

QUESTION 1

Company is a Delaware corporation and large chemical manufacturer. Company's Board of Directors ("Board") has five members. Company's long-time CEO ("CEO") is also a director of Company.

Residents of Town sued Company in a civil suit that accused Company of disposing of toxic waste into a nearby river for years. They alleged the pollution caused tragic harm to the wildlife and people of Town. The Company was found liable in the civil suit brought by the Residents of Town.

Beyond the civil suit, Company's toxic waste disposal practices had been under investigation by the United States Department of Justice ("DOJ") for years. The investigation led to a lawsuit by the DOJ, which was settled by a consent order ("DOJ Consent Order") in which Company acknowledged that its toxic waste disposal practices were illegal, agreed to remediate the existing pollution and, going forward, agreed to cease dumping waste and institute new legally compliant procedures for proper

disposal of toxic waste in exchange for the DOJ agreeing not to further prosecute its lawsuit against Company. The DOJ Consent Order was approved by the United States District Court for the District of Delaware and Company's obligation to remediate its dumping of toxic waste contained in the DOJ Consent Order carries the force of law. Each director of Company's Board has acknowledged Company's obligations under the DOJ Consent Order.

Company initially complied with the DOJ Consent Order and ceased its illegal toxic waste dumping practices. Company also remediated the prior toxic waste and instituted a policy for disposal of future toxic waste.

One year after entry of the DOJ Consent Order, CEO reported to the Board that Company's sales were up 10% but profits were down 25% due to the increased costs of disposing of toxic waste in compliance with the DOJ Consent Order and Company's new toxic waste disposal policy. In response, Company's Board directed CEO to ignore the DOJ Consent Order's requirements and resume Company's prior practice of dumping toxic waste into the river.

CEO initially expressed concern that resuming the toxic waste dumping process would amount to illegal activity under the terms of the DOJ Consent Order. The Board dismissed CEO's concern, insisting that secretly resuming the illegal dumping of toxic waste would save Company millions. CEO complied with the Board's instruction.

Soon thereafter, the DOJ discovered that Company was again dumping the toxic waste into the river in violation of the DOJ Consent Order and filed a second lawsuit. Company paid \$100 million to settle that DOJ lawsuit ("DOJ Settlement"). In the DOJ Settlement, Company acknowledged that the DOJ alleged Company had resumed its prior illegal toxic waste dumping practices that led to the DOJ Consent Order in the first place, but admitted to no wrongdoing.

* * *

Company received a demand for books and records of Company from an attorney of a beneficial stockholder ("Stockholder") of Company. The demand seeks to inspect Company's books and records relating to Company's compliance with the DOJ Consent Order and the DOJ

Settlement. You have been retained by Company to respond to Stockholder's demand.

1. (a) What Section of the Delaware General Corporation Law applies to Stockholder's inspection demand?

(b) What are the statutory requirements that Stockholder's demand for inspection of Company's books and records must satisfy?

Do not discuss the principle of a proper purpose in your answer to Question 1(b).

(c) How many days does Company have to respond to Stockholder's demand for inspection of books and records? What is Stockholder's remedy after the expiration of the time period?

(d) Assume Stockholder's inspection demand states a proper purpose for inspection of Company's books and records. What standard applies to determine the appropriate books and records the Company should produce to Stockholder for inspection?

Assume for purposes of Question 1(d) only that Stockholder does not seek to inspect Company's stock ledger or list of stockholders.

(e) Assume Stockholder's inspection demand was made in the form and manner required by the Delaware General Corporation Law and the Stockholder seeks to inspect a copy of Company's stock ledger or list of stockholders. Who bears the burden of proof to determine whether Company is obligated to permit inspection of its stock ledger or list of stockholders, and what must they prove?

* * *

Stockholder commences a lawsuit in the Delaware Court of Chancery alleging that Company's Board is liable for the \$100 million DOJ Settlement because the Board allegedly failed to properly oversee Company's compliance with the DOJ Consent Order. The lawsuit was filed six months after the DOJ Settlement. You have been retained to represent Company's Board in the lawsuit.

2. (a) Describe the standards of liability for such a claim under *Caremark*.

(b) Assume that the Board wants to defend the litigation by asserting that it was an informed, prudent business decision intended to increase profits by resuming Company's illegal toxic waste dumping practices. Is that defense likely to prevail? Explain why or why not.

* * *

Assume that Stockholder's complaint alleges the *Caremark* claim discussed in response to your answer to Question 2 immediately above. The parties dispute whether Stockholder's *Caremark* claim is direct or derivative.

Assume that demand futility is not an issue and do not discuss it in your answer.

3. Explain what a direct claim is, what a derivative claim is, and how to differentiate between the two. Would Stockholder's claims be direct or derivative? Explain why or why not.

* * *

During the litigation, Company learns that Stockholder sold all of its shares of Company stock a week before filing its complaint, but purchased new shares of Company stock the day before filing its complaint.

4. What defense should the Company raise as a result, and what are the elements of the defense? Is it likely to succeed, and why or why not?

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The board of directors of a different company, Corporation, is considering converting Corporation from a Delaware corporation to a Delaware limited liability company, because the Corporation's board of directors wants to minimize any fiduciary obligations owed to equity holders.

5. (a) Can the parties to an LLC operating agreement alter traditional fiduciary duties or obligations?

(b) If so, how?

(c) Are there any fiduciary duties or obligations under Delaware law that cannot be altered under the Delaware Limited Liability Company Act? If so, identify the fiduciary duty or obligation and what it requires.

* * *

QUESTION 2

Two friends, Doug and Carla, suffer from an addiction to illegal drugs. While having drinks at a bar in Dover, Kent County, Delaware, they decide to go next door to Capital Casino, which operates a legal gambling business, to win money to buy drugs. While at the casino, Doug and Carla pass Wanda walking through the slot machines. Wanda is 75 years old and uses a cane to assist her walking. Carla nudges Doug, nodding toward the plastic purse Wanda is carrying. Doug winks at Carla. Once Wanda sits at a chair to play slots, Doug grabs her purse from the back of the chair. Doug and Carla are happy to find \$500 cash in Wanda's purse. They use the money to continue gambling. Wanda later realizes her purse is missing and reports this to casino security, who in turn notify the local police department.

At the blackjack table, Doug and Carla meet Victor, who is dressed up and winning hand after hand. Doug and Carla convince Victor to go for a ride to their friend Brian's house in Lewes, Sussex County, Delaware. They pile into Doug's car and drive south. Before leaving

Dover, they stop for gas. Victor goes inside the gas station to use the bathroom. While he's gone, Doug and Carla agree to beat Victor up and take his blackjack winnings. When Victor exits the gas station, Doug hits Victor over the head with a metal baseball bat. Victor is knocked unconscious with a gash on his forehead and a skull fracture. Panicking, Doug and Carla pick Victor up and throw him into the trunk of Doug's car. Carla places the bat in the backseat. Once Victor is in the trunk, they remove his wallet from his back pocket. Doug and Carla are thrilled to find \$200 cash inside. The two continue on their journey to Brian's house in Lewes. Once they arrive, Carla asks Brian to sell her 2 doses of ecstasy, which is a controlled substance. Brian sells the ecstasy to Carla in exchange for \$50, and Carla places the ecstasy in the cupholder of Doug's car. Doug and Carla drive away from Brian's house and get pulled over by Police Officer for traveling 60 miles per hour in a 45 mile per hour zone shortly thereafter.

1. Identify all possible crimes that may be charged based upon the fact pattern. For each crime, identify the elements, and, if

applicable, the degree. For each crime identified, list which individual(s) could be charged.

For purposes of Question 1, do not address Title 21 traffic violations.

* * *

Doug pulls over to the shoulder. Police Officer runs the registration on Doug's car and learns that it is expired, and also that the vehicle is uninsured. When Police Officer approaches Doug's vehicle, he immediately sees the ecstasy pills in the cupholder. He asks Doug and Carla to exit the car. He immediately handcuffs Doug and Carla, places them in his patrol vehicle, and searches Doug's car. He collects the ecstasy and moves on to the backseat. There is a bloody metal baseball bat laying across the backseat. Police Officer removes the bat and places it in his patrol car. Back at Doug's car, Police Officer hears banging sounds from behind the back seat, so he opens the trunk. He finds Victor inside, bleeding profusely from the laceration to his head. Police Officer exclaims, "Who is this? What happened to him?" Carla says, "We don't

even know his name, we just met him a little while ago. Doug hit him with that bat and then we stole his wallet and threw him in the trunk.” Police Officer calls for medical assistance. Victor is transported to the hospital. Police Officer also calls for a tow truck to impound Doug’s car, as permitted due to the lack of insurance and expired registration.

2. Doug’s defense attorney files a motion to suppress all evidence seized from Doug’s car for lack of a warrant. Discuss all applicable legal doctrines the prosecution may rely upon in the suppression hearing.

3. Carla’s defense attorney files a motion to suppress the statement she made to Police Officer while on scene. Should the statement be suppressed? Explain your answer, including identifying and analyzing the applicable legal doctrine(s) that should be considered.

* * *

Doug and Carla are charged by Police Officer for crimes related to their conduct against both Wanda and Victor. They are charged by joint

indictment in Kent County. Shortly before trial, Doug and Carla's defense attorneys both file pre-trial motions.

4. The defense attorneys file motions to sever, arguing that Doug and Carla should be tried separately. How should the court rule on the motions, and why?

5. Doug and Carla's defense attorneys file motions to dismiss, claiming the charges were filed in the wrong county. What legal principle are they referencing? How should the court rule, and why?

* * *

Question 3

At the time of his death, Decedent was married to Wife who survived Decedent. Decedent and Wife had two children together, Son and Daughter, both of whom survived Decedent. Decedent's mother ("Grandmother") survived him, but Decedent's father predeceased him. Decedent had no siblings. Decedent's estate consists of exclusively \$150,000 in cash, which is held in a bank account solely owned by Decedent. Decedent's bank account has no beneficiary designated. Decedent dies without a will.

1. State the specific amount to be distributed, if any, to each person listed below, and explain the basis for your answers.

(a) Wife,

(b) Son,

(c) Daughter, and

(d) Grandmother.

* * *

For the purpose of Question 2 only, assume that Wife and Son predeceased Decedent, and that Daughter and Grandmother survived Decedent.

2. State the specific amount to be distributed, if any, to each person listed below, and explain the basis for your answers.

(a) Daughter, and

(b) Grandmother.

* * *

For Question 3, rely only on the facts in the following paragraph for your answer:

For the last six months of Father's life, he lived in a nursing home after having been diagnosed with dementia. He was sometimes confused, was occasionally unable to recognize people, and needed assistance with some daily tasks such as personal hygiene, taking his medications, and grocery shopping. Son lived nearby, visited Father weekly, and assisted Father with some of his needs, although Father continued to pay his own bills. Son also prevented Daughter from visiting or speaking with Father. Father was always able to recognize Son, and Father told Son he was

thankful for Son's frequent visits. Son, who had recently lost his job and had substantial debts, suggested to Father that Father have a will prepared naming Son as executor and sole beneficiary of Father's estate. Father agreed with Son's suggestion. Son took Father to Son's personal lawyer who prepared a will for Father naming Son as executor and sole beneficiary of Father's estate. Assume that Father's will was validly executed and that, after Father died, Son opened Father's estate and was appointed executor by the Register of Wills.

Daughter contests Father's will. One of Daughter's claims is that Father lacked testamentary capacity. The Daughter's other claim is that Father was unduly influenced by Son.

3. Identify the elements of each of Daughter's two claims and evaluate each claim's likelihood of success. Explain your answers.

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For Questions 4 and 5, rely only on the facts in the following paragraph for your answers:

Husband executes a valid will that leaves his entire estate to Wife. Husband later decides he wants to establish a revocable trust to provide for his adult Daughter. He hires a lawyer to draft a declaration of revocable trust (“Declaration”). Husband executes the Declaration in the presence of Daughter and the lawyer who prepared the document, who both then sign the Declaration as witnesses. Pursuant to the Declaration, Husband is the trustee of the trust until he dies. Husband is the sole owner of a bank account with no beneficiary designated for the account. The Husband’s bank account holds \$75,000 in cash. The Declaration states that Husband’s bank account will be the corpus of the trust to be distributed to Daughter upon Husband’s death. When Husband dies, his bank account is still in his name with no beneficiary designated on the account. Wife and Daughter survive Husband.

4. Was Husband’s Declaration validly executed? Explain your answer, including the requirements for a valid execution.

5. State the specific amount of the funds in Husband's bank account to be distributed, if any, to each person listed below, and explain the basis for your answers.

(a) Daughter, and

(b) Wife.

* * *

QUESTION 4

Anthony worked at a company in Wilmington, Delaware. One day, just before 5:00 p.m., Anthony's boss, Bill, called Anthony to his office. Bill explained that Anthony had made a crucial mistake and terminated Anthony's employment, effective immediately. Anthony tried to explain that Carl, another employee at the company, was responsible for the mistake, but Bill did not change his mind.

Bill instructed Anthony to gather his things and leave the building. Anthony became very angry and began yelling at Bill. Bill called security, and Anthony was escorted from the building. Carl's office was next to Bill's office, and he overheard Anthony and Bill's entire interaction. Shortly after Anthony was escorted from the building, Bill informed Carl that the company was terminating his employment also, effective immediately.

After leaving the building, Anthony drove to a nearby bar where his estranged wife Darlene worked. Anthony and Darlene live separately, and while they have agreed to file for divorce, neither of them has done so yet. The bar was noisy and crowded, and Darlene was the only

bartender working that night. Anthony sat at the bar and grumbled aloud whenever Darlene brought him a drink. At one point, Anthony said to Darlene, "If I ever see Bill again, I'll kill him." Darlene was busy with the bar's many other patrons and did not respond. Anthony had 10 alcoholic drinks and left the bar at 10:30 p.m.

Unbeknownst to Anthony, Carl had followed Anthony to the bar, sat a couple of seats away from Anthony, and recorded everything Anthony said. After Anthony left the bar, Carl followed him to the parking lot, but they left in their own cars. Carl has no alibi for the remainder of the night.

Later that night, Bill was shot in the chest in front of his Wilmington home. An emergency paramedic, Medic, arrived in an ambulance approximately 15 minutes later. While Medic treated Bill in an attempt to stop his massive blood loss from the gunshot wound, Bill said, "I think I saw Anthony in the moonlight! I can't wait to get back at him for this if by some miracle I survive!" Bill died in the ambulance on the way to the hospital.

Ten minutes after Bill was shot, Officer Harold saw Anthony's car swerving erratically and pulled him over three blocks from Bill's house.

Anthony was alone in the car. Anthony consented to a breathalyzer test, which revealed his blood alcohol concentration (BAC) was .31 – nearly four times the legal limit of .08. Upon searching him, Officer Harold found a handgun. Anthony was arrested for driving under the influence (DUI), before being charged with Bill’s murder a few days later. Darlene files for divorce one week after Anthony’s arrest, and the divorce is finalized three weeks after that.

Anthony’s trial for Bill’s murder begins several months later. During the trial, Darlene is asked by the prosecutor whether she heard Anthony say, “If I ever see Bill again, I’ll kill him.” The defense objects on the basis that the communication was privileged, and asks the judge to strike the statement from the record.

1. (a) Identify and define the privilege that the defense is attempting to invoke as its objection. (b) What should the defense argue to support its objection? Identify and apply the required elements. (c) What should the prosecution argue in response? (d) How should the court rule, and why?

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The police interviewed Carl a short time after Bill's murder and considered him a suspect. Carl had no alibi for his whereabouts after leaving the bar. Later, the police told Carl that although they were not convinced he was innocent, they were stopping their investigation of him as a suspect because Anthony had been charged with the murder.

After Anthony was arrested, Carl gave a statement to the police declaring he never heard Anthony threaten Bill and Anthony did not seem angry about his termination.

At trial, however, Carl testifies Anthony was "incredibly angry at Bill" over his termination and he "heard Anthony threaten to kill Bill."

2. How could the defense attempt to impeach Carl? Explain your answer.

Do not discuss hearsay in your answer to Question 2.

3. In addition to impeaching Carl, what should the defense argue to attack Carl's credibility based on the facts provided? Explain your answer.

Do not discuss character or Rule 404 in your answer to Question 3.

* * *

At trial, Carl also testifies about recording Anthony's statements at the bar. The prosecution seeks to introduce the recording as evidence.

Assume the recording was lawfully obtained (i.e., Anthony's consent was not required).

4. (a) Generally speaking, what must be shown in order to authenticate evidence? (b) In what two ways will Carl be able to authenticate the recording through his testimony?

* * *

At trial, Medic testifies that he heard Bill say, "I think I saw Anthony in the moonlight! I can't wait to get back at him for this if by some miracle I survive!" The defense objects to the statement as hearsay.

5. What is hearsay?

6. (a) What should the defense argue in support of its hearsay objection? Identify the required elements. (b) What should the prosecution argue in response? (c) How should the court rule, and why?

* * *

The defense wants to introduce evidence that there was no moon the night Bill was murdered, and that it was raining continuously throughout Wilmington from 6:00 p.m. until midnight.

7. The defense has no witness from the National Weather Service, but wants to introduce a National Weather Service report showing that there was no moon and it was raining when Bill was shot. (a) How can the defense do so? (b) What should the court consider in its ruling? (c) How should the court rule, and why?

Do not discuss hearsay in your answer to Question 7.

* * *

The defense plans to offer the testimony of an expert witness, Dr. Jay. Dr. Jay intends to testify that with a BAC of .31, Anthony would have been far too impaired to operate a handgun. Dr. Jay graduated from medical school with honors 25 years ago, and throughout his career he has specialized in how BAC affects a person's ability to operate a motor vehicle. He is well regarded in the medical field with respect to the subject and has authored numerous academic publications concerning it. He has also conducted numerous experiments regarding intoxicated

individuals operating motor vehicles. Finally, Dr. Jay has testified as an expert witness in more than 250 prior trials, all involving DUI.

The defense requests the court permit expert testimony on the issue of whether Anthony would have been too impaired to operate a handgun due to his BAC level, and qualify Dr. Jay as an expert witness.

Assume for purposes of Questions 8 and 9 that there is no issue concerning disclosure of Dr. Jay's testimony or the timing of either the defense's request or the prosecution's opposition.

8. What should the defense argue in support of (a) permitting expert testimony on the issue of whether Anthony was too impaired to operate a handgun due to his BAC level and (b) qualifying Dr. Jay as an expert witness?

* * *

The prosecution opposes the defense's request that Dr. Jay be qualified as an expert.

9. What should the prosecution argue in support of its opposition?