Sample Answers
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Performance Test: Sample Answer

DATE: July 27, 2010

TO: Steven Sauer

FROM: Associate

RE: Johanson Litigation

STATEMENT OF FACTS:

Dr. Johanson (Dr. J) is a licensed psychologist in the Commonwealth of Pennsylvania (Pa). He practices in Madison, PA serving clients of both Pa and State X. He advertises in both Pa and State X and approximately 25% of his clients are residents of State X.

Mary Lam and Tim Tait were married in 1999 and were residents and citizens of State X. They have two children. After having marital difficulties, Tim moved out of the marital home and the couple began seeing Dr. J in January of 2008 for both individual and couples therapy. Each signed Dr. J’s standard client agreement. The client agreement contained a “Disputes” clause which provided that:

“any disputes of any nature arising out of or relating to this agreement or the therapy provided shall be submitted to final and binding arbitration before a single arbitrator pursuant to the rules and under auspices of the Madison County Bar Association Dispute Resolution Center. The arbitrator shall apply relevant substantive law in making the decision.”

The agreement also contains a “Communications and Confidentiality” Clause which provides that “subject to professional responsibility requirements. [Dr. J] will keep all communications from clients strictly confidential.”

In late 2009, Mary moved to Madison with the children. Tim continued to live with his mother in State X. Over the course of sessions Mary related that Tim had never raised his voice or been mentally or physically abusive to her. During the course of sessions Tim expressed frustration and rage with Mary over religion. Dr. J related that over the past few months Tim’s rage had increased due to Mary’s move to Pa, and he often expressed a desire to inflict bodily harm on Mary. During an interview session on January 7, 2010, Tim indicated that he was so angry with Mary that he was planning to kill her that night when he went to her home. By the end of the session he said his anger was under control and would not harm Mary. Dr. J consulted with Dr. Headbanger, the President of the Madison Psychotherapy Association and Dr. Shrink, a professor of Marital Counseling at Madison University who both advised Dr. J to warn Mary of Tim’s threats.
On the evening of January 7, 2010, Mary was called by Dr. J who told her about the prior threats and the specific threat that Tim said he would kill Mary that night. When Tait arrived at Mary's home she shot him with a hand gun.

Thelma Tait, the mother and administratrix of the estate of Tim Tait is bringing wrongful death and survival claims in federal District Court in Madison, PA against Dr. J. The claims are based on negligence in releasing confidential information of Tim Tait to Mary Lam in violation of professional standards and the client agreement.

ISSUE PRESENTED:

If a lawsuit is filed against Dr. J in federal court based on the claims of Attorney Pepper, can we compel the matter to be heard through arbitration?

ANALYSIS:

Arbitration is a matter of contract. (Peltz) A written provision in a contract “evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction...shall be valid, irrevocable, and enforceable.” (9 U.S.C. 2) Here the claims do involve interstate commerce, since Dr. J is located in Pa while Tim Tait and Mary Lam were residents of State X. We must first determine whether the claims fall within the arbitration clause and then determine whether the plaintiffs are subject to the arbitration agreement. (Peltz)

The Plaintiff, Ms. Thelma Tait, the mother and administratrix of the estate of Tim Tait, is bringing a wrongful death and survival action. These claims are based on both tort and contract theories. The arbitration clause excerpted above, is broad and applies to “any disputes of any nature arising out of or relating to this agreement.” The term “relates to” is broadly defined and means “reference to.” (Peltz) The claims being brought by Tait's estate are similar to the claims brought in Peltz, for wrongful death and survival. As in that case, the arbitration clause was written broadly here and it is likely that the court will find that the claims do fall within the arbitration clause.

We must next determine whether the plaintiffs are subject to the arbitration agreement. An individual cannot be made to arbitrate a claim unless she is “bound by that agreement under traditional principles of contract and agency law.” (Peltz) Both a signatory to a contract with an arbitration clause and his estate are bound to arbitrate. (Peltz) A survival action for negligence, such as brought in Peltz, could have been brought by the deceased had he lived and therefore the administrator of the estate stands in the shoes of the deceased and is bound by the arbitration agreement. (Peltz) There are five situations in which a non-signatory may still be bound by an arbitration agreement: “(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel.” (Peltz) Equitable estoppel provides that a non-signatory to a contract will be bound to the arbitration agreement if she “knowingly exploits the agreement.” (Peltz) Where a non-signatory's claims “implicate” the agreement with the arbitration clause, that will count as “exploitation” of the agreement.

Tim Tait was a signatory to the client agreement and therefore he would be bound to arbitrate. The survival action is being brought by his estate which is therefore bound by the arbitration agreement since it was a claim that he could have made had he survived. The estate
will also be bound by the arbitration agreement as to the wrongful death claim, since the claim is based on the client agreement signed by Tait, Lam and Dr. J.

BRIEF CONCLUSION

If a lawsuit is filed in federal court against Dr. J we will be able to compel that the matter be heard through arbitration.

ISSUE PRESENTED:

Does Dr. J have any liability for negligence for having allegedly breached the duty of confidentiality?

ANALYSIS:

The elements of negligence are the existence of a duty to conform to a certain standard of conduct, a failure to conform to the standard required, a casual connection between the conduct and resulting injury and damages. (Prosser) Dr. J had a duty under professional standards to not reveal confidential client information. (Emerich) Dr. J received information from Tait during the course of therapy which was covered by the confidentiality agreement. However, Dr. J as a mental health professional has a duty to warn a third party of potential harm where the threat is of specific and immediate serious bodily harm, made against an identifiable person.

Mental health professionals are held to the standard of care of their profession. (Emerich) A mental health professional has a duty to warn a third party of potential harm. (Emerich) The predicate for a duty to warn another is the existence of a “specific and immediate threat of serious bodily injury” communicated to the professional. (Emerich) The duty to warn only arises where a threat is made against a victim that the professional can specifically identify. (Emerich) The protection against disclosure of confidential information is not sufficient to bar a finding of a duty to warn third parties in these limited circumstances. (Emerich) The State Board of Psychology has regulations which support this conclusion that information received in confidence should only be revealed where there is “clear and imminent danger”. (Emerich) This information may be revealed to the potential victim. (Emerich)

In this instance, Dr. J had heard threats by Tait previously but they had never risen to this level. On January 7, 2010 Tait made a specific threat that he was going to kill his wife that evening when watching college football at her home. This threat was specific as to the victim and was an immediate threat of serious bodily injury. Dr. J therefore had a duty to warn. Consistent with Board of Psychology regulations Dr. J deliberated over the proper course of action and consulted two other doctors prior to determining that the proper course of action was to warn Mary. Therefore, it is likely that Dr. J will not be liable for breaching the confidentiality owed to Tait.

BRIEF CONCLUSION:

Dr. J does not have liability for negligence for having allegedly breached the duty of confidentiality due to his duty to warn Mary of the threat.
Question No. 1: Sample Answer

1. On what basis should Kelly’s lawyer object to the probate of Frank’s will contesting Peg’s interest in Frank’s estate and her appointment as executrix.

    Kelly’s lawyer should object to the probate of Frank’s will arguing that Peg and Frank were divorced, and that a divorce essentially severs the ex-spouse from the will of the decedent. The attorney should argue that because of the divorce, Peg is not fit to either take under the will, or to be the executrix of the property, because she has no valid right to take because of the final divorce. However, while this is the general rule, there is an exception when there is clear intent in the will itself not to prevent the ex-spouse from taking under the will.

    Here, the facts are clear that Frank and Peg were married for 30 years. While their marriage failed in 2009, they separated amicably, and the divorce concluded in March 2010, with the parties dividing their assets in an amicable manner. Furthermore, according to the facts, Frank had his lawyer draft a will sometime in 2009 after Frank and Peg were having marital difficulties that stated that “under and any all circumstances so long as she survives me and is willing to serve” that Peg be named the executrix of the will. This might suggest, that even because of the marital difficulties and the foreseeability of a divorce, Frank wanted Peg to take under the will. However, this statement does not explicitly state that Frank wanted Peg to take under the will, only that he wanted her to remain as executrix.

    Thus, the language of the will is clear, that Frank wanted Peg to remain as the executrix of the will, regardless of the outcome of the divorce, but a challenge to her taking her 50% share would likely succeed because the divorce serves to cut that spouse out of the will so that they do not take. Thus, Peg should not be entitled to 50% of the estate.

2. Under the PA Rules of Professional Conduct (RPC) Wanda may not represent Peg. An attorney may not take on clients that have a conflict of interest with other past or present clients unless the attorney informs both clients about the conflict and both clients give informed consent to the representation. Further, there is an attorney client privilege and duty of confidentiality that attorneys must keep information obtained during the course of their representation confidential. The scope of this privilege extends past the termination of the attorney/client relationship and even past the death of the client.

    Here, Peg is asking Wanda to represent her to file a claim against the estate for her share of the landscaping business. This will not be allowed on many grounds as it would not be possible for Wanda to represent the estate and sue that estate, as this is clearly a prohibited conflict of interest. Additionally, Wanda represented Frank during the divorce and as a result likely has confidential information gained from the representation of Frank. Further, Frank is dead and cannot consent to this agreement. Peg may try to claim that the marital property agreement was informal and there was no written agreement made by Wanda, however during the course of the divorce proceedings it is very likely that Wanda was given confidential information from Frank and this will preclude her from representing Peg.
3. The will’s forfeiture provision will have no effect on Kelly’s right to take because of her objections to Peg’s taking under Frank’s will, as long as she has probable cause for her objections. In Pennsylvania, forfeiture clauses in wills are permitted. However, courts will not give effect to a forfeiture provision if the challenging party has probable cause to challenge the will.

Here, Kelly, someone who would be taking under the will and therefore subject to the forfeiture clause, is challenging the will. Under the plain language of the will’s clause, she would lose her 50% interest in the estate. However, Kelly has probable cause to bring an objection to the will. She knew that Frank and Peg had divorced, and had divided all their marital assets, save the landscaping business. Pursuant to their divorce Kelly has probable cause to challenge Peg’s right, as a divorcee, to take under the will. Kelly will therefore be able to challenge the will without forfeiting her estate, because the clause does not apply to individuals who have probable cause to challenge the will.

4. The landscaping work done for Wanda should be reported as income in the year in which it was received, but should also be deducted as a business expense. The legal services that Frank received are also income, but not deductible.

Income includes any net accession to wealth, from any source derived, unless covered by a specific exclusion. It also includes the acquisition of valuable goods or services in exchange for work performed. A person cannot avoid paying taxes on the income that they receive in consideration of work by structuring it as trade of services. Rather, both sides of the trade will have to report income in the fair market value of the services received. However, in working out the adjusted gross income of a business, expenses can be deducted from it for services that count as the ordinary and necessary expenses involved in running the business. They must be the sort of expenses that other businesses in the same line of work would ordinarily have.

In this case, Frank received $2000 worth of legal services for his work, and Wanda received $2000 worth of landscaping work for hers. Because both agreed that this was a fair exchange, it seems that $2000 was the fair market value of the benefit. Both sides therefore have $2000 of income.

However, a law firm needs to have an office in order to conduct its business, and the expense of having that office ordinarily requires other expenses such as landscaping services for the office. Because the landscaping services were ordinary and necessary for Wanda to maintain her law office, she can deduct the cost from the gross income of her practice. The services that Frank received were for a will and divorce, both of which are personal in nature and not necessary for running a landscaping business. Frank’s income is therefore not deductible as a business expense.
Question No. 2: Sample Answer

1. The Court should overrule the objection, finding that the operation of the Dead Man’s Act (DMA) was waived by the decedent’s representative in taking the deposition of Karl. The Dead Man’s Act operates to keep parties in a civil action from testifying as to events that, had the decedent been alive, they could and would have contradicted. To this effect, the party seeking to assert the operation of the Dead Man’s Act must be a party with an interest in the civil suit. They must seek to assert this against another party or person who has an interest in the outcome of the action that is adverse to the decedent. The testimony that they seek to prevent must be something that the decedent would have properly been able to contest, and the decedent must have made sure not to waive the operation of the Dead Man’s Act prior to the objection.

Here, the decedent is Ray, whose estate is represented by Sue and Attorney Wiley. The estate is one of the defendants to a civil action, which was brought by Karl, the party who is attempting to testify. Because Ray died immediately following the accident, his observations and the reasons for his actions were never reduced to writing in a deposition or prior court proceeding. Therefore, the decedent is unable to contradict the testimony offered by his opponent in the civil action. The Dead Man’s Act would normally apply to prevent Karl’s testimony from being introduced at trial.

Unfortunately, in discovery, Attorney Wiley deposed Karl on the events surrounding the accident and the responsibility of the parties for the fact that the accident occurred. By not raising the Dead Man’s Act to prevent Karl’s testimony at the deposition, which is a court proceeding, Attorney Wiley waived the application of the Dead Man’s Act as to those subjects that Karl testified about in the deposition. Therefore, the objection should be overruled and Karl should be allowed to testify.

2a) The Court should deny Attorney Wiley’s objection because interrogatories are available to use as a discovery device for the purpose of leading to relevant evidence. The existence of insurance is not admissible to prove Karl’s negligence claim; however, inquiries into insurance coverage may lead to relevant evidence.

Under the Pennsylvania Rules of Evidence, the use of insurance coverage is inadmissible to prove the claim asserted but may be admitted to show the person had control or ownership over the thing insured. Under the Rules of Civil Procedure, interrogatories are used as means to discover relevant material to prepare a case and potentially litigate a case. Discovery allows a party to determine whether there are enough relevant facts to support a case or establish a defense. It is a means to promote settlement or voluntary dismissal. Discovery cannot be conducted in bad faith so as to burden, harass, or delay the opposing side.

Here, Able merely seeks Ray’s insurance information so as to lead to relevant material. Able’s request is relevant to his case. It was not done in bad faith or done to harass Wiley. At this point in the timeline of the litigation it is appropriate to allow for the interrogatories. There is nothing present in the facts to indicate that Able intends to admit the evidence as proof of negligence.
Due to the nature of the request and the potential that it may lead to relevant information regarding the negligence action, the court should deny the objection to the interrogatories.

2b) Fred’s attorney should advise Fred that he is obligated to attend the deposition but that he may remain silent as to certain potentially incriminating statements that may implicate him in committing a criminal offense.

Under the Pa Rules of Civil Procedure, when a person is subpoenaed to attend a deposition, the person must do so unless there are extenuating circumstances that do not allow for the person to do so. During the deposition, Fred does not have to disclose any incriminating evidence that may lead to criminal prosecution. This right to remain silent is protected under the Fifth Amendment of the United States Constitution and applied to the states through the Fourteenth Amendment. A person may remain silent when they are under oath during a hearing, trial or deposition. Only testimonial statements are protected and only those testimonial statements that can lead to criminal prosecution are protected. Furthermore, a party may assert this right during a civil proceeding or criminal proceeding. The crucial element is that the statement may lead to his criminal prosecution.

Here, Fred is reluctant to be deposed because he does not want to reveal his illegal payment practices. Fred must attend the deposition but his testimony can be limited. At the deposition Fred will be under oath and will be deposed regarding a civil matter. Any and all statements regarding Emily’s employment must be disclosed. However, any and all statements that may lead to incriminate him in tax fraud do not have to be disclosed. Fred is allowed to remain silent, as protected by the constitution, and to not disclose any incriminating evidence pertaining to his payment practices.

Fred may remain silent as it relates to any statements that may incriminate him in tax fraud or any other criminal charge that may stem from his payment practices.

3. The court should not allow Able’s evidence that the city installed an electronic traffic signal after receiving the traffic report.

Generally, all relevant evidence is admissible unless otherwise excluded by the rules or law. Evidence is relevant if it has any tendency to make more or less likely a material fact. There are certain special rules of relevancy which keep out certain evidence based on public policy. One such rule excludes evidence of subsequent remedial measures to prove negligence. Evidence of subsequent remedial measures may be admitted for other purposes, such as to show ownership or control, but it may not be admitted to prove negligence. This is because the court likes to encourage remedial measures and increased safety and does not want to discourage parties from taking such measures out of fear that it will be later held against them.

Here, evidence of the later installation of the signal may be relevant to the plaintiff’s theory of liability with regard to the city; however, it is kept out because of the rule against subsequent remedial measures. The installation of the light likely was to remedy the many accidents which have occurred at that location. The facts state that the evidence is being used by plaintiff’s counsel to prove negligence of the City, and not something else, such as ownership or
control. Accordingly, the evidence may not be admitted based on the rule against subsequent remedial measures.

4a) The estate should assert the defense of contributory negligence and if successful this defense will bar Karl’s recovery if he is found more liable than Ray.

Pennsylvania is a comparative negligence jurisdiction, which means that if the plaintiff is more than 50% negligent compared to the defendant, he will be barred from recovery. In a negligence suit, comparative negligence is a defense that would either limit the amount of money the plaintiff is able to recover or completely bar recovery altogether. Based on the eyewitness testimony, the estate should assert that Karl was negligent because he ran into the crosswalk quickly without looking as Ray’s car was approaching at a high rate of speed. This testimony, if believed, would find that Karl was also liable, and the jury must then apportion their percentage of fault. If Karl is found more than 50% liable for the accident compared to Ray, then Ray’s estate will not be liable for any damages to Karl, and Karl will be completely barred from recovering. If Karl is found less than 51% liable as compared to Ray, he will be entitled to an amount in damages that is in proportion to his percentage of liability.

4.b) Emily has a cause of action for loss of consortium, and this claim will be successful so long as Karl is not found more than 50% liable.

A loss of consortium claim is essentially a derivative claim that arises from an injured spouse’s cause of action. The spouse of the injured spouse is entitled to bring a loss of consortium claim for losses that the spouse has suffered due to her spouse being injured. It is a claim that includes the loss of services, loss of companionship, loss of society of one’s spouse due to the injury. The facts say that Emily had to take two months off from work to care for Karl and that Karl could not perform his normal household chores such as yard work. Normally, Emily would be entitled to recovery for this type of claim, but if Karl was more than 50% negligent in his actions, then she will not be entitled to recover because a loss of consortium claim is derivative of Karl’s personal injury claim, and it is only meant to compensate spouses for the loss of services provided by their injured spouse.
Question No. 3: Sample Answer

1. (a) Harpo should be charged with first degree murder of Raptor. First degree murder is the willful, deliberate, and premeditated killing of another human being. It is the most serious degree of killing. Premeditation can be formed in a very short amount of time. Willful means an intent or purpose to cause the death of the human being. On these facts, Harpo premeditated the murder of Raptor because he spent time devising a plan to address the competition in drug sales by killing Raptor. He also showed premeditation when he told his fellow gang member Louis that he was going to shoot Raptor. Finally, he showed premeditation when he waited outside of the Tavern for 30 minutes. Shooting Raptor in the head shows he intended to kill Raptor, because a shot in the head is almost certain to kill. Planning the note to pin on Raptor also shows that he wanted to kill Raptor, because it shows he planned for there to be a dead body as a result of his plan. Therefore, these facts support a charge of first degree murder.

(b) Harpo is guilty of third degree murder for Eldridge’s death. In Pennsylvania, second degree murder is the killing of a human being during a commission of an enumerated felony. The felonies include rape, kidnapping, burglary, and arson. Third degree murder is the reckless killing of another human being, showing malice and an extreme indifference to human life. This includes a killing that results from infliction of serious bodily harm.

Here, Harpo is likely not guilty of second degree murder because first degree murder is not one of the enumerated felonies in the statute. But he is guilty of third degree murder. He acted recklessly and with indifference to human life when he aimed a dangerous weapon at a part of Eldridge’s body and fired. Although he only intended to slow Eldridge down, the firing of a gun at another person shows malice and therefore is enough for third degree murder. He did not have the requisite mental state for first degree murder, because he did not premeditate, but rather was surprised by Eldridge’s presence. His purpose was not to kill, but rather to prevent Eldridge from calling the authorities. Therefore, Harpo can be convicted of third degree murder for the killing of Eldridge.

2. The Court should overrule the objection. Evidence is admissible if it is relevant, meaning that it tends to make a fact at issue more or less probable. It must also have probative value that outweighs its prejudicial effect. Hearsay is an out of court statement offered for the truth of the matter asserted. But even when statements are hearsay and offered for their truth, there are several exceptions to the hearsay rule. One exception is for former testimony. Former testimony is admissible if the witness is no longer available. A witness is no longer available when the witness is dead or gone from the jurisdiction and attendance cannot be procured. To qualify under the former testimony exception, the statement must have been made during an official proceeding and under oath, such as in a hearing or deposition, and the opposing counsel must have had a full and fair opportunity to cross examine the witness.

Here, John’s statement is hearsay. The identification was made outside the current trial. It is offered for its truth, to show that Harpo committed the murder. But the requirements for the former testimony hearsay exception are met. John is no longer available, because he has been found dead. The circumstances around his death seem suspicious, because he was found in a ditch and shot in the head, but there is no evidence that the party seeking to admit the evidence, the prosecution, had anything to do with John’s death. The statement was made under oath at a
preliminary hearing. The defense counsel was present and fully cross examined John regarding the identification. Therefore, the statement qualifies under this exception and the court should overrule the objection.

3. (a) The attorney should advise Camille to seek a divorce for cruel and barbarous treatment. Pennsylvania is a hybrid jurisdiction that has both fault and no fault grounds for divorce. There are several fault grounds, and one is for cruel and barbarous treatment. Cruel and barbarous treatment includes physical abuse. A spouse does not need the consent or cooperation of the other spouse to seek divorce on these grounds.

Here, there is ample evidence of cruel and barbarous treatment. Patrick has beaten Camille three times and two of them were serious enough to require medical treatment. This time, she has a broken jaw and ribs. Camille can use her medical records to show that Patrick has abused her, and this will be sufficient evidence to gain a fault-based divorce.

These grounds would be better than seeking a no-fault divorce. In Pennsylvania, a spouse can seek a no-fault divorce based on irretrievable breakdown of the marriage. It can be with mutual consent, in which the party files a complaint alleging the breakdown, the other spouse files an answer admitting the breakdown, 90 days pass, and a divorce is granted. A party can also seek a unilateral no-fault divorce based on irretrievable breakdown. But the parties must live separate and apart for two years to get this type of divorce.

Here, Camille does not have the consent of Patrick to get a divorce. She likely does not want to wait two years to get a divorce, so she is better off filing on fault grounds. She is very likely to have success on the fault-based divorce petition.

(b) Camille should immediately seek a Protection from Abuse (PFA) order, and she should be successful. A PFA order is a court order, similar to a restraining order, sought in instances of domestic violence. An abused spouse or domestic partner (such as a boy or girlfriend) must make a showing that there has been a pattern of domestic violence against him or her, that such violence put him or her in fear for her safety if she or he continued living with the abusive partner, and that the domestic violence is likely to continue without the PFA.

Here, Patrick has beaten Camille three times since they were married. The facts do not say how long the two have been married. Two of the beatings have been severe enough to require her to seek medical attention. Most recently, he broke her jaw and two of her ribs, because she assisted the Commonwealth in a murder case. While there is no numerical baseline for severity, number of incidents or number of times medical attention has been sought, there is clearly a pattern of violence against Camille here by her husband. Camille does not feel safe living with Patrick; this, combined with the numerosity and severity of beatings, tends to show that Camille is reasonably in fear, and that the violence will continue against her. Therefore, because of the systemic and continuous pattern of domestic violence by Patrick against Camille, which put her in fear of her safety and is likely to continue, a PFA order should be sought. She will be likely to get her PFA Order granted.
Question No. 4: Sample Answer

1. Personal jurisdiction is proper in State S because it meets the minimum contacts analysis. Personal jurisdiction can be based on minimum contacts in the forum state under the 14th amendment due process clause of the Constitution. First, the defendant must have minimum contacts with the jurisdiction and must have purposefully availed itself of the jurisdiction's law. Generally, just placing a product in the stream of commerce is enough to have purposeful availment. Minimum contacts include doing business in the jurisdiction, advertising, and marketing there.

   If the defendant has sufficient contacts, the plaintiff must also show that jurisdiction does not offend traditional notions of fair play and substantial justice. This means that jurisdiction must be foreseeable, reasonable, and otherwise consistent with due process.

   If personal jurisdiction is found, it can be either specific or general jurisdiction. General jurisdiction is based on systematic and continuous contacts with the jurisdiction. If this level of contact is found, the court will have personal jurisdiction over the defendant for any cause of action. Specific jurisdiction is based on one or very few contacts with the jurisdiction, that are sporadic or seldom. If this type of contact is found, the court will only have jurisdiction over the defendant for a cause of action related to the specific transaction or occurrence that formed the basis of that contact.

   Here, State S has personal jurisdiction over Adventures Airline. Although it is headquartered in State P, the Airline has minimum contacts with State S. The facts show that the Airline advertised in State S newspapers and magazines. The advertising in State S shows purposeful availment, because it shows a desire of American Airline to take advantage of the consumer travel market in State S.

   The personal jurisdiction also does not offend traditional notions of fair play and substantial justice. It is foreseeable for the Airline that it could be sued in State S, because it advertised tours to consumers there and has a record of sales to State S citizens. Therefore, finding personal jurisdiction in State S is reasonable and promotes justice. The jurisdiction is likely specific jurisdiction arising from the contact with the Banks. Because the Banks' claim of false advertising stems from Airline's advertising contact with State S, personal jurisdiction would be proper based on a finding of specific jurisdiction.

2. Adventure may assert that the state law is expressly or impliedly preempted as it conflicts with the federal law and this claim is likely not to succeed. Under the Supremacy Clause, the Constitution, treaties, and laws made pursuant to the Constitution are the supreme laws of the land. If a state law conflicts with a federal law, the state law must yield. There are two types of preemption: (1) express preemption; and (2) implied preemption. Under express preemption, there is a direct conflict between the state law and the federal law.

   Here, the federal statute provides that "No state...shall enact or enforce any law...relating to rates, routes, or services of any air carrier." The State S consumer protection law prohibits "deceptive advertising and trade practices, defined in part as: 'failure to list all exceptions to the terms and conditions on the front page of the offering in bold 12 point type.'"
Adventure will argue that the State S law is preempted as it conflicts with the federal statute. Specifically, it is regulating advertising relating to “rates, routes, or services of an air carrier.” However, the State S law does not conflict with the federal statute because it is regulating trade practices in general. The federal statute does not mention deceptive trade practices, rather it governs flights specifically. Therefore, both the state law and federal law and “co-exist” and State S’ law should not be preempted. Adventure will likely lose on this defense.

3. If the Banks sought to bring suit against Airlines in federal court, they would either have to bring a class action suit against Airlines or they would have to have complete diversity between the plaintiffs and Airlines and would have to have an amount in controversy of more than $75,000.

For a suit to be brought in federal court, there must be subject matter jurisdiction. Subject matter jurisdiction is present where (1) the suit is regarding a federal question or (2) there is complete diversity between the plaintiffs and the defendants and the amount in controversy exceeds $75,000. Where the matter is in regard of a breach of contract, that is a state law issue and is not a federal question. Complete diversity requires that no plaintiffs be residents of the same state as any of the defendants. Each plaintiff in a diversity action must meet the amount in controversy.

Where there are many plaintiffs involved in the same common transaction, a class action may be the better way to bring a suit in federal court. A class action suit is valid if four things are present, (1) commonality of the transactions, (2) typicality, where each member of the class has the same typical problem in the case, (3) numerosity - where there are so many plaintiffs that it would be better to file as a class and (4) adequate representation – where the representation by the attorney would be adequate for each member of the class. For a diversity class action, only the representative plaintiffs must be diverse from the defendants.

Here, the Banks should seek to receive class certification. A class action based on diversity requires that the amount in controversy must be over a certain amount. Here, there are 125 other couples who could become part of the class. The class has numerosity. The class would have commonality and typicality as well because the State S Attorney General had received complaints from the other couples who had the same unfortunate experience with the tours and the Bank’s experience was typical of the complaints of the others. In addition, combining the parties into a class action would save the court time and money rather than adding each of the couples as an additional plaintiff to the case, each with their own separate attorney.

Here, a class action suit would be recommended.

4. Under Title VII, a plaintiff who engages in protected activity and suffers adverse action can bring a claim for retaliation. Protected activity includes both participating in a Title VII case, by bringing a claim or offering evidence, and opposition activity, which is lawfully opposing a discriminatory practice. Adverse action is broad, and includes both activity relating to employment and activity outside the workplace, such as harassment. Here, Eugene engaged in protected activity when he filed a claim with the agency. He suffered adverse action because he was transferred to a less desirable position. Therefore, he has a basis for bringing a retaliation claim.
Question No. 5: Sample Answer

1. Ed will not be successful on his demand for payment of the additional $30,000. The issue is whether Ed was under a pre-existing legal duty to complete the renovations as agreed to for $100,000 in the original contract. Under common law, a party in a contract for services is under a pre-existing legal duty to perform under the contract as agreed in the original contract. Any modifications to the contract for compensation must be supported by new consideration.

   Here, Ed originally contracted with Al to perform the renovations for $100,000. Once he signed the contract he was under a duty to perform the contract as agreed. When Ed and Al agreed to the payment of an additional $30,000, there must have been new consideration for the additional sum of money. There was no new consideration because Al only got what he originally agreed to. Since there was no new consideration and Ed had a pre-existing legal duty to perform under the contract, Ed will not be successful on his claim against Al for the additional $30,000 on a breach of contract theory.

2. Al’s breach of contract claim should succeed because a unilateral contract was formed when Al performed the conditions of the contract which was not properly revoked by Century Motors. Under contract law, a valid contract has an offer, acceptance and consideration. A valid offer is one that is definite enough so as to place in the offeree the reasonable belief that he has the power of acceptance. A unilateral contract is one where the promisor seeks performance. A typical unilateral contract is a reward offer. Offers to the public are definite enough if the conditions set forth are specific and create the power of acceptance in the reader or hearer of the public offer. When a party performs a contract, the offeror cannot revoke the contract.

   Here, Century Motors placed a sign on a golf course stating that any player who gets a hole in one, wins the car parked by the sign. The offer was made to the public at large. It was specific in who can accept the offer and what the person must do to perform. Al then commenced performance by striking the golf ball. Once he made a hole in one, he performed the condition of acceptance. Once this occurs, Century Motors cannot then subsequently revoke the offer by claiming they forgot to take down the sign.

   Under these facts, Al will be successful in a breach of contract claim because he performed in accordance with the offer and the offer at the time of performance was not properly revoked.

3. Sam should assert that he is the proper owner of the land by adverse possession, and he is likely to be successful. For a party to obtain title to land via adverse possession, several elements must be met. First, the party must be in continuous use of the land for the length of time required by statute. In Pennsylvania, the statutory period for adverse possession is 21 years. Time of continuous possession may be tacked together between owners who are in privity of contract with each other. Second, the ownership must be open and notorious, meaning that the party used the land as the true owner would. Third, the party must be in actual possession of the land. And fourth, the party’s presence on the land must be hostile – this is, not permitted by the true owner.
In this case, Al purchased Blackacre in 1988 and built the driveway and garage that encroached onto Bob’s land shortly thereafter. The facts suggest that Bob had the survey for Whiteacre done in 2010, when he was contemplating sale of Whiteacre. Therefore, the garage was present on Whiteacre’s property for 22 years (1988 until 2010). Although Al sold the property to Sam during this time, Al and Sam can tack their time together, because they are in privity with each other via the sale of Blackacre. Therefore, the “continuous” element of adverse possession is satisfied. During this time of adverse possession, Sam and Al used the garage on a regular basis, as a rightful landowner would. This satisfies the “open and notorious” requirement of adverse possession. Al and Sam collectively were in actual possession of the property because Al built the garage and driveway on the land and they continued to use it for the statutory period. The possession of the land was also hostile, because it was without Bob’s permission. Therefore, in an action to quiet title, Sam would likely be successful in claiming adverse possession of the land.

4. Al will not succeed on a Statute of Frauds defense because the writing between the parties satisfies the Statute of Frauds. A contract for the sale or lease of land must be in writing for it to be valid. To satisfy the Statue of Frauds for a land sale contract the writing must have the following: a description of the property and the parties; the amount; and the signature by one against whom enforcement is sought.

Here, the handwritten receipt will constitute a valid writing for the Statute of Frauds. Both parties are named. The full names do not need to present because it was Al who wrote the contract. Furthermore, the property address is listed. Though it is not done with “metes and bounds” the listing of the address is adequate enough for a valid property description. Also, it contains the price of the contract. It is dated and provides the closing date. Lastly, it is signed by the party against whom enforcement is sought. Al was the creator of the writing. He controlled all of the terms. He has all of the necessary pieces of information that were bargained between the parties. Al signed the contract and a good faith deposit was delivered and accepted by Al.

Due to all of the necessary elements of a land-sale contract being present, the handwritten receipt satisfies the Statute of Frauds.
Question No. 6: Sample Answer

1. Power can reject the tubing since it does not meet the perfect tender requirement of the UCC. Power should promptly notify Tube that it is rejecting some or all of the goods. Tube may limit Power's right to reject by curing the defect by the required delivery date. If Tube fails to cure, Power must pay for only the goods accepted. Power must segregate the goods and wait for instructions from Tube as to disposition. If Tube fails to provide instructions after a reasonable time, Power may dispose of the goods in a reasonable manner and remit the proceeds less a reasonable commission and any expenses to Tube.

A contract is a legally enforceable agreement. Under the UCC performance of a contract for the sale of goods requires perfect tender. The goods shipped by the seller must perfectly match the order by the buyer. Where the seller ships goods that are not perfect the buyer has the option of rejecting all or part of the goods and accepting all or part of the goods and suing for damages for breach of contract. If a buyer wishes to reject goods, they must notify the seller prior to accepting the goods that they wish to reject those goods. This rejection must be promptly given after discovering the lack of perfect tender. If a buyer retains goods for an excessive period of time acceptance will be implied. The power to reject is limited by the seller's power to cure which arises in two situations. This first situation is where the seller believes that the goods shipped would be acceptable to the buyer due to past course of dealing. The second situation exists where the seller ships the wrong goods but they are received prior to a specified delivery date. In this situation the seller has the opportunity to cure by that specified delivery date.

Power and Tube had a valid written contract for the purchase of 900 sections of tubing. Power specifically ordered tubing that was stainless steel and exactly 30 inches in length. Tube shipped 900 sections of tubing, however, only 600 of those sections were the correct length while 300 were incorrect. Therefore, Tube did not meet the perfect tender standard. As a result, Power has the right to reject the goods in whole or in part or accept in whole or in part and sue for damages for breach of contract. Power should immediately notify Tube that the goods failed to meet the perfect tender standard and that they wish to reject. Tube has the ability to limit Power's right to reject by curing the imperfect tender. Tube and Power included a delivery date in the contract of no later than August 1, 2010. The goods arrived at Power's plant on July 26, 2010. As a result, the wrong goods were received early and Tube has the right to cure the deficiency prior to August 1st. If they can do so, Power cannot reject and sue for damages.

Where goods are validly rejected by a buyer due to failure of perfect tender, the UCC requires that the buyer hold the goods until they receive indication from the seller of how to dispose of them. The buyer does not have to pay for goods that were properly rejected. A buyer should separate the goods and follow any instructions received from the seller. If a buyer does not receive indication from the seller within a reasonable amount of time as to how to dispose of the goods the buyer may act as the seller's agent and sell the goods for a reasonable price. The buyer must then remit the sale proceeds to the seller less a reasonable commission for the buyer's acting as agent and any incidental costs incurred.
If Tube does not cure the defect after notification from Power, Power has the right to reject all or part of the goods. Assuming Power keeps the 600 complying sections and wishes to dispose of the non-conforming 300 sections they should notify Tube of that and wait for instructions as to disposition of the 300 nonconforming sections. Power does not have an obligation to pay for the rejected goods, however, they will have to pay for any goods accepted. If Tube fails to give instructions as to disposition of the rejected goods, Power may sell the 300 sections for a reasonable price and deduct any costs incurred plus a reasonable commission.

2. Sara has the right to seek dissenter’s appraisal rights for the merger. She must immediately notify the company in writing that she wishes to seek dissenter’s appraisal rights, vote against the merger and then promptly seek appraisal rights after being notified of the passage of the merger.

Under Pennsylvania law a shareholder in a corporation has dissenter’s appraisal rights where certain transactions are taken by a corporation with which the shareholder disagrees. Generally these rights are only available in close corporations since in a publicly traded corporation the shareholder could sell the shares on the market. In a close corporation where the company is going to engage in a transaction that will substantially change the character of the corporation such as a merger, the shareholder has dissenter’s appraisal rights. This is generally the only remedy the shareholder has for the corporate action. If a shareholder wishes to exercise this right she must notify the corporation in writing that she plans to exercise her dissenter’s appraisal rights. When a shareholder vote is held the shareholder must abstain or vote against the proposed transaction. Once the shareholder has received notice that the proposal has passed she must notify the corporation that she wishes to exercise her rights. At this point the corporation is required to buy the shareholder’s share at a fair price. If the shareholder and the corporation cannot agree on a fair price the corporation can petition a court to make that determination.

Sara has the right to seek dissenter’s appraisal rights since the corporation is a close corporation only owned by 3 individuals. The corporation is proposing a merger with another company which Sara disagrees with. Sara therefore must notify the corporation in writing prior to the shareholders meeting that she plans to exercise her dissenter’s appraisal rights. Sara must then vote against the proposed merger or abstain from the vote. Once Sara has been notified that the proposal has passed, which in this case will be instantly, she must notify the corporation that she wishes to be bought out. If Sara cannot agree with the corporation (Art and Bill) about the fair price to be used to purchase her shares, the corporation can petition the court for a determination. Therefore Sara should immediately send notice to the corporation that she plans to exercise her dissenter’s appraisal rights.

3. Art and Bill are incorrect in their belief. If the merger proceeds Big will be liable for Power’s customers’ breach of warranty claims under successor liability.

Where two companies merge, the assets and liabilities of each corporation survive. The liabilities of the corporation that was merged into another continue to exist for the corporation surviving the merger. This is known as successor liability. Therefore, in a merger or consolidation, there is successor liability and the surviving corporation is generally liable for all claims against and liabilities of the prior corporation.
In this situation Power has existing breach of warranty claims that have been asserted against it. Power is voting to merge with Big. This merger will result in all of Power’s assets and liabilities being absorbed into Big. As a result, Big will become liable on the breach of warranty claims that customers of Power have under successor liability. Therefore, Art and Bill are incorrect in their belief that the merger will eliminate the need for Power or Big to deal with the breach of warranty claims.