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Performance Test: Sample Answer

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

Our firm has been retained by Ethan Carney who is involved in a dispute with his next-door neighbor. The following is a memorandum of law detailing my conclusions as to two specific legal questions Mr. Carney has asked our firm to research.

(1) Issue: Mr. Carney's likelihood of success in appealing the zoning Board's determination that Mr. Aaron's bocce court does not violate the setback requirement of the Lilly Township ordinance.

On appeal the decision should be overturned if the zoning hearing board committed an abuse of discretion or an error of law (Albright). Mr. Carney would be very likely to succeed in an appeal of the zoning board's decision as the bocce court does in fact fall into the unambiguous definition of an accessory structure and does not conform to setback guidelines.

The Lilly Township zoning ordinance in question provides for side yard setbacks of not less than twenty feet for detached accessory buildings. Under the ordinance accessory buildings are a subordinate building or construction located in the same lot. This includes but is not limited to swimming pools, tennis courts and other structures constructed for the purpose of playing sports or games. Under the ordinance a structure is a combination of materials erected at a fixed location. Ambiguities in zoning ordinances are to be construed in favor of the broadest possible use of the land. (Albright) A zoning ordinance is only ambiguous if its is susceptible to more than one reasonable interpretation. (Adams)

According to the court in Risker, a zoning board's interpretation of its zoning ordinance is entitled to great weight and deference because it possesses knowledge and expertise in interpreting that ordinance.

The zoning Board's decision rests on the fact that bocce court is not specifically included in the definition of accessory building and defers to the judgment of the zoning officer as to whether it constitutes a sport. The bocce court Mr. Aaron built is within two feet of the property line, not in compliance with the setback requirement for accessory structures. It includes 4x4 beams layered around the court twelve inches high that are permanently set in place with spikes that go down into concrete footers. The bocce court also has a particularly constructed playing surface of compacted sand and gravel. This is clearly a permanent structure because it is a combination of materials constructed above the ground, located on the same lot as the main building. The term accessory building is broad, but not necessarily ambiguous. It lists examples of what are considered accessory structures but that list is not meant to be exhaustive. There is no susceptibility to multiple meanings upon a plain reading of the ordinance. A structure constructed for the purpose of playing sports or games is included. It specifically included tennis.
courts and structures constructed for the purpose of playing sports and games. Again there is not any clear ambiguity in this statute. There is ambiguity in the definition of "sport" as it is not given, however what the ordinance covers is broader than that. Regardless of the definition of sport, a reasonable person would find that bocce as described is a game. There are players on either side, rules and a goal to achieve in order to win. The bocce court need not be a structure for the purpose of playing sports in order to be an accessory building. The enumerated examples list a tennis court, which is similar in many ways to a bocce court.

Mr. Aaron's addition of grandstands and lights and tournaments would strongly support the classification of bocce as a sport, but such additional factual evidence would not be admissible on appeal.

The zoning board is likely to argue that it is entitled to great weight and deference. However the rationale for that deference is the zoning board's experience and expertise. The board in the very opinion acknowledges its lack of experience and expertise in this area and admits its ruling is based on the recommendation of a non-board member. The board is also likely to invoke the maxim that zoning statutes should be interpreted in a way to allow for the broadest possible use. However there is no need for a broad interpretation when the criteria is clear. There simply is not the same ambiguity as was present in the Kerwick case.

Therefore, Mr. Carney would likely be successful on appeal as the court would find the Zoning Board's reading of the statute was incorrect and that it need not be afforded deference where it admittedly lacked knowledge and expertise in this area.

(2) Issue: Mr. Aaron’s liability for nuisance as a result of the noise and light from the bocce tournaments.

Mr. Carney is likely to be successful if he sues Mr. Aaron for private nuisance. To establish a cause of action for private nuisance, Mr. Carney will need to show that by intentional and unreasonable conduct of another, there was an invasion of his interest and private enjoyment of his land, such that he suffered a significant harm. (Kembel v. Schlegel). To determine if a harm is "significant," courts apply an objective test, looking at what a person with reasonable sensitivities living in that community would regard as "definitely offensive, seriously annoying, or intolerable." (Id.) A significant harm requires a real and appreciable invasion of Plaintiffs' interests. (Id.)

In the case here, Mr. Aaron has installed bleachers and twenty feet tall lights next to the bocce courts for use during bocce tournaments. The tournaments are held four nights a week with sometimes up to a hundred people playing and spectating. These tournaments last from 8:00 PM until early in the morning. The lights face Mr. Carney's property and are so bright as to illuminate yards half a mile away and make Mr. Carney's yard look like it is mid-day in the dead of night. They also shine directly into Mr. Carney's house. Up to a hundred people come to the tournaments and they are very rowdy and loud. When these tournaments are occurring, the lights and sounds prevent Mr. Carney from getting his accustomed eight hours of sleep; rather he can only sleep from 3:00 AM to 6:00 AM. As a result of the sleep deprivation, Mr. Carney's health has suffered.
Mr. Carney is able to establish each element for a private nuisance claim. Mr. Aaron's conduct in putting up bleachers and lights and hosting tournaments that last all night four nights a week is intentionally done and unreasonable for a residential area. Mr. Carney will show that Mr. Aaron's actions constitute a significant harm as a reasonable person in the community would regard the nightly bright lights and loud sounds of the tournaments as "definitely offensive, seriously annoying, or intolerable." Supporting this argument for significant harm is the fact that Mr. Carney is unable to get enough sleep as a result of the tournaments, and his health is suffering. No reasonable person would find that tolerable. Also supporting his claim is that Mr. Carney already owned and resided on his property before Mr. Aaron constructed the bocce court. While the timing factor is not dispositive, it does help Mr. Aaron's case that he did not move to the nuisance. Less helpful to his claim is Mr. Carney's interest in stargazing, unless he can show that regular stargazing is something a reasonable person in the community would find important.
Question No. 1: Sample Answer

1. The voice mail message and the unsigned codicil will not affect the distribution of Roger's estate because a will or codicil must be in writing and be signed by the testator.

   In Pennsylvania, a will is created by a person with testamentary intent and capacity in a signed writing. Video recordings or voice mail do not qualify as a will or will modification as they are not written. A testator may modify his or her will through a codicil. A codicil is effective when it is made in writing by the testator and signed.

   Here, Roger has testamentary intent in both the voice mail message and the unsigned codicil. He specifically states in the voice mail that he wants to leave Ted the additional college tuition in his will. However, the voice mail message will not have any effect on the distribution of Roger's estate because it was not in a signed writing but rather is an oral message. Therefore, it will not constitute a will modification. The unsigned codicil will not allow Ted to receive his remaining balance of the promised tuition. While the codicil was made under the direction of Roger and exhibited testamentary intent through the gift to Ted, it remained unsigned. Therefore, neither the voice mail message or the unsigned codicil will have any effect on the distribution of Roger's estate.

2. The issue is how should Roger's estate be distributed.

   The general rule is that a subsequent born child will be permitted to take his or her share of the decedent's estate unless there was specific contemplation and statement in the will to the contrary.

   Here, Roger's will is silent to the possibility of subsequently born children. Ted, although an illegitimate child born outside Roger’s marriage, is still a subsequent born child. There was also evidence to indicate that Roger wanted to include Ted in his will by phoning Larry and indicating that he wanted to add a specific devise of $30,000 to Ted for the purpose of paying Ted's college tuition. Larry even created a codicil to match the request of Roger to include Ted in Roger's will.

   However, the codicil was never executed and therefore, Ted, as a subsequent born child would be entitled to a share of Roger's will as provided by statute. The distribution of the estate would follow the initial will of Roger to Betty who would still get 2/3 of the estate and Dennis and Ted would split the remaining 1/3 and get 1/6 each.

3. Larry's conduct in regards to Roger's voice mail and the revision of Roger's will violated the Rules of Professional Conduct.

   The Pennsylvania Rules of Professional Conduct provide that an attorney has a duty to maintain an open line of communication between himself and his client. Furthermore, there is a duty of diligence that an attorney has in regards to his client. An attorney is to act with diligence in advocating for his client.
Here, Roger initially called his attorney Larry to make an amendment to his will. Larry, as the facts show, did not reply to Roger's initial phone call. He hadn't replied in three weeks. Roger had to call him back. Furthermore, upon calling Larry again, Roger was told that his request could not be fulfilled because his attorney Larry was too busy. Because Roger's phone calls were not returned, Larry did not maintain an effective and sufficient line of communication between himself and Roger. As a result he is in violation of the Rules of Professional Conduct because he breached his duty to his client to maintain that line of communication. Furthermore, because Larry told Roger that he was too busy to prepare the codicil to the will prior to Roger's vacation, he has also breached his duty of diligence to his client. In this instance given the importance of the codicil, if Larry was too busy and working on other matters, he should have made his client aware of that to give him the opportunity to seek counsel who would be diligent to his matter. Because of his failure to act in a diligent manner for his client, Roger's will was not properly amended. Therefore, Larry is in violation of the Rules of Professional Responsibility in regards to the phone call that he did not return, and the revision that was not properly made in a timely manner.

4. Ted will exclude the $10,000 given to him by Roger on his 2014 federal tax return because it was a gift. In 2015, Ted will exclude the $10,000 scholarship because it was applied directly to his tuition and will include the $5,000 scholarship in his income as a payment for services rendered. Ted will recognize these amounts in the appropriate year based upon when he received the cash.

A gift is excluded from gross income. A payment is considered a gift if it is given out of good will and generosity. A scholarship is not included in gross income if it is for tuition and related fees. However, a scholarship is a part of gross income when it is offered in exchange for services (such as work study and research). A cash-basis taxpayer recognizes income when he receives it and recognizes expenses when he pays them.

Here, Ted will not recognize income in his 2014 federal income tax return for the $10,000 gift that Roger gave him for tuition. Roger spontaneously gifted Ted the money out of good will and generosity because he was impressed with his new son. In 2015, Ted will recognize $5,000 in gross income and will exclude $10,000. The $10,000 is excluded because the scholarship was for tuition purposes. The $5,000 will be included because it was awarded in exchange for Ted to work 25 hours per week by performing research and assisting professors (and receiving payment at the normal hourly rate for students through the 15-week semester). The $5,000 has the appearance of funds paid in return for services due to its payment in biweekly installments upon performance of the required work.
Question No. 2: Sample Answer

1.) Other than defamation and commercial disparagement, GMC should file a tortious interference with prospective business relations claim against Tom.

Pennsylvania recognizes the tort of interference with prospective business relationships. An individual may be held liable for tortious interference with prospective business relationships where he is aware of a prospective business or contractual relationship, takes actions with the intent to impede or ruin that prospective relationship, the prospective relationships are impeded as a result, and the type of behavior engaged in does not fall under an acceptable privilege.

Here, Tom was clearly aware of the prospective contractual relationships between GMC and other tenants, because he watched for them to be shown vacant apartments and attended open houses. Thus, he knew that the individuals who he targeted were potential tenants at GMC's building.

Second, Tom took intentional actions to interfere with the prospective contracts between GMC and the tenants when he told them "negative things about the apartment building that were not entirely true" and "made every effort to speak to as many of the open house attendees as possible to discourage them from entering into a lease with GMC.

Third, Tom's actions were intentional. This is evidenced by his affiliation with a radical group that believed in and supported actions, to reduce corporate profits, with a purpose of bringing about the dissolution of large companies, such as "Gigantic Mega Corp," which owned the building. Moreover, Tom's actions were done specifically to discourage potential tenants from moving into the building.

Fourth, Tom's actions actually impeded GMC's relationship with prospective tenants because GMC suffered a substantial decline in the rental rate and an increased number of vacancies.

Finally, Tom was not privileged in his actions. To be privileged an individual must be acting in an acceptable manner such as for a valid business reason. Here Tom told lies about GMC and his only reason was to act on his beliefs regarding large corporate companies, which is not a valid business reason.

2.) GMC should file Preliminary Objections as to improper service and to strike out the comment regarding GMC being a money-grabbing corporate atrocity as immaterial.

Pursuant to the PA Rules of Civil Procedure, certain defenses may be raised in preliminary objections. Pursuant to the PA Rules of Civil Procedure, an out-of-state defendant can be served by certified mail. If a defendant is domiciled in the Commonwealth of Pennsylvania, they MUST be personally served by the sheriff. GMC is incorporated in the Commonwealth of Pennsylvania and is domiciled in Pennsylvania and therefore must have a
director or authorized agent personally served by the sheriff. Improper service should be raised in Preliminary Objections and a court will find that service was improper.

Any averments that are scandalous and immaterial in a Complaint can be struck via objection in the preliminary objection if the statement is immaterial and only there for controversial purposes. Since the fact that GMC is an alleged "money-grabbing corporate atrocity" does not go to any elements of the case and is included to attack or create controversy, a court will find that the statement must be struck.

3.) The issue is what intentional tort claim GMC might be able to file against Jerry and on what basis that claim can be included in the lawsuit Jerry filed against GMC.

GMC should attempt to raise a tort claim for fraud, and possibly trespass. Trespass occurs where a defendant intentionally enters the property of another without permission or consent. Here, the facts tell us that Jerry lied about his disability in order to gain access to a first floor apartment. Presumably there was a lease and Jerry could argue that he had permission under the lease terms to be in the first floor apartment; however, GMC could argue that Jerry's lies concerning his disability eliminates any actual consent or permission that GMC otherwise would have granted. GMC might have a stronger case for fraud, fraudulent misrepresentation, or fraudulent inducement. Such fraud claims require a showing that the defendant through lies or deceit on a material matter induced the plaintiff to act in a certain way and sustained damages as a result. Here, Jerry lied about his disability, resulting in GMC leasing an apartment to him that would otherwise have been available for another tenant at a reduced rate from other apartments.

GMC can raise any valid claim as a counterclaim in its answer to Jerry's complaint in negligence. In Pennsylvania, any claim or counterclaim may be asserted by a defendant in his or her answer to the plaintiff's complaint. Thus, GMC should file a counterclaim against Jerry in its answer.

4.) Attorney Wiley will be able to offer evidence of two prior accidents involving falls on the rear steps of the apartment. Attorney Wiley must argue that these are substantially similar occurrences and therefore are relevant to Jerry's action at trial to prove GMC had notice of the poor condition.

Relevant evidence is any evidence that tends to make a fact or consequence more or less probable. Not all relevant evidence is admissible. Under the Pennsylvania Rules of Evidence, the probative value of the evidence must outweigh any prejudicial effect. Evidence that shares similar circumstances and facts can be admissible under certain circumstances. Evidence of similar occurrences can be introduced to show that the defendant had notice of the issue from prior complaints and failed to act to improve the conditions.

The evidence of the two prior accidents involving falls on the rear steps of the apartment are relevant to Jerry's case. Attorney Wiley must prove that the prior accidents occurred because of similar circumstances to that of Jerry's, particularly the uneven concrete. In addition, Attorney Wiley must argue that GMC was aware because of the prior complaints and accidents on the same rear stairwell of the apartment building.
Despite GMC's objection on grounds of relevancy, if Attorney Wiley shows the similarity of the accidents he will be able to offer evidence of the two prior accidents in order to show that GMC had notice of the uneven concrete condition and failed to act to fix it.
Question No. 3: Sample Answer

1. What criminal charges should have been brought by the police against Harry relative to the incident in the Restroom?

Assault

Harry could have been charged with the criminal charge of assault. A defendant is guilty of assault if he intentionally, knowingly or recklessly causes bodily injury to another human being, or if he acts or makes an intentional statement to place another human being in fear of imminent serious bodily harm. Simple assault is any act that satisfies the above definition of assault.

Here, Harry followed Mo into the bathroom and pulled out a handgun and pointed it at Mo's head. He then threatened him by telling Mo he was "going to teach [Mo] a lesson by putting a bullet in [Mo's] head." Although no actual contact was made, Harry's actions satisfy the elements of assault in that he placed Mo in fear of imminent serious bodily harm, because Mo was not aware that the gun was not loaded and a reasonable person would be placed in fear of imminent serious bodily harm if a gun was pointed at his or her head.

Terroristic Threats

Harry could have been charged with the crime of making terroristic threats. In this context, a defendant would be guilty of making terroristic threats if he makes a threat to commit a crime of violence with the specific intent to terrorize the victim.

Here, Harry followed Mo into the bathroom after Mo insulted Louise, Harry's wife. In the bathroom, he pointed a gun at Mo's head and told him that he shouldn't have talked to his "gal" that way and that he was going to teach Mo a lesson by putting a bullet in Mo's head. In doing so, Harry threatened to commit a crime of violence, and although the gun was not loaded, the evidence is sufficient to establish that Harry's intent was to place intense fear in Mo (i.e. to terrorize him). The fact that Harry knew his gun was not loaded lends support to the idea that his intent was not to actually kill Mo, but rather to terrorize him by making him believe Harry was about to commit a homicide on Mo. Therefore, Harry should have been charged with making a terroristic threat against Mo.

2. Harry should object that the evidence the Prosecutor wishes to present is per se inadmissible as it is part of a withdrawn guilty plea and plea bargaining. Under the rules of evidence, withdrawn guilty pleas and any statements made in connection to the guilty plea, be it part of the bargaining process or the plea itself, is never admissible in court. It cannot be used as substantive evidence. The court should sustain the objection and exclude from evidence the withdrawn guilty plea and specific admissions made during the plea.
3. Louise and Harry's Divorce

(a) No Fault Divorce: Irretrievable Breakdown

The issue at hand is what kind of divorce Able should advise Louise to file.

A party filing for divorce may file a no fault divorce for an irretrievable breakdown in the marriage if both parties agree that the marriage is irretrievably broken and the differences cannot be resolved.

Here, Louise and Harry both agree that there is no hope to save the marriage and they agree to get divorced. Since they both agree that the marriage is irretrievably broken, they can file for a no fault divorce.

(b) File Divorce in 6 Months

In order for a court to have jurisdiction over domestic matters, such as divorce, alimony, or child support or custody, one party must be domiciled in Pennsylvania and must be a bona fide resident at least 6 months prior to filing. A party is domiciled in a place that they reside with the intent to remain there indefinitely.

Here, Louise left Texas and moved back to live in C County, Pennsylvania permanently on November 5, 2014. After 6 months (May 5, 2015), she will be a bona fide resident of C County, PA for 6 months. She can file for divorce at that time.

(c) Proper Venue

The final issues are where the proper venue is for filing for divorce, and whether Louise can file the divorce in D County and under what circumstances.

Venue is proper against an individual in a county where the party resides, or where the parties consent. If the parties agree to a different venue to file the action, it can be filed there.

Here, Louise is domiciled in C County. Harry is not domiciled in Pennsylvania, but domiciled in Texas. Therefore, venue would be proper in C County, PA. However, if Harry responds without objecting to improper venue or if Harry agrees or consents to filing in D County, his objections will be waived, and Louise may file it in C or in D County.

Accordingly, the divorce should be filed by Louise in C County, however, if Harry consents to venue in D county or waives his right to object, it can be filed in D county.
Question No. 4: Sample Answer

1. In regards to the constitutional challenge, Global Cell Phone Company will argue that the State Y Consumer Electronics Safety Law violates the Supremacy Clause of the U.S. Constitution. Pursuant to the Supremacy Clause, federal law is the "law of the land" to the extent there is conflicting state law. Here, the federal law expressly provides that no state or local government may regulate RF emission standards. The State Y law is in conflict with the federal law as the State Y law attempts to regulate RF radiation emissions. It appears that the federal law is express preemption as it expressly directs that only the federal government may regulate in the area of RF emissions from cell phones. The federal law preempts the State Y law.

2. First, the plaintiff has the burden of making a prima facie showing of discrimination. Specifically, for religious protection, the plaintiff must show (1) the plaintiff had a bona fide religious belief that interfered with his or her ability to comply with the terms of employment, (2) the employer was aware of that religious belief, and (3) the employer acted adversely towards the plaintiff.

   Once the plaintiff has made a prima facie showing sufficient to establish his or her burden, the burden shifts to the defendant (employer) to show that the defendant was unable to accommodate the plaintiff's religious belief because it would have been unduly burdensome.

   Here, based on the facts provided, Beverly has a good likelihood of success. She can show that she was a member of a protected class. Religion is a protected class under Title VII. Second, she can show that the defendant took adverse action by showing that she was terminated. And third, she can show that the reason for the adverse action was due to her religious belief. She had informed the Company of her religiously-mandated observance of the Sabbath and the Company had rejected her request to accommodate her beliefs. Thus, Beverly can easily make out a prima facie case.

   The Company will likely argue that accommodating Beverly's request would have resulted in an undue burden. Specifically, it may argue that it might cause complaints among employees. However, the complaints are speculative, and it is unlikely that employee complaints are so unduly burdensome as to justify rejection of all of Beverly's recommended options. Second, a court will likely find that the Company could have easily placed Beverly in a different shift. The burden of having to deal with a few extra employee complaints likely does not outweigh the plaintiff's religious observation in this case.

3. The issue is if Carl's attorney filed a timely Motion to Intervene in Beverly's lawsuit, how should the court rule on Carl's motion?

   If the court finds that the procedural requirements to intervene have been met and Carl's case is substantially related to Beverly's claims and actions against Company then the court would permit the cases to be joined as they relate the same subject matter and claims.
In this case it would be necessary for Carl and his attorney to show that the elements and claims of their case for religious discrimination are the same or so similar to those of Beverly that it would be prudent to join the cases together. Carl joined Beverly's church and by joining has demonstrated that he likely possesses the sincere beliefs similar to Beverly. Carl has also suffered a similar adverse action based upon the religious beliefs similar to Beverly. Therefore, Carl should be permitted to Intervene and join the lawsuit along with Beverly in the interest of judicial efficiency.

4. The Company can object on several bases - (1) privilege, (2) irrelevance, (3) overbroad, and (4) unduly burdensome. Specifically, the Company can seek a protective order from the court on these bases.

The scope of discovery, however, is broad. Generally, any information that could lead to the discovery of relevant information is discoverable.

The Company may argue that the request is overbroad and unduly burdensome. It will likely argue that producing 10 years’ worth of files is too burdensome and unlikely to reveal information relevant to the present claim. Here, Beverly is claiming that she was wrongfully terminated for actions that began approximately two months ago. Therefore, a fishing expedition, such as this one, will likely not be allowed by the court. The court is likely to grant the Company's objection based on over breadth and being burdensome. Beverly will likely be able to narrow the scope of the production sought.

Furthermore, the Company will likely succeed in its objection for over breadth regarding the performance evaluation and disciplinary files for the supervisors. It is unlikely that those files would contain any relevant information or information that would lead to relevant information. Additionally, the records requested included medical records that might be considered confidential and should be excluded from discovery.
Question No. 5: Sample Answer

1. The Court should rule in favor of Andy and order Bob to return the 50,000 cash deposit.

   In Pennsylvania, a seller of land is required to provide marketable title at closing. Marketable title is title that is reasonably free from suspicion of defects, potential litigation, or claims of right to the land by others. Land that has been adversely possessed is not marketable until a court decree to quiet title has been obtained. Time is of the essence clauses give a presumption that any breach of the closing date of the contract is a material breach and relieves the party from performing.

   Here, the contract between Andy and Bob contained a time is of the essence clause for February 1, 2015. The purchase was for two lots, Lot A and Lot B. A day before closing, a title search revealed that there was no record of conveying Lot B to Bob. Bob admitted that he did not have the deed, but was confident that he had adversely possessed the land. Bob asked for a postponement but Andy did not want to postpone the closing and asked for his deposit to be refunded. Bob refused and neither party showed up to the closing. Bob eventually won his action to quiet title on the land after the scheduled closing.

   The Court should rule that the time is of the essence clause prohibited Bob from moving the closing date. This is because a time is of the essence clause requires the parties to perform by that date, and if performance is not complete it is considered a material breach allowing the other party to not perform. On Feb. 1, 2015, Bob was unable to provide marketable title because he did not have the deed to lot B and did not have a court order authorizing his quiet title action. Because Bob was unable to provide marketable title at the closing date, he breached the contract.

   Thus, the Court should conclude that Bob breached the sale agreement, and Andy is entitled to have his 50,000 returned.

2. A contract was not formed between Charlie and Andy.

   A contract requires consideration and the mutual assent of the parties. A contract forms when one party makes an offer and the other party accepts within a reasonable amount of time. Not every statement is an offer, it must contain all the material terms under common law. Some statements are merely an invitation to solicit an offer. The common law mirror image rule states that an acceptance must perfectly match an offer in its terms if it to be effective. If an "acceptance" contained different terms it is treated as a counter offer. A counter offer extinguishes the previous offer. An offer may be accepted in a reasonable time if not revoked unless a specific expiration date is expressed by the offeror.

   The initial email Andy sent on December 1, 2014 to Charlie did not constitute an offer but was a mere invitation as it did not include material terms. Charlie's email back on December 2 constituted the first offer. Andy's reply stated "not the ale profits" so it did not satisfy the mirror image rule and was in fact a counter offer. That counter offer by Andy had an expressed expiration of January 1, 2015. Charlie attempted to agree to that counter offer on January 2,
2015 after the offer was no longer valid. The expressed expiration date of the offer meant that it could no longer be accepted, and there was no mutual assent and no meeting of the minds.

Therefore, a valid contract was never formed between Andy and Charlie.

3. The statute of frauds defense would likely not be valid for Charlie to defend against Donna's suit.

The statute of frauds covers several areas of law, requiring that a writing be present. One of the areas of law covered is the sale of real estate. To satisfy the statute of frauds, there must be a writing, signed by the party to be charged. The parties, the property, and the price need to be identified in the writing. The intent behind the statute of frauds is to prevent fraudulent assertions in dealings by requiring a writing to act as the express intention of the parties.

Here, the facts indicate that Charlie wrote on two napkins December 31, 2014, 10:30pm, Donna to buy Charlie’s house at 6175 Hocker. On the second napkin, he wrote, "Drive, Smallville, PA, for 100,000 cash. 30 day closing. Charlie. There is no formal requirement that the writing needs to be on letterhead or in a particular format. Therefore, the 4-corners of the document will be examined. The parties are indicated in the writing. The property is sufficiently identified. The price for the property is identified. The closing date is identified. Charlie signed his name at the end of the second napkin.

Due to the unique nature of real estate, specific performance of a real estate contract is a recognized remedy. Because the statute of frauds is most likely satisfied specific performance would be an appropriate remedy.

4. Andy's action will be successful.

Don's January 10 offer to perform contained in it an option -- "in exchange for $500 I will keep this offer open until February 1, 2015." Had Andy accepted this option, Don would not have been able to revoke his offer with Andy until February 1, 2015. However, Andy never sent Don a $500 check, and therefore never took advantage of the option. Therefore, the default contract rule applies -- an offer may be revoked by the offeror at any time prior to the offeree accepting such offer.

The mailbox rule applies and involves the notion that acceptances are effective when dispatched. Revocations are effective when received. Though Don was entitled to revoke his offer on January 27, 2015, his letter indicating his revocation was not effective until received by Andy on February 2, 2015. Andy's acceptance of the offer, on the other hand, was effective when he dispatched his acceptance on January 30. Because Andy accepted Don's offer prior to Don's revocation becoming effective, Andy and Don had a valid contract which could not be revoked by Don as of January 30, 2015. Therefore, when Don failed to appear, he was in breach of contract and Andy's claim will be successful.
Question No. 6: Sample Answer

1. Able must, under the Rules of Professional Conduct, consider (1) whether he can competently and diligently represent the interests of both Smith and Jones in forming the entity/entities, (2) whether the representation is prohibited by law, (3) whether Smith and Jones are directly adverse in a current action or proceeding, and (4) must obtain the informed consent of both Smith and Jones. These procedures are required under the Rules of Professional Conduct because there is a possibility of a concurrent client conflict in that Smith and Jones may have competing interests in the business and its assets.

   As a general matter, however, the facts don’t seem to warrant a conclusion by Able that he cannot at this stage competently and diligently represent the interests of both Smith and Jones. In fact, it is common for a company and its initial investors to be jointly represented so long as their interests are not significantly different in terms of their rights in the entity at the outset. In addition, the representation is not prohibited by law and Smith and Jones are not adverse in a current action or proceeding. Thus, so long as Able has the informed consent of Smith and Jones, the representation of both in forming the bar business should not run a foul of the Rules of Professional Conduct.

2. (a) A general partnership (GP) in Pennsylvania is not required to make any filing with the Commonwealth in order to be formed. Although not required, a partnership agreement would be advisable in order to set forth the rights and obligations, of the partners and the governance of the GP.

   A corporation formed in PA must file articles of incorporation with the PA Secretary of State and pay the required statutory filing fee. Bylaws should be prepared to control the internal affairs of the corporation. The bylaws are not filed with the state.

   A limited liability company (LLC) formed in PA must file a certificate of formation with the PA Secretary of State and pay the required statutory filing fee. Although not required, it would be advisable to draft a limited liability company agreement that specifies how the LLC is managed and the rights of its members.

   A GP does not provide any limited liability protection, and partners are generally liable for the debts and obligations of the partnership.

   Both a corporation and a LLC afford equity owners limited liability protection, so long as equity holders don’t abuse the privilege of incorporation or formation. They are generally not liable for the debts and obligations of the corporation or LLC, as applicable.

   By separating ownership into separate entities, they may be able insulate assets from claims brought against the bar by separating the ownership of the real estate and the building. That is because generally each entity is only liable for its own debts and obligations.

3. Smith and Jones will not be successful in asserting a breach of implied warranty of
merchantability because they refused the opportunity to inspect the goods.

Under Pennsylvania's UCC, an implied warranty of merchantability applies to the sale of goods by a merchant selling goods of the kind and warrants that the goods sold will be fit for their ordinary use or purpose. An implied warranty of merchantability can be disclaimed by conspicuous language in the contract or using the terms sold "as is" or "with all faults." Merchantability can be disclaimed when the buyer has the opportunity to see a model or sample of the item. When a buyer has been told to inspect the goods, he should use the opportunity to inspect the goods before purchase.

Here, an implied warranty of merchantability existed because Equipco was a merchant selling goods of the kind. Equipco sold restaurant furniture and equipment and sold Smith and Jones used tables and chairs for the restaurant. Therefore, a warranty existed that the chairs and tables would be fit for their ordinary use or purpose. However, Smith and Jones were told to look at a sample or model of the chairs and tables before purchase. The owner of Equipco indicated that the 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 this, Smith and Jones declined to see them and bought them. This effectively is a disclaimer of the implied warranty of merchantability. Smith and Jones refused to see the condition of the tables and chairs and now cannot rely on an implied warranty of merchantability to collect damages from Equipco.