Firefighter is likely to prevail. In doing so, discuss what defenses, if any, George can assert.

2. What cause(s) of action, if any, does Reporter have against Mom?

Identify each, its elements if not previously identified, and discuss whether Reporter is likely to prevail. In doing so, discuss what defenses, if any, Mom can assert.

3a. What cause(s) of action, if any, does Wife have against: (i) Hospital, (ii) George, (iii) Bobby, or (iv) Mom?

By possible defendant, identify each cause of action, its elements if not previously identified, and discuss whether Wife is likely to prevail. In doing so, discuss what defenses, if any, each defendant could assert.

3b. If Wife is successful against the Hospital, what types of damages are available to Wife on behalf herself and her husband?

4. What cause(s) of action, if any, does Mom have against Reporter and George? Identify each, its elements if not previously identified, and discuss whether Mom is likely to prevail. In doing so, discuss what defenses, if any, Reporter or George can assert.

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GENERAL INSTRUCTIONS

The Essay Section of the 2019 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.