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PENNSYLVANIA BAR EXAMINATION

Essay Questions and Examiners’ Analyses and
Performance Test

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Roger and Betty were married in 1990 in E County, Pennsylvania. Shortly after their marriage Roger had Larry, an attorney who practices law in E County, write a will which left 2/3 of his estate to Betty, named her as Executrix, and left 1/3 to Dennis, his only child from a prior marriage, with whom he had a distant relationship since the divorce from Dennis’ mother. The will was properly executed and witnessed.

In 1995, Roger and Betty had marital difficulties and separated for a time, during which Roger had a brief affair with Jean, who nine months later gave birth to Ted. Jean did not tell Roger about Ted and raised Ted by herself. In May 2014 when Ted, age 18, was ready for college, Jean contacted Roger to tell him about Ted. Roger demanded a DNA test, which confirmed his paternity. He informed Betty of this news, saying he was interested in knowing this child, but did not intend to add Ted to the will. Roger met with Ted in August 2014 and was impressed with him as a gifted student, respectful, and responsible. Roger spontaneously offered to give Ted $10,000 a year for his 4 years of college to help with the high costs of the Ivy League university which had accepted him and gave him $10,000 for his first year.

Roger called Larry’s office shortly afterward, and left a voice mail message informing Larry about his newly-discovered child, and asked for advice about changing his will, stating, ”I want to make sure that Ted will get college tuition money, but nothing more, should I die before Ted had finished college, but I don’t want to upset Betty.” Larry, an experienced estate law attorney, had maintained an ongoing attorney-client relationship with Roger and Betty, regularly performing legal work for them that resulted in Larry being aware of Roger’s financial worth and family relationships over the years. After three weeks with no return call, Roger called Larry again asking if he had made any change to the will, as he and Betty were going on a long
vacation in a few days, and wanted to have the matter addressed before his vacation. Larry apologized to Roger for not getting back to him and stated that due to his busy schedule he could not have the codicil prepared before Roger left for vacation. Larry made an appointment for Roger to come in after his vacation to sign a codicil providing for his wishes for Ted. Larry drafted a codicil to the 1990 will as Roger asked, with Ted getting only any remaining balance of the promised tuition gift by reducing Dennis’ 1/3 share by the necessary amount. Unfortunately, Roger suffered a massive stroke while on vacation, and he died a few weeks later, never regaining sufficient consciousness to sign the codicil. His net distributable estate was approximately $1.5 million.

1. What effect, if any, would the voice mail message Roger left for Larry or the unsigned codicil have on the distribution of Roger's estate?

2. How should Roger's estate be distributed?

3. Did Larry's conduct with respect to Roger's voice mail message or handling the revision of Roger’s will violate any Rules of Professional Conduct?

Ted entered the Ivy League university using Roger’s $10,000 gift, but needed much more money to pay tuition and other costs. After a very impressive first semester, one of his professors was able to get him a $15,000 scholarship award beginning January 2015. Ten Thousand dollars ($10,000) of the scholarship award was designated as a “grant” and was applied immediately to his tuition. The other $5,000 of the scholarship award required Ted to work 25 hours per week, at the normal hourly rate paid to students, by performing research or other assistance to the professor for the second 15-week semester. These funds were credited to his tuition bill in biweekly installments, upon his performance of the required work.

4. How should the $10,000 Roger gave to Ted and the $15,000 scholarship Ted was awarded from the university be treated by Ted, as a cash-basis taxpayer, on his federal income tax returns in calendar years 2014 and 2015?
1. Neither the voice mail message nor the unsigned codicil will have any effect on the distribution of Roger’s estate because the voice mail cannot be used as a new will or codicil because it is not in writing, and the drafted codicil has no effect because it was not signed by Roger.

The requirements for a valid will under Pennsylvania law are set forth in the Pennsylvania Decedents, Estates and Fiduciaries (PEF) Code at 20 Pa. C.S.A. 2502; most pertinently “Every will shall be in writing and shall be signed by the testator at the end thereof…” The requirement of a signed writing applies as well to any codicil to a will. In Re Stinson’s Estate, 232 Pa. 230, 81 A. 212 (1911). The requirement that a will or codicil be in writing prohibits an oral, or “nuncupative” will, including an audio recording such as the voice mail from Roger to Larry. The requirement that a will or codicil be signed precludes the unsigned codicil from being effective to alter the will.

Neither the voice mail nor the unsigned codicil have any effect on the distribution of Roger’s estate, including Ted’s status and share as a pretermitted child despite the expressed intent to limit Ted’s share, because no reflection of such an intent was set forth in the 1990 will or any subsequent codicil.

2. Betty will get two-thirds (2/3) of Roger’s estate as the will provides, but Dennis will split his one-third (1/3) share equally with Ted, who is a pretermitted child not excluded by the will itself.

When Roger wrote his will in 1990 he had one child, Dennis, and a wife, Betty, and included them as beneficiaries. Ted was born several years afterward. The Pennsylvania Decedents, Estates and Fiduciaries (PEF) Code provides, at 20 Pa.C.S.A. 2507, for modification by circumstances to wills written prior to the birth or adoption of a child, specifically at subsection (4):

If the testator fails to provide in his will for his child born or adopted after making his will, unless it appears from the will that the failure was intentional, such child shall receive out of the testator’s property not passing to a surviving spouse, such share as he would have received if the testator had died unmarried and intestate owning only that portion of his estate not passing to a surviving spouse.

Roger’s 1990 will made no mention of excluding or limiting the share of any future child, designated as a “pretermitted child.” Such a limitation must be set forth in the will itself, or a valid codicil. The will provides that two-thirds (2/3) of Roger’s estate be given to Betty, his surviving spouse. The other one-third (1/3), given to Dennis, is the portion of the estate to which Ted is entitled to share as if Roger were intestate and unmarried at his death. He would take equally with Dennis because the PEF Code at 20 Pa. C.S.A. 2103(1), provides for an intestate estate with no surviving spouse to pass “to the issue of the decedent,” which encompasses any child of the decedent. Dennis and Ted are the only “issue” of Roger. Section 2104, "Rules of
Succession," provides at subsection (2), that “when the persons entitled to take under this chapter other than as a surviving spouse are all in the same degree of consanguinity to the decedent, they shall take in equal shares.” No distinction is made between children born in or out of wedlock for purposes of descent, so long as paternity of the child is accepted by the father during his life, or clear and convincing evidence establishes paternity. 20 Pa. C.S.A. 2107 (c).

Roger’s estate should be distributed two-thirds (2/3) to Betty, the surviving spouse, and the remaining one-third (1/3) must be divided equally between Dennis and Ted.

3. Larry violated R.P.C. 1.4 Communication with Clients by failing to return Roger’s initial phone call, and will likely be found to have violated R.P.C. 1.3 for failing to have acted promptly and diligently in drafting the codicil for Roger before his trip when informed of Roger’s intent to limit Ted’s legacy.

Larry maintained an ongoing attorney-client relationship with Roger and Betty, regularly performing legal work for them. Larry received a voice mail from Roger to which he did not respond at all for three weeks, with no excuse set forth in the narrative. The Rules of Professional Conduct (RPC) 1.4 Communication requires a lawyer to respond promptly to client communications.

R.P.C. 1.4, "Communication", states in multiple subsections that a lawyer must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” “keep the client reasonably informed...” and “promptly comply with reasonable requests for information…” The comment states that, “A lawyer should promptly respond to or acknowledge client communications.” Larry likely violated the Rules of Professional Conduct with respect to Communication in failing to respond to his client’s call for over three weeks.

Larry also had a duty to be diligent and prompt in representing his client. R.P.C. 1.3 states simply that, “A lawyer shall act with reasonable diligence and promptness in representing a client.” The comment to this rule notes the intention to minimize delays in attending to client matters, by stating:

Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions. …. Even when the client’s interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness.

The initial phone message from Roger informed Larry that Roger recently discovered he had a second child born after the 1990 will, and requested advice about his will as it was his intention to make sure Ted received college funds in the event of his death, but did not want Ted to receive anything more or to “upset Betty,” his spouse. Larry, as an experienced estate attorney, would most likely have known that Ted would be included in the current will as a pretermitted child by taking half of Dennis’ 1/3 share, and that this result would be substantially inconsistent with Roger’s present wishes.
The second call from Roger, three weeks later, made it clear that Roger wanted to get the matter resolved before leaving for vacation, but Larry was unable to do this because of his busy schedule. Larry prepared the codicil which would have accomplished Roger’s intent to limit the share of his pretermitted child, and had the codicil ready for an appointment that was scheduled for when Roger returned from vacation. However, Roger’s stroke while on vacation made it impossible for him to sign the codicil.

Larry did not act promptly and diligently in drafting the codicil when he was given the specific information from Roger about his intentions. Based on his experience, Larry should have known from Roger's message that a codicil was necessary to accomplish Roger's wishes, or at a minimum that the matter needed to be evaluated to see if a codicil was necessary. Nonetheless, Larry ignored Roger's phone call for three weeks and when called a second time by Roger, he delayed the preparation of the codicil due to his busy schedule so that it could not be signed until after Roger returned from vacation. Larry should have either timely performed the necessary services, sought help from any associate or partner if available, or referred Roger to another lawyer. Instead, the facts show that even after a second phone call from Roger in which he requested the services before he left for vacation, Larry did not produce the required codicil as requested. While Larry could not have known that Roger would suffer a stroke while on vacation, it is likely that he violated R.P.C. 1.3 because he delayed drafting the required codicil for more than three weeks after the initial call even though the necessity for the codicil was made clear by Roger's first message.

There is insufficient information to find that Larry's drafting of the codicil for Roger created a conflict of interest with respect to his representation of Betty because Roger was the sole client regarding his will, there is nothing in the facts to show Larry represented Betty in drafting a will or estate planning and the codicil did not affect Betty's welfare or diminish her portion of Roger's estate.

4. The $10,000 gift Ted received in 2014 is excluded from income on Ted's 2014 federal income tax return. The 10,000 scholarship grant received in 2015 would not need to be included in income on Ted's 2015 federal income tax return, but any portion of the remaining $5,000 that he received from the university in that year must be declared as income on Ted's 2015 federal income tax return because Ted had to perform work to receive these funds.

The Internal Revenue Code at Section 61(a), 26 U.S.C.A. §61, defines “gross income” generally as “all income from whatever source derived.” Some forms of income, however, are excluded elsewhere in the Code, including Gifts and Inheritances as set forth in §102 (a) of the IRC, which states:

Gross income does not include the value of property acquired by gift, bequest, devise or inheritance.

Exceptions to the general rule excluding gifts from income that are set forth in Subsections (b) and (c) of Section 102 are not applicable to Roger’s $10,000 gift to Ted in 2014.
For a gift to be excluded from income to the recipient, it must be made with “detached and disinterested generosity out of affection, respect, admiration, charity or like impulses.” *C.I.R. v. Duberstein*, 363 U.S. 278 (1960). As Roger’s gift to Ted is described in the narrative, it constituted a gift and should not be reported as income on Ted’s federal tax return for the year 2014.

Scholarships may also be excluded from income. Section 117 excludes from “income” a scholarship or fellowship grant received by a student who is a candidate for a degree at an eligible educational institution who uses the funds to pay “qualified tuition and related expenses; including tuition, books, fees, supplies and equipment required for courses of instruction; but not room, board or other living expenses. Part (c) of Section 117, however, limits the exclusion to funds which are not “payments for teaching, research or other service by the student required as a condition for receiving the qualified scholarship or qualified tuition reduction,” unless it was received under the National Health Service Corps Scholarship Program or the Armed Services Health Professions Scholarship and Financial Assistance Program.

IRC Regulations at 26 C.F.R. 1.117-2(a) provides that:

... in the case of an individual who is a candidate for a degree at an educational institution, the exclusion from gross income shall not apply ... to that portion of any amount received as payment for teaching, research, or other services in the nature of part-time employment required as a condition to receiving the scholarship or fellowship grant. Payments for such part-time employment shall be included in the gross income of the recipient in an amount determined by reference to the rate of compensation ordinarily paid for similar services performed by an individual who is not the recipient of a scholarship or fellowship grant.

The $15,000 scholarship award Ted received in 2015 was split between a pure grant of $10,000, which Ted applied to his tuition bill and the other $5,000 that had the requirement that he perform 25 hours per week for his Professor, at the normal hourly rate paid to students, as a condition of receiving the funds. While he may have used all of the scholarship money for qualified expenses, he was being compensated for work for $5,000 of the $15,000 scholarship. Therefore, that portion of the money that Ted received for his services would be income to Ted in the year 2015.
Question No. 1: Grading Guidelines

1. **Nuncupative will and unsigned codicil**

Comments: Candidates should recognize that oral wills are prohibited and that an unsigned codicil is ineffective; and that neither an oral will or an unsigned codicil will alter distribution under a valid will.

4 points

2. **Pretermitted child’s share of will**

Comments: Candidates should understand the effect of the birth of a child after a will has been written, if not negated or limited by the language of will.

5 points

3. **Professional responsibility - Diligence and Communication**

Comments: Candidates should recognize the responsibility of a lawyer to promptly respond to client phone calls and to act in a diligent manner in representing a client and apply these rules to the facts in evaluating whether Larry complied with the Rules of Professional Conduct.

5 points

4. **Federal income tax - Gifts, scholarships and earned assistance**

Comments: Candidates should recognize that gifts and pure scholarships are not income, but the work requirement portion of an academic grant is income.

6 points
Tom and Jerry were tenants in separate first floor apartments located in an apartment building in M County, Pennsylvania. The apartment building was owned by Gigantic Mega Corp (GMC), a large Pennsylvania corporation. Tom and Jerry were close friends who belonged to a radical group that believed in the disbursement of corporate wealth and supported actions that reduced corporate profits and might lead to the failure or dissolution of large companies.

Tom would watch for prospective tenants to be shown vacant apartments in his building and then invite the prospective tenants into his apartment. To further the goals of his group, Tom would tell prospective tenants negative things about the apartment building that were not entirely true in order to discourage them from moving into the building. Tom also attended an open house held by GMC for potential renters and made every effort to speak to as many of those individuals as possible to discourage them from entering into a lease with GMC. Tom would tell the prospective tenants that GMC did not take care of the apartments in the building and failed to provide adequate heat and water for tenants, all of which was untrue. Tom was successful in his efforts to discourage prospective tenants from leasing an apartment that resulted in a substantial decline in the rental rate and an increased number of vacancies in the apartment building.

While in the process of exiting the apartment building by the rear steps, which he rarely used, Jerry tripped on some uneven concrete and fell down ten steps to the sidewalk, resulting in severe injuries. GMC was aware of the general poor condition of the rear steps due to a number of prior complaints and accidents, but did nothing to fix the steps. At the time of his accident, Jerry was unaware of the existence of the uneven concrete on the steps or of any prior accidents on the steps. Immediately upon his release from the hospital, Jerry hired Attorney Wiley who filed a timely civil
lawsuit in the Court of Common Pleas in M County, Pennsylvania, alleging negligence against
GMC.

The Complaint sought compensatory damages against GMC alleging that GMC was aware of
the condition of the steps and did nothing to remedy their condition. The negligence Complaint
contained a statement which referred to GMC as "a money-grabbing corporate atrocity operated by a
group of one percent fat-cats who sought to fatten their pockets at the expense of their tenants."

GMC was served by Attorney Wiley mailing it a certified copy of the Complaint, return receipt
requested, at its Pennsylvania office. The GMC office manager signed for the Complaint.

In the course of its investigation into the accident, GMC’s attorneys discovered that Jerry had
lied to GMC about his physical condition by claiming that he was disabled in order to secure a first
floor apartment. First floor apartments are only available to those with disabilities and are offered at
a reduced rate from other apartments. Jerry was not disabled and only qualified for the apartments
that were available on other floors. Also, GMC’s attorneys found out about Tom’s statements to
potential tenants for the purpose of discouraging them from renting from GMC.

1. Other than a possible cause of action for defamation or commercial disparagement, what
cause of action, if any, should GMC file against Tom, and with what likelihood of success?

2. What objections should be raised by GMC to the Complaint filed by Jerry against it, how
should the objections be raised, and with what likelihood of success?

3. Assume for purposes of this question that any objections raised by GMC have been
resolved and that GMC must file a response to the negligence complaint. What
intentional tort claim, if any, can GMC file against Jerry, and on what basis, if at all,
can that claim be included in the lawsuit filed by Jerry against GMC?

4. Assume that Jerry's action against GMC proceeds to trial and that at trial Attorney
Wiley attempts to offer evidence of two prior accidents involving falls on the rear
steps of the apartment, and GMC objects on the basis of relevancy. What must Jerry's
attorney argue and establish in response to the objection to support the admissibility
of the evidence?
1. GMC should file a lawsuit against Tom containing a cause of action for the intentional interference with prospective contractual relations, which will likely be successful.

GMC should bring a cause of action for the intentional interference with prospective contractual relations against Tom. In order to sustain a successful cause of action for intentional interference with a prospective contractual relationship, the following elements must be established by the plaintiff:

   (1) a prospective contractual relationship;
   (2) the purpose or intent to harm the plaintiff by preventing the contractual relationship from occurring;
   (3) the absence of privilege or justification on the part of the defendant; and
   (4) actual harm or damages resulting from the defendant’s conduct.


In this situation, Tom purposely watched for prospective tenants at the GMC apartment building and invited the prospective renters into his apartment. Tom said negative things about the apartment building, some of which were not entirely true. Tom would also tell the prospective tenants about GMC’s failure to maintain the apartments properly and failure to provide adequate water and heat to tenants, all of which was untrue. Tom also attended an open house for potential tenants where he spoke negatively about GMC and their operation of the apartment. Tom was acting to further the goals of the radical group to which he belonged, and his intent was to discourage the prospective tenants from moving into the building so as to harm GMC by reducing its profits. Given the number of prospective tenants that Tom talked to both individually and at the open house, it is reasonably probable that there would have been a contract between GMC and some of the prospective tenants but for Tom's wrongful acts. In fact, the narrative states that Tom was successful in his efforts to discourage prospective tenants from leasing an apartment that resulted in a substantial decline in the rental rate and an increased number of vacancies in the apartment building. Tom carried out his plan to prevent GMC from executing lease agreements with a number of tenants to the financial detriment of GMC therefore establishing damages.
One who causes a third person not to enter into a prospective contractual relation by giving factual information does not improperly interfere with a prospective contract. *Walnut Street Associates, Inc. v. Brokerage Concepts*, 610 Pa. 371, 20 A.3d 468 (2011) (adopting Restatement (2d) Torts §772 (a)). A groundless allegation or a misrepresentation, however, supports such an action. *Walnut Street Associates*, 20 A.3d at 477. From the facts, it is clear not only that the statements made by Tom about the condition of the apartments were false but also that as a resident of the apartments Tom knew the statements he made were false.

There is nothing in the facts to indicate that Tom was either privileged or justified in his actions. The courts have described the privilege that will defeat an action for interference with a prospective contractual relationship in such general terms as “interferences which are sanctioned by the rules of the game which society has adopted” and “the area of socially acceptable conduct which the law regards as privileged.” *Glenn v. Point Park College*, 272 A.2d at 899. Tom’s assertion of any claim of privilege or First Amendment right to free speech would be unsuccessful because he knew that the statements he made were false, which would satisfy even the most stringent First Amendment requirements. Tom’s action of fabricating information about GMC in order to discourage prospective tenants from entering into a lease with GMC is not likely to be considered to be within the area of acceptable conduct.

GMC would have the burden of not only producing sufficient evidence to indicate that Tom interfered with prospective tenants but some measure of damages. GMC could easily show that due to the vacancies it lost a substantial amount of rental income.

Based upon the facts, GMC should file a cause of action against Tom for the intentional interference with prospective contractual relations, and GMC will likely be successful.

2. **Preliminary Objections should be filed to the Complaint raising the issue of the inclusion of scandalous and impertinent matter and the improper service of the Complaint; and the objections will likely be successful.**

GMC could file Preliminary Objections to the Complaint raising the inclusion of scandalous and impertinent material in the Complaint, and improper service of the Complaint. Preliminary Objections may be filed by a party to any pleading and are limited to a specified number of grounds set forth in the Rules of Civil Procedure including the pleading of scandalous and impertinent matter. Pa.R.C.P. No. 1028 (a)(2). To be scandalous and impertinent, the allegations in the Complaint must be immaterial and inappropriate to the proof of the cause of action. *Department of Environmental Resources v. Peggs Run Coal Company*, 55 Pa. Cmwlth. 312, 423 A.2d 765, (1980).

The inclusion of a statement in the Complaint that GMC was a “money-grabbing corporate atrocity which was operated by a group of one percent fat-cats who sought to fatten their pockets at the expense of their tenants,” is wholly immaterial to the allegation of negligence raised in the Complaint. Whether the corporation was money-grabbing or not is immaterial to whether the steps were maintained properly. Additionally, the fact that the corporation may or may not have been operated by a group of one percent fat-cats who sought to fatten their pockets at the expense of their tenants is likewise immaterial to the claim regarding the safety of the
steps. Either the steps were maintained improperly or not. The allegations previously discussed have no bearing on whether the steps were actually maintained in a proper manner. The material objected to should be stricken from the Complaint.

An additional objection pursuant to Pa.R.C.P. No. 1028 should be raised for the improper service of the Complaint on GMC. In this case the Complaint was not served properly on GMC. The Complaint filed by Attorney Wiley was original process and must be served on the corporation pursuant to the requirements of the Pennsylvania Rules of Civil Procedure. Pa.R.C.P. No. 424 provides that service of the Complaint upon a corporation is to be accomplished by handing a copy of the Complaint to certain specified individuals including the office manager. Pa. R.C.P. No. 400, with certain exceptions that are not applicable to this fact situation, provides that original process shall be served within the Commonwealth only by the Sheriff. Service by mail is not authorized in this situation. Service should have been made on GMC by the M County Sheriff. Therefore, service of the original process on the corporation was improper even though the office manager signed a certified mail receipt. While the office manager would normally be an authorized person to receive service from the sheriff, no service is authorized by certified mail. Because service was not performed in accordance with the rules the court would not have personal jurisdiction over GMC, and the preliminary objection filed regarding the improper service on GMC will be sustained by the court. The remedy for improper service is to set aside the service, however, in such a case, the action remains open and the court must allow the plaintiff to attempt to make proper service of process on the defendant which would properly vest jurisdiction in the court. City of Philadelphia v. Berman, 863 A.2d 156 (Cmwlth. Ct. 2004). Although the court may permit Jerry the opportunity to obtain proper service, this preliminary objection could be critical to Jerry’s case in the situation where the statute of limitations has expired.

3. GMC could bring intentional tort actions against Jerry for fraud/intentional misrepresentation and trespass that may be included in the lawsuit filed by Jerry against GMC.

GMC as a defendant is permitted by Pa.R.C.P. No. 1031 to set forth in its Answer under a heading titled “Counterclaim” any cause of action it may have that is recognizable as a civil action which a defendant has against the plaintiff at the time of filing the Answer. Once the Preliminary Objections are resolved and GMC is required to file an Answer it could raise a Counterclaim for any civil action it may have against Jerry.

Common law fraud or intentional misrepresentation can be proven by showing that there has been a representation, which is material to the transaction at issue, made falsely and with knowledge of its falsity or with reckless disregard for its falsity, with the intent to mislead another person into relying on it, that induces justifiable reliance on the misrepresentation, and a resulting injury caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499-500, 729 A.2d 555, 560 (1999). “Fraud consists of anything calculated to deceive whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture.” Woodward v. Dietrich, 378
In this situation, the facts state that Jerry misrepresented his status as being disabled in order to obtain a first floor apartment at a reduced rental rate. The representation was clearly false. The intention of the representation was to induce GMC to rent a first floor apartment to him for less rent than would be normally charged for other available apartments in the building. GMC relied upon the representation made by Jerry and rented the apartment to him. GMC only found out about the fraudulent representation when it was investigating Jerry’s accident on the steps.

Jerry’s intention was to have GMC rely on his representations to his advantage and its detriment. This is what occurred. There are no facts to indicate that GMC should not have relied upon Jerry’s representation or that there was any doubt or uncertainty in that representation.

GMC was damaged by the fraud. GMC received less rent from Jerry than it normally would have, had Jerry rented a unit on another floor. The rules relating to a determination of whether reliance upon a fraudulent misrepresentation was justifiable have been set forth by the court in Silverman v. Bell Savings and Loan Association, 367 Pa. Super. 464, 533 A.2d 110 (1987) as follows:

Thus, “[a]lthough the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the maker’s honesty by investigating its truth, he is nonetheless required to use his senses and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.

GMC could have conducted its own investigation regarding Jerry’s claimed disabled status or could have requested documentation to substantiate the disabled status claimed by Jerry. While there is nothing in the facts to indicate any apparent doubt or uncertainty about Jerry’s representation that he was disabled, the nature of the alleged disability may have given rise to a need for some further inquiry or investigation by GMC. This remains an issue that would need to be resolved by the finder of fact in favor of GMC prior to any recovery.

GMC could also raise a claim of trespass. One who intentionally enters the property of another without the privilege to do so is chargeable with civil trespass. Kopka v. Bell Telephone Company of Pennsylvania, 371 Pa. 444, 91 A.2d 232 (1952). Jerry entered GMC’s property by living in the first floor apartment and intentionally misrepresented that he had a physical disability to obtain GMC’s permission to rent the first floor apartment. GMC’s consent to his entry and his occupancy of the unit was obtained by intentional misrepresentation and therefore its consent was invalid. See Restatement (2d) Torts, § 892B: Commonwealth. v. Hayes, 314 Pa. Super. 112, 460 A.2d 791 (1983).

4. Jerry will have the burden of proving certain facts including a similarity in the place of occurrence and cause of the accident to impute notice to the landlord as to the defect on the steps to support the admission of evidence of prior accidents.
Pa. R.E. 402 provides that relevant evidence is admissible except as otherwise provided by law. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action. Pa. R.E. 401. In this situation, the evidence of similar occurrences would be relevant to establish notice of the defective steps and possibly that the stairs were unsafe.

A party generally may produce evidence of similar accidents involving the same subject matter in a negligence case to establish that the defendant had notice of a defective condition that may cause harm, or that the condition of the premises was unsafe and likely to cause injury. 

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A party generally may produce evidence of similar accidents involving the same subject matter in a negligence case to establish that the defendant had notice of a defective condition that may cause harm, or that the condition of the premises was unsafe and likely to cause injury. 


In order to introduce the evidence of similar occurrences, Jerry would need to prove that the prior accidents occurred on the same steps and that the conditions under which the accidents occurred are similar. Jerry would be able to introduce this evidence to show that GMC knew or should have known of the defective condition on the steps and that there was a likelihood of injury. In Houdeshell v. Rice, 939 A.2d 981 (Pa. Super. 2007), the Court permitted the introduction of evidence of similar accidents relating to breaking glass in a sliding door and in doing so cited a statement of applicable Pennsylvania law as follows:

In certain circumstances “evidence of similar accidents occurring at substantially the same place and under the same or similar circumstances may, in the sound discretion of the trial Judge, be admissible to prove constructive notice of a defective or dangerous condition and the likelihood of injury.” …This limited exception, permitting the introduction of evidence of similar accidents, is tempered by judicial concern that the evidence may raise collateral issues, confusing both the real issue and the jury. Stormer v. Alberts Construction Co., 401 Pa. 461, 466, 165 A.2d 87, 89 (1960).

Jerry must therefore prove that other accidents occurred on the rear steps under similar circumstances, causing similar injuries, that is, by slipping on uneven concrete, falling down the steps and sustaining bodily injuries, to support the argument that GMC knew or should reasonably have known about the defective condition. If Jerry satisfies these requirements, the court should rule in his favor and permit admissibility of similar accidents.
Question No. 2: Grading Guidelines

1. **Intentional Interference with prospective contractual relations**

   Comments: The candidate should discuss the elements of intentional interference with prospective contractual relations and reach a proper conclusion that GMC’s cause of action will be successful against Tom.

   5 points

2. **Preliminary objections to complaint**

   Comments: The candidate should discuss the filing of Preliminary Objections to the Complaint which includes the issue of scandalous and impertinent matter and improper service of the Complaint, and conclude that the Preliminary Objections are likely to be successful.

   5 points

3. **Fraud/intentional misrepresentation and Trespass – inclusion in the Counterclaim filed by GMC**

   Comments: The candidate should discuss the elements of the intentional torts of fraud/intentional misrepresentation and trespass and further recognize that these torts may be included in GMC’s Answer as a Counterclaim.

   6 points

4. **Admissibility of similar occurrences or accidents on the apartment steps**

   Comments: The candidate should recognize that evidence must be relevant to be admissible, and that similar occurrences are relevant to establish that GMC was on notice of possible defects in the steps and possibly that the steps were unsafe if the moving party is able to prove prior accidents on the steps under similar conditions as this accident.

   4 points
Question No. 3

In January 2007, Harry and Louise, lifelong residents of C County, Pennsylvania, married and immediately moved to Austin, Texas. On January 1, 2014, they returned to C County to visit family. That evening, they went to the Ugly Mug, a local bar. One of the patrons, Mo, approached Louise and told her she looked like a “southern tramp.” Harry heard the comment and told Mo to buzz off, and Mo walked away.

Over the course of the next hour, Harry decided that he was going to do something about Mo’s comment. When Harry saw Mo go to the restroom, he followed him into the restroom and pulled out a handgun and pointed it at Mo’s head saying, “You shouldn't have talked to my gal like that. I am going to teach you a lesson by putting a bullet in your head.” Unbeknownst to Mo, the gun was actually unloaded. No one else was present in the restroom to witness the statement Harry made to Mo. After the threat, Harry left the restroom and Mo fled the bar and called the police to report what happened. Mo was still clearly traumatized by the incident as he reported it to the police. Criminal charges were filed against Harry two days later.

1. Assuming that Harry was authorized to carry a firearm in Pennsylvania, aside from the possible charges of Harassment and Possessing Instruments of Crime, what criminal charges should have been brought by the police against Harry relative to the incident in the restroom?

Three months after the charges were filed against Harry, a Pre-Trial Conference was held in open court, at which Harry entered a guilty plea to the charges and admitted to the statement he made in the restroom and the use of the handgun. A month later, Harry successfully withdrew his guilty plea and proceeded to trial. At trial, the Prosecutor attempted to introduce the fact that Harry previously pled guilty to the charges and the specific admissions he made during the guilty plea.
2. What specific objection(s) should Harry’s counsel have raised at trial to try to prevent the introduction of the guilty plea and the admissions made during the guilty plea, and how should the Court have ruled on those objections?

On November 5, 2014, after many months of marital discord, Louise left Harry and moved from Texas back to C County to live permanently with her mother. Harry remained in Texas. Yesterday, Louise went to Attorney Able for a divorce consultation and told him that she and Harry agree that there is no hope to save the marriage and that she and Harry both agree to the divorce. Both parties just want to get the divorce done as soon as possible. She also tells Attorney Able that she wants to file in adjacent D County, Pennsylvania, to avoid the publicity of the divorce being reported in C County newspapers.

3. How should Attorney Able advise Louise with respect to (a) the type of divorce that should be filed, (b) how soon the divorce action can be filed, and (c) the proper venue for the filing of the divorce action including whether her request to file in D County can be achieved and, if so, under what circumstances?
Question No. 3: Examiner’s Analysis

1. **The criminal charges that should have been brought by the police against Harry relative to the incident in the restroom would be simple assault and terroristic threats.**

   Initially, Harry should have been charged with simple assault. A person is guilty of simple assault if he attempts by physical menace to put another in fear of imminent serious bodily injury. 18 Pa. C.S.A. 2701 (a)(3). Serious bodily injury is defined as bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. 18 Pa. C.S.A. Section 2301. In order to establish simple assault by physical menace, the elements which must be proven are intentionally placing another in fear of imminent serious bodily injury through the use of menacing or frightening activity. Commonwealth v. Reynolds, 835 A.2d 720 (Pa. Super. 2003), citing, Commonwealth v. Repko, 817 A.2d 549, 554 (Pa. Super. 2003). The act of pointing a gun at another person can constitute a simple assault as an attempt by physical menace to put another in fear of imminent serious bodily injury. In Re Maloney, 431 Pa. Super 321, 636 A.2d 671, 674 (1994).

   As applied here, when Harry entered the restroom he pointed his gun directly at Mo’s head saying, “You shouldn't have talked to my gal like that. I am going to teach you a lesson by putting a bullet in your head.” Although the gun was not loaded, Mo did not know that at the time the threat was made. Harry’s words and actions appear to clearly have been designed to place Mo in fear of imminent serious bodily injury, namely being shot in the head. The facts indicate that Mo was traumatized as a result of the incident. In sum, these facts likely support a charge of simple assault against Harry.

   Harry should have also been charged with the crime of terroristic threats. A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to commit any crime of violence with intent to terrorize another. 18 Pa. C.S.A. Section 2706(a)(1). The Commonwealth must prove that 1) the defendant made a threat to commit a crime of violence, and 2) the threat was communicated with the intent to terrorize another or with reckless disregard for the risk of causing terror. Commonwealth v. Tizer, 454 Pa. Super. 1, 684 A.2d 597, 600 (1996). The harm sought to be prevented by the statute is the psychological distress that follows from an invasion of another’s sense of personal security. Id. at 600. Neither the ability to carry out the threat nor a belief by the person threatened that the threat will be carried out, is an element of the offense. Id. at 600. Section 2706 of the Crimes Code is not meant to penalize mere spur-of-the-moment threats which result from anger. In Re J.H., 797 A.2d 260 (Pa. Super. 2002).

   As applied here, it is clear that when Harry pointed the gun at Mo’s head and stated that he was going to teach Mo a lesson by putting a bullet through his head that he was making a threat to commit a crime of violence. It can be inferred from these actions that the threat was being communicated with the intent to terrorize Mo. It does not matter for the purposes of this charge that the gun was unloaded at the time the threat was made. The facts also make clear that
Mo was clearly traumatized as a result of the incident in the restroom. Given the length of time that had elapsed from the comment made by Mo to Louise and the incident in the restroom, namely about one hour, it is unlikely that this would be deemed to be a spur-of-the-moment incident. In summary, the facts likely support a charge of terroristic threats against Harry.

2. **Harry’s counsel should have objected to the Prosecutor’s attempt to introduce Harry’s guilty plea and admissions at the time of the guilty plea on the basis that they are not admissible under the Pennsylvania Rules of Evidence, and the Court should have barred the introduction of this evidence.**

   Pennsylvania Rule of Evidence 410 (a)(1) provides that in a criminal case evidence of a guilty plea that is later withdrawn is not admissible against the defendant who made the plea. In addition, any statements made during the course of a proceeding in which a guilty plea was made in open court pursuant to Pennsylvania Rule of Criminal Procedure 590 shall not be admitted against the defendant who made the plea. See Pa. R.E. 410 (a)(3).

   As applied here, the Prosecutor is attempting to use both Harry’s guilty plea, which was later withdrawn, and the admissions he made during the guilty plea, against him at trial. This tactic is clearly improper under Rule 410, and Harry’s counsel should have objected to the prosecutor’s attempt to admit this evidence for the reasons set forth above. The Court should have ruled in Harry’s favor and barred the introduction of both the guilty plea and the admissions made during the course of the plea.

3(a). **Counsel should recommend to Louise that a no fault divorce be filed under Section 3301(c) of the Divorce Code in order to achieve the objectives of the parties.**

   A Court may grant a divorce where it is alleged that the marriage is irretrievably broken and 90 days have elapsed from the date of commencement of an action and an Affidavit has been filed by each of the parties evidencing that each of the parties consents to the divorce. 23 Pa. C.S.A. Section 3301 (c). Irretrievable breakdown is defined as estrangement due to marital difficulties with no reasonable prospect of reconciliation. 23 Pa. C.S.A. Section 3103.

   As applied here, Louise has indicated that both she and Harry feel that there is no hope to save the marriage and that both she and Harry are in agreement with securing a divorce as soon as possible. Assuming this is true, it appears that the marriage is irretrievably broken and a divorce filing under Section 3301 (c) of the Divorce Code would be the most appropriate way to dissolve the marriage. Accordingly, counsel for Louise should recommend to Louise that the divorce be filed under 23 Pa. C.S.A. Section 3301 (c).

3(b). **The divorce complaint cannot be filed until 6 months after November 5, 2014, when Louise returned to permanently live with her mother in Pennsylvania.**

   A spouse may commence a divorce action in a Pennsylvania court if he/she or the other spouse has been a bona fide resident of Pennsylvania for at least six months previous to the commencement of the divorce. 23 Pa. C.S.A. Section 3104 (b). Bona fide residence means

As applied here, Louise returned to C County, Pennsylvania, on November 5, 2014, and the facts indicate her intention was to live here permanently. Since she has not yet met the six month residency requirement in order to establish jurisdiction for a divorce in Pennsylvania, she must wait until six months have elapsed from November 5, 2014 in order to file her complaint. Once this time period expires, she can properly file the divorce complaint in Pennsylvania.

3(c). **Although venue for the divorce action would be proper in C County, the divorce action can also be filed in D County if both parties agree in writing and attach the writing to the Complaint or both parties elect to participate in the proceeding.**

Pennsylvania Rule of Civil Procedure 1920.2 provides that an action may be brought only in the county in which the Plaintiff or the Defendant resides or in a county upon which the parties have agreed in a writing which shall be attached to the Complaint or by the parties participating in the proceeding. An action includes an action of divorce pursuant to Pennsylvania Rule of Civil Procedure 1920.1(a).

As applied here, Louise would clearly be permitted to bring the action in C County as that is the county where she currently resides. However, she has indicated to counsel that she wishes to avoid the publicity of the divorce filing in C County and instead wishes to file in adjacent D County, Pennsylvania. A filing in D County will be permissible if she can get Harry to agree, in writing, to the filing in D County and the writing is attached to the divorce filing. Alternatively, Louise can file the divorce action in D County, and if Harry does not object to the filing and participates in the proceeding, the divorce action could proceed in D County under those circumstances as well.
Question No. 3: Grading Guidelines

1. **Criminal Law**

   Comments: The Candidate is expected to recognize that simple assault and terroristic threats should have been filed against Harry and the candidate should discuss the elements of each offense and apply the applicable facts.

   8 Points

2. **Evidence**

   Comments: The Candidate should argue that the introduction of the guilty plea and the admissions made during the guilty plea are not admissible under the Pennsylvania Rules of Evidence, and the Court would not permit the introduction of this evidence.

   3 Points

3. **Family Law**

   Comments: The Candidate should conclude and explain why the divorce action should be filed under Section 3301 (c) of the Divorce Code, recognize that Louise must be a resident of Pennsylvania for six months prior to the commencement of the action in order for the Court to have jurisdiction and recognize that venue would be proper in C County or potentially in D County if Louise was able to secure Harry’s written agreement for the action to be heard in D County or both parties participate in the action.

   9 Points
Question No. 4

Global Cell Phone Company sells cell phones in various states, including State Y. Cell phone safety is regulated by a federal agency (Agency) which, pursuant to a federal statute, has been granted authority to promulgate regulations setting standards for radio frequency (RF) radiation emissions in all electronic devices. The statute provides that, “No State or local government or instrumentality thereof may regulate safety standards for RF radiation emissions in electronic devices.” Agency has promulgated regulations that set the maximum body absorption rate (BAR) for RF radiation emissions from cell phones at 2 watts per kilogram. State Y has a Consumer Electronics Safety Law (Safety Law) that limits the BAR for RF radiation from cell phones from exceeding 1 watt per kilogram unless the cell phone is sold with a headset. Global’s cell phones comply with Agency standards but not the State Y Safety Law standard. Allen is a Global cell phone user who filed a lawsuit in federal district court against Global, claiming that sale of Global’s cell phones without a headset is unsafe due to exposure to dangerous amounts of RF radiation, in violation of the State Y Safety Law.

1. Assume that all jurisdictional requirements are met. What defense is available to Global based upon the United States Constitution, and with what likely result?

Beverly works at Company, which employs 100 workers. Her job entails packing boxes of auto parts. Beverly has a sincerely held religious belief that the Sabbath must be observed from sundown on Friday to sundown on Saturday, and she refuses to work during that time. Two months ago, Company’s business increased substantially, and Company hired 35 additional box packers to handle the increased workload. Company also began requiring two mandatory Saturday overtime shifts per month for workers in most departments, including Beverly’s department. Beverly requested that because of her religious beliefs to avoid working on Saturdays, she be permitted to have other employees voluntarily take her shifts, to switch positions with another employee or to transfer to a job in a department that was not required to...
work Saturdays. Company considered her request to accommodate her beliefs, but Beverly’s supervisor rejected all options because they “might cause complaints among the employees.” Beverly was terminated when she failed to show up for work the following Saturday.

After satisfying required administrative procedures, Beverly filed suit against Company in the appropriate federal district court, claiming her termination was improper religious discrimination under Title VII of the Civil Rights Act of 1964.

2. What are the respective burdens for each party in litigating Beverly's claim of discrimination, and based on the facts what is Beverly's likelihood of success?

Carl also works at Company and recently joined Beverly’s church. Carl has advised his supervisor that he cannot work on the Sabbath. Carl requested that he be able to use personal leave time to avoid working on Saturday. Carl's request was denied, and he was then terminated when he failed to show up for work on the following Saturday.

3. Assuming all procedural requirements have been met, if Carl’s attorney filed a timely Motion to Intervene in Beverly's lawsuit, how should the court rule on Carl’s Motion?

During the litigation, Beverly’s attorney served on Company a Request for Production of Documents, requesting the complete personnel files of supervisors Baker, Edward and Reilly and any other of Beverly’s supervisors over the last ten (10) years. The request included any EEOC file, evaluations, training records, reviews, employment dates, commendations, education records, experience records, leave records, injury or illness records, benefit records, incident or accident reports, and any other items from this time. The request also sought all employee performance evaluations and disciplinary files for the three supervisors.

4. What action, if any, can counsel for Company take to try to avoid producing the documents, and what is the likelihood of success?
1. **Global should argue that Allen’s claim should be dismissed because of preemption, and the defense will likely be successful. The State Y Consumer Electronics Safety Law is pre-empted under the Supremacy Clause of the United States Constitution, because the federal statute precludes state interference with matters concerning the safety standards for electronic radiation emissions from an electronic device.**

   By federal statute, Agency was granted the authority to promulgate regulations setting standards for radio frequency (RF) radiation emissions in all electronic devices, and state and local governments were prohibited from regulating safety standards for RF radiation emissions in such devices. Under the Commerce Clause, Congress had the power to enact the statute in order to regulate the interstate market for electronic devices and to preempt states from acting in the field. See, *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88 (1992) - in holding that an Illinois statute that set state standards concerning occupational health and safety was preempted by federal OSHA statute, the court acknowledged that Congress has the power, under the Commerce Clause, to regulate aspects of occupational health and welfare, and to preempt states from acting in this area.

   The Supremacy Clause of the United States Constitution invalidates state laws that interfere with or contradict federal law. Article VI, cl. 2. Preemption may be either express or implied, and implied pre-emption includes both field pre-emption and conflict pre-emption. *Gade*, 505 U.S. 88, 98 (1992). The three forms of pre-emption were further described by the court in *Aguayo v. U.S. Bank*, 653 F.3d 912, 918 (9th Cir. 2011), *cert. denied*, 113 S.Ct. 106 (2012) as follows:

   First, Congress may preempt state law by so stating in express terms. Second, preemption may be inferred when federal regulation in a particular field is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. In such cases of field preemption, the mere volume and complexity of federal regulations demonstrate an implicit congressional intent to displace all state law. Third, preemption may be implied when state law actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

   Express preemption applies where Congress has explicitly indicated its intention to preempt state law in the text of the statute. See, *English v. General Electric Company*, 496 U.S. 72 (1990). Where there is a federal statute that specifically precludes certain state action, a state law in violation thereof will be found to have been preempted. See, *Pace v. CSX Transportation, Inc.*, 613 F.3d 1066 (11th Cir. 2010) - federal statute that stated the remedies provided therein with respect to regulation of rail transportation were exclusive and preempted any remedies provided under another Federal or State law preempted a state law nuisance claim for monetary
relief based on the noise and smoke caused by use of a railroad track adjacent to plaintiff's land; *Turek v. General Mills, Inc.*, 662 F.3d 423, 427 (7th Cir. 2011) -federal statute that prohibited states from imposing any requirement regarding claims made in labeling certain foods that were not identical to the requirements set forth in a federal regulation precluded a claim under a state consumer protection law for deceptive practices because “[t]he information required by federal law [did] not include” the disclaimers sought by the consumer, and the state-law requirements were “not identical to the labeling requirements imposed … by federal law.”

In our case, the federal regulation in this area was accomplished through a federal statute providing that, “No State or local government or instrumentality thereof may regulate safety standards for RF radiation emissions in electronic devices.” This statute explicitly precludes a state from acting on electronic radiation safety standards for electronic devices including cell phones. As such, the type of preemption confronting Allen would likely be deemed “express” preemption by the district court because contrary to the prohibition in the federal statute State Y is regulating the safety standards for cell phones by requiring that all cell phones with a body absorption rate (BAR) exceeding 1 watt per kilogram must be sold with a headset. If Allen's claim that the product was unsafe was successful, State Y would be regulating the safety standards for cell phones by setting standards that are more stringent than the federal standards. As in *Pace* and *Turek, supra*, in this case Congress has stated its intent to govern the matter of radiation in electronic devices including cell phones without state assistance or interference. The intent of Congress to preempt matters of cell phone radiation is clear in our case. In our question, Allen’s claim under the State Y Consumer Electronics Safety Law seeks relief based on a claim concerning the acceptable level of electronic radiation in cell phones that the federal statute makes clear should not be established by the states. The court likely would hold that the State Y Consumer Electronics Safety Law could not be used to regulate or deem unsafe the radiation from a cell phone because the regulation of safety standards for electronic devices was expressly preempted by federal law.

2. Beverly must establish a *prima facie* case of discrimination by showing that her termination was based upon unlawful discrimination against her because of her sincere religious beliefs that prohibited her from working on the Sabbath. If a *prima facie* case is established, Company must show that it is unable to provide a reasonable accommodation without undue hardship. Beverly will likely be successful because her employer's failure to make a reasonable accommodation for her religious beliefs was not based on undue hardship.

Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e et seq., prohibits discrimination in employment on the basis of religion. Specifically, an employer may not “fail or refuse to hire or ... discharge any individual, or otherwise ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion.” 42 U.S.C.A. § 2000e-2(a)(1). "Religion" includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's religious observance or practice without an undue hardship on the conduct of the employer's business." Id. at § 2000e(j).

Pursuant to Title VII, an employer has an obligation to reasonably accommodate an employee’s
religious belief unless to do so would constitute an undue hardship. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). An accommodation constitutes an “undue hardship” if it would impose more than a de minimis cost on the employer. *Id.*

Initially, the employee must establish a *prima facie* case of discrimination. Various courts have held that employees who seek to make out a *prima facie* case of religious discrimination must show that (1) they hold a bona fide religious belief conflicting with an employment requirement, (2) they informed their employers of this belief and conflict, and (3) they were disciplined or subject to discriminatory treatment for failure to comply with the conflicting employment requirement. *Shelton v. University of Medicine and Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993); *Cooper v. Oak Ridge Rubber, Co.*, 15 F.3d 1375 (6th Cir. 1994). In our question, Beverly will be able to establish a *prima facie* case of discrimination based on religion, because she had a bona fide religious belief that it was not permissible to work on the Sabbath, informed Company of her belief and the conflict with her work schedule, requested accommodation, and was terminated because of her failure to comply with the conflicting employment requirement.

Once a *prima facie* case is established by the employee, the burden shifts to the employer to show that it made good faith efforts to accommodate the employee's religious practices or that any accommodations would work an undue hardship. *Shelton*, 223 F.3d at 224; *Heller*, 8 F.3d at 1440; *Cooper*, 15 F.3d at 1378. In the question, Beverly suggested several options to accommodate her religious beliefs but Company refused to grant an accommodation, justifying its decision for refusing an accommodation on the basis that other employees might complain about it.

The fact pattern in the question is similar to that in *E.E.O.C. v. Texas Hydraulics, Inc.*, 583 F. Supp. 2d 904, 907-08 (E.D. Tenn. 2008). In *Texas Hydraulics*, the court found that for an employer to meet its burden, the employer must have considered possible options that would have accommodated an employee and rejected those options because they would have caused an undue hardship. *Id.* at 910. The Court found employer’s actions to be deficient, and discussed several reasonable accommodations, pursuant to prior case law, that would have been sufficient, such as initiating a voluntary shift change, seeking other employees who would be willing to substitute, or possible transfer of duties. *Id.* at 911. The Court held that “an employer's burden is discharged if it can show that each and every accommodation would cause an undue burden.” *Id.* at 910.

In the question, Beverly has requested to use several options to compensate for her inability to work on Saturday due to her religious beliefs. The options suggested by Beverly included other employees voluntarily taking her shifts, switching jobs with other employees or transferring her to another department. These suggestions appear to constitute reasonable accommodations. There does not appear to be any reason why other employees voluntarily taking her shifts would be problematic; and there weren't any reasons offered why she could not switch jobs with another employee or be transferred to another department. Beverly’s request for accommodation was repudiated on the sole basis that other employees might complain about the accommodation. The reason offered by Company was entirely speculative, and likely falls

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In *Hardison* the Court in the context of a unionized setting held that an employer neither had a duty to require other workers to substitute shifts for an employee who objected to working on the Sabbath, nor to provide the employee an exemption from its contractual seniority system. Here, the requested accommodation involved a voluntary rather than mandatory substitution of shifts or a possible transfer to another position. There is no evidence in the facts that the options Beverly proposed would violate any seniority provision or collective bargaining agreement or that they would have cost implications for Company. Under these circumstances, it is reasonable to conclude that the employer failed to meet its burden of establishing that it could not reasonably accommodate the employee without undue hardship. Accordingly, Beverly’s discrimination claim based on religion is likely to prevail.

3. **Carl’s Motion to Intervene likely will be granted.**

Intervention is governed by Federal Rule of Civil Procedure 24, which provides in pertinent part:

a) **Intervention of Right.** On timely motion, the court must permit anyone to intervene who:

   1. is given an unconditional right to intervene by a federal statute; or
   2. claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

b) **Permissive Intervention.**

   1. In General. On timely motion, the court may permit anyone to intervene who:
      
      A: is given a conditional right to intervene by a federal statute; or
      B: has a claim or defense that shares with the main action a common question of law or fact.

   * * *

   3. **Delay or Prejudice.** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

   3. **Notice and Pleading Required.** A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention.
and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

Carl would not have cause to intervene as a matter of right. Carl’s motion likely would not be controlled by Rule 24(a), since there is neither evidence of a federal statute providing him with an unconditional right to intervene, nor does Carl have an interest relating to Beverly's lawsuit that he may be unable to protect if not permitted to intervene. Although both Beverly and Carl are raising claims of religious discrimination, Carl neither has an interest in Beverly's loss of her job, nor will he be precluded from protecting his interest in his job if not permitted to intervene. Carl would not be bound by the judgment on Beverly’s case, and consequently he would suffer no impairment of his interest in his job by virtue of not being permitted to intervene.

Carl’s motion likely would be governed by Rule 24(b), Permissive Intervention. Pursuant to this section, a court may permit anyone to intervene who files a timely motion to intervene and (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact. See, Rivers v. Califano, 86 F.R.D. 41 (S.D.N.Y. 1980) (motion for leave to intervene pursuant to Fed.R.Civ.P. 24(b) granted because claims of proposed intervenors were virtually identical to those of named plaintiffs and there were common questions of law and fact). Additionally, the court, pursuant to Rule 24(b)(3), must use its discretion to consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Based on the facts in the question, Carl has satisfied the prerequisites for permissive intervention under Rule 24(b). The motion has been timely filed and all procedural requirements regarding notice have been met. Carl has an employment discrimination claim based on religion that would have questions of law and fact common to Beverly’s claim; specifically, the claim would be based on Company’s refusal to offer or accept a reasonable accommodation for his religious beliefs. There is no basis in the facts for a finding that Carl’s motion will unduly prejudice or delay Beverly’s rights. Accordingly, Carl should be permitted to intervene after filing a motion that sets forth the facts and law underlying his claim that provides the basis for his intervention.

4. Company’s attorney should file a Motion for Protective Order to try to avoid complying with the discovery request. The Motion likely will be granted.

Under Federal Rule of Civil Procedure 26(b), parties may generally “obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . .” Fed.R.Civ.P. 26(b)(1). Nonetheless, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, a party from whom discovery is being sought may file a motion for protective order when necessary to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Any motion for a protective order under Fed.R.Civ.P. 26(c)(1) “must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action” before the Motion is filed. Id.
The party seeking the protective order has the burden to show good cause for its issuance. *Cipollone v. Liggett Group., Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986). To demonstrate good cause, the party seeking the order must submit “a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n. 16 (1981). In this situation, counsel for Company should file a Motion for a Protective Order, and the Court will likely grant the Motion. Beverly’s discovery request is very broad and encompasses material that could be deemed confidential, such as personnel and medical records, and also requests material that may be considered irrelevant to Beverly’s lawsuit. Beverly’s cause of action is founded upon her employer’s failure to offer a reasonable accommodation for her to observe the Sabbath. The legal issue is employment discrimination. Her supervisors’ education and medical records, or whether they received commendations or were involved in accidents is irrelevant to her employment discrimination claim. Additionally, protection from the production of these records that contained personal and confidential information for all of Beverly's supervisors for the past 10 years is necessary to avoid embarrassment, annoyance and undue burden on Company and its supervisors. For these reasons, the protective order likely would be granted pursuant to Rule 26.
Question No. 4: Grading Guidelines

1. **Constitutional Law**

   Comments: Applicants should demonstrate an understanding of the preemption doctrine of the Supremacy Clause, and apply the law and applicable test to the facts to achieve a reasoned conclusion.

   5 Points

2. **Title VII – Religious Discrimination**

   Comments: Applicants should demonstrate an understanding of the anti-discrimination provisions of Title VII concerning religion, and apply the law to the facts to reach a well-supported conclusion.

   6 Points

3. **Civil Procedure**

   Comments: Applicants should demonstrate an understanding of the practice of intervention under the Federal Rules of Civil Procedure, and apply the Rule to the facts to achieve a reasoned conclusion.

   4 Points

4. **Civil Procedure**

   Comments: Applicants should demonstrate an understanding of the availability of a Protective Order in response to a burdensome discovery request, and apply the law to the facts to arrive at a well-reasoned conclusion.

   5 Points
Question No. 5

Andy quit his job as a junior executive in Big City, Pennsylvania, to open a brewery. On December 1, 2014, Andy sent an e-mail to Charlie, his college roommate who lived in Smallville, Pennsylvania, stating, “I’m finally starting my own brewery. You should think about working as my assistant brewmaster. I’ll pay you a decent buck and some great benefits.” Charlie replied a day later, “I will agree to become your assistant brewmaster for $50,000/year, a leased car, and 5% of the profits from sales of that beer you made in college – Stale Pale Ale.” On December 6, 2014, Andy replied, “I’m ok with giving you the job, the money and the car, but not my Ale profits. I’ll give you until January 1, 2015, to make up your mind.”

Soon thereafter, Andy entered into a written agreement with Bob to purchase an old warehouse complex in Big City built on two lots, A and B, as the site for his brewery. The sales agreement provided for a $50,000 cash deposit and payment of the remaining purchase price at a closing on February 1, 2015. The agreement also stated, “Time is of the essence.”

Anticipating a move to Big City, Charlie made an oral agreement with Donna to sell his Smallville house for $100,000. Late on December 31, 2014, Donna saw Charlie as he was leaving the bar of a Big City hotel where Charlie was staying to attend a series of New Year’s Eve parties. Having heard nothing more about their agreement, Donna stopped Charlie and pointedly asked him whether he really was going to sell his house to her. Annoyed that Donna was making him tardy for his parties, Charlie grabbed two cocktail napkins and a “Sharpie” from the bar and hurriedly scribbled on the first napkin, “December 31, 2014 – 10:30 PM. Donna to buy Charlie’s house at 6175 Hocker.” On the second napkin, Charlie wrote, “Drive, Smallville, PA for $100,000 cash. 30 day closing. Charlie.” Charlie shoved the two napkins into Donna’s hand and abruptly left the bar.

Andy contacted Don, a star professional wrestler publicly known as Brutus the Beer Can, about making a personal appearance at the opening of the brewery. On January 10, 2015, Don sent
Andy the following text message: "I will agree to appear as Brutus at your brewery’s opening for a fee of $5,000. In exchange for $500, I will keep this offer open until February 1, 2015. Since I will be on a wrestling tour, please send all correspondence to me by regular mail." Andy wrote a check for $500, but forgot to mail it to Don.

On January 27, 2015, Don mailed Andy a letter that stated, “My plans have changed. I’m going to be wrestling in Japan on the date of the opening of your brewery. I am revoking my offer to make the personal appearance.” On January 30, 2015, Andy mailed Don a letter that stated: “I accept your offer. Enclosed is my $5,000 check.” Andy received the letter revoking the offer on February 2, 2015. Don received Andy’s acceptance letter and check on February 3, 2015.

A day before the closing on the warehouse, a title search revealed that there was no record of a deed conveying Lot B to Bob. Bob admitted that he had lost the deed to Lot B, but told Andy that he should not worry because he had a “slam dunk” case for title to Lot B based upon adverse possession. Bob asked for a postponement of the closing to initiate a quiet title action for Lot B. Andy replied, “Forget it. Give me back my $50,000.” Bob refused. Neither party showed up for the scheduled closing.

1. Andy sued Bob for return of his cash deposit. In his defense of the suit, Bob produced a court decree dated after the scheduled closing date on the warehouse confirming his title to Lot B by adverse possession. How should the court rule on Andy’s suit?

2. On January 2, 2015, Charlie e-mailed that he would agree to the terms outlined in Andy’s December 6, 2014 e-mail. Was a contract formed between Andy and Charlie?

3. After Charlie refused her demands to set a closing date for the sale of the house, Donna filed an action for specific performance. Charlie has raised the Statute of Frauds as his only defense to Donna’s suit. Will this defense be successful?

4. Assume for this question only that Andy did eventually acquire a site for his brewery and was able to open the brewery on schedule. Don (Brutus) failed to appear for the opening of the brewery. Andy filed an action for breach of contract. Without discussing damages, will Andy’s action be successful?
1. The court should rule in Andy’s favor because Bob was not able to convey marketable title to Lot B on date of the closing.

There is nothing in the facts to indicate that the sales agreement between Andy and Bob specified the title to be conveyed. In the absence of a statement indicating the character of title to be conveyed, every agreement for the sale of real property implies an undertaking on the part of the seller to convey marketable title to the buyer. R. BOYER, H. HOVENKAMP and S. KURTZ, THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY, § 14.6, at p. 511 (4th ed. 1991). “A marketable title is one that is free from liens and encumbrances and ‘which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and ready to perform his contract, would in the exercise of that prudence which businessmen ordinarily bring to bear upon such transactions, be willing to accept and ought to accept.’” Barter v. Palmerton Area School District, 399 Pa. Super. 16, 20, 581 A.2d 652, 654 (1990), quoting, 77 Am. Jur. 2d Vendor and Purchaser, §131 (1975). If there is a reasonable doubt as to title or where the title is in such condition that the purchaser will be exposed to the hazard of a lawsuit, the title to the real estate is not considered marketable. Id., citing, LaCourse v. Kiesel, 366 Pa. 385, 77 A.2d 877 (1951). If there is only a mere possibility of some future litigation concerning title, the title is considered good and marketable. Rice v. Shank, 382 Pa. 396, 115 A.2d 210 (1955).

A break in the chain of title caused by an unrecorded and lost deed would be sufficient to raise doubts in the mind of a prudent buyer and justify refusing to accept a seller’s title as marketable. Barter v. Palmerton Area School District, supra. Thus, it appears at first glance that Andy could refuse to conclude the sale because it was reasonable for him to believe that another party might challenge the title to Lot B.

Nonetheless, title derived from adverse possession may constitute marketable title. Smith v. Windsor Manor Co., 352 Pa. 449, 43 A.2d 6 (1945). However, there is no general rule as to when an alleged title by adverse possession is shown with sufficient clarity to justify compelling an unwilling buyer to accept it. See, 46 A.L.R. 2d 544 at § 7. The Pennsylvania Supreme Court has called cases in which a buyer can be required to take title alleged to have been acquired by adverse possession “exceptional.” The Court has cautioned that a court should never undertake to declare title to real estate good and marketable based upon adverse possession unless all the parties in interest were present on the record. See, Hoover v. Pontz, 271 Pa. 285, 114 A. 522 (1921). Accordingly, title may not be marketable until such time as the possessor’s title by adverse possession is evidenced by some publicly recorded document. R. BOYER, H. HOVENKAMP and S. KURTZ, THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY, supra, § 4.5, at pp. 66-67.

In this case, Bob told Andy that he had a “slam dunk case” for title to Lot B by adverse possession. Indeed, Bob later obtained a court decree that he had title to Lot B. The agreement between Andy and Bob, however, specified that time was of the essence. Where the parties have expressly agreed in the contract that time should be treated as of the essence, courts will ordinarily accept the agreement as made and refuse to decree performance of the contract’s terms.
in the event of failure to do what was required within the stipulated time. *Morrell v. Broadbent*, 291 Pa. 503, 140 A. 500 (1928). Because time was of the essence, Bob was required to produce marketable title on February 1, 2015, the date of closing, not at a later time.

Therefore, the court most likely would find that Andy is entitled to the return of his cash deposit because Bob was not able to produce a marketable title to Lot B on the date of the closing.

2. **A contract between Andy and Charlie was not formed because Andy’s reply to Charlie’s offer was not an unconditional acceptance, but rather was a counter-offer that lapsed when Charlie failed to exercise his power of acceptance within the time period specified.**

To create a contract, there must be an offer on one side and an unconditional acceptance of the offer on the other side. *Cohn v. Penn Beverage Co.*, 313 Pa. 349, 169 A. 768 (1934). The Restatement (Second) of Contracts describes an offer as “a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.” *Restatement (Second) of Contracts § 24 (1981); accord, Philadelphia Newspapers, Inc. v. Unemployment Compensation Board of Review*, 57 Pa. Cmwlth. 639, 641 n.3, 426 A.2d 1289, 1290 n.3 (1981). In determining whether an offer has been made, the manifestation of willingness to bargain must take the form of a promise or a commitment and be sufficiently definite or complete as to the essential terms of the proposed bargain. *Columbian Rope Co. v. Rinek Cordage Co.*, 314 Pa.Super. 585, 594, 461 A.2d 312, 316 (1983).

Based upon these criteria, Andy’s initial e-mail to Charlie would not be considered an offer. Andy’s initial e-mail does not objectively manifest a willingness to enter into a bargain, as Andy made no promise and offered no specific or definite terms about the assistant brewmaster’s position. Thus, Andy’s initial e-mail is an opening of negotiations with Charlie rather than an offer. Charlie’s reply to Andy, however, would constitute an offer. In his reply, Charlie manifested a willingness to enter into a bargain by committing to taking the job as an assistant brewmaster under definite terms – a salary of $50,000, a leased car, and 5% of the profits from the sales of Stale Pale Ale.

In this case, Charlie’s offer was to work as the assistant brewmaster for $50,000, a leased car, and 5% of the Stale Pale Ale profits. Although Andy’s reply matched the job, salary and leased car terms in Charlie’s offer, his reply was not the mirror image of Charlie’s offer. Andy’s December 6, 2014 reply omitted the sharing of Ale profits term contained in Charlie’s offer. By omitting this term, Andy materially altered Charlie’s offer to take the position at Andy’s brewery. Therefore, Andy’s December 6, 2014 reply would not be considered an acceptance, but a counter-offer to Charlie.

When the offeror creates a power of acceptance, as the master of the offer, he may place whatever time limitations upon the exercise of the power that seem desirable to him even though that duration may seem to be unreasonable under the circumstances. MURRAY ON CONTRACTS, supra, § 42 (B), at p. 112. Where a limited time for acceptance is specified, the acceptance must be made within that time. Van Schoiack v. United States Liability Ins. Co., 390 Pa. 27, 133 A.2d 509 (1957). If the power of acceptance is not exercised within the time limitations specified by the offeror, the lapse of time will terminate the offeree’s power of acceptance. RESTATEMENT (SECOND) OF CONTRACTS, supra, § 41 (1) (1981).

Andy’s December 6, 2014 reply stated that he would give Charlie until January 1, 2015, “to make up your mind” about the counter-offer. Because the time period specified within Andy’s counter-offer had expired, Charlie’s power of acceptance no longer existed and the counter-offer lapsed. Even though he eventually assented to the terms of Andy’s counter-offer, Charlie’s acceptance occurred too late to create a binding contract between the parties.

3. Charlie’s defense will be unsuccessful because the two cocktail napkins not only constituted a signed writing but also contained all of the essential terms to satisfy the requirements of an enforceable contract for the sale of real estate under the Statute of Frauds.


The initial question presented under the facts is whether the notations made by Charlie on the two cocktail napkins constitute a writing under the Statute of Frauds. The Statute of Frauds does not designate the particular form of writing necessary to satisfy its requirements. Brown v. Hahn, 419 Pa. 42, 213 A.2d 342 (1965). Moreover, a writing need not consist of one single
document. *Target Sportswear, Inc. v. Clearfield Foundation*, 327 Pa.Super. 1, 10-11, 474 A.2d 1142, 1147-48 (1984). Thus, several writings can constitute one memorandum sufficient to satisfy the Statute of Frauds as long as one of the writings is signed and the writings in the circumstances clearly indicate that they relate to the same transaction. See, RESTATEMENT (SECOND) OF CONTRACTS, *supra*, § 132 (1981). The facts here state that the first napkin on which Charlie scribbled ended with a house number and the second napkin began with the street name. A sentence that is incomplete on one page and then is completed on the next page is indicative that the two pages are to be read together as one document. *Id.*, comment c - Illustration 3. Applying the law to the stated facts, it is likely that a court would conclude that the two napkins on which Charlie marked and handed to Donna collectively constitute a writing for purposes of the Statute of Frauds.


Here, the identity of the parties’ requirement is satisfied because the notations made by Charlie on the two napkins indicated that Donna and Charlie were the parties to the proposed sale. Additionally, the napkins stated a street address of the property to be sold. Under Pennsylvania law, a property description sufficient to satisfy the Statute of Frauds is one where it describes a particular piece or tract of land that can be identified, located or found. *Zuk v. Zuk*, 55 A.3d 102 (Pa. Super. 2012). (citation omitted). A street address has been held to be a sufficiently definite and certain description to comply with the Statute of Frauds. *Sawert v. Lunt*, 360 Pa. 521, 62 A.2d 34 (1948). Thus, the property description requirement also has been satisfied in this case.

Under longstanding Pennsylvania case law, the failure to state the consideration for the purchase of real estate in the writing makes the writing unenforceable. *Soles v. Hickman*, 20 Pa.180 (1912). In this instance, this is not an issue because Charlie noted the consideration for the sale of his Smallville house to Donna on the napkin as “$100,000 cash.”

The final requirement under the Statute of Frauds pertaining to transfers of interests in real estate is that the writing must be signed by the party to be bound. *Hessenthaler v. Farzin*, 388 Pa. Super. 37, 564 A.2d 990 (1989). This requirement clearly has been satisfied because the facts state that the second napkin, the second page of the writing, was signed by Charlie, the purported seller and the party to be bound.

In short, the two cocktail napkins marked up and handed by Charlie to Donna on New Year’s Eve not only constituted a writing but also contained all of the essential terms to satisfy the requirements necessary to evidence an enforceable contract for the sale of real estate under the Statute of Frauds. Therefore, Charlie’s Statute of Frauds defense to Donna’s action for specific performance will be unsuccessful.
4. Although Don’s offer to make a personal appearance as Brutus the Beer Can at the opening of Andy’s brewery was not made irrevocable by the creation of an option contract, Andy will prevail in his breach of contract action because Andy had already dispatched his acceptance before Don revoked his offer.

In order to provide an offeree with a dependable basis on which to decide whether or not to accept an offer, the law recognizes a device known as the option contract. MURRAY ON CONTRACTS, supra, § 44 A. An option contract is a contract to keep an offer open. Warner Bros. Theatres, Inc. v. Proffitt, 329 Pa. 316, 198 A. 56 (1938). “The principal legal consequence of an option contract is that . . . it limits the promisor’s power to revoke an offer . . . A revocation by the offeror is not of itself effective, and the offer is properly referred to as an irrevocable offer.” RESTATEMENT (SECOND OF CONTRACTS), supra, § 25, Comment d.

Like every other contract, an option contract must satisfy the ordinary requirements for contract formation. If an option has no actual or legal consideration to support it, no matter how nominal, the offer may be revoked by the offeror at any time prior to the acceptance. Real Estate Co. of Pittsburgh v. Rudolph, 301 Pa. 502, 153 A. 438 (1930). In this case, Andy failed to send the $500 check to Don. Thus, an option contract was not created and Don was free to revoke his offer to appear as professional wrestler Brutus the Beer Can at the opening of Andy’s brewery.

“[A] retraction of an offer can have no effect until it is communicated to the person to whom the offer is made.” Owen M. Bruner v. Standard Lumber Co., 63 Pa. Super. 283, 290 (1916). Thus, a revocation of an offer is only effective upon its receipt by the offeree. RESTATEMENT (SECOND) OF CONTRACTS, supra, § 42.

Where the use of the mails as a means of acceptance is authorized or implied from the surrounding circumstances, an acceptance of an offer traditionally has been deemed to be effective when the offeree has placed the acceptance in the mailbox. Meierdierck v. Miller, 394 Pa. 484, 147 A.2d 406 (1959). The rationale for the so-called “mailbox rule” is that the offeree needs a dependable basis for the decision whether to accept an offer. One of the comments to Section 63 of the Restatement (Second) of Contracts states, “The common law provides such a basis through the rule that revocation of an offer is ineffective if received after an acceptance has been properly dispatched.” RESTATEMENT (SECOND) OF CONTRACTS, supra, § 63, comment a.

The facts state that on January 27, 2015, Don sent his letter revoking the offer to appear as Brutus at the brewery opening. Andy, however, had no knowledge of the revocation until he received the letter from Brutus on February 2, 2015. By that time, Andy already had accepted the offer when he placed his letter with the $5,000 check in the mail on January 30, 2015.

Although Don’s offer to make a personal appearance was not made irrevocable by the creation of an option contract, his attempt to revoke the offer was not effective until Andy had received it. Since Andy had dispatched his acceptance by placing it in the mailbox prior to receipt of the revocation, a contract was formed. Accordingly, Andy’s breach of contract action against Don for failing to appear as Brutus the Beer Can at the opening of his brewery will be successful.
Question No. 5: Grading Guidelines

1. Marketable Title and Time of the Essence Clause

Candidates should recognize and express an understanding of the concept of marketable title. Candidates should recognize that a possessor’s title by adverse possession may not be marketable until such time as that title is evidenced by some publicly recorded document. Candidates should consider how a time of the essence clause in a real estate sales agreement would affect efforts to convey a marketable title.

5 Points

2. Offer, Acceptance as Mirror Image of Offer and Lapse of Offer Due to Expiration

Candidates should recognize the common law rule that an acceptance must be the mirror image of an offer - absolute and unequivocal with no deviations or changes in the terms and conditions. Candidates also should recognize that a reply to an offer which changes the terms and conditions of the offer is not an acceptance, but a counter-offer that terminates the original offer. Candidates further should recognize that the offeror can place a time limitation on acceptance of the offer or counter-offer. Candidates should apply these principles to the stated facts and reach a reasoned conclusion concerning whether a contract was formed.

6 Points


Candidates should recognize the applicability of the Statute of Frauds to the sale of real property. Candidates should discuss the elements necessary under Pennsylvania law for a writing to satisfy the Statute of Frauds. Candidates should apply these elements to the stated facts in reaching the conclusion that the writing stated in the facts is sufficient to comply with the Statute.

5 points

4. Option Contracts; Effective Date of an Acceptance (Mailbox Rule)

Comments: Candidates should discuss the significance and elements necessary to create an option contract. Candidates then should discuss the principles of law governing when an offer is accepted or revoked. The candidates should apply these principles to the stated facts in reaching the conclusion that a contract was created even though the offer was not made irrevocable by the creation of an option contract.

4 points
Question No. 6

Jones manages a bar/restaurant, and Smith is a chef. Smith and Jones recently learned that a bar/restaurant located in C City, Pennsylvania, known as “The Place” was for sale. Smith and Jones have always wanted to have their own facility. Two weeks ago, Smith and Jones agreed to purchase The Place and its assets, contingent upon the negotiation and approval of a sales agreement.

Yesterday, Smith and Jones met with Attorney Able (“Able”), a licensed Pennsylvania attorney. Able has never represented Smith or Jones. Smith and Jones asked Able to form an entity or entities, to be owned by Smith and Jones, to be the purchaser or purchasers of The Place and its assets and to represent the entity or entities in purchasing The Place. They also asked Able to draft any necessary agreements defining their respective rights, obligations and interests in each entity as equity owners, and governing equity contributions, incurrence of debt, and transfer of equity interests upon death, divorce, bankruptcy, disability, or other specified events.

Based on internet research, Jones suggested that a general partnership, corporation, or limited liability company might be appropriate entities. Jones also explained to Able that the purchase included acquisition of the land and building where The Place is located, as well as its equipment, inventory and liquor license. Smith and Jones have asked what the formation requirements are for each type entity and what type of internal governing documents Able would recommend be prepared for each type of entity. They have also asked Able what liability protection each type of entity would provide for Smith and Jones and whether or not it would be wise, from an asset protection perspective, to place the ownership of the land and building in one entity and ownership of the bar and restaurant in another entity given the various liabilities that can arise from operation of a bar (e.g., claims relating to the improper sale of liquor, dram shop liability, claims relating to unruly patrons harming other patrons). Smith and Jones advised Able that they have a CPA who will advise them regarding the tax attributes of each type of entity.
Last week, Smith and Jones visited Equipment Company ("Equipco"), a local restaurant furniture and equipment retailer, looking for new or used tables and chairs to replace The Place’s current tables and chairs. The owner of Equipco indicated that it had 100 used tables in its inventory, with chair sets for each table, that Equipco had taken in a trade from another customer. Equipco’s owner indicated that these tables and chairs had been used hard by the prior owner and insisted that Smith and Jones inspect all of the tables and chairs before agreeing to buy them. Despite the owner’s insistence, Smith and Jones indicated they did not need to see the tables and chairs, signed a purchase agreement to purchase the tables and chairs for $5,000, and handed the owner a check for the full purchase price. Yesterday, the tables and chairs were delivered. Smith and Jones examined the tables and chairs. Their examination revealed that many of the tables have deep gouges in their surfaces and that many of the chairs have cut and torn cushions making them virtually unusable.

1. Under the Pennsylvania Rules of Professional Conduct what analysis should be undertaken by Able to determine if he can represent both Smith and Jones in forming an entity or entities, and with what conclusion?

2. Assume for this question that Able is permitted to provide the representation as requested. What advice should Able offer under Pennsylvania law regarding:

   (a). the formational requirements and the recommended internal governing documents that should be prepared for each of a general partnership, corporation and limited liability company;

   (b). the liability protection, if any, that is afforded to equity owners in a general partnership, corporation and limited liability company; and

   (c). the advantages, after considering liability issues potentially arising from the operation of a bar, of separating the ownership of the real estate and building from the ownership of the liquor license, bar and restaurant equipment and inventory, and operation of the bar and restaurant?

3. Would Smith and Jones be successful in asserting a breach of implied warranty of merchantability claim under the Pennsylvania Uniform Commercial Code against Equipco for the damaged tables and chairs?
Question No. 6: Examiner’s Analysis

1. Able should identify each client and their respective interests, determine whether a conflict of interest exists, and if so, decide whether he can provide competent and diligent representation to each party and, if so, obtain their consent to the joint representation. Able will likely be able to represent Smith and Jones in forming an entity or entities.

Pennsylvania Rule of Professional Conduct 1.7 (“Rule 1.7”) provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

1. the representation of one client will be directly adverse to another client; or

2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

2. the representation is not prohibited by law;

3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

4. each affected client gives informed consent.

Rule 1.7 requires an attorney, after identifying each client in a potential joint representation situation, to determine whether a conflict of interest exists, decide whether the representation may be undertaken despite the conflict and, if so, consult with the clients and obtain their informed consent. See, Rule 1.7, comment [2]. Here, we have multiple clients seeking a lawyer’s assistance in dealing with multiple layers of representation. With respect to Smith and Jones, the lawyer should recognize that the clients have common interests with respect to a major element of the lawyer’s representation; i.e., they both want to form an entity or entities to consummate the purchase of The Place and its assets for their mutual benefit. The lawyer should also recognize that the potential for conflicts exists in connection with the negotiation and drafting of documents such as ownership or cross purchase agreements by and between the parties to accommodate their respective interests. Although both Smith and Jones want to consummate the purchase, and both want advice relative to the type of entity or entities to be used to complete the purchase; they may not agree on the requirement for equity contributions, how and when debt may be incurred, how each should be treated in the event of death, divorce, bankruptcy or withdrawal, or relative to how much of their personal confidential information they want shared with the other party.
In this scenario the potential for conflict does exist with respect to at least part of Able’s representation because his clients may take different, sometimes inconsistent positions, relative to issues such as equity contributions, the incurrence of debt, cross purchase agreements and the sharing of information. Comment 8 to Rule 1.7 provides: "... a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the others." Able should evaluate the respective interests of the potential clients and should likely conclude that there is a significant risk that his representation of one client will be materially limited by the lawyer's responsibilities to the other client.

Having determined that a conflict is likely to arise, Able must then evaluate the requirements set forth in Rule 1.7(b) for continued representation. One of the requirements is to determine whether despite the conflict, he reasonably believes that he will be able to provide competent and diligent representation to each affected client. Comment 28 to Rule 1.7 provides some guidance in this area and provides:

Whether a conflict is consentable depends on the circumstances. ... [C]ommon representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus a lawyer may seek to establish ... a relationship between clients on an amicable and mutually advantageous basis, for example, in helping to organize a business in which two or more clients are entrepreneurs ... The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests.

If Able believes that despite the differences he can competently and diligently represent all involved then, recognizing the existence of a concurrent conflict, he should obtain the consent of Smith and Jones in order to be able to provide the representation giving rise to the conflict. Able should explain carefully the ‘implications’ of joint representation, which includes both advantages and disadvantages, and obtain their informed consent. Able should also indicate to the potential clients that should a direct conflict arise Able would have to withdraw his representation. Although the clients have approached [Able] seeking joint representation, and have in this sense ‘consented,’ it is clear that they must consent ‘again,’ after hearing [Able’s] explanation, in order for the consents to be considered valid ...” Hazard and Hodes, The Law of Lawyering, 3rd Ed., §11.14 (2002). It should also be noted that Able should monitor the relationship to determine if a non-consentable new conflict arises during the representation and act accordingly.

Able should recognize the potential for a significant risk of a concurrent conflict, and if after talking to the clients, Able could reasonably conclude that despite this potential conflict he will be able to provide competent and diligent representation to each client, he should explain the joint representation to the parties, and should obtain the informed consent of each party to the joint representation in order to proceed with the representation.

2.a. A partnership may be formed without a formal filing, while a corporation and limited liability company require a filing to be formed. Relative to internal governing documents, the partnership should have a partnership agreement, the corporation should have bylaws and the limited liability company should have an operating agreement.
A partnership is an association of two or more persons to carry on as co-owners a business for profit. Under Pennsylvania law a general partnership may be formed by an agreement without the filing of any type of document with the Pennsylvania Department of State. See, *Murphy v. Burke*, 454 Pa. 391, 311 A.2d 904 (1973). Formation of a corporation requires the filing of articles of incorporation with the Pennsylvania Department of State. 15 Pa. C.S.A. §1309(a). Formation of a limited liability company requires the filing of a certificate of organization with the Pennsylvania Department of State. 15 Pa. C.S.A. §8914(b).

A partnership may exist without a written partnership agreement governing its operation. *Murphy*, 311 A.2d at 907. However, it is unwise for partners to proceed without the existence of a written agreement in order to avoid potential disputes concerning the terms of the agreement. A corporation should have bylaws to govern its affairs. The bylaws may contain any provisions for managing the business and regulating the affairs of the corporation not inconsistent with law or the articles. 15 Pa. C.S.A. §1504. It is not necessary for a limited liability company to have a written operating agreement but, like in the case of a general partnership, it is unwise for members to proceed without the existence of a written operating agreement. An operating agreement, with certain exceptions, may contain any provision for the regulation of the internal affairs of a limited liability company. 15 Pa. C.S.A. §8916(a).

2.b. **Partners are jointly and severally liable for certain debts of the partnership.** Shareholders in a corporation and members of a limited liability company are generally not liable for the debts of the corporation or limited liability company.

Partners in a general partnership are jointly and severally liable for debts and obligations of the partnership relating to a wrongful act of, or breach of trust by a partner and are jointly liable for all other debts and obligations of the partnership. 15 Pa. C.S.A. §8327. Corporate shareholders and members of a limited liability company are generally not liable for the debts and obligations of the corporation or limited liability company. 15 Pa. C.S.A. §1526(a); 15 Pa. C.S.A. §8922(a).

2.c. **There is a value in separating the ownership of the land and building from the ownership of the operating entity and its assets to limit the potential liability exposure that may result from the operation of a bar establishment.**

It would be wise to separate the ownership of the land and building from the ownership and operation of the business and its assets. A partnership could be formed between Smith and Jones to take title to the land and building (or it could be purchased by a corporation or limited liability company if it would make sense to do so under applicable tax law). The operating entity that would own the liquor license and bar and restaurant equipment and inventory and run the bar and restaurant should be a separate corporation or limited liability company. With this structure the land and building, presumably substantial assets, could be protected from claims made by a patron of the operating entity or third party injured by a drunk patron of the operating entity who successfully pursues a claim.

3. **Smith and Jones would be unsuccessful in pursing an implied warranty of merchantability claim under the Uniform Commercial Code (the “Code”) because of their failure to inspect the goods prior to entering the contract to purchase.**

Section 2102 of the Code provides that the Code applies to transactions in goods. 13 Pa. C.S.A. §2102. The sale of the tables and chairs by Equipco, a merchant, is a transaction in goods under the
Code. Equipco is a merchant because it is an entity that deals in goods of the kind being purchased by Smith and Jones. 13 Pa. C.S.A. §2104.

Section 2314(a) of the Code provides, “[u]nless excluded or modified (section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of the kind.” 13 Pa. C.S.A. §2314(a). Goods are generally merchantable if they “pass without objection in the trade under the contract description” or “are fit for the ordinary purposes for which such goods are used.” 13 Pa. C.S.A. §2314(b)(1)and (3). An implied warranty of merchantability would apply to the sale of the used tables and chairs unless otherwise excluded under the Code.

Section 2316(c)(2) of the Code bears on this scenario. This section provides, “When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.” 13 Pa. C.S.A. 2316(c)(2). Comment 8 to this Section further explains the operation of this rule providing,

In order to bring the transaction within the scope of ‘refused to examine’ in paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language ‘refused to examine’ in this paragraph is intended to make clear the necessity for such a demand. Id., comment 8.

The facts indicate that the seller insisted that the buyers inspect the goods before entering into the contract to purchase. Despite this demand the buyers refused to inspect the goods and purchased them without making an inspection. At this point the risk of defects passed to the buyers and they should not be successful in asserting a breach of implied warranty of merchantability claim. See, White and Summers, Uniform Commercial Code, §12-6(b)(4th Ed. 1995).
Question No. 6: Grading Guidelines

1. **Professional responsibility—concurrent conflict**

   Comments: The candidates should recognize that a potential conflict exists, discuss the analysis that needs to be undertaken to be able to continue the representation and conclude that under the circumstances the representation may proceed with informed consent.

   5 points

2. **Business organizations**

   Comments: The candidates should discuss the formation requirements, or lack thereof, for each type of entity, the recommended internal governing documents and the liability protection afforded by each. The candidate should discuss the separation of assets to protect Smith and Jones from liability claims.

   10 points.

3. **Sales—disclaimer of warranty by failure to inspect**

   Comments: The candidates should recognize that an implied warranty of merchantability arises that was disclaimed by the failure of the buyers to inspect the goods when demanded to do so by the seller.

   5 points
Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
February 24 and 25, 2015

PERFORMANCE TEST
February 24, 2015

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MEMORANDUM

TO: Applicant
FROM: Ben Sharp, Managing Partner
CLIENT: Ethan Carney, Client # 051508
DATE: February 24, 2015

Our firm has been retained by Ethan Carney, who is presently involved in a dispute with his next-door neighbor, Luke Aaron, concerning the location of a bocce ball court close to the side yard property line shared by the two in Lilly Township, Pennsylvania. Mr. Carney has raised two issues for our firm to address.

The first issue concerns an appeal of a decision by the Zoning Hearing Board to the Court of Common Pleas regarding the bocce court. Mr. Carney has asked us for a legal opinion concerning whether he will be successful in appealing the Board's determination that Mr. Aaron's bocce court does not violate the setback requirements of the Lilly Township Ordinance. The standard of review by the Court of Common Pleas on this issue is the same as the standard of review for appellate courts reviewing decisions by common pleas courts. No additional evidence will be presented on appeal, and you should base your conclusions on the facts related to the bocce court that are set forth in the documents in the File, as all of the relevant facts presently of record are set forth in the documents in the File. The only issue before the Zoning Hearing Board at the time of its hearing was a challenge to the bocce court itself, and not to subsequently added bleachers and lights. Thus, for the first issue, limit your opinion to the success of the appeal on the bocce court alone, without addressing the bleachers and lights. Further, please set forth the argument(s) you would anticipate the Zoning Hearing Board’s counsel will make in support of the Board's decision, and state the reasons why the argument will be successful or not. Mr. Carney has also asked for an opinion as to whether he can successfully sue Mr. Aaron for creating a nuisance as a result of the noise and light from the bocce tournaments.

Kindly prepare a memorandum to me that addresses both of Mr. Carney’s questions. Please prepare your memorandum with a heading like the one above, and address the memo to me, Ben Sharp as Managing Partner; include a “From” line, listing only “Applicant”; a “Client” reference line, which includes the client name and number; and a “Date” line with the date of your memorandum. Your memorandum should contain a separate section for each issue, and must set forth a reasoned analysis supporting your conclusions by applying the applicable law to the relevant facts. Legal authorities that are relied upon should be cited. However, because I am familiar with the documents in the Library, informal citations are acceptable. Bluebook citations are not required; however, you must sufficiently identify each case or ordinance such that I will know to what document you are referring in your memorandum. Please address the questions in the order in which they were presented.

Our File in this matter includes this Memorandum, my notes from my meeting with Mr. Carney, and the relevant Lilly Township Zoning Hearing Board decision. You should assume that all of the information in the File is factually accurate. I have also included a Library, which contains the only legal principles and authorities you should consider and rely upon when completing your task. The Library includes applicable ordinances and caselaw.
Ben Sharp’s Notes from Meeting with Ethan Carney – 2/23/15

Mr. Carney and Mr. Aaron live in a traditional residential neighborhood in Lilly Township. While Mr. Carney was recently out of town, his neighbor, Mr. Aaron constructed a bocce ball court along the side yard border of his property adjoining Mr. Carney’s property. Mr. Carney returned home to find the already constructed bocce court, which was built two (2) feet from the property line.

Mr. Aaron’s bocce court is thirty (30) feet long and nine (9) feet wide. The playing surface, which is at ground level, is made from densely compacted sand, which was poured over a bed of gravel installed as the base for the bocce court. When playing bocce, players roll or throw larger balls toward a smaller ball at the other end of the court. Mr. Aaron built one layer of 4x4 beams around the entire playing surface, and stacked two additional layers of beams at each end of the court, so that when players roll the balls, they do not leave the playing surface. Thus, the height of the border at each end is twelve (12) inches, and the height of the border in the center is four (4) inches. The beams are permanently set in place with spikes that go through the beams and down into concrete footers to prevent the beams from being removed or coming loose.

Mr. Carney complained to Mr. Aaron about the location of the court, and informed him of the twenty (20) foot setback required for accessory buildings, in accordance with the Lilly Township Zoning Ordinance. When Mr. Aaron refused to move the bocce court, Mr. Carney filed a complaint with the Zoning Officer. The Zoning Officer told Mr. Carney the bocce court did not violate the zoning ordinance. Mr. Carney’s review of decisions made by the Zoning Officer concerning sports or game structures revealed that the decisions seem to have no true relationship to the zoning ordinance, or the location of the structures. It also appears the Zoning Hearing Board defers to the Zoning Officer’s decision without fail, and has never rendered a decision contrary to that of the Zoning Officer.

Mr. Carney next appealed to the Zoning Hearing Board (“Board”). He represented himself at the hearing because, to him, it was painfully obvious the bocce court was an “Accessory Building” requiring a twenty (20) foot setback. At the hearing, Mr. Carney introduced evidence related to the size and construction of the bocce court. During testimony, Mr. Aaron admitted the court was two feet from the side yard property line that he shared with Mr. Carney. He further admitted that bocce involves players throwing or rolling larger balls toward a smaller ball on a court; that teams of players are competing against one another pursuant to established rules; and that spectators often watch bocce tournaments and cheer on their favorite team. However, he argued bocce is a “pastime” and not a sport and, therefore, is not covered by the definition of “Accessory Building” in the zoning ordinance. Mr. Aaron further claimed that, because bocce courts are not specifically discussed in the ordinance, and because he believes bocce is not a sport, the bocce court should be exempt from the setback requirements.

The Board ultimately concluded Mr. Carney was not entitled to relief, and Mr. Aaron was allowed to keep his bocce court. The Board's decision, a copy of which is attached to these notes for reference, sets forth the Board’s rationale for finding the bocce court does not require a setback.

Mr. Carney was prepared to simply plant a row of bushes at the property line, and allow Mr. Aaron to keep his bocce court. However, the day after the Board’s ruling, Mr. Aaron added bleachers to accommodate sixty (60) spectators in between his own driveway and the bocce court. He also purchased industrial light posts, which are twenty (20) feet tall, and placed them on the side of the bocce court by the bleachers. The lights consist of clusters of eight (8) 1,000 watt lights on each of four posts. The lights all point toward the bocce court and Mr. Carney’s property. They are so bright that they
illuminated yards up to ½ mile away. Now, Mr. Aaron holds bocce tournaments four nights each week from 8:00 P.M. into the early morning hours. These tournaments draw between 70 to 100 players and spectators, who consume alcohol and get very rowdy as they watch the games. There are frequent outbursts of cheering, booing, and shouting throughout each match. The lights illuminate Mr. Carney’s entire yard as if it were noon on a sunny summer day. Worse yet, the lights shine directly into each room in Mr. Carney’s house facing Mr. Aaron’s property.

Mr. Carney used to pursue astronomy as a hobby and loved stargazing between sundown and his bedtime. The lights from Mr. Aaron’s bocce court now make it impossible for Mr. Carney to view the nighttime sky with his telescope in his yard. Also, the combination of the light and the noise of the rowdy guests at the bocce court have interfered with Mr. Carney’s ability to sleep at night. He used to sleep from 10:00 P.M. each night until 6:00 A.M., but is now only able to sleep from approximately 3:00 A.M. until 6:00 A.M. on nights when Mr. Aaron holds his bocce tournaments. There is no question that Mr. Carney’s health has been negatively impacted by the inability to sleep caused by the lights and noise. Unfortunately, the Lilly Township Zoning Ordinance does not address the type of lights or bleachers used by Mr. Aaron, so the complaints of Mr. Carney and others to local officials have not brought relief.

Mr. Carney wishes to appeal the decision of the Board to the Court of Common Pleas, and he has asked us to provide a legal opinion concerning whether he will be successful in appealing the Board’s determination that Mr. Aaron’s bocce court does not violate the setback requirements. We still have ten (10) days to appeal. Mr. Carney would also like to know if he can successfully sue Mr. Aaron for creating a nuisance as a result of the noise and light from the bocce tournaments.
ZONING HEARING BOARD OF LILLY TOWNSHIP, PENNSYLVANIA

Appeal of Decision of Zoning Hearing Officer: Re: Bocce Court of Luke Aaron
Property Address: 618 Harrison Avenue, Lilly Township, PA
Complaint filed by Ethan Carney: Hearing Date: January 30, 2015

DECISION

AND NOW, this 30th day of January, 2015, upon hearing testimony from witnesses and reviewing all exhibits, as well as the applicable Lilly Township Zoning Ordinance, the Board hereby finds that the bocce court at issue does not constitute an Accessory Building and, therefore, its location does not violate the twenty (20) foot setback.

In so finding, the Board is reminded of its opinion in Kerwick v. Croson, a case in which Kerwick’s tennis court was required to be relocated outside the setback, even though it was constructed at ground level. In the Kerwick case, we so held because “tennis court” is specifically listed in the Lilly Township Zoning Ordinance as an Accessory Building, which required a setback of no less than twenty (20) feet. In the instant matter, however, “bocce court” is not specifically included in the definition of “Accessory Building.” Further, the Board has little to no experience with bocce courts and, thus, our opinion herein rests solely upon the representations of Mr. Aaron and our Zoning Officer that bocce is not a sport and, thus, the court cannot be construed to be contained within the general definition of “Accessory Building.” We need not perform additional research into this matter, nor look further than the expertise of our Zoning Officer, who has ably guided us for years on other issues of which we had little knowledge, such as this.

At a minimum, the Board believes that the definition of “Accessory Building” is sufficiently ambiguous so as to allow for the reasonable interpretation of the ordinance to allow for the placement of a bocce court consistent with the facts of the instant matter.

ZONING HEARING BOARD OF LILLY TOWNSHIP

Jean Flora, Chairwoman
LILLY TOWNSHIP ZONING ORDINANCE (Excerpts)

Section 101. Definitions.

“Accessory Building.” A subordinate building or construction customarily incidental to, and located on the same lot occupied by the main building. The term Accessory Building includes but is not limited to private garage, barn, a private playhouse, a private greenhouse, a private swimming pool, tennis court, and other structures constructed for the purpose of playing sports or games.

“Setback.” A Setback means the distance from a curb or property line within which a structure may not be erected.

“Structure.” A combination of materials assembled, constructed or erected at a fixed location.

“Yard.” Open space unobstructed from the ground up.

Section 301. “Residential District”

The Residential District is designed to provide a single-family detached dwelling environment with supporting ancillary uses in areas of the community which at present are served by public utilities. Also included are areas generally characterized as contemporary residential developments and those older residential parts of the community in which houses of architectural and historic distinction are to be preserved.

Section 402. “Accessory Building.”

A. Setbacks. Accessory Buildings attached to a principal structure shall meet the setbacks for principal structures. Detached Accessory Buildings shall meet the front yard setback of ten (10) feet, and shall maintain side and rear yard setbacks of not less than twenty (20) feet.
Commonwealth Court of Pennsylvania

Richard and Sandra Albright

v.

Newton Township Zoning Hearing Board
and Newton Township Board of Supervisors

Appeal of: Newton Township Board of Supervisors

MEMORANDUM OPINION

The Newton Township Board of Supervisors (Township) appeals from the Order of the Court of Common Pleas of Lackawanna County (trial court), which granted the appeal of Richard Albright and Sandra Albright (Landowners) from the order of the Zoning Hearing Board of Newton Township (ZHB). The ZHB held that a tennis court that Landowners constructed on their property met the definition of "structure" found in the Newton Township Zoning Ordinance (Ordinance) and, therefore, was required to comply with setback and permitting requirements found in the Ordinance. The trial court, relying upon this Court's decision in Klein v. Township of Lower Macungie, 395 A.2d 609 (Pa. Cmwlth. 1978), concluded that a tennis court is not a structure. The Township argues that the language of its Ordinance is different from the language at issue in Klein and that the trial court failed to give deference to the ZHB's interpretation of the Ordinance.

Sometime prior to October 13, 2009, the Township's Code Enforcement Officer (Officer) visited Landowners' property … and found workers installing a tennis court with an appurtenant stone wall. … Officer informed Mr. Albright that a building permit was required for this construction project, and that the tennis court and wall were subject to setbacks. … Landowners had no permit to construct the tennis court or wall. The tennis court was within ten feet of the rear property line. Counsel for Landowners subsequently sent a letter to Officer, arguing, based on Klein, that the tennis court was not an accessory structure under the Ordinance and was not, therefore, subject to the Ordinance's permitting and setback provisions. The Township responded with the Cease and Desist Letter…. stating the language of the Ordinance differed from the language at issue in Klein and that Landowners must stop construction or use of the tennis court until they complied with the Ordinance's setback and permitting requirements. … Counsel for Landowners appealed to the ZHB, again arguing that, pursuant to Klein, the tennis court was not an accessory structure to which the Ordinance's permitting and setback requirements applied.
During the ZHB hearing, Landowners presented the testimony of Officer as if on cross-examination. Officer testified regarding his contact with Mr. Albright and his visit to Landowners' property. His testimony was not precise regarding the tennis court; however, he did testify that it was within 10 feet of Landowners' property line.

The ZHB issued its decision, finding, with regard to the facts of the case, "the Board is unable to determine the role of the [stone] wall in regards to the tennis court." The ZHB based its decision only on the uncontested evidence that "the tennis court exists, that it is on the residential property, that it is made of macadam at least in part, and that part of it is 10 feet from the rear property line." The ZHB held that the outcome of the case was not controlled by *Klein* because the Ordinance's definitions differed significantly from those at issue in *Klein*. Interpreting the Ordinance, the ZHB held that the Ordinance's definition of "structure" was broad enough to encompass a tennis court. Therefore, the ZHB denied Landowners' appeal from the Cease and Desist Letter.

Landowners appealed to the trial court, which issued its Memorandum and Order. … After noting that ambiguities in zoning ordinances are to be construed in favor of the broadest possible use of the land, the trial court concluded that the facts of the current case were similar to those of *Klein*, given that, as in *Klein*, the Ordinance does not provide specific requirements for tennis courts. The trial court concluded that *Klein* controlled and granted Landowners' appeal. The Township now appeals to this Court.¹

Before this Court, the Township argues that the language of the Ordinance is broad enough to encompass the tennis court as a structure, requiring the tennis court to comply with setback and permitting requirements. The Township argues that the definition of "structure" in the Ordinance is substantially different from, and broader than, the definitions at issue in *Klein* and that the courts should give deference to the ZHB's interpretation of its own Ordinance.

In *Klein*, this Court adopted the trial court's opinion which relied, in part, on an earlier case, *Jones v. Zoning Hearing Board of Lower Merion Township*, 298 A.2d 664, 667 (Pa. Cmwlth. 1972), which held that absent language to the contrary or evidence of specific legislative intent, tennis courts are not structures as that term was generally used in zoning.

¹ “Where the trial court receives no additional evidence, our standard of review is to determine whether the Board committed an abuse of discretion or an error of law.” *Philadelphia Suburban Development Corp. v. Scranton Zoning Hearing Board*, 41 A.3d 630, 633 n.8 (Pa. Cmwlth. 2012).
legislation. In *Klein*, the trial court reviewed a zoning hearing board's determination that, under its zoning ordinance, a tennis court was not a structure required to comply with setback requirements. *Klein*, 395 A.2d at 610. The trial court first considered whether a tennis court was required to comply with setback requirements as an accessory use. *Id.* at 611. The trial court noted that the zoning ordinance explicitly required certain accessory uses to comply with setback requirements; because a tennis court was not enumerated among these uses, the trial court concluded that this provision did not apply. *Id.* The trial court next determined whether a tennis court was a "structure" under the zoning ordinance. In looking at whether a tennis court was a structure, the trial court concluded that it was necessary to read the zoning ordinance definitions of "yard" and "structure" together, particularly with reference to a setback requirement.

In the instant ordinance the term "yard" is defined as "open space unobstructed from the ground up." A "structure" is defined as "[a] combination of materials assembled, constructed or erected at a fixed location including a building, the use of which requires location on the ground or attachment to something having location on the ground." *Id.*

The trial court concluded that "a structure consists of a combination of materials located upon or attached to the ground and which obstructs open space from the ground up." *Id.* Importantly, *Klein* did not hold that tennis courts could not be subject to setback or other zoning regulations; rather, that the ordinance in question, as written, did not include tennis courts as structures that could impinge on a required setback. *Id.* at 609.

It is well settled that "a zoning hearing board's interpretation of its own zoning ordinance is entitled to great weight and deference. Such deference is appropriate because a zoning hearing board, as the entity charged with administering a zoning ordinance, possesses knowledge and expertise in interpreting that ordinance." *Risker v. Smith Township Zoning Hearing Board*, 886 A.2d 727, 731 (Pa. Cmwlth. 2005). Here, the ZHB interpreted the Ordinance, which, as we will discuss, is significantly different from the ordinance at issue in *Klein*, and made an independent interpretation. We must give this interpretation its due weight and deference.
The Ordinance in this case includes a definition of the term "structure" that is different from the definition cited in *Klein*. Section 202 of the Ordinance defines a "structure" as "[a] combination of materials to form a construction for use, occupancy, or ornamentation whether installed on, above, or below the surface of land or water." Under the plain language of this definition, a tennis court is a combination of materials—macadam, foundation material, posts, and net—installed on the surface of the land for use. The conclusion that a tennis court is a structure under the Ordinance is bolstered if, as in *Klein*, we look to other provisions of the Ordinance to inform our interpretation of the term "structure." The Ordinance defines "yard," as "[a]n open unoccupied space which shall extend the full depth or width of a lot and which shall not be occupied by any building." The Ordinance provides that "[a]ll accessory structures shall conform to the minimum yard regulations established for the District." Unlike the definition of "yard" in *Klein*, this definition of "yard" does not require that, in order to intrude upon the yard setback, an occupation of land obstruct space from the ground up. Rather, reading these definitions together, a yard must be open, unoccupied space that is not occupied by a building or other accessory structure. Unlike *Klein*, these provisions, read together, do not mitigate against a determination that the tennis court falls within the plain meaning of the definition of "structure" found in the Ordinance.

Landowners argue that ambiguities in zoning ordinances must be drawn in favor of property owners. *Riker*, 886 A.2d at 731. However, a zoning ordinance is only ambiguous if it is susceptible to more than one reasonable interpretation. *Adams Outdoor Advertising, L.P. v. Zoning Hearing Board of Smithfield Township*, 909 A.2d 469(Pa. Cmwlth. 2006). In this case, we conclude the language of the Ordinance's definition of "structure" is clear and broad enough to encompass a tennis court. While one might read *Klein* and conclude that a tennis court may only be a structure if specifically designated as such by a zoning ordinance, this does not create an ambiguity in the Ordinance. For these reasons, we hold the trial court erred in declining to give deference to the ZHB and holding that *Klein* controlled.
Superior Court of Pennsylvania

Carl E. KEMBEL, Helga Kembel,
Jerry D. Hassinger, Diane M. Hassinger, Paul
C. Nace and Kathryn H. Nace, Appellants

v.

Edwin D. SCHLEGEL, David L.
Schlegel, Vera G. Schlegel and Hegins Valley
Lines, a corporation

Plaintiffs-appellants appeal from the order of the Court of Common Pleas of Dauphin County refusing to enjoin defendants-appellees from operating a transportation business on certain land owned by appellees. Appellants allege that appellees' business violates restrictions in appellees' deed, that it constitutes a nuisance, and that appellants have sustained monetary damage as a result of appellees' business.

The trial court found that in 1950, appellees' father, Raymond Schlegel, constructed a cement building on Lot 47 of the land in question, which he used as a garage to house buses and mail trucks. From that time to the present, this building has been used to park, maintain, and repair buses and trucks used by the Schlegels in their bus transportation and mail delivery business. In 1958, Raymond Schlegel and his wife acquired Lots 44, 45, and 46, which were and are used for the parking of buses, trucks, and automobiles of patrons and employees. In 1963, Raymond Schlegel formed a partnership with his sons, Edwin and David, known as Schlegel Transportation Company (the Company). . . . Between 1965 and 1970, a shelter for the housing of buses was constructed on the northern side of the cement block building previously constructed on Lot No. 47. This shelter partially extends onto Lots 44, 45, and 46. By 1972, the Company had acquired three (3) diesel powered vehicles. From June 1972 to the time of the hearings, the Company has owned between five (5) and eight (8) diesel powered vehicles. During 1979 and 1980, the Company instituted various commuter routes to and from the city of Harrisburg.

* * *

Appellants Carl and Helga Kembel acquired property near the site of the Schlegel Transportation Company in 1959 and 1960. They constructed a residence on this land in 1962. This land is not located within the same plan of lots as the lots upon which appellees' business is conducted.

* * *
The demands of appellees' business, especially the common carrier concern, has required the Company to operate, repair, maintain, and prepare the motor vehicles during late evening and early morning hours, both on weekdays and weekends.

With the exception of periodic complaints from the [appellant] Carl Kembel concerning slight tire damage to the bank located on the western side of his property, and occasional complaints from Kembel concerning noise, the [appellees'] business has been conducted on Lots. Nos. 44, 45, [46] and 47 . . . without interference from any [appellant] or other individual from 1950 as to Lot No. 47 and 1958 as to Lots. Nos. 44, 45 and 46, and no legal action or other legal proceeding has been instituted by any individual to limit or remove the [appellees'] business until the instant lawsuit was instituted. Lower ct. op., 10-22-81, at 11.

On October 11, 1979, appellants filed this action in equity alleging that appellees had breached the restrictive covenants in their deed and seeking to enjoin appellees' operations on the basis of an alleged nuisance. Appellants sought to enjoin appellees from conducting any type of business on any of the lots in question between the hours of 5:00 p.m. and 7:30 a.m. on weekdays, and at any time on weekends. Appellants also sought monetary damages. . . .

[O]n October 22, 1981, the Honorable Clarence C. Morrison issued an opinion and order denying appellants' application for injunctive relief and monetary damages. . . . This appeal timely followed.

* * *

Appellants' remaining issues deal with the lower court's discussion of their nuisance claim:

Did the lower court err in applying improper legal standards to the facts in reaching its opinion regarding the presence of a nuisance and the abatement of the same.

Did the lower court err in its rendition of the standard of proof required to be presented by appellants concerning noise and its effects.

Did the lower court err in rendering an opinion concerning the nonexistence of a nuisance against the weight of evidence.

* * *

First, we believe that appellants' complaint alleged a private nuisance and not a public nuisance as stated by the trial judge. Lower ct. op., 10-22-81, at 12. In Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954), the Pennsylvania Supreme Court adopted section
822 of the Restatement (Second) of Torts FN3 as the test to determine the existence of a private nuisance. That section provides as follows:

FN3. We recognize that the Moffat court actually adopted the version of § 822 that appeared in the first Restatement of Torts. The substantive differences between the two versions, however, are minimal. Thus, we will refer to Restatement (Second). (citation omitted)

§ 822. General Rule

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

(a) intentional and unreasonable, or
(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

The Restatement defines the extent of the invasion necessary to incur liability as follows:

§ 821F. Significant Harm

There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose.

The Comment to this section further explains the meaning of “significant harm:”

c. Significant harm. By significant harm is meant harm of importance, involving more than slight inconvenience or petty annoyance. The law does not concern itself with trifles, and therefore there must be a real and appreciable invasion of the plaintiff's interests before he can have an action for either a public or a private nuisance.... In the case of a private nuisance, there must be a real and appreciable interference with the plaintiff's use or enjoyment of his land before he can have a cause of action.

* * *

When [the invasion] involves only personal discomfort or annoyance, it is sometimes difficult to determine whether the invasion is significant. The standard for the determination of significant character is the standard of normal persons or property in the particular locality. If normal persons living in the community would regard the invasion in question as definitely offensive, seriously
annoying or intolerable, then the invasion is significant.

Thus, the standard to be applied instantly is whether or not the appellees' business would cause “significant harm” to a person of “normal” or reasonable sensitivities.

In its opinion, the trial court stated:

While the defendants' business may have aesthetical shortcomings, it is nonetheless, a legal business with respect to which the creation of some noise and interference to neighbors will be inevitable, but which is not inherently injurious to the health of the public . . . . The issue is not whether the business creates noise or odors but whether the noise or odors created are of an injurious level. The plaintiffs have presented no calculated readings to establish whether the noise or fumes are at a level that is environmentally unsafe or injurious to health, i.e., decibel readings of noise or readings of environmental pollution directly related to the business. A Court of equity must demand an extremely clear case of unquestionable injurious conduct or interference which has been unnecessarily created in the operation of an activity which is of little if any benefit to the general public. Lower ct. op., 10-22-81, at 20.

It is clear that appellees' actions need not be injurious to health in order to be classified as a nuisance. See Smith v. Alderson, 262 Pa.Super. 387, 389, 396 A.2d 808, 810 (1979) (a nuisance may be found where there is an “unreasonable, unwarrantable, or unlawful use by a person of his own property which causes injury, damage, hurt, inconvenience, annoyance or discomfort to one in the legitimate enjoyment of his reasonable rights of person or property.”) (emphasis added). We are satisfied that the trial court used the term “injurious” as the equivalent of “significantly harmful.”

We find that the facts as reiterated in the trial judge's opinion are supported by the record. It is for the trier of fact to determine whether there was a significant invasion of appellants' enjoyment of their property, and, if such an invasion existed, whether the invasion was unreasonable. We are certain that the trial court applied the proper legal standard i.e., was there an invasion of appellants' enjoyment and use of their property such that it would cause “significant harm” to a “normal” or reasonable person. The trial court found no nuisance to exist and under the facts of this case, we agree.

Order affirmed.
**Instructions**

The performance test is designed to test an applicant’s ability to perform the legal task that has been assigned using the factual information contained in the File and legal principles that are provided in the Library.

The File contains the only factual information that you should consider in performing the assigned task. The task to be completed is set forth in the first document in the File in the form of a memorandum to the applicant. The Library contains the only legal principles that you should consider to complete the assigned task. Although your general knowledge of the law may provide some background for analyzing the problem, the factual information contained in the File and the legal principles contained in the Library are the only materials that you should use in formulating your answer to the assigned task.

Your response should be written or typed in the correct answer screen or book that has been provided. Be sure to allow sufficient time for reading the materials, organizing your answer and completing the task assigned. Your answer should demonstrate an understanding of the relevant facts, recognition of the issues and the applicable principles of law and the reasoning that supports your answer. Your grade will be based on the content of your response and your ability to follow instructions in performing the assigned task.

The events depicted and the persons portrayed by the information in the File are fictitious and such information does not depict nor is it intended to depict or portray any actual person, company or occurrence. Any similarity to any person, living or dead, or any occurrence is purely coincidental.
The applicant is assigned to draft a memorandum to the managing partner answering questions posed during a client meeting concerning a zoning violation and a question of nuisance.

In addressing the questions, the applicant must identify the relevant facts from the managing partner’s notes from a client meeting, and analyze them in the context of the provided Library, which contains caselaw and zoning ordinance sections.

**Format**

Following directions concerning formatting is an important skill of every lawyer. The applicant is expected to follow the directions provided concerning the format of the memorandum, and to answer each question in the order presented.

**Will the Appeal of the Zoning Board’s Determination be Successful?**

The applicant is asked to provide an opinion concerning whether the client’s appeal of a decision by the Zoning Hearing Board to the Court of Common Pleas will be successful.

Both the Zoning Officer and the Zoning Hearing Board concluded that the bocce court is not an Accessory Building that is subject to the setback set forth in the Ordinance.

The standard of review of a zoning decision by an appellate court where the trial court received no additional evidence is to determine whether the Zoning Hearing Board committed an abuse of discretion or error of law. *Albright v. Newton Township Zoning Hearing Board.*

The memorandum from the managing partner to the applicant indicates that the standard of review by the Court of Common Pleas in reviewing a decision of the Zoning Hearing Board is the same as the standard of review for appellate courts reviewing zoning decisions by the courts of Common Pleas.

The Zoning Hearing Board abused its discretion and/or committed error of law in concluding that the bocce court was not an accessory building subject to the setback requirement because the definition of “Accessory Building” in the ordinance includes not just the enumerated structures, but also structures used for sports or games; the ordinance is not ambiguous in this regard; and based on the facts, bocce would be considered to be a game even if it were not considered to be a sport.

A detached accessory building must be set back 20 feet from the side yard property line. *Ordinance Section 402*

An accessory building includes any structure constructed for the purpose of playing sports or games. *Ordinance Section 101*
A structure is a combination of materials assembled, constructed or erected at a fixed location. *Ordinance Section 101*

A yard is open space unobstructed from the ground up. *Ordinance Section 101*

The bocce court is made up of compacted sand poured over a bed of gravel that is surrounded by 4x4 beams ranging in height from 4 to 12 inches.

When reading the definitions of “structure” and “yard” together, the bocce court would be considered to be a “Structure” under the Lilly Township Zoning Ordinance, as it is “a combination of materials assembled, constructed or erected at a fixed location” that “obstructs open space from the ground up.”

The bocce court would be considered to be an “Accessory Building” under the Lilly Township Zoning Ordinance, as it is a “structure” “constructed for the purpose of playing sports or games.” Under the facts, bocce would be considered to be a sport or game because players compete against each other pursuant to established rules by rolling larger balls toward a smaller ball at the other end of the court, and bocce tournaments involve spectators cheering on their favorite team.

The bocce court should have been set back 20 feet from the property line between Carney's and Aaron's property but was only set back 2 feet.

Counsel for the Board might argue that a zoning hearing board’s interpretation of its own zoning ordinance is entitled to great weight and deference and should be upheld by the Court. See *Albright v. Newton Township Zoning Hearing Board*.

The rationale for giving deference to a decision by a Zoning Hearing Board is because the Board, as the entity charged with administering the ordinance, possesses knowledge and experience in interpreting that ordinance. *Albright v. Newton Township Zoning Hearing Board*.

Here, the Board's decision should not be entitled to deference or great weight because the Board did not exercise its own knowledge or experience; instead it relied solely upon the representations of Mr. Aaron and the Zoning Officer that bocce was not a sport in rendering its decision that the bocce court was not an accessory building unlawfully located within the setback.

Counsel for the Board might also argue that the zoning ordinance is ambiguous as to what constitutes a sport or game.

Ambiguities in zoning ordinances must be drawn in favor of property owners. See *Albright v. Newton Township Zoning Hearing Board*.

A zoning ordinance is ambiguous if it is susceptible to more than one reasonable interpretation. *Albright v. Newton Township Zoning Hearing Board*.

The Zoning Ordinance provides that “other structures constructed for the purpose of playing sports or games” are considered Accessory Buildings subject to a twenty (20) foot setback.
There is no ambiguity in the Ordinance with respect to the fact that structures constructed for the purpose of playing sports or games are subject to the setback, and the definition of "accessory building" in the Zoning Ordinance, when reasonably construed, is clear and broad enough to include a bocce court as an Accessory Building that is subject to the setback because based on the facts bocce is clearly a sport or game.

The memorandum should include a conclusion that the Zoning Hearing Board’s decision will likely be overturned.

**Can the Client Bring a Successful Suit for Nuisance**

The applicant is asked to determine whether Mr. Carney can successfully sue Mr. Aaron for creating a nuisance as a result of the noise and light from the bocce tournaments.

A nuisance may be found where there is an unreasonable use by a person of his own property which causes injury, damage, hurt, inconvenience, annoyance or discomfort to one in the legitimate enjoyment of his reasonable rights of person or property. *Kembel v. Schlegel*

One is subject to liability for a private nuisance if his conduct is a legal cause of an intentional and unreasonable invasion of another's interest in the private use and enjoyment of land. *Kembel v. Schlegel*

To be liable for nuisance the invasion of another's interest in the use and enjoyment of his land must cause significant harm of a kind that would be suffered by a normal person in the community. *Kembel v. Schlegel*

To constitute significant harm, the harm must involve more than slight inconvenience or petty annoyance and there must be a real and appreciable interference with the plaintiff's use or enjoyment of his land. *Kembel v. Schlegel*

The invasion is significant if normal persons in the community would regard the invasion as definitely offensive, seriously annoying or intolerable. *Kembel v. Schlegel*

The bocce tournaments are held four (4) nights per week, and take place from 8:00 P.M. well into the early morning hours. The players and spectators number between 70 and 100 on any given night, who are rowdy, and they cheer, boo, and shout throughout the bocce matches.

In addition to the noise, Mr. Aaron illuminates his bocce court for the tournaments using 32,000 watts of industrial lights, mounted on four (4) poles, all of which shine toward and light Mr. Carney’s entire yard, and yards up to ½ mile away.

The noise and light invading Mr Carney's interest in the private use and enjoyment of his land was intentional and would likely be found to be unreasonable.

The parties live in a traditional residential neighborhood. There is no evidence of any other sports facilities located in the neighborhood, and none that would accommodate 70 to 100 people with industrial lighting that illuminates a yard ½ mile away.
The fact that this is a residential neighborhood, and the activities are carried out late at night and into the early morning hours, should lead the applicant to conclude that a normal person in the community would regard the light and noise as offensive, annoying and intolerable.

The noise and light are having two effects on Mr. Carney: 1) he is no longer able to engage in his favorite hobby of astronomy; and 2) his health is suffering as a result of his inability to sleep for more than three hours on each of the four nights per week on which the bocce tournaments are played.

Although the loss of Mr. Carney’s astronomy hobby may not be sufficient grounds to claim that Mr. Aaron is carrying on a nuisance with the light and noise, the fact that Mr. Carney’s health has been adversely affected by the bocce tournaments would likely be found to constitute significant harm.

The intentional and unreasonable invasion of Carney's interest in the private use and enjoyment of land by the exposure to excessive noise and illumination late into the night and the early hours of morning four nights per week is likely to be found to constitute a nuisance.