Applicant Number

BOARD OF BAR EXAMINERS

OF THE DELAWARE SUPREME COURT

2014 BAR EXAMINATION

Monday, July 28, 2014

9:30 a.m. – 12:30 p.m.

Questions 1 - 4

QUESTION 1

Note: In responding to this Question, you are to apply the Delaware Rules of Evidence as they existed prior to July 1, 2014. Any amendments to the Delaware Rules of Evidence effective as of July 1, 2014 should not be considered.

Blaze Singer ("Singer") is an international pop music sensation. A graduate of the prestigious Music & Art College, he is considered the most successful graduate in the school's long history. When not on tour, Singer's home base is a mansion in a gated community in Hollywood, Delaware. Because of Singer's popularity, he has a home security system maintained by Alarmist Company, which is owned by Singer's neighbor, Nick Neighbor ("Neighbor"). Singer has been the subject of numerous articles raving about his success, the beauty of his home, and his valuable wine collection.

In January 2014, Neighbor's 19 year old son, Junior, is suspended from the Music & Art College for cheating on his exams and returns home to live with Neighbor. In February 2014, Singer leaves town on a six-month world tour. The next month Neighbor and Junior receive word from the Music & Art College that Junior is permanently expelled from the school for cheating and for defacing the paintings of Master Painter, a teacher at the Music & Art College. That same day, an article appears in the local paper about a huge benefit Singer recently hosted at his home on behalf of the Music & Art College. During the event, Singer purchased two self-portraits by Master Painter. The article reported that after purchasing the portraits, Singer thanked Master Painter and his alma mater for helping him on his road to success. After reading the article, Junior, who knows Singer is on a world tour, invites a group of his friends to join him at Singer's house to "party like rock stars."

During the party, Junior and his guests drink their way through Singer's wine collection, vandalize the self-portraits of Master Painter that Singer recently purchased at the benefit he hosted for his alma mater, and otherwise make a mess of Singer's mansion. Tommy Twitter ("Twitter"), a local mechanic and one of Junior's friends, attends the party at Singer's house. While at the party, Twitter takes pictures and videos with his smart phone and posts them in real time on his blog site. Twitter's blog postings also include quotes from other party attendees detailing the events as they transpire, but without identifying any of the individuals quoted in the blog posts by name.

One of Singer's friends, Phyllis Friend ("Friend"), comes across the blog postings and immediately sends pictures of the blog posts by email to Singer. After reviewing the blog posts, Singer recognizes Junior and calls Neighbor demanding that Neighbor put a stop to Junior's actions and make amends for the damage to his property. Neighbor immediately apologizes for Junior's actions and tells Singer that he and Junior's mother have been having trouble with Junior since he was expelled from the Music & Art College in March. During the conversation, Neighbor promises to cover all of the damages if Singer agrees not to call the police. Sympathetic to Neighbor's plight, Singer agrees to not report the incident to the police, but only if Neighbor pays for all of the damage.

At the end of his tour, Singer returns home to assess the amount of the damage, which is in excess of $225,000. When Singer tells Neighbor the damages are in excess of $225,000, Neighbor is shocked and retracts his promise to pay the damages. Neighbor also informs Singer that he checked Alarmist Company records and there is no way Junior could have been responsible because the alarm system never went off on the night of the alleged party allegedly hosted by Junior.

Singer reports the incident to the police who investigate the scene. Junior is arrested and charged with various crimes under the Delaware Code. Unfortunately, all of the pictures and videos of the party were deleted from Tommy Twitter's blog site and all that remain on the blog site are the anonymous comments made by attendees at the party, some of which identify Junior as the host of the party. Junior maintains his innocence.

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1. **Prosecutor attempts to introduce testimony from the President of the Music & Art College that Junior cheated on an exam and defaced school property while at the school, which resulted in his eventual expulsion. What objection(s) can Junior's attorney make to try and prevent the introduction of that testimony? What argument(s) should Prosecutor make to overcome the objection(s)?**

2. **Prosecutor attempts to introduce copies of the pictures and videos from the blog posts attached to the emails that Friend sent to Singer as well as testimony from Twitter that another party attendee posted a comment on his blog stating: "OMG – I can't believe I just saw Junior pour Singer's red wine all over Master Painter's self-portraits and then rip them up!" Explain whether Prosecutor will be successful.**

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The morning after the party, Junior seeks medical attention from Doctor for stomach pains. Twitter drives Junior to the hospital and sits in the room with Junior during his examination by Doctor. During the examination, Junior tells Doctor that the night before he partied like a certain local pop star everyone is always bragging about. He also tells Doctor that the wine in Singer's wine collection that everyone raves about was really just common swill and that is why his stomach hurts so much now. During the examination, Twitter remains in the

room with Junior and Doctor, but does not participate in the discussion. In his criminal trial, Junior asserts his Fifth Amendment rights and refuses to testify. Junior also claims the physician-patient privilege as to any statements he made to Doctor. At trial, the Prosecutor calls Twitter to testify concerning the conversation Junior had with Doctor during the examination. Junior's attorney objects based on the physician-patient privilege and hearsay.

3. Explain what arguments Prosecutor should make for why the testimony should be admitted into evidence.

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In *Singer v. Junior*, a civil trial following the criminal proceedings, Junior's attorney attempts to introduce records from Alarmist Company to show that there was no improper access of Singer's house the night of the party and that an employee monitoring Singer's home security system entered "no entry" on a ledger every 30 minutes to indicate the house alarm was not set off by an intruder during the monitored time-frame.

4. Explain under what circumstances, if any, these records can be admitted into evidence. What arguments, if any, can Singer's attorney make to exclude the evidence.

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During the civil trial, Junior's attorney argues that Junior did not break into Singer's home and that the lengthy delay between the alleged break-in and Singer's reporting of it to the police supports his argument. In response, Singer's attorney seeks to introduce Neighbor's promise to pay for the damages. Junior's attorney objects to the introduction of this evidence.

5. You are the judge. How do you rule on Junior's objection to the introduction of this evidence and why?

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QUESTION 2

The State of Delaware has enacted a new statute that changes the requirements for teenage drivers to obtain their driver's licenses to operate motor vehicles within the State of Delaware. Under the new law, after a teenage driver has passed a certified driver's education course and attained a specified age, the person may obtain a driver's license.

The age at which a teenage driver may obtain a driver's license is 17 for females and 18 for males. The legislative synopsis for the new statute states:

> The disparity in the ages at which female and male drivers may obtain their driver's licenses is necessary to the promotion of public safety and the well-being of teenage drivers and their passengers. The need for this disparity is supported by statistical research showing that teenage male drivers in the State of Delaware are more likely to be involved in automobile accidents resulting in personal injuries or fatalities, more likely to engage in moving violations (such as exceeding the posted speed limit), and more likely to drive while intoxicated.

Adam is a male resident of the State of Delaware who just had his 17th birthday. He has met all requirements for obtaining a driver's license other than attaining the requisite age. He commences suit in the United States District Court for the District of Delaware, properly naming as defendants the Governor of the State of Delaware and other State officials. The suit contends that Delaware's statute concerning the age at which teenage drivers may obtain their driver's licenses improperly discriminates against males and denies males between the ages of 17 and 18 equal protection of the law. Adam seeks a declaration that the statute violates his right to equal protection of the law and injunctive relief enjoining enforcement of the minimum age requirement of the statute against him. He does not seek damages.

1. Under what provision of the United States Constitution will Adam bring his equal protection claim and why? What standard of judicial scrutiny will the District Court apply in evaluating Adam's equal protection claim? Describe that standard of judicial scrutiny, explain why it applies in these circumstances, and explain which party will have the burden of showing that the standard is or is not met.

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2. While Adam's case is still pending, and before any decision has been rendered, Adam turns 18 and obtains his driver's license. Assume that Adam's equal protection claim presented a justiciable case or controversy when he commenced the action. Discuss whether Adam's equal protection claim still presents a justiciable case or controversy after Adam has reached the age of 18, and explain whether or not the case should be dismissed.

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A medium-sized town in Delaware ("Town") has implemented an automated traffic enforcement ("ATE") system at three intersections in Town. The ATE system detects violations of Town's red light laws through the use of underground sensors and digital cameras located at certain intersections. Under the ordinance that Town enacted in connection with its ATE system, proof of a red light violation may be evidenced by information obtained through the ATE system. Once the ATE system reports that a vehicle has engaged in a red light violation, a Town police officer reviews the information obtained through the system and determines whether a ticket should be issued to the registered owner of the vehicle.

Under the law, a registered owner of a vehicle who receives a ticket for a red light infraction detected by the ATE system must submit a form either admitting liability (and paying

a $100 civil fine) or denying liability and requesting a hearing. If the registered owner requests a hearing, it will take place before the Alderman of Town in Alderman's Court. If a violation of Town's red light law is established at the hearing, then the registered owner of the vehicle that violated the law is liable for the $100 civil fine, unless the registered owner has reported the vehicle or the vehicle license plate stolen before the time of the violation or the registered owner proves by clear and convincing evidence that the vehicle was not in his or her custody, care, and control at the time of the violation. In addition, the registered owner can avoid liability by showing that the vehicle was yielding the right of way to an emergency vehicle or that certain other exceptions are applicable. Violations of Town's red light law are civil offenses not criminal offenses.

Barb is a Delaware resident who lives in Town. She is the registered owner of a vehicle that the ATE system detected running a red light. Barb receives a ticket, which identifies the license plate number of her vehicle and provides the date, time, and location of the violation. The ticket is accompanied by two digital images showing the vehicle in the process of committing the red light infraction and showing its license plate.

Barb responds to the ticket in a timely manner, denies liability, and properly requests a hearing. At the hearing, Barb explains that she has no recollection of whether she was the driver of her vehicle at the time of the red light infraction, but that she frequently loaned her car to a neighbor during the week of the infraction because the neighbor's car was being repaired. Barb argues that the ordinance Town enacted to implement the ATE system deprives her of her procedural due process rights under the United States Constitution. Specifically, she argues that the ordinance violates the presumption of innocence and improperly shifts the burden of proof to

the defendant by creating a presumption that the registered owner of the vehicle involved in the red light violation was the driver of the vehicle.

3. **Does the Town ordinance violate Barb's procedural due process rights under the United States Constitution by disregarding the presumption of innocence and creating a presumption that the registered owner of a vehicle involved in the red light violation was the driver of the vehicle? Explain. Discuss Barb's likelihood of prevailing on her procedural due process argument, and explain your answer.**

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Chris is another resident of Town. One day as she is driving to work, she passes a local school whose teachers are on strike. The striking teachers are picketing in front of the school and several of them hold signs stating "Honk to Support Your Teachers." Chris gives three long blasts of her car horn as she passes the picketing teachers. After driving another block, she is pulled over by a Town policeman, who tickets her for violating Town's anti-honking ordinance.

Town's anti-honking ordinance provides:

> A driver of a motor vehicle within the city limits may, when reasonably necessary to ensure safe operation of the vehicle and the safety of other vehicles and pedestrians, give audible warnings using the vehicle's horn or similar sound signal device. A driver of a motor vehicle is otherwise prohibited from using the vehicle's horn or similar sound signal device within the city limits of Town.

A violation of the anti-honking ordinance is a civil infraction, resulting in a fine of $45. The ordinance was enacted for the purposes of improving road safety and reducing noise pollution to improve the quality of life for Town residents and the quality of the experience for tourists and other visitors to Town. The roadway in front of the school where Chris honked her horn is within the city limits of Town.

At a hearing on the ticket before the Alderman's Court of Town, Chris states that she honked her horn as she passed the school to express her support for the picketing teachers. Chris argues that enforcement of the anti-horn honking ordinance against her would violate her right to free speech under the First Amendment to the United States Constitution.

4. **Discuss the factors the Court should consider in determining whether enforcement of the anti-honking ordinance against Chris under the circumstances would be a violation of her right to free speech under the United States Constitution. Discuss the arguments for and against a conclusion that Chris's free speech rights would be violated.**

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QUESTION 3

Motor, Inc. ("Motor"), a Delaware corporation, manufactures motor carts in the basement of its owner's home in Delaware. Motor sells carts for $3,000 each, via Motor's website, and ships them to customers located throughout the United States. Motor maintains a deposit account ("Deposit Account") at Credit Union, located in Delaware.

Motor is successful, with a reputation for manufacturing well-made carts that have a useful life of six to eight years. After several successful years, Motor decides to expand its operations and move out of its owner's home to a separate facility in Delaware with a warehouse and showroom. For the expansion, Motor needs to purchase $75,000 of manufacturing equipment ("Equipment"), which will be installed in the newly-purchased warehouse, and to purchase more supplies and hire more employees. Motor needs capital to fund the expansion. Motor reaches an agreement on loan terms with Bank, also located in Delaware.

Motor and Bank enter into a Loan and Security Agreement, by which Bank agrees to loan Motor $125,000. To secure the loan, Bank demands a security interest in the Equipment and the Deposit Account.

Assume that the Delaware Uniform Commercial Code applies to all questions.

1. How can the Bank perfect its security interest in (a) the Equipment and (b) the Deposit Account? In your answer, explain the steps necessary to do so.

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Ron wants to start a motor cart rental business in Delaware, but he does not have the funds to purchase the carts. Ron tells Motor of his business plan and Motor agrees to lease carts to Ron. They enter into a Lease Agreement, which includes the following provisions:

- Motor agrees to lease Ron 20 carts for 60 months ("Term").

- Ron agrees to pay Motor $500 per month on the first of each month ("Monthly Payment") during the Term.
- Ron will maintain the carts in good condition and is required to perform all maintenance on the carts during the Term.
- Ron is responsible for any loss or damage to the carts at the end of the Term, except for normal wear and tear.
- Ron cannot terminate the Lease Agreement prior to the end of the Term without Motor's consent, and only upon full payout of the Lease Agreement.
- At the end of the Term, Ron may purchase the carts at fair market value.
- The Lease Agreement cannot be renewed.

2. **Is the Lease Agreement a lease or a security agreement? In your answer, identify and explain any facts that weigh in favor of your conclusion, and any facts that weigh against it.**

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Speedy visits Motor's showroom. Speedy tells Motor's sales representative that Speedy loves driving fast and is looking for a cart that can handle hills and bumpy roads at top speed, but has not been able to locate any cart that meets those criteria. The sales representative tells Speedy "I've been in this business a long time, and I can tell you that the roads you describe will not be a problem for our carts to handle. Our carts are very rugged. They can handle extreme terrain at fast speeds." The sales representative shows Speedy a cart in the showroom that Motor specifically customized to handle extreme terrain at fast speeds, and tells Speedy that Motor can manufacture a similarly-customized cart for Speedy. Speedy says "This is just what I've been looking for!"

After negotiating a price, Motor manufactures and sells Speedy a customized cart for $10,000. The cart is for Speedy's personal use. Speedy pays $2,800 of the purchase price in cash and Motor finances the remaining $7,200 balance. Motor and Speedy enter into a contract ("Contract") with the following language:

> Motor agrees to finance $7,200 for Speedy's purchase of cart (serial no. 1983) at 0% interest. Speedy agrees to pay $200.00 per month for thirty-six months.

Contract is the only written agreement between the parties relating to the sale, and contains no references to warranties. Motor validly perfects a security interest in the cart.

Speedy takes his new cart for a ride. The cart performs well on flat roads, but as Speedy is driving up the bumpy hills near his home, the engine sputters and then shuts off. Although Speedy is able to restart the engine, it only moves a few feet before sputtering and shutting off again. This problem continues all the way to Speedy's home. The next day, Speedy drives the cart down the hill and on flat roads for hours without incident, but the engine again sputters and shuts off when he drives the cart up the bumpy hills near his home. Speedy files suit against Motor in Delaware Superior Court for breach of warranty.

3. Identify and analyze any warranty or warranties that Speedy could assert, and how such warranty or warranties would be created. Explain your answer.

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Assume that instead of filing suit, Speedy calls Motor two weeks after purchasing the cart and says, "This cart is a piece of junk. I'm not paying for it." Speedy makes no payments on the loan. Motor lawfully repossesses the cart, and then hand delivers a notice ("Notice") to Speedy, which states in its entirety the following:

> To whom it may concern: Your property has been repossessed and will be sold. You will be responsible for any deficiency balance. You can call 800-555-5556 to request a redemption amount or additional information regarding the disposition.

The next day, Motor sells the cart in a private sale for $1,500. Motor sues Speedy for the remaining $5,700 balance due under the Contract, plus costs and fees. While the lawsuit is pending, Speedy learns that if Motor had sold the cart at an auction, it would have sold for $5,000.

4. **Was the Notice delivered by Motor sufficient? Explain your answer.**

5. **What does Motor need to prove to recover the deficiency balance from Speedy? Explain your answer, discuss the ways Motor could make that showing, and discuss whether Motor can do so on the facts presented.**

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QUESTION 4

Albert, a 15-year-old, is practicing bicycle tricks on his parents' driveway. The driveway connects to Blackacre Drive, a two-lane road with a 45 mile per hour posted speed limit. Betty is driving home in her car after finishing her work day at Don's Lawn Care Service, Inc., where she is a scheduling assistant. Rather than driving straight home, Betty decides to drop off a spare lawn tractor part at her coworker's house. The part is needed to fix a tractor for a lawn care job starting the next morning. Betty's coworker lives on Blackacre Drive. Betty would not otherwise take Blackacre Drive on her way home. Traffic is light, visibility is clear, and the roadway is dry. When Betty is about 500 feet from Albert's driveway, she notices Albert on the bicycle in the driveway. Betty proceeds down a straight stretch of Blackacre Drive toward Albert's driveway, traveling 35-40 miles per hour.

As Betty approaches Albert's driveway, Albert suddenly enters Blackacre Drive directly in front of Betty's car. Betty hits the brake pedal and swerves to the left, but her front right bumper strikes Albert's bicycle. Albert somersaults over the handlebars, falls onto the ground, and suffers various neck and back injuries. Albert looked both ways before entering Blackacre Drive, but did not see Betty's car approaching.

Assume all events occur in Delaware, that Delaware law applies, and that the applicable Delaware statutes require motorists to (i) obey the posted speed limit and (ii) sound the horn in the event a driver perceives a reasonable risk of a collision.

1. Given the facts and the statutes above, identify Albert's potential claims against Betty and discuss whether they will be successful. Where applicable, identify and discuss the elements of each claim and defense.

2. **If Albert successfully asserts a claim against Betty, discuss whether he can hold Don's Lawn Care Service, Inc. liable for his injuries.**

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For this question only, assume that Betty is proceeding at 54 miles per hour on Blackacre Drive rather than 35-40 miles per hour. All other facts remain the same.

3. **Discuss whether this changes your answer as to question number 1 above.**

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Assume that the manufacturer of Betty's car issues a recall for a manufacturing defect in the brake system several months before the accident. Betty receives and reads the recall notice informing her of a low possibility of failure of the car's brake system in emergency braking situations and asking her to take the car to her nearest dealer for a free repair. Betty ignores the recall notice and continues driving the car. When Betty hits the brake pedal and swerves to the left to avoid hitting Albert on his bicycle, the brake system fails.

4. **Discuss whether this changes your answer to question number 1 above.**

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Assume that there is no manufacturing defect in the brake system of Betty's car (and thus no recall). Immediately after leaving work at Don's Lawn Care Service, Inc., and before driving down Blackacre Drive, Betty stops at a bar and drinks several alcoholic beverages. She leaves the bar and heads toward Blackacre Drive. Along the way, Betty sees her friend, Candy, walking on the side of the road and offers her a ride. Candy gets in the front passenger seat and buckles her seat belt. Candy smells alcohol on Betty's breath but says nothing. Betty then gets into the accident with Albert. At the scene, shortly after the accident, a police officer measures Betty's blood alcohol level to be in excess of the statutory limit.

Candy suffers no bodily injuries as a result of the accident but she soon begins to suffer from facial tics, anxiety, and insomnia. She sees her physician, who refers her to a psychiatrist, who successfully treats Candy with a course of psychotherapy and anti-anxiety medication over a period of six months.

5. Discuss the following: (a) whether Candy can assert a claim against Betty for negligent infliction of emotional distress; (b) whether there are any affirmative defenses that Betty can assert to defend against that claim; and (c) whether Candy's claim would be successful.

6. Discuss whether Albert can recover punitive damages against Betty.

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QUESTION 5

Parent Corporation ("Parent") and Sub Corporation ("Sub") are Delaware corporations. Parent itself is owned by Terri and Vic, each of whom is a record holder of 50% of Parent's issued and outstanding shares of common stock, and who serve as Parent's co-Chief Executive Officers and comprise Parent's entire board of directors. Sub is a publicly-traded company, with Parent owning a majority of Sub's issued and outstanding shares of common stock. CFO is the Chief Financial Officer of Sub and one of five members of the Sub Board of Directors (the "Board"). Andy is the Chief Executive Officer of Sub and a member of the Board. Bob, Dory, and Edna, the other three members of the Board, are outside directors (*i.e.*, not employed by Sub) and have no connection to Parent, Andy, CFO, Terri, or Vic.

Sub's sole business is manufacturing and selling widgets. Sub's certificate of incorporation contains a provision stating that "directors shall be exculpated for monetary liability for breaches of fiduciary duty to the fullest extent allowed under the Delaware General Corporation Law." Sub has a meaningful internal financial reporting and control system in place, including, among other things, Lawyer, who serves as compliance officer of Sub, and a three person Audit Committee of the Board consisting of Bob, Dory and Edna which meets regularly.

Fran, who is CFO's assistant at Sub, sends a memo to the Board identifying material weaknesses in Sub's financial controls, stating, among other things, that CFO possesses too much authority over Sub's funds. The Board unanimously (with CFO recused from all discussion and abstaining from voting) decides that, given CFO's reputation for honesty and years of service with Sub, no investigation into the adequacy of Sub's financial controls is necessary.

Six months later, Lawyer sends a memo to the Board, identifying the same weaknesses in Sub's financial controls that Fran had identified earlier and accusing CFO of misappropriating funds of Sub. Lawyer's memo includes documentation supporting the claim that CFO misappropriated funds. Upon receipt of the memo, the Board (with CFO again recused and abstaining from voting) delegates to the Audit Committee the authority to consider the memo and take appropriate action to formulate a recommendation to the full Board for a course of action in response to Fran's and Lawyer's memoranda. The Audit Committee meets and decides unanimously that it should interview CFO about the memo. When interviewed, CFO denies any wrongdoing. The Audit Committee then reports to the full Board that the Audit Committee believes CFO's denial of wrongdoing and has not investigated further. The full Board (again with CFO recused and abstaining from voting) decides to take no further action. Neither the Audit Committee nor the full Board gave any further consideration to Fran and Lawyer's assertions that financial controls at Sub were inadequate.

However, Lawyer's accusations were true: CFO was misappropriating funds. CFO is criminally charged by the government with misappropriating funds from Sub. The government also charges CFO with insider trading for selling Sub stock after engaging in the misappropriation but before the misappropriation was discovered.

After the announcement regarding the criminal charges against CFO, Stockholder, who has been a stockholder of Sub since its inception, commences a derivative action on behalf of Sub in the Court of Chancery (the "Derivative Action"). Stockholder alleges that CFO committed breaches of fiduciary duties under Delaware law by misappropriating funds and engaging in insider trading. Stockholder further alleges that Andy, Bob, Dory and Edna each

committed breaches of fiduciary duties under Delaware law because they failed to oversee Sub's financial controls.

1. **What are the elements of a cause of action under Delaware law for Stockholder's fiduciary duty claim against CFO for insider trading? What arguments should Stockholder make to support the claim?**

2. **What are the elements of a cause of action under Delaware law for Stockholder's fiduciary duty claim against Andy, Bob, Dory and Edna? What arguments should Stockholder make to support the claim?**

3. **If a court were to find that Andy, Bob, Dory, or Edna breached their fiduciary duties, would the exculpatory provision in Sub's certificate of incorporation exculpate Andy, Bob, Dory or Edna for monetary liability? Explain.**

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While the Derivative Action is pending, Parent eliminates the public stockholders of Sub by merging Sub into Parent (the "Merger"). In the Merger, Sub's public stockholders receive cash for their shares of Sub stock at a price that represents a 20% premium over the market price for Sub stock immediately before the offer. Parent's only reason for the Merger is that it believes that the market undervalues Sub's shares.

4. **Following the Merger, the defendants in the Derivative Action move to dismiss it on the grounds that Stockholder lacks standing to maintain its claims. Will the court grant the motion? Explain why or why not.**

5. **Would a minority stockholder of record of Sub be entitled to appraisal in connection with the Merger, assuming that the stockholder satisfied all procedural prerequisites to perfect a claim to appraisal? Explain.**

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Following the Merger, Parent's only business is Sub's former business of manufacturing and selling widgets. However, the widgets that Sub had manufactured and sold for years have become obsolete. There are two new types of widgets that Parent could manufacture and sell in order to maintain its business. The manufacture and sale of the two new types of widgets are mutually exclusive for Parent, however, because Parent only has the ability to obtain funding to purchase the machine needed to manufacture one of them. Terri and Vic disagree as to which new widget to manufacture and sell, and each refuses to approve the obtaining funds to invest in the other's favored widget. As a result, Parent's factories remain idle and Parent essentially stops generating income. Due to its lack of income and failure to develop a new product to replace the obsolete widget, Parent's business is in danger of collapsing. But the opportunity to purchase either of the machines needed to manufacture the new types of widgets remains open, and Parent still has the opportunity to obtain the funds to purchase one of the machines. Parent is not insolvent and has not abandoned its business.

6. Terri files a petition in the Court of Chancery seeking, on the grounds of director deadlock, the appointment of a custodian for Parent to break the deadlock regarding which type of new widget Parent should manufacture going forward. What arguments should Terri make to support Terri's claim that the Court of Chancery should exercise its discretion to appoint a custodian?

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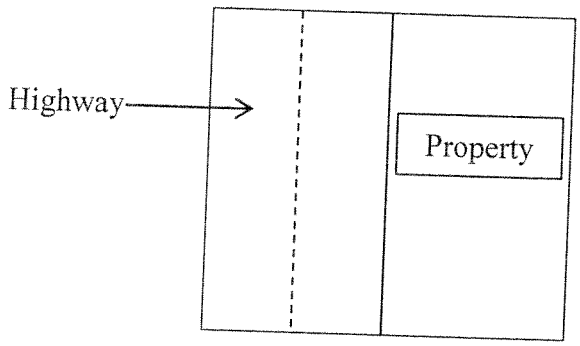
QUESTION 6

After 25 years of marriage, Husband and Wife recently obtained a divorce in Delaware Family Court. While organizing and dividing the personal property that they had accumulated during the last several decades, they search a locked safe in the basement of their house and discover a document titled, "Deed."

The deed describes a parcel of real property, approximately 10 feet wide by 20 feet long, that sits adjacent to a two-lane highway that runs north and south through Delaware. Among other uses, the highway serves as an alternate route to Delaware's beach towns during the summer. Once farm land, the area surrounding the property is occupied by gas stations and fast-food restaurants. The property is situated as follows:



Husband and Wife recall how Grantor, a real-estate investor and longtime family friend, presented the deed to them one month after their wedding. The deed states that Grantor "grants and conveys" the property to Husband and Wife. It was signed by Grantor in the presence of Husband and Wife, but it was not notarized or signed under seal. It does not specify the type of estate created. It was never recorded.

Grantor wanted to provide Husband and Wife not only a parcel of real property, but also a stream of monthly income. The property housed a billboard that advertised a local fast-food restaurant, for which the restaurant paid Grantor a monthly sum.

Several months after the conveyance, however, the restaurant indicated to Husband and Wife that it was no longer interested in paying for the billboard. Thereafter, the restaurant never made a payment to Husband and Wife, but over the years it periodically (including as recently as two years ago) repainted its billboard logo when it was covered with graffiti. Husband and Wife attempted to find a new advertiser, but they were unsuccessful. They locked the deed in their safe and ignored the property, except to pay annual taxes. The property is free and clear of liens and mortgages.

1. **What type of deed do Husband and Wife hold and what warranties, if any, are associated with such a deed? Explain your answer.**

2. **Is the deed valid and enforceable against Grantor? Why or why not?**

3. **Explain what type of estate in property Husband and Wife hold (a) upon Grantor's conveyance of the property and (b) after their divorce becomes effective.**

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As part of their divorce settlement, Husband and Wife retain ownership of the property. Husband, a landscaper by trade, agrees to record the deed, clean up and maintain the property, and attempt either to find a new advertiser for the billboard or sell the property. Wife agrees to pay the annual property taxes. They agree to split the proceeds of any billboard advertising or sale.

One year later, Wife has heard nothing from Husband about the property. After several unreturned phone calls, Wife visits the property. The property is overgrown with grass and weeds, the billboard structure is rotting and in disrepair, and there is a fresh coat of graffiti on the billboard. Wife recognizes the graffiti as the work of the Tagger Crew, a notorious group of local high-school students. It is apparent that Husband neglected the property for the last year.

4. **What property-law-based causes of action, if any, does Wife have against Husband, and why?**

5. **For each property-law-based cause of action that Wife has against Husband, in which Delaware court(s) may she bring such cause of action?**

6. **Does the fast-food restaurant have any rights with respect to ownership or use of the property? Explain your answer.**

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Wife commences an action against Husband relating to the property. While that action is pending, two members of the Tagger Crew, both minors, are injured when they are spray painting the billboard and the structure collapses. At the time of their fall, the minors are standing on a rotted wood platform at the base of the billboard, approximately 15 feet off the ground, which they accessed by a ladder attached to structure's base. The injured minors sue Husband and Wife in Delaware state court.

7. **Are Husband and Wife liable for the minors' injuries? Why or why not?**

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QUESTION 7

Eddie is a salesman with a history of success in selling widgets to customers in Delaware. He has a friend named Frank who owns the Ajax Company in Delaware. Frank and Eddie have a meeting. During the course of the meeting, Frank suggests that Eddie come work for him at Ajax. Frank says: "Come on. I say you start Monday. We are a growing company." Eddie says he thinks it is a great idea, but wants to talk it over with his wife first. After doing so, Eddie quits his job and shows up to work at Ajax on Monday. When Eddie arrives, Frank says that the job was already filled and tells Eddie to go home.

1. Identify and analyze the theories under which Eddie should claim that he is employed by Ajax.

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After the disagreement with Ajax, Eddie finds another job with Widgets-R-Us. Eddie demands that he and Widgets-R-Us negotiate and enter into a written employment agreement. During negotiations prior to signing the agreement, Widgets-R-Us representatives assure Eddie that he is entitled to a $2,000 per month transportation allowance since he will be traveling frequently. Following negotiations, Eddie and Widgets-R-Us execute a final written agreement (the "Agreement") which states that the initial term of the contract is one (1) year, Eddie will be paid $50,000 per year and Eddie will receive a commission of 10% of the sales volume he generates. The Agreement also states that Eddie is to be paid his commissions within 30 days of the date when a customer places an order. Finally, the Agreement contains the following three (3) provisions:

Entire Agreement: This Agreement embodies the final, entire agreement of Eddie and Widgets-R-Us with respect to Eddie's employment and supersedes any and all prior commitments, agreements, representations and understandings, whether written or oral, relating to the subject matter hereof. This Agreement is intended by Eddie and Widgets-R-Us as a final and complete expression of the terms of the Agreement, and no evidence of prior, contemporaneous or subsequent oral agreements or discussions or other extrinsic evidence of any nature shall be used to contradict, vary, supplement or modify any term of this Agreement.

Modification: No modification, amendment, extension, termination or waiver of any provision of this Agreement shall in any event be effective unless the same shall be in writing signed by the party against whom enforcement is sought.

Non-Compete: Eddie agrees that, should Eddie's employment hereunder be terminated for any reason, voluntarily or involuntarily, then for a period of five (5) years from termination, Eddie shall not work for any competitor of Widgets-R-Us with sales locations in Delaware.

There is no mention of the $2,000 per month transportation allowance in the Agreement. The following week Eddie commences work for Widgets-R-Us.

When Eddie shows up for his first day of work, he meets with the head of Human Resources for Widgets-R-Us who gives him a copy of the employee handbook, and Eddie signs a piece of paper in which he acknowledges receiving a copy of the handbook.

After working for several months, Eddie realizes that Widgets-R-Us is only paying Eddie 5% of the sales volume he has been generating and is not paying him his car allowance. When he inquires with the head of Human Resources, he is told that Widgets-R-Us has a written policy in their employee handbook that says all sales employees are only paid half their commissions during their probationary period, which is 10 months. The Human Resources head also confirms that other sales employees do get travel allowances. When Widgets-R-Us continues to only pay

Eddie 5% in commissions and refuses to pay the car allowance, Eddie quits and sues Widgets-R-Us for the difference in commissions and the unpaid car allowances.

2. **Identify and analyze the arguments Eddie should make in support of his claims and the arguments that Widgets-R-Us should make in defense of those claims.**

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Eddie and Widgets-R-Us settle the lawsuit and come to be in each other's good graces again. In a signed and delivered written document, they affirm and ratify the Agreement and agree it will continue for another year. Six months later, Eddie approaches Widgets-R-Us and complains that he is being underpaid. Widgets-R-Us says "Ok, you're doing such a good job that we'll increase your commission to 15%." Nothing is ever put in writing. Thereafter, Eddie keeps working but Eddie's paychecks continue to reflect a commission of only 10%. When Eddie inquires with the head of Human Resources, he's told that since he signed the Agreement for 10%, they aren't going to pay him the 15%. He quits Widgets-R-Us a second time and immediately sues for lost commissions.

3. **Identify and analyze any non-statutory arguments Eddie should make in support of his claim for lost commissions.**

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Eddie and Widgets-R-Us settle the second lawsuit and come to be in each other's good graces yet again. Once again, in a signed and delivered written document, they affirm and ratify the Agreement and agree it will continue for another year. Six months later, Widgets-R-Us approaches Eddie and says that it is deducting from his next paycheck the $4,000 in commissions previously paid to him for an order he sold to the Standard Company. Widgets-R-Us explains that the Standard Company went out of business after it placed the order, so the Standard

Company never paid for its order. Widgets-R-Us then deducts from Eddie's next paycheck the $4,000 in commissions. Eddie is furious and quits a third time. Eddie goes to work in Delaware for one of Widgets-R-Us's competitors and Widgets-R-Us sues Eddie for breaching his non-compete clause.

4. **Identify and analyze what defenses to the lawsuit Eddie may have.**

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An opportunity for Eddie to go to work for Delta Company arises. Delta offers Eddie a sales job for a permanent position within Delta even though Delta knows that the position is only temporarily vacated while the existing salesperson is on an extended leave of absence. Eddie accepts the sales position with Delta and relocates his family 80 miles within the State of Delaware to perform the job. Eddie is performing the Delta job well. Three weeks later, the former salesperson returns from leave, and Eddie is terminated. Eddie sues Delta.

5. **Assume that there is no written contract, and that Eddie is an at-will employee. Identify and analyze any contractually based claim(s) that Eddie can bring against Delta.**

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QUESTION 8

Police Officer Charles is on patrol in the area of Main and Front Street when he observes a four door sedan with two occupants—Abe (the driver) and Beck (the front seat passenger). Officer Charles sees the vehicle make a left hand turn onto Front Street from Main Street without using its turn signal. Officer Charles begins to follow the sedan and prior to initiating a traffic stop, the Officer runs the vehicle registration and determines that the owner of the vehicle has a suspended driver's license. Officer Charles pulls the vehicle over as it enters a residential area.

Upon approaching the vehicle, Officer Charles detects an odor of burnt marijuana. He also notices several used needles in a cup holder in the center console area. Based on the officer's training and experience he knows that needles are commonly used to inject illegal drugs into a person. He asks Abe to produce his license and registration information and determines that Abe is the owner of the vehicle. During this contact, Abe is very fidgety and will not make eye contact with the Officer. He eventually provides the officer with the car registration but is unable to produce a driver's license. Beck keeps moving his hands to the side of the passenger seat, and his eyes appear to be very glazed, a sign of recent drug use. When the Officer asks Beck for his name, Beck immediately tells him his name and that he was wanted for a probation violation. Officer Charles returns to his patrol vehicle and runs Abe's contact information. Officer Charles discovers that not only does he have a suspended driver's license, but he is also wanted for failure to pay a fine in Court. In addition, he discovers that Abe has a prior conviction from four years ago for Trafficking in Cocaine (which at the time was a class B felony). Officer Charles calls for back-up so that he can take Abe and Beck into custody.

Once another officer arrives, Officer Charles approaches the vehicle and asks Abe and Beck to exit and both are secured in separate patrol vehicles. The officer radios for a tow truck

to have the vehicle towed off of the public street as both occupants of the vehicle are now in custody and there is no one to drive the vehicle away. According to standard police practice, he conducts an "inventory search" of the vehicle to document its contents for the protection of the Police Department. While searching the passenger compartment of the vehicle he finds 20 packets of suspected heroin (which when tested proves to be heroin with a cumulative weight of less than one gram) underneath the used needles in the cup holder in the center console area. Upon searching the trunk of the vehicle, he discovers a scale, 15 Ecstasy pills, and a loaded .38 revolver.

The second officer while searching Beck prior to placing him in his patrol vehicle finds $500.00 in cash in his possession. Beck immediately tells the second officer without any questions being asked of him, that he is a user and has a $200.00 a day heroin addiction and that he was trying to buy drugs from Abe who is his regular supplier.

The police arrest Abe and Beck and bring their case file to the Attorney General's office for prosecution. They each obtain separate counsel.

1. **Identify and discuss by reference to the elements, each Delaware crime with which Abe and Beck should be charged. If a crime is a felony, specify the appropriate degree and class of felony.**

2. **Identify, discuss and resolve any issue(s) that must be addressed if the prosecution intends to use the statement of Beck in its case in chief in a joint trial with a single jury.**

3. **You are appointed by the Court to represent Abe. Identify and discuss the legal and factual bases for all pre-trial motions and or requests that you should file in your representation of Abe.**

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GENERAL INSTRUCTIONS

The Essay Section of the 2014 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 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.