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Robert was a widower living in E County, Pennsylvania, who had one child, James. Robert was very active in his church. In June of 2009 he decided to write his own will and researched examples of will drafting on the Internet. He wrote in his own hand a one-page document titled “My Last Will and Testament” which stated: “I leave all of my estate, real and personal, 50% to my son James and 50% to The Eternal Life Church.” He also named Harold, his personal lawyer who had a general practice of law in E County, as Executor. Robert signed it at the bottom.

In January of 2010 Robert met Mike, a young man who had started coming to the Eternal Life Church. Mike showed Robert a painting that he said he had painted himself, and Robert offered to buy it for $200. In reality, Mike had stolen the painting in 2009 from a gallery where it was offered for sale at the price of $2,000, as it was painted by a well-known local artist whose work often sold in that price range. Mike left the painting with Robert and said they would discuss its price later.

A few weeks later, Mike consulted Wanda, another E County attorney, because he was considering confessing his theft. He informed Wanda of the true value of the painting and requested advice on how best to rectify his crime, whether by turning himself in to the police or returning the painting anonymously to the gallery. Wanda agreed to represent Mike and said she would contact Robert to get the painting back and then advise him how he should proceed. Wanda called Robert and left a phone message to inform him that she represented Mike, and needed to discuss getting the painting back. Robert really liked the painting and met with Harold to get his advice on whether he could keep the painting if he paid the $200 he had offered Mike for it. He showed Harold the painting and told him that “someone” had left a message about
getting it back. Harold was familiar with the work of the local artist who had painted it and thought that the painting might have been stolen from a local gallery. Harold then called Mike to find out if the painting was his. Mike responded that Harold should talk to his attorney, Wanda. Harold continued speaking, telling Mike that if the painting was stolen, he was willing to convince Robert to give the painting back, so long as Mike agreed to return the painting to the gallery, in which case Harold would not report the theft to anyone. Mike then admitted the theft and said he’d consider the offer.

Days later, Robert suffered a massive heart attack which he barely survived and was hospitalized. He received visits from the pastor and members of the Eternal Life Church and became concerned about his prospects for the afterlife. While he was awaiting surgery, he recorded a message in his hand-held tape recorder which stated, “Today, March 1, 2010, I am changing my Last Will and Testament which I wrote last year. I am changing the shares of my estate to 25% James and 75% Eternal Life Church. Everything else stays the same.” He wrote on the face of his handwritten Last Will the words “Canceled – my new will is on my tape recorder” and showed it to the nurses who prepped him for surgery. Robert died during surgery, having never regained consciousness. He was survived only by James. The will and the tape recording were taken by James to Harold.

1. Was the document prepared by Robert in 2009 a valid and enforceable will qualifying for probate?

2. How should Robert’s estate be distributed given Robert’s subsequent writing on the 2009 document and the tape recorded changes?

3. Did either Harold’s contacting Mike or his conversation with him violate any of the Rules of Professional Conduct?

4. If, after Robert’s death, Mike obtained the painting and returned it to the gallery, what are the federal income consequences, if any, in 2009 and 2010 to Mike as a cash-basis taxpayer with respect to the theft and return of the painting?
1. **The document prepared by Robert was a valid and enforceable will qualifying for probate.**

   The handwritten (holographic) “Last Will and Testament” made by Robert meets the criteria for a valid will under Pennsylvania law. There are several requirements that must be met in order for a document to qualify as a valid and enforceable will, which qualifies for probate. The wills statute in the Probate, Estates and Fiduciaries Code (PEF), at 20 Pa.C.S.A. 2502 provides that: “Every will shall be in writing and shall be signed by the testator at the end thereof . . .” There is no requirement that a will be typewritten, or that it cannot be written by the testator himself. See *Smith v. Beales*, 33 Pa. Super. 570 (1907).

   Additionally, the writing must be dispositive in character and the disposition must be intended to take effect after the testator’s death. *In Re Ritchie’s Estate*, 480 Pa. 57, 389 A.2d 83 (1978). No formal words are necessary so long as such intent is shown by the language.

   The document handwritten and signed at its end by Robert was titled “My Last Will and Testament;” and he explicitly left all of his property and even named an executor. This establishes his intent that the document would be his will; and it was valid as such when he prepared it.

2. **The estate should be distributed as set forth in Robert’s holographic will, despite the proper revocation, because the oral changes were ineffective, and Dependent Relative Revocation would apply to reinstate the revoked will because Robert’s intention to provide some legacy to the church was clear.**

   Robert’s writing of the word “canceled” on the will was effective as a revocation as provided by section 2505 (3) of the PEF Code. The writing on a will of words indicating the intent to revoke it in full or as to specific provisions is recognized as sufficient to constitute a revocation. See *In Re Estate of Sidlow*, 374 Pa. Super. 624, 543 A.2d 1143 (1988).

   The tape recorded “new will” made by Robert in the hospital, however, will not be valid. The requirement that a will be in writing prohibits oral (nuncupative) wills, and the voice recording does not meet the requirement that a will must be in writing in order to be valid.

   If the revocation of Robert’s handwritten will were to be given effect, Robert would have died intestate, and his estate would pass under the statute defining Intestate Distribution in the PEF Code. Because Robert had no spouse surviving him, section 2103 of the Code would provide that the entire estate would pass to his issue, with James being the sole such person. The Eternal Life Church would receive neither the 50% of his estate set forth in his handwritten, valid will, nor the 75% he intended to provide through his invalid oral will on the tape recorder.

   In circumstances where a testator has revoked a valid will in reliance upon the validity of a subsequent will or codicil which is determined to be invalid, the doctrine of Dependent
Relative Revocation may be applied to reinstate the revoked will. *In Re Braun’s Estate*, 358 Pa. 271, 56 A.2d 201 (1948). This doctrine provides that “where the act of destruction is connected with the making of another will, so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails also, and the original will remains in force…” *Jarman on Wills*, 7th Ed. I, pg 35, cited in *Braun’s Estate*, 56 A.2d at 203. If the subsequent new will or codicil fails for reasons other than the invalid nature of its execution or some other intrinsic defect of the will itself, such as a gift to a pre-deceased person, revocation remains effective. *In Re Melville’s Estate*, 245 Pa. 318, 91 A. 679 (1914).

The situation set forth in the facts establishes that Robert’s replacement will is an invalid nuncupative will. It is clear that the revocation of the handwritten will was connected with the making of what Robert believed to be another will by tape recording his intentions. While it cannot be probated, the tape recording nevertheless makes clear that Robert wanted the Eternal Life Church to receive some portion of his estate rather than nothing. Robert’s intention to revoke his initial will was based on the validity of the recorded will. In light of the tape recording’s invalidity as a will, Robert’s intent would certainly be that the holographic will should be reinstated, giving 50% of his estate to the church, rather than having the entire estate pass by intestacy to James alone. Therefore, the holographic will remains valid, and James will share the estate evenly with the Eternal Life Church.

3. **Harold’s making a phone call to Mike was not a violation of Rule 4.2 because he was not aware that Wanda represented him; however, once Harold became aware that Mike was represented by counsel, it was a violation of Rule 4.2 for him to continue to discuss the case with Mike.**

Harold, an attorney representing Robert, made a direct phone call to Mike to discuss a legal matter for which Wanda represented Mike. Rule of Professional Conduct 4.2 Communication with Person Represented By Counsel, states that “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

The facts state that Wanda left a message for Robert himself, noting her representation of Mike, but that Robert only told Harold that “someone” had left a message about the painting. Therefore, Harold was not aware that Wanda represented Mike, so he was not in violation of this rule by calling him directly in behalf of his own client, Robert. Once Mike informed Harold during the conversation that he had his own lawyer, Comment 3 to the Rule provides that Harold would have had to stop speaking with Mike about the subject of the representation unless he had gotten the consent of Wanda as Mike’s attorney. Because of Harold continuing the conversation despite being informed that Mike was represented by Wanda, Mike admitted his guilt of a criminal offense, which would likely be against the advice which Wanda would give him to protect his right against self-incrimination. This violates the central purpose of Rule 4.2, as Harold has deprived Mike of the ability to confer with his own attorney regarding the benefits
and drawbacks of such an admission by speaking directly to a person he has learned is represented by counsel.

4. Mike must declare the $2,000 value of the painting as income for the year 2009 when he stole it, and could deduct the same value when he returned it in 2010.

The Internal Revenue Code (IRC) defines “gross income” as “all income from whatever source derived.” 26 U.S.C. §61. While 15 specific categories of income are set forth at IRC §61 (a), as well as in IRC sections 71-90, and specific exclusions from the definition are set forth at sections 101-139, the construction given to the statute by the courts has always been in favor of an expansive definition of what is included in “gross income,” and a strict reading of what is specifically excluded by the Code. Comissioner v. Glenshaw Glass Co., 348 U.S. 426, 75 S.Ct. 473 (1955). Referring to the predecessor statute to IRC Section 61, the Supreme Court noted that “This Court has frequently stated that this language was used by Congress to exert in this field 'the full measure of its taxing power.'”

In calendar year 2009, Mike stole a painting worth $2,000 from an art gallery. In James v. U.S., 366 U.S. 213, 81 S. Ct. 1052 (1961) the Supreme Court resolved a conflict in two previous cases by holding that embezzled funds are “gross income.” “When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, 'he has received income which he is required to return even though it may still be claimed that he is not entitled to retain the money...’” Id. citing North American Oil Consolidated v. Burnet, 286 U.S. at 424. It is immaterial that the person taking cash or property unlawfully has not been charged, or that the rightful owner has not become aware of the theft at the time; it is still required that the income be recognized and reported. Mike has income in calendar year 2009 to the extent of the $2,000 fair market value of the painting which he stole. See Collins v. Commissioner, 3 F.3d 625 (2nd Cir. 1993).

The question states that in 2010 Mike returned the painting to the gallery. Regardless of whether he did so openly or anonymously, he is entitled, under the James opinion and IRS Revenue Ruling 65-254 to an itemized deduction of $2,000 from his gross income in 2010.
Question No. 1: Grading Guidelines

1. Will Requirements, Holographic Will Valid

Comments: Candidates should recognize the validity of the handwritten will because it meets all the formalities required by the Wills statute and disposes of testator’s property after his death.

4 points

2. Oral Wills Prohibited, Revocation of Will, Dependent Relative Revocation

Comments: Candidates should recognize the effectiveness of a will cancellation by marking the document; the invalidity of the oral will despite its tape recording; the alternative of intestacy because of the cancellation, and the applicability of Dependent Relative Revocation in order to effectuate Robert’s presumed preference of the holographic will.

7 points

3. Rules of Professional Conduct 4.2 Direct Contact with Individual Represented by Counsel

Comments: Candidates should recognize Harold’s contact with Mike as initially non-violative of the rule, but a violation after he was informed of Wanda’s representation.

5 points

4. Federal Income Taxation, Stolen Property, Restitution

Comments: Candidates should recognize that stolen property is treated as income to the thief in the year stolen, in the amount of its fair market value, and that an itemized deduction can be taken if the property is returned in a subsequent year.

4 points
Question No. 2

Testco, a Pennsylvania corporation, was in the business of chemical testing of various agricultural diseases. Testco’s laboratories were located in a rural county in Pennsylvania.

Currently, Testco is under contract with a tropical island nation to attempt to find a cure for a crop disease (tefobia) that now has the potential to infect poultry. Tefobia has only been found to exist in tropical climates. The containers of tefobia were received at Testco’s main laboratory, but due to the heavy workload at the main laboratory, Testco decided to transport several gallons of tefobia in a company van to another testing facility located fifty miles away from the main facility. While transporting the tefobia, Testco’s van was involved in an accident.

The accident occurred as the van passed through a tunnel located on a Pennsylvania state highway. The tunnel has one lane of travel in each direction with no berms on either side. A bus operated by Fred was traveling in a safe manner in the tunnel in the opposite direction of both the Testco van and a truck driven by Ben which was several hundred feet in front of the Testco van. Fred instinctively swerved the bus across the center line to avoid hitting several ladders which had just fallen off Ben’s truck and bounced into Fred’s lane of traffic directly in front of the bus. Fred did not see Testco’s vehicle approaching when he crossed the center line, and he hit the Testco van head on. Once the bus crossed the center line, neither the driver of the Testco van nor Fred could do anything to avoid the head on collision.

The containers of tefobia, which were packed and secured per industry standards, were jarred loose and opened. The tefobia became airborne and spread due to the hot muggy August weather, which approximated a tropical climate, infecting and killing twenty thousand chickens at a nearby egg farm (Yoke Farm). Later testing conclusively proved that the chickens died as a result of exposure to tefobia.
Ben could not recall when the last time was that the ladders had been used, but he told the police that after using the ladders he always attached the ladders to his truck securely and has done so for the past twenty years. Ben maintained that someone at the tavern he had just frequented for lunch could have tampered with the ladders. Witnesses said Ben pulled out of a tavern parking lot two minutes before the accident and that he had been in the tavern for two hours consuming alcoholic beverages while eating lunch.

A number of lawsuits were filed including Yoke Farm vs. Testco for the loss of the chickens due to the release of the tefobia. In Yoke’s complaint it was alleged that Testco was an agent of the tropical country which is a communist-controlled dictatorship that is subsidized by the proceeds from the cocaine trade.

1. In Yoke’s lawsuit against Testco, in addition to negligence, what claim should be filed against Testco, and with what likelihood of success?

2. Testco sued Fred for negligence for the damages caused in the collision. What argument should Fred make in defending the lawsuit, and with what likelihood of success?

3. Assume that Fred files a cause of action for negligence against Ben for driving his truck with the ladders not properly secured.

   (a) At trial, will Ben be permitted to testify that for twenty years he always securely attached his ladders to the truck after using them?

   (b) Would the witnesses’ testimony that Ben had consumed alcoholic beverages during the two hours before the accident be admissible as part of Fred’s case in chief?

4. What pleading should Testco file to object to Yoke’s allegation in its complaint about Testco’s relationship with a communist dictatorship that is subsidized by the cocaine trade, and with what result?
Question No. 2: Examiner’s Analysis

1. Yoke should include a cause of action alleging strict liability in its complaint against Testco.

As a general rule, strict liability involves policy judgments that one who engages in certain activities will be financially responsible to those injured by such activities. Commonwealth of Pennsylvania Department of Public Welfare for Use of Molek v. Hickey, 136 Pa. Cmwlth. 223, 226, 582 A.2d 734, 735 (1990). The Court must determine as a matter of law whether an activity is abnormally dangerous so that strict liability will be imposed. Albig v. Municipal Authority of Westmoreland County, 348 Pa. Super. 505, 502 A.2d 658 (1985). In Diffenderfer v. Staner, 722 A.2d 1103 (Pa. Super. 1999), the Superior Court analyzed whether an activity would be classified as abnormally dangerous and, in doing so, applied the Restatement (Second) of Torts, Sections 519 and 520 (1977) which provide as follows:

§519. General Principal.
(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

§520. Abnormally Dangerous Activities.
In determining whether an activity is abnormally dangerous, the following factors are to be considered:
(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) Inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

Tefobia is a substance that has the potential to cause vast crop destruction in tropical agricultural areas and now has evidenced the ability to infect poultry. The facts indicate that the tefobia was received at Testco’s main facility but due to a heavy workload was being transported to another facility about fifty miles away. The initial analysis must focus on whether the transportation of tefobia by vehicle for the purpose of testing and analysis is an abnormally dangerous activity, using the criteria set forth under Section 520. See Smith v. Weaver, 445 Pa. Super. 461, 665 A.2d 1215 (1995).

First it must be determined if the transportation of the tefobia on a rural Pennsylvania highway poses the existence of a high risk of harm to the person, land or chattels of another. The answer to this question is yes. The transport of tefobia in a vehicle, even though packaged per
industry standards, was risky especially in a rural area where there were farms. The transportation of tefobia by vehicle was not something that normally or routinely would occur and posed a high degree of risk of harm if the vehicle was involved in an accident.

Second, there is an obvious risk of great harm to the land or chattels of another. The transport occurred in August where the temperature approximated a tropical climate, and was done in a rural/agricultural area. There was a high possibility that if the substance came out of the container it could infect not only agricultural products but also poultry.

Also, the packaging of the tefobia as per industry standards was not sufficient when after being involved in an accident, the tefobia escaped its container and thus the risk was not eliminated by complying with industry standards. Since tefobia is not common to Pennsylvania the transportation of it is a specialized activity and not a matter of common usage. While it might be argued that transporting the tefobia in Pennsylvania for purposes of testing might be considered appropriate since Pennsylvanian is not typically a tropical climate, the fact that the tefobia was being transported through a rural area with farms which would be directly affected by its release provides a counter argument that the transportation in Pennsylvania for purposes of testing was not appropriate.

Lastly, the risk to the community was greater than the potential benefit to the community from the research on tefobia. Although the disease was able to spread in August in Pennsylvania, this is a tropical disease that is not indigenous to Pennsylvania. It would appear that counsel for Yoke would be successful in pursuing a claim for strict liability since the transporting of tefobia would likely be classified as an abnormally dangerous activity. Therefore all the damages resulting from the release of the tefobia would be attributed to Testco regardless of whether they exercised the utmost care in attempting to prevent this harm, subject however to proof by plaintiff that Testco’s action was the proximate cause of Yolk’s damages.

2. **Fred’s best argument in defense of the negligence cause of action filed by Testco would be the sudden emergency doctrine, and he should be successful in this defense.**

   The sudden emergency doctrine is available as a defense to otherwise negligent conduct by a defendant who suddenly and unexpectedly is confronted with a perilous situation that permits no opportunity to assess the danger and respond appropriately. *Carpenter v. Penn Central Transport Company*, 269 Pa. Super. 9, 409 A.2d 37 (1979). This doctrine is successfully applied as a defense where the defendant can show that he did not create the emergency and that when confronted with the emergency he acted in a reasonable manner in light of the circumstances. *Westerman v. Stout*, 232 Pa. Super 195, 335 A.2d 741 (1975). Because of the shortness of time to react, a person confronted with a sudden and unforeseeable occurrence should not be held to the same standard of care as someone confronted with a foreseeable occurrence. *Cunningham v. Byers*, 732 A.2d 655 (Pa. Super. 1999).

   The facts indicate that both the Testco vehicle and Fred’s bus entered the tunnel from opposite directions. After entering the tunnel, Fred’s bus crossed over the center line to avoid hitting ladders which had just fallen off of Ben’s truck which was travelling in the opposite
direction. The ladders bounced into Fred’s lane of traffic directly in front of his bus causing Fred to instinctively swerve across the center line and hit the Testco vehicle head on. Once the bus crossed the center line, neither driver had the ability to avoid the accident. The facts indicate that the vehicle driven by Ben lost ladders in the tunnel while traveling in the opposite lane of travel from Fred and thus created a sudden emergency for Fred. At the time Fred swerved to avoid the ladders, he did not see the oncoming Testco vehicle.

The emergency was not created by Fred, and there is no evidence that Fred was operating his bus improperly. While Fred was negligent in crossing the center line and leaving his lane of traffic, he should be excused from liability due to the sudden emergency with which he was confronted because he acted reasonably under the circumstances by taking the only evasive action he could under the circumstances.

3.(a) Ben’s testimony concerning his habit for always securing the ladders on his truck is relevant and will be admissible.

All relevant evidence is admissible except as otherwise provided by law. Pa.R.E. 402. “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Pa.R.E. 401. “Evidence is relevant if it logically tends to establish a material fact in a case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact.” Commonwealth v. Drumheller, 570 Pa. 117, 808 A.2d 893 (2002).

Pennsylvania has adopted Rule 406 of the Pennsylvania Rules of Evidence which states as follows:

**Rule 406. Habit; Routine Practice**

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Here, the evidence of Ben’s habit of securing the ladders on his truck was relevant to prove that his conduct at the time in question was in conformity with the habit. The Pennsylvania Supreme Court in Baldridge v. Matthews, 378 Pa. 566, 567, 106 A.2d 809, 810 (1954) stated:

The probative value of a person’s habit or custom as showing what was done on a particular occasion, is not open to doubt. See 1 Wigmore on Evidence (3rd edition, section 92, page 519, et seq.) Whether evidence of such usage or habit is admissible to show what occurred in a specific instance depends upon the ‘invariable regularity’ of the usage or habit. To be admissible, the usage must have ‘sufficient regularity’ to make it probable that it would be carried out in every instance or in most instances. Wigmore, loc. cit. supra.
Ben’s testimony would be relevant since he would be able to testify that the ladders were always secured on his truck after use, and it may be presumed from the facts that over the last 20 years Ben secured the ladders on his truck numerous times. Ben’s habit of properly securing the ladders to his truck for twenty years is relevant as tending to make it more probable that he did so on this occasion as well.

3.(b) The testimony of witnesses who observed Ben consuming alcoholic beverages within two hours of the accident would not be admissible in Fred’s case in chief without evidence that Ben was intoxicated to the extent his conduct was reckless or careless.

The proposed testimony is that in the time period immediately preceding the accident, Ben was observed consuming alcoholic beverages. The facts do not indicate any evidence of testimony from people at the tavern as to how many alcoholic beverages Ben consumed over the period of time. Further there is no evidence in the facts of testimony as to any irregular or unusual behavior Ben exhibited either at the tavern or the accident scene which would be some indication of possible intoxication. Also there is no expert testimony as to Ben’s intoxication which would include a blood alcohol test reading.

In Pennsylvania the admission of alcohol consumption in civil cases is restricted due to the potential prejudice of such evidence and the relevancy of such testimony. The Pennsylvania Superior Court in Whyte v. Robinson, 421 Pa. Super 33, 617 A.2d 380 (1992) set forth the following as a statement of applicable Pennsylvania law:

Since Critzer v. Donovan, 289 Pa. 381, 137 A.2d 665 (1927), the well-settled law of this Commonwealth is that where recklessness or carelessness is at issue, proof of intoxication is relevant, but the mere fact of consuming alcohol is inadmissible as unfairly prejudicial, unless it reasonably establishes intoxication. Cusatis v. Reichert, 267 Pa. Super. 247, 249-50, 406 A.2d 787, 788, 789-89(1979) and cases cited therein. The rule of Morreale v. Prince, 436 Pa. 51, 53, 258 A.2d 508 (1969), states that such evidence of intoxication must reasonably establish a degree of intoxication which proves unfitness to drive where reckless or careless driving is the matter at issue…

Here, the testimony would be inadmissible due to the lack of relevancy of Ben’s consumption of alcohol. Fred would need to have further proof as to intoxication which caused Ben to be reckless or careless in operating his vehicle with the ladders not properly secured. Based upon the facts, alcohol consumption alone is not probative and further would be highly prejudicial.

4. Testco should file preliminary objections to the complaint filed by Yoke seeking to strike impertinent matter relating to the allegation that Testco dealt with a communist dictatorship that was subsidized by the cocaine trade. The Court would sustain the preliminary objections based upon the inclusion of impertinent and scandalous material.
Testco should file preliminary objections under Pennsylvania Rule of Civil Procedure 1028 (a)(2) which in part provides that preliminary objections may be filed to strike the inclusion of scandalous or impertinent matter. For material to be scandalous and impertinent the allegations 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 allegation that Testco did business with a country that was run by a communist dictatorship was wholly immaterial to the allegation of negligence and/or strict liability. Whether the tropical island is controlled by a communist dictatorship or is a democracy would be immaterial to the subject matter of the lawsuit. The fact that the tefobia was released during a vehicle accident in Pennsylvania has nothing to do with the politics of the country of origin for the tefobia. Additionally, whether the government of the tropical island is subsidized by the cocaine trade or not is once again not only immaterial to the issue of liability but is scandalous. Simply referring to the tropical island country as one that is subsidized by the cocaine trade would only be used to prejudice the finder of fact and has no bearing upon the liability of any party.

The preliminary objections should be sustained by the Court and the references to the communist government of the tropical island and the allegation that the government is subsidized by the cocaine trade should be stricken from the complaint.
Question No. 2: Grading Guidelines

1. **Strict liability**

   Comments: The candidate should identify and discuss the applicability of strict liability to Yoke’s claim against Testco, and discuss the factors to be evaluated in order to establish that an activity is abnormally dangerous in relation to the facts.

   5 points

2. **Sudden Emergency Doctrine**

   Comments: The candidate should identify the defense of sudden emergency and fully discuss the requirements of this defense in relation to the facts, in reaching the proper conclusion that this defense is available.

   5 points

3a. **Habit**

   Comments: The candidate should discuss habit, and its relevancy under Pa.R.E. 406, and conclude that Ben’s testimony relating to securing the ladders is relevant and thus admissible.

   4 points

3b. **Alcohol**

   Comments: The candidate should discuss the facts and conclude that due to a lack of relevancy and the likelihood of prejudice evidence of Ben’s alcohol consumption without proof of intoxication would be inadmissible.

   3 points

4. **Preliminary Objections**

   Comments: The candidate should identify preliminary objections as the proper pleading for Testco to file to Yoke’s complaint and conclude that the information concerning a communist dictatorship that is subsidized by the cocaine trade should be stricken from the complaint as impertinent and scandalous material.

   3 points
Question No. 3

Mark and Beth were married on January 1, 2000, and had two children together who are currently 8 and 9 years of age. The family residence is in C County, Pennsylvania. Beth is a truck driver and is away from home about five to six days per week and is often not accessible even by cell phone. As a result, she has left the major decisions concerning the children up to Mark. For the past three years Mark has managed the home and has been primarily responsible for the overall care of the children. The children have been happy under their father’s care.

Mark and Beth began having marital problems, and in November 2010 Mark filed for divorce and custody of the children in C County. Upon receiving the divorce papers, Beth moved out of the marital home and has been sleeping in the cab of her tractor trailer on the few days that she is in C County.

With the divorce and custody battles looming, Beth was in need of cash. One day while driving to the store in her passenger vehicle she saw a nail gun lying on the ground at a construction site. She believed, based on her prior experience as a construction worker, that she could get about $1,000 for the gun at a pawn shop. She parked her car about one block away from the construction site and walked to the site where she took the nail gun. Unbeknownst to her, a worker saw her take the nail gun and immediately called the police on his cell phone and described both Beth and the nail gun. On her way back to her car, Beth heard a siren. Beth panicked and ran up the steps of a nearby home located at 115 Mockingbird Lane, C County, and broke a window in the door to unlock it. Beth then stepped inside the home to conceal herself.

After the noise of the siren passed, Beth left the residence and continued toward her car. When she arrived at her car, and while in the process of placing the nail gun in the trunk of her car, a uniformed police officer approached her. The officer had just received a report that a nail
gun was taken from a nearby construction site and received a description of the perpetrator and the nail gun. Beth realized that she had been caught, and before the officer even asked her a question, she instinctively admitted that she took the nail gun because she needed to get cash. While standing on the sidewalk next to the car, the officer saw a nail gun lying in Beth’s trunk which fit the description of the nail gun which was recently taken from the construction site. The officer seized the nail gun from the trunk, and shortly thereafter told Beth she was being placed under arrest.

A female officer was summoned to the scene, and while properly searching Beth incident to the arrest, the officer discovered three gold pens with the name “Kelly” engraved in them. These pens had been taken from the purse of a woman named Kelly the weekend before at a C County restaurant when she went to the restroom. When Kelly returned from the restroom, the three pens were missing from her purse and she immediately reported the incident to the police. Beth told the female officer, without being asked, that she knew the pens were stolen, but she is not the one who took them.

The police are unable to gather any further evidence to establish that Beth actually took the pens from Kelly. The police confirmed through an interview of the owners of 115 Mockingbird Lane that Beth did not have permission to enter the home.

1. Aside from Criminal Mischief, with what crimes should Beth be charged, and with what likely result?
2. Was the seizure of the nail gun legal under the Pennsylvania Constitution?
3. If Mark wants to secure the maximum custody rights to his children, what type of custody should Mark’s counsel argue for, and with what likelihood of success?
Question No. 3: Examiner’s Analysis

1. Beth should be charged with the crimes of theft, criminal trespass and receiving stolen property and would likely be convicted of all three offenses.


As applied here, Beth took the nail gun from the construction site without permission or a lawful right to take the gun. She carried the gun away from the scene and proceeded to place the gun in the trunk of her vehicle, which would support the argument that she intended to deprive the lawful owner of the gun. When confronted by the police officer, she admitted to the officer that she took the gun because she needed cash. All of these facts would support a successful prosecution against Beth for the crime of theft.

Beth should also be charged with the crime of criminal trespass. A person commits an offense of criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or breaks into any building or occupied structure or separately secured or occupied portion thereof. 18 Pa. C.S.A. Section 3503(a)(1)(i) and (ii). “Breaks into” for the purposes of the criminal trespass statute is defined as gaining entry by force, breaking, intimidation, unauthorized opening of locks, or through an opening not designed for human access. 18 Pa. C.S.A. Section 3503 (a)(3) The crime of criminal trespass involves either entering or remaining in a place, while knowing that one is not licensed or privileged to do so. "Commonwealth v. Walker, 384 Pa. Super. 562, 559 A.2d 579 (1989). As applied here, Beth entered 115 Mockingbird Lane in an attempt to elude the police who she believed were pursuing her. She broke the window of the door in order to obtain entry, which would qualify as “breaking into” for the purposes of the criminal trespass statute. The home would classify as a building under the statute. It is also clear from the facts that she was not permitted to be in the home which was confirmed by the statement of the homeowners secured by the police. Accordingly, Beth would likely be successfully prosecuted for the crime of criminal trespass.

Beth should also be charged with the crime of receiving stolen property. A person is guilty of theft if he intentionally receives, retains or disposes of moveable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained or disposed with intent to restore it to the owner. Receiving includes acquiring possession of the subject property. 18 Pa. C.S.A. Section 3925 (a) and (b). To prove the crime of receiving stolen property the Commonwealth must establish possession of the stolen item and that the possessor knew, or had reason to know, that the item was stolen. "Commonwealth v. Morrissey, 540 Pa. 1, 654 A.2d 1049 (1995). As applied here, Beth was discovered to be in possession of the three pens which had previously been reported stolen by Kelly. Although Beth denied that she took the pens and the police were unable to secure any evidence to prove that she actually took them, she freely admitted to the police that she knew the
pens had been stolen. Since Beth was in possession of items that she knew were stolen she would likely be convicted of the crime of receiving stolen property.

2. **The nail gun was properly seized under the Pennsylvania Constitution pursuant to the plain view exception to the warrant requirement.**

The Pennsylvania Constitution, Article 1, Section 8 provides that the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed by the affiant. Absent an exception, the police are generally required to secure a warrant before searching for and seizing an item of evidence.

The plain view doctrine permits the warrantless seizure of evidence based on the principle that an individual does not have a reasonable expectation of privacy in an object that is in plain view. *Commonwealth v. Winfield*, 835 A.2d 365 (Pa. Super. 2003) In order to be permitted to seize an item in plain view, a police officer must lawfully be in a position from which he can view the object and it must be immediately apparent to him that the object is incriminating (i.e. the officer has probable cause to believe the evidence is incriminating). *Commonwealth v. Ballard*, 806 A.2d 889 (Pa. Super. 2002). Additionally, the plain view exception also requires a determination of whether the police have a lawful right of access to the object seen in plain view. *Commonwealth v. McCree*, 592 Pa. 238, 924 A.2d 621 (2007) The Supreme Court in *McCree* also held that a limited automobile exception under Article I, Section 8, of the Pennsylvania Constitution may, depending on the circumstances of each case, serve as the basis of the lawful right to access an object seen in plain view inside a vehicle. The seizure of drugs or other evidence of a crime from the floor of the backseat or from some other part of a vehicle, which were clearly visible by the police from a lawful vantage point outside the vehicle, have been found to be proper under the plain view exception to the warrant requirement. *Id.*, See also, *Commonwealth v. Ellis*, 541 Pa. 285, 662 A.2d 1043 (1995).

As applied here, the police officer had just received the report of a nail gun being taken from a nearby construction site and was given a description of the perpetrator as well as the nail gun. In conducting his foot patrol he saw a person who fit the description of the person who took the gun, and the nail gun which fit the description of the item taken was plainly visible to the officer from the sidewalk. Further, as the officer approached Beth she admitted to taking the nail gun before she was even asked a question. At the time the officer saw the nail gun he was on the sidewalk where he had a lawful right to be. Based upon the report of the stolen gun recently received by the officer and Beth’s admission to taking the gun he had probable cause to believe the gun was incriminating evidence. Given the fact that probable cause did exist, and given the mobility of the vehicle, a strong argument can be made that a lawful right of access existed under the limited automobile exception. Accordingly, the seizure of the gun would likely be deemed proper under Pennsylvania law pursuant to the plain view exception to the warrant requirement.
3. Mark’s counsel should argue for primary physical and sole legal custody of the children and should have a good likelihood of success.

The paramount concern in a child custody case is the best interests of the child, based on a consideration of all factors that legitimately affect the child’s physical, intellectual, moral and spiritual well-being, which determination is to be made on a case by case basis. Dranko v. Dranko, 824 A.2d 1215 (Pa. Super. 2003). In making an order for custody or partial custody, the court shall consider the preference of the child as well as any factor which legitimately impacts the child’s physical, intellectual and emotional well-being. 23 Pa. C.S.A. Section 5303 (a)(1).

Legal custody is defined as the legal right to make major decisions affecting the best interest of a minor child, including, but not limited to medical, religious and educational decisions. Physical custody is defined as the actual physical possession and control of a child. The court may award partial custody which is defined as the right to take possession of a child away from the custodial parent for a certain period of time, or shared custody which is defined as an Order awarding shared legal or shared physical custody, or both, of a child in such a way as to assure the child of frequent and continuing contact with and physical access to both parents. Visitation is defined as the right to visit a child. 23 Pa. C.S.A. Section 5302.

The Court shall award sole custody when it is in the best interest of the child. 23 Pa. C.S.A. Section 5303(d). However, it is the public policy of the Commonwealth when in the best interest of the child to assure a reasonable and continuing contact of the child with both parents after a separation, and the sharing of the rights and responsibilities of child rearing by both parents. 23 Pa. C.S.A. §5302. Visitation rights will be denied only when it is shown that visits would be detrimental to the welfare of the child. Commonwealth ex rel Lotz v. Lotz, 188 Pa. Super. 241, 146 A.2d 362 (1956). A parent is rarely denied the right to visit the child. Commonwealth ex rel. Peterson v. Hayes, 252 Pa. Super. 487, 381 A.2d 1311 (1977).

As applied here, the facts indicate that Mark has managed the home and been primarily responsible for the care of the children for the past three years. During this period of time the mother has been away for five to six days per week and is oftentimes not even able to be reached by cell phone. At this point, Beth is living in the cab of her truck. Since Mark is looking to secure maximum custodial rights to his children his counsel could try to argue for sole custody. However, as indicated above, this type of custody is generally disfavored and the facts presented may not support such an award because there is nothing in the facts to indicate that Beth does not have a good relationship with the children or that she is unwilling or unable to cooperate with Mark in making future decisions.

Alternatively, his counsel should argue that Mark should have primary physical custody of the children. Counsel should point out that the mother does not have suitable living arrangements for the children since she is living in the cab of her truck. Additionally, since the father appears to be primarily providing for the children’s physical, intellectual and emotional well-being and the children are happy while under his care, there appears to be a compelling argument that the best interest of the children would be served by granting primary physical custody of the children to Mark. Since it does not appear that Beth can demonstrate that she will have suitable living arrangements available for the children and be available to care for them,
Mark will likely receive primary physical custody. At best, the mother probably should receive only visitation at this point until she establishes appropriate living arrangements where the children can reside while under her care.

It should also be argued that the father should have legal custody of both children. Since the father is with the children the majority of the time and the mother is not even capable of being reached via telephone for a good portion of any given week, there would be a strong argument that it would be in the children’s best interest to have legal custody conferred to the father so that he can make the medical, religious and educational decisions which need to be made on a day to day basis. This is especially true with regard to medical decisions which oftentimes need to be made quickly. The fact that Beth had left such decisions up to Mark in the past would strengthen the argument for awarding legal custody to Mark. Unless Beth can demonstrate an ongoing concern for being involved in making such decisions regarding the children and being able and available via phone or otherwise to work cooperatively with Mark in making such decisions it is likely that Mark will be awarded legal custody.

In summary, it appears that the father has a compelling argument for primary physical custody and sole legal custody of the children. Although the mother can attempt to make arguments for shared physical custody or partial custody rights, her current circumstances will likely make it difficult to convince the Court that she should be afforded those rights at this time. At best, she will likely only receive visitation rights until her circumstances change. Additionally, unless she can demonstrate an ongoing concern and ability to be involved in making important decisions, it is likely that Mark will be awarded legal custody.
Question No. 3: Grading Guidelines

1. Criminal Charges

Comments: The candidate is expected to identify that Beth should be charged with the crimes of theft, criminal trespass and receiving stolen property, discuss the elements of each of the crimes and apply the relevant facts in reaching a conclusion as to the likelihood of success.

10 Points

2. Plain View

Comments: The candidate is expected to discuss the plain view exception to the warrant requirement and apply the applicable facts.

5 Points

3. Custody

Comments: The candidate is expected to discuss the concepts of primary physical custody and legal custody and apply the facts which would most strongly support Marks grounds to secure these legal rights.

5 Points
C City Club (“Club”) is located in C City, State S. It is a private, members-only social club, located on the first four floors of the “Community Development Authority Building.” The Community Development Authority (“Authority”) owns the building and leases space to Club. Authority’s offices are located on the top two floors of the building, and it holds its regular meetings at Club. Authority’s decision to build its building was driven by its need for permanent offices and a location to hold meetings and social functions throughout the year. Authority contacted Club and offered it the first four floors of the building at a favorable rent, in return for priority access to Club’s facilities for functions. Authority was created by state legislation and is funded by public funds, which pay for general maintenance and upkeep of the Authority’s properties, including the building in which Club is located.

Club is owned by its members and is governed by By-Laws that limit membership to military veterans and give a preference to combat veterans. Club’s stated purposes are to facilitate veterans’ re-integration into the business community and assist combat veterans adjust to the routine of daily life. Club’s facilities include recreational space, dining rooms that serve food and beverages, meeting rooms, and lounge areas. When an opening at Club arose, Sue, who was a veteran but not a combat veteran, submitted an application for membership accompanied by the required supporting documents. Club denied Sue’s application and admitted a male combat veteran. A higher proportion of combat veterans are men, and Club’s membership is 90% male. Sue filed suit against Club in state court in C City claiming a violation of her rights under the Equal Protection Clause of the Federal Constitution on the ground that Club’s policy had a disproportionate adverse impact on women. Sue properly served Club with a copy of the complaint.

1. What action should Club’s counsel take to attempt to have the matter heard in federal court, and with what likelihood of success?
Assume that Sue’s case was removed to the appropriate federal court, that defendant answered the complaint raising a defense of lack of state action, and other appropriate defenses, and that the case proceeded to a non-jury trial, at which the facts set forth above were presented to the court.

2a. How should the court analyze Club’s defense of lack of state action?

2b. Assume, for purposes of this question that the court found state action, how should the court analyze the Equal Protection claim?

Mary is employed by a 200 employee company in State S, where she has worked for over 10 years in progressively more responsible positions. Currently, she is the Executive Assistant to Al who is the CEO of the company. For the entire period of her employment, Mary has always received excellent performance reviews and substantial raises. The office in which Mary works has 25 employees, most of whom are men. It is common for the managers in the office, including Mary, to socialize together along with their spouses and dates, and it is not uncommon for them to share sexually suggestive jokes and e-mails. At an office party, Mary, who is single, shared some jokes of a sexual nature with Al, which his wife overheard, making his wife jealous.

When Mary was scheduled to take a business trip with Al, his wife insisted that he “get rid of Mary” because she did not want her husband to go on an overnight trip with Mary, whom she viewed as a dangerous flirt. Al did as his wife requested and had Mary transferred to another office in the company with a loss of pay and prestige. Mary was replaced by a young man with less experience than Mary. None of the male managers who had told similar jokes to Al in front of his wife were transferred. After following all required administrative procedures, Mary filed suit against her employer alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

3a. Can Mary establish a prima facie case of sex discrimination?

3b. If Mary’s employer filed a Motion for Summary Judgment, raising Mary’s inappropriate conduct in making sexual jokes and Al’s wife’s concern as the bases for Mary’s transfer, on the above referenced facts, how should the court analyze and rule on the motion?
1. Club’s attorney should file a Notice of Removal with the federal court for the district within which the action is pending, and the case will be removed from state court where it was filed to the federal district court.

Where a federal court would have original jurisdiction of a claim, such a claim, filed in state court, may be removed to federal court pursuant to 28 U.S.C. §1441, which provides, in pertinent part:

Actions removable generally…

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending… .

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution,…shall be removable without regard to the citizenship or residence of the parties.

Sue’s complaint alleges a violation of the Equal Protection Clause of the Fourteenth Amendment based on the disproportionate percentage of males admitted to membership in Club by virtue of the combat veteran preference. On its face, therefore, Sue’s action presents a federal question. See Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 118 S.Ct. 921 (1998). As such, a federal court would have original jurisdiction over such a claim under 28 U.S.C. §1331, granting district courts of the United States original jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States.

Club could remove Sue’s action to the appropriate United States District Court in S State by filing a notice of removal with the federal court for the district within which such action is pending within 30 days of service of Sue’s Complaint. See 28 U.S.C.A. §1446, Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 119 S.Ct. 1322 (1999). The notice should contain the grounds for removal, and it should be provided to plaintiffs and to the state court.

2a. The court will analyze the relationship between Club and Authority, which is a public entity, to determine whether the state has involved itself with Club sufficiently to transform Club’s discriminatory activities into state action.

It is undisputed that Fourteenth Amendment protections, including the Equal Protection Clause, are triggered only in the presence of “state action”, so that a private entity, acting on its own, cannot violate a citizen’s constitutional rights. See e.g., Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729 (1978). While improper discriminatory action by the State is prohibited by the Equal Protection
Clause, private conduct “however discriminatory or wrongful” is not prohibited by the Equal Protection Clause. *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S. Ct. 836 (1948). Accordingly, since Club is not a governmental entity, it can only be the subject of a claim of a constitutional violation if its actions are viewed as those of the state. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965 (1972). In such cases where the action is by a private entity, the state must have significantly involved itself with the invidious discrimination in order for the discriminatory action to fall within the ambit of the constitutional prohibition. *Id.*

The issue before the court will be whether Club’s actions in denying Sue admission may fairly be viewed as state action by virtue of Club’s relationship to Authority, which is an arm of the state. If so, the court may consider whether the disparate impact of Club’s admissions practices violated the Equal Protection Clause. The connection between the state (i.e., Authority) and Club is Authority’s ownership, maintenance and use of the building in which Club operates, including the fact that the arrangement between Authority and Club includes preferential access to Club’s facilities by Authority and favorable rent charged Club. There is no evidence that Authority mandated or even actively participated in developing Club’s By-Laws or in membership decisions.

Private action may be treated as state action if a state has so far insinuated itself into a position of interdependence with a private party that it must be recognized as a joint participant in the challenged activity. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856 (1961). In *Burton* discriminatory conduct by a private restaurant that leased space in a public building housing a public parking garage was found sufficient to constitute state action, based on a number of factors, such as the obligations and responsibilities of the public agency, the benefits mutually conferred on both parties, and the relationship of the private entity to the state operation, all of which demonstrated a “nexus” between the state and the private entity.

Subsequent cases have refined the *Burton* rule and have held that there must be a sufficiently close nexus between the State and the challenged action of the private entity so that the action of the private entity may be fairly treated as that of the state itself. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449 (1974). “Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.” *Blum v. Yaretsky, et. al.*, 457 U.S. 991, 1004-1005, 102 S.Ct. 2777, 2786 (1982). Whether such a close nexus exists depends on whether the State has exercised coercive power or has provided such significant encouragement either overt or covert that the challenged action must in law be deemed to be that of the State. *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977 (1999)

Based on the lack of state involvement in the challenged action, it is not likely that state action will be found.
In its analysis of Sue’s Equal Protection claim based on sex discrimination, by virtue of the disparate impact of the preference for combat veterans, which resulted in a disproportionate male membership in Club, the court should determine whether the combat veterans’ preference was motivated by a discriminatory intent against women, and if so, apply an intermediate scrutiny analysis to determine whether Sue’s equal protection rights were violated. If no discriminatory purpose is found, the rational basis test would be applied by the court.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits States from denying any person the equal protection of the laws, and provides, in pertinent part:

…nor shall any State …deny to any person within its jurisdiction the equal protection of the laws.

Sue is claiming that she was denied the equal protection of the laws, based on her gender, on the ground that Club’s policy of giving a membership preference to combat veterans had a disproportionate adverse impact on women. When a rule or practice appears to be gender-neutral on its face but has a disparate impact on women, courts look first at whether the classification in question is indeed gender neutral, and, if so, whether the adverse impact “…reflects invidious gender-based discrimination.” Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 274, 99 S.Ct. 2282 (1979).

Club’s By-Laws, limiting membership to veterans, are gender neutral. Similarly, the preference for combat veterans over non-combat veterans appears to be gender neutral since both men and women qualify as combat veterans as evidenced by the statement in the facts that a higher proportion of combat veterans are men. There is no evidence that female combat veterans would be denied membership in favor of males, other factors being equal.

Based on the facts presented, the court should consider whether there was a discriminatory purpose behind the combat veterans’ preference, given its discriminatory impact. In Personnel Administrator of Mass. v. Feeney, supra at 279, the Court stated: “It [discriminatory purpose] implies that the decision maker, … selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of’ its adverse effects upon an identifiable group. The facts indicate that one of Club’s purposes was to help combat veterans adjust to the routine of daily life, which would provide a legitimate reason for the preference, and, unless there is some other evidence that the purpose was to discriminate against women, or that male combat veterans were routinely admitted over female combat veterans, it is unlikely that a discriminatory purpose will be found. Absent any evidence of discriminatory purpose, the court would analyze Club’s By-Laws using a rational basis test, and uphold the membership classification if there is a rational basis for the preference for combat veterans.

However, if a discriminatory purpose is found, the court should apply intermediate scrutiny to determine whether Sue’s rights were violated. In doing so, the defendant must show “…at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives…” United States v. Virginia, 518 U.S. 515, 532-33, 116 S.Ct. 2264 (1996).” Membership in a social club for veterans is at issue, and
it’s unlikely that Club could successfully argue that a gender-based classification for membership serves important governmental objectives.

3a. Since Employer has more than 15 employees, and since Mary was performing satisfactorily in her job and she was treated differently and adversely from similarly-situated male managers, she should be able to establish a *prima facie* case of discrimination.

Title VII of the Civil Rights Act of 1964 outlaws discrimination based on race, color, sex, or national origin. 42 U.S.C. §2000e-2(a)(1). It applies to all employers with more than 15 employees, a requirement which Mary’s employer meets.

Mary complied with all of the administrative procedures required to raise a Title VII claim. She can establish a *prima facie* case of discrimination either by direct evidence showing that the employment action was based on illegitimate criteria or indirectly by circumstantial evidence under either a pretext or mixed motive theory. The elements of a *prima facie* case of gender disparate treatment based on pretext are: (a) she was a member of a protected group; (b) she was qualified to perform her job; (c) she suffered an adverse employment action; and (d) she was treated differently than similarly-situated males, or she was replaced with a less qualified male. See *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), *Weber v. Universities Research Association*, 621 F.3d 589, 593 (7th Cir 2010). Under a mixed motive theory Mary must prove by direct or circumstantial evidence that gender was a motivating factor in the employment decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989), *Desert Palace v. Costa*, 539 U.S. 90, 123 S.Ct. 2148 (2002).

Mary is certainly a member of a protected group by virtue of her sex. She was qualified for and had been performing her job well. She suffered an adverse employment action by being transferred with a loss in pay, and she was treated differently than similarly-situated males and was replaced by a male. It is likely that Mary can establish a *prima facie* case of gender discrimination.

3b. The court is likely to deny the Motion for Summary Judgment because, in analyzing the facts in the light most favorable to the non-moving party, there is a genuine dispute of fact as to the reason for Mary’s transfer.

A Motion for Summary Judgment is a pretrial motion that determines whether a trial is necessary. Summary Judgment is governed by Rule 56 of the Federal Rules of Civil Procedure. Motions may be filed until 30 days after the close of discovery, and may concern some or all of the claims. Summary judgment may be granted as a matter of law where “…there is no genuine dispute” as to any material facts in the case and the movant is entitled to judgment as a matter of law. Fed. R. Civ. Proc. 56. In considering a Motion for Summary Judgment, the court determines whether any material facts are in dispute, and all facts are reviewed in the light most favorable to the non-moving party. *Matsushita Electric Co. v Zenith Radio Corp.*, 475 U.S. 574, 586-587, 106 S.Ct. 1348 (1986)

A Title VII plaintiff may successfully oppose a motion for summary judgment by either: producing “direct evidence” of discrimination showing that the employment action was based on illegitimate criteria, or, if there is no direct evidence of discrimination, using circumstantial evidence to discredit the employer’s articulated reasons or show that discrimination was more likely than not a motivating or determinative cause of the adverse employment action. See *Fuentes v. Perskie*, 32 F.3d
“Direct evidence is evidence that, if believed, shows discriminatory conduct by the employer without reliance on inference or presumption, such as where there is an admission by an employer that the decision was based on the prohibited animus.” *Elkhatib v. Dunkin Donuts, Inc.*, 493 F.3d 827, 829 (7th Cir. 2007). A plaintiff may also survive a Motion for Summary Judgment by creating an inference of discrimination through the burden-shifting analysis of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). *Tenge v. Phillips Modern Ag. Co., et. al.*, 446 F.3d 903 (8th Cir. 2006). In a mixed motive claim, the plaintiff need only provide evidence sufficient to convince a jury that race, color, religion, sex or national origin was a motivating factor for the employer’s adverse decision. *Costa, supra.*, *White v. Baxter Healthcare Corporation*, 533 F.3d 381 (6th Cir. 2008)

While it may be difficult for Mary to produce direct evidence of discrimination on the basis of her sex, there is sufficient circumstantial evidence from which a factfinder could reasonably find that plaintiff established an inference of discrimination under *McDonnell-Douglas* or that her sex was one of the reasons (motivating factor) for her demotion.

Under the burden shifting analysis since Mary can establish a *prima facie* case of discrimination, her employer would be required to articulate a legitimate nondiscriminatory reason for her transfer and loss of pay, following which Mary would be required to prove that the reason proffered was a pretext [for discrimination]. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981). Throughout, the burden of persuasion remains with Mary. *Id. at 256*. Mary’s employer has claimed that her inappropriate conduct and Al’s wife’s concerns were the legitimate non-discriminatory reasons for the adverse action. However, Mary would still have the opportunity to establish that the reasons were a pretext for discrimination by pointing to her service record and showing that male managers who behaved similarly were not subjected to adverse action, and that she was singled out because of her sex (using the wife’s concern for support). This circumstantial evidence could also be used to support a finding that her gender was a motivating factor in the employment decision. Since there is a factual dispute as to whether the reasons offered for the adverse action were a pretext for discrimination as well as whether gender was a motivating factor in the determination, it is likely that the court will deny the motion for summary judgment.
Question No. 4: Grading Guidelines

1. **Removal of action to federal court**

   **Comments:** Candidates should demonstrate an understanding of removal of an action from state court to federal court, and the general procedures for doing so.

   3 points

2. **a. State action requirement**

   **Comments:** Candidates should demonstrate an understanding of the requirements for state action, and should apply the facts to the law to show how the court would analyze the issue.

   4 points

   **b. Equal Protection**

   **Comments:** Candidates should demonstrate an understanding of the Constitutional analysis of an Equal Protection claim, including the level of scrutiny, and apply these principles to the facts to show how the court would analyze the issue.

   5 points

3. **a. Title VII – *prima facie* case**

   **Comments:** Candidates should demonstrate an understanding of the requirements, under Title VII, for a *prima facie* claim of sex discrimination, and apply the requirements to the facts to reach a well-reasoned conclusion.

   4 points

   **b. Summary Judgment – Title VII**

   **Comments:** Candidates should demonstrate an understanding of the requirements for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure, and apply the rules to an analysis of a Title VII claim under the facts to reach a well-reasoned conclusion.

   4 points
Gus owned two Pennsylvania properties, a vacant building in Big City called Blackrock and an undeveloped 600-acre tract in Rural County called Pennacres. Gus validly conveyed Blackrock “to Bella, then upon Bella’s death to Edward” and Pennacres “to Jacob so long as Pennacres is left as an undeveloped conservation area.” Gus died one month later. By a valid will, Gus left any interest in real estate that he owned at his death to his elderly sister, Alice.

Alice spoke “broken English,” had a limited education, and lived on a fixed income. Due to her declining health, she had to leave an assisted-living facility and move to Golden Home (Golden), the only skilled nursing facility in Rural County that had a vacancy and could meet her needs. On the day that Alice was to move into Golden, she was given a complex 30 page form residency agreement to sign. The agreement was printed in small type and contained hard-to-understand provisions, including a clause, not distinguished in any manner, mandating all residents to pay for a costly prescription drug plan provided by Golden even if the resident did not need the plan. When Alice asked if her family could review the agreement, Golden’s director stated that Alice would be refused admission unless the agreement was signed immediately. Moreover, Golden’s director stated that review was “pointless” since Golden would not accept any changes to its agreement. Alice reluctantly signed the agreement.

Bella opened and solely operated a gourmet kitchen accessories and appliances store at Blackrock. To increase her store’s profits, Bella contacted Rachel, a celebrity chef, about making a personal appearance and giving a cooking demonstration at a special promotional event at the store. On January 2, 2011, Rachel sent Bella the following text message:

I agree to appear at your store for a fee of $10,000. In exchange for $100, I will agree to keep this offer open until February 1, 2011. Because I will be in Europe promoting my new cook book, please send your acceptance by regular mail.
Upon receiving Rachel’s text message, Bella wrote a check for $100, but forgot to mail it to Rachel.

On January 27, 2011, Rachel mailed Bella as follows: “Because I have agreed to compete on the television show, “Best Chef in the USA,” taping at the same time as your promotional event, I must revoke my offer.” On January 30, 2011, Bella mailed Rachel: “I accept your offer. Enclosed is my $10,000 check.” Bella received Rachel’s letter revoking the offer on February 2, 2011. Rachel received Bella’s acceptance letter and check on February 3, 2011.

1. (a) What legal interests were created in Pennacres by Gus’s conveyance?
   
   (b) Six months after the conveyance, Jacob started to construct housing units on Pennacres. What effect, if any, does this action have on who owns Pennacres?

2. (a) What legal interests were created in Blackrock by Gus’s conveyance?
   
   (b) As a result of Gus’s conveyance of Blackrock, is Bella required to share any profits from the operation of her store with Edward?

3. After Alice moved into Golden, an attorney reviewed the residency agreement at the request of a family member and determined that the mandated prescription drug plan not only was of no benefit to Alice because it duplicated her existing coverage, but also that it doubled the cost for Alice to stay at Golden. When Alice discontinued paying for Golden’s prescription drug plan, Golden sued. What defense, based upon the law of contracts, should Alice assert in opposition to Golden’s suit?

4. When Rachel failed to appear for Bella’s promotional event, Bella filed an action for breach of contract. Without discussing damages, will Bella’s action succeed?
1. (a) Gus granted a present fee simple determinable interest in Pennacres to Jacob and retained a possibility of reverter.

A fee simple determinable is an interest in land which has the potential to last forever like a fee simple but is subject to a limitation that causes the grantee’s estate to end and revert to the grantor upon the occurrence of an event specified in the limitation. R. Boyer, H. Hovenkamp and S. Kurtz, The Law Of Property: An Introductory Survey, §5.2, at p. 83 (4th ed. 1991). The interest retained by the grantor whenever there is the grant of a fee simple determinable is a future interest called a possibility of reverter. Emrick v. Bethlehem Township, 506 Pa. 372, 485 A.2d 736 (1984).

The use of words of limitation in a deed such as “so long as,” “during,” “while,” and “until” is commonly viewed as manifesting an intent to create a fee simple determinable in the grantee. Brown v. Haight, 435 Pa. 12, 255 A.2d 508 (1969); Higbee Corporation v. Kennedy, 286 Pa. Super. 101, 428 A.2d 592 (1981). Gus used the words “so long as” in his deed conveying Pennacres. By use of these words, Gus granted a fee simple determinable interest in Pennacres to Jacob and retained a possibility of reverter.

1. (b) Because Gus had transferred his possibility of reverter in his will, Alice automatically became the owner of Pennacres upon the occurrence of the events stated in the limitation.

Pennsylvania law has long recognized that a possibility of reverter is “capable of transmission by inheritance, conveyance or release.” Herr v. Herr, 957 A.2d 1280, 1285 (Pa. Super. 2008), quoting London v. Kingsley, 368 Pa. 109, 116, 81 A.2d 870, 873 (1951). The facts state that Gus transferred any interest in real estate that he owned at his death by will to Alice. Thus, the possibility of reverter that Gus retained in Pennacres was transferred to Alice upon his death.

Unlike a fee simple subject to a condition subsequent which requires an action on the part of the grantor to retake or perfect title upon the happening of the event stated in the condition, a fee simple determinable interest in land automatically ends upon the occurrence of the event specified in the limitation and title is transferred to the holder of the possibility of reverter. Emrick v. Bethlehem Township, supra. When Pennacres was no longer left as an undeveloped conservation area as specified in Gus’ deed, Jacob’s fee simple determinable interest ended and title to Pennacres automatically vested in Alice, the holder of the possibility of reverter.

2. (a) Bella has a life estate and Edward has a vested remainder in Blackrock.

A life estate arises when a conveyance or will expressly or implicitly limits the duration of the created estate in terms of the life or lives of one or more persons. S. Kurtz, Moynihan’s Introduction to the Law of Real Property, Chap. 2, § 9, at p. 64 (4th ed. 2005). The use of particular phrases or words of art is not required to create a life estate. Appeal of Board of Directors of Owen J. Roberts School District, 500 Pa. 465, 469, 457 A.2d 1264, 1266 (1983).
In this case, the language in Gus’ deed stating that the interest granted to Bella terminates upon her death would be viewed as granting Bella a life estate in Blackrock. *See*, Moynihan, *supra*, Chap. 2, § 10, at p. 64.

A remainder is a future interest in favor of someone other than a grantor which is capable of becoming possessory upon the natural expiration of a prior estate of lesser duration created at the same time and in the same instrument. A remainder is considered to be vested if the person to whom the interest is given is born, ascertainable and does not have to satisfy an express condition precedent to obtain possession. R. Boyer, H. Hovenkamp and S. Kurtz, *The Law of Property: An Introductory Survey*, § 7.5, at p. 184 (4th ed. 1991). Since the grant to Edward satisfies all of these requirements, Edward’s interest in Blackrock is a vested remainder.

2. (b) **As a life tenant, Bella is not required to share any income or profits derived from her use of Blackrock with Edward, her remainderman.**

A life tenant is entitled to both the possession and the use of the property for the term of the tenant’s life to the exclusion of the remainderman. *Deffenbaugh v. Hess*, 225 Pa. 638, 641, 74 A. 608, 609 (1909); *see also*, Restatement of Property, § 117 (1936). The life tenant also is entitled to collect rents and retain profits generated from the land during the tenant’s life. W. Stoebuck & D. Whitman, *The Law of Property*, § 2.11 at p. 60; *Heyer v. Kranach*, 52 Pa. Super. 635 (1913).

Because Bella had the exclusive right to possess and use Blackrock during the period of her life tenancy, she does not have to share any profits or income with Edward, the remainderman.

3. **Alice should assert as a defense to Golden’s suit that the clause in Golden’s form residency agreement mandating her to pay for the prescription drug plan is unconscionable.**

Alice should defend Golden’s lawsuit by asserting that the clause in Golden’s form residency agreement mandating that all residents must pay for a prescription drug plan provided by Golden even if a resident did not need the plan is unconscionable. The general purpose of the unconscionability doctrine is the prevention of oppression and unfair surprise in light of the setting, purpose and effect of a contract or a contract term. Restatement of Contracts (Second), § 208, Comments a and b. In Pennsylvania, the unconscionability doctrine has both procedural and substantive components. *Salley v. Option One Mortgage Corp.*, 592 Pa. 323, 331, 925 A.2d 115, 119 (2007).

Procedural unconscionability has been described as the “absence of meaningful choice on the part of one of the parties.” *Witmer v. Exxon Corp.*, 495 Pa. 540, 551, 434 A.2d 1222, 1228 (1981) (citation omitted). It considers not only the process by which the parties reached an agreement but also the form of the agreement. *Harris v. Greentree Financial Corp.*, 183 F.3d 173, 181 (3rd Cir. 1999). Some factors in the bargaining process which may contribute to a finding of procedural unconscionability include the stronger party’s knowledge that the weaker party either will be unable to receive substantial benefits from the contract or is unable to

Procedural unconscionability also may exist if the agreement is a contract of adhesion. Todd Heller, Inc. v. United Parcel Service, Inc., 754 A.2d 689 (Pa. Super. 2000). A contract of adhesion is a standardized contract form prepared by a party with excessive bargaining power and presented to the other party on a non-negotiable “take it or leave it” basis. Bishop v. Washington, 331 Pa. Super. 387, 400, 480 A.2d 1088,1094 (1984). Such an agreement may be created if the other party cannot obtain the good or service from other sources. Denlinger, Inc. v. Dendler, 415 Pa. Super. 164, 608 A.2d 1061 (1992). Nonetheless, a contract is not unconscionable simply because of a disparity in bargaining power. Witmer v. Exxon Corp., supra. (citations omitted). “Once a contract is deemed to be one of adhesion, its terms must be analyzed to determine whether the contract as a whole, or specific provisions of it are unconscionable.” Todd Heller, Inc. v. United Parcel Service, Inc., supra, 754 A.2d at 700. (citation omitted).

Substantive unconscionability involves a determination of whether the contract or a specific contractual term is “unreasonably favorable” to the party asserting it. Salley v. Option One Mortgage Corp., supra, 592 Pa. at 331, 925 A.2d at 119 (citations omitted). A substantively unconscionable contract or term is one that is “overly harsh, particularly one-sided or lopsided or manifests an outrageous degree of unfairness.” John E. Murray, Jr., Murray on Contracts, § 96, (4th ed. 2001).

In this case, Alice can point to a number of facts to support her defense that the prescription drug clause in Golden’s residency agreement is procedurally and substantively unconscionable. The residency agreement was a form contract that was written in small type and contained hard-to-understand provisions. Moreover, the prescription drug clause was essentially buried in the text of the complex, 30 page form. Further, Golden’s residency agreement has all the earmarks of a contract of adhesion. Golden’s director presented the form agreement to Alice as a take-it or leave-it proposition and stated that the review of its terms by Alice’s family was “pointless” because Golden would not accept any changes.

In addition to the form of the agreement, Alice can point to the unfairness of the bargaining process with Golden and the one-sided nature of the agreement. Golden was the only facility available to meet Alice’s healthcare needs and would not admit Alice unless she immediately signed the agreement. Golden easily could have seen that Alice would be unable to reasonably protect her interests during the bargaining due to Alice’s age, ill health, limited education and rudimentary command of the English language. Golden also required its residents to agree to pay for Golden’s prescription drug plan even if the plan did not benefit the residents,
and the cost of the plan doubled the residents cost to stay at Golden. Thus, Golden may have known that Alice, the weaker party to the agreement, would not have received any substantial benefit from her involuntary participation in the plan.

A court would have to consider all of these facts and circumstances in deciding whether the drug payment plan clause in the residency agreement should not be enforced based upon the doctrine of unconscionability.

4. Although Rachel’s offer to appear at Bella’s store was not made irrevocable by the creation of an option contract, Bella will prevail in her breach of contract action because Bella had already dispatched her acceptance before Rachel revoked her 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, § 43 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, Bella failed to accept Rachel’s offer to enter into an option contract by sending the $100 check as consideration. Thus, an option contract was not created and Rachel was free to revoke her offer to appear at Bella’s store.

“[A] revocation of an offer can have no effect until it is communicated to the person to whom the offer has been 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, 2011 Rachel sent her letter revoking her offer to appear at the store. Bella, however, had no knowledge of the revocation until she received
Rachel’s letter on February 2, 2011. By that time, Bella already had accepted the offer when she placed her letter with the appearance fee in the mail on January 30, 2011.

Although Rachel’s offer to make a personal appearance was not made irrevocable by the creation of an option contract, Rachel’s attempt to revoke the offer was not effective until Bella had received it. Since Bella had placed her acceptance in the mailbox prior to receipt of the revocation, a contract was formed. Accordingly, Bella’s breach of contract action against Rachel will be successful.

Rachel could make an argument in defense of the breach of contract claim that Bella’s acceptance of the offer to make the personal appearance was simply too late. Because an option contract was not created, Rachel can argue that the January 2, 2011 offer had lapsed due to the passage of time. “Where an offer does not specify an expiration date or otherwise limit the allowable time for acceptance, the offer is deemed to be outstanding for a reasonable period of time.” *Yaros v. Trustees of University of Pennsylvania*, 742 A.2d 1118, 1124 (Pa. Super. 1999).

What is a reasonable time for acceptance of an offer is ordinarily a question to be decided by the finder of fact and is dependent upon the numerous facts and circumstances surrounding the transaction, including the nature of the contract, the relationship or situation of the parties, their course of dealing, and the practices within a particular business. *Id.* In this case, the finder of fact would have to weigh all of these circumstances in deciding whether Bella’s acceptance, which was made in fewer than thirty days from the making of Rachel’s offer, was made within a reasonable period of time.
Question No. 5: Grading Guidelines

1. Fee Simple Determinable and Possibility of Reverter

Comments: Candidates should correctly identify the applicable interests as a fee simple determinable and a possibility of reverter. Candidates should discuss what language is needed to create a fee simple determinable and the rights associated with a possibility of reverter.

6 Points

2. Life Tenant and Vested Remainder; Rights of a Life Tenant

Comments: Candidates initially should identify the applicable interests as a life estate and vested remainder. Candidates should discuss and apply the principles of law governing the rights of a life tenant in reaching a well-reasoned conclusion about the remainderman’s right to a share of the profits from the life tenant’s use of the property.

4 Points

3. Unconscionability

Comments: Candidates should recognize the applicability of the doctrine of unconscionability and identify the elements necessary to assert such a defense under Pennsylvania law. Candidates should examine the stated facts to determine whether the elements necessary to assert an unconscionability defense have been satisfied.

5 Points

4. Option Contracts; Offer and Acceptance

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.

5 points
Question No. 6

Farm Corporation (“FarmCo”) is a Pennsylvania corporation that operates a 1,000 acre farm in Pennsylvania. FarmCo’s greenhouses allow it to grow produce year round. FarmCo grows various fruit and vegetable products for wholesale and retail sale and also has its own brand of juices that it produces at a small plant on its farm.

FarmCo is profitable and has accumulated a cash surplus of $500,000. FarmCo’s board of directors has learned that new government regulations have been proposed that, if adopted, would require FarmCo to make significant upgrades to its facilities. Both FarmCo’s corporate legal counsel, Attorney Able, and FarmCo’s accountant have advised the board to retain its reserves in case upgrades to its facilities are required in the near future due to the proposed governmental regulations. Considering the advice given, the board has voted against declaring a dividend at this time.

Three weeks ago, Pete, the President of Produce, Inc. (“Produce”), which owns various retail produce stores, telephoned FarmCo’s sales manager and reached a verbal agreement for 1,000 bushels of FarmCo’s tomatoes at a price of $20 per bushel. Since Produce was a new customer, FarmCo’s sales manager immediately prepared a memo to confirm Produce’s purchase that set forth the quantity ordered and the $20,000 purchase price. The sales manager signed the memo on behalf of FarmCo and mailed it to Pete. Pete received the memo the next day, read it carefully, and filed it away. Yesterday, Pete learned that he can buy tomatoes from another source for $18 per bushel. Pete has called FarmCo’s sales manager and stated that he does not wish to honor the verbal agreement with FarmCo.

Last month, FarmCo was having problems with the walk-in refrigerator in which it stores its inventory of juices. When the problem was discovered, FarmCo hired HVAC Service
Company (“HVAC”) to service the refrigerator. HVAC immediately sent one of its new technicians to FarmCo who cleaned and oiled a pump, replaced a section of piping that was leaking, and replaced coolant that had leaked from the system. HVAC’s bill to FarmCo shows $900 for labor and $100 for the replacement line and coolant.

One week after HVAC serviced the refrigeration system, it failed again even though it was operated under normal operating conditions. FarmCo’s quality control inspector has advised FarmCo’s president, Tom, that the inventory of juice in the refrigerator has spoiled and that anyone who drinks the juice will probably experience nausea and stomach pains for around twenty-four hours and that young children or infants could experience more serious problems. Tom had a conversation yesterday with Able, in which he disclosed the problem with the juice but suggested that he will ship the juice to FarmCo’s customers nonetheless since the chances of anyone suing FarmCo over a stomach ache is probably low. Able immediately completed some research and has concluded that shipping tainted juice could expose FarmCo to both civil and criminal penalties.

1. Under the Uniform Commercial Code (the “Code”), is there an enforceable agreement between FarmCo and Produce for the sale and purchase of the tomatoes?

2. If a disgruntled shareholder of FarmCo files an appropriate equity action to try to compel the declaration of a dividend, how should the court rule?

3. Would HVAC’s services to FarmCo allow for a claim under the Code, assuming that after the repair, the refrigerator was not fit for the ordinary purpose for which it is used because it was not properly repaired by HVAC’s technician?

4. Under the Pennsylvania Rules of Professional Conduct, what responsibilities does Able have and what steps should he take relative to Tom and FarmCo regarding Tom’s plans to ship the tainted juice?
1. There is an enforceable contract under the Uniform Commercial Code’s confirming memo between merchants exception to the statute of frauds.

Section 2201 of the Pennsylvania Uniform Commercial Code (the “Code”) provides, inter alia:

(a) General rule.—Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in such writing.

(b) Writing confirming contract between merchants.—Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (a) against such party unless written notice of objection to its contents is given within ten days after it is received.


Under the Code both FarmCo and Produce are merchants. The Code defines a transaction “between merchants” as “any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.” 13 Pa. C.S.A. §2104. A merchant is a person who: “(1) deals in goods of the kind; or (2) otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.” 13 Pa. C.S.A. §2104. FarmCo and Produce each deal in the sale of tomatoes and thus would each fall within the definition of a merchant.

Under the Code, between merchants if (i) within a reasonable time, (ii) a party sends a writing in confirmation of the contract “sufficient against the sender”, (iii) that is received by the receiving party and read and understood by the receiving party, (iv) and not objected to within ten days, then the writing is a confirming memo that will satisfy the writing requirement of subsection (a) of Code Section 2201. 13 Pa. C.S.A. §2201(b). In the instant case, FarmCo’s sales manager immediately prepared the confirming memo and mailed it to Produce the day the verbal agreement was reached. It was received by Pete the next day. The memo was sufficient against FarmCo as it contained the quantity ordered and price and was signed by FarmCo’s agent. Pete carefully read the memo and filed it away assumedly understanding its contents.
which should have been clear from the face of the memo. He did not object to the memo within ten days which he should have done under the Code if he did not wish to be bound by the memo. Thus, the memo satisfies the writing requirement of the Statute of Frauds under the Code and the contract between FarmCo and Produce is enforceable. See, White and Summers, Uniform Commercial Code, 4th Ed., §2-3 and 2-5.

2. The declaration of a dividend rests with the discretion of the board of directors and a court will not overturn the decision absent a showing of fraud or abuse of discretion.

   Unless restricted by the bylaws and subject to certain statutory restrictions, the board of directors of a corporation has broad discretion in determining if and when dividends should be declared. 15 Pa. C.S.A. §1551(a). Generally, shareholders of a corporation are not entitled to the earnings of a corporation even if a surplus exists. See Green v. Philadelphia Inquirer Co., 329 Pa. 169, 196 A. 32 (1938).

   The fact that the corporation has a surplus is not determinative on whether or not the board should declare a dividend, and courts will refrain from questioning the declaration or nondeclaration of a dividend unless fraud or an abuse of discretion can be shown. Jones v. Costlow, 349 Pa. 136, 36 A.2d 460 (1944). If the board has a valid reason for not declaring a dividend a court will not compel the board to do so even if a surplus would support a distribution. In the instant case, the board has been advised by corporate counsel that new regulations may be adopted that could bring substantial costs in the near future. Both legal counsel and the corporation’s accountant have advised the board to retain its surplus as a hedge against the potential future costs.

   Under the Pennsylvania Business Corporation Law of 1988 (“BCL”), a director is required to act in good faith in a manner he reasonably believes to be in the best interest of the corporation. 15 Pa. C.S.A. 1712. In exercising this duty, directors may rely on the advice of professionals, such as corporate counsel and the corporation’s accountant in making decisions on behalf of the corporation. Id. Courts will give substantial deference to the business decisions made by directors exercising their managerial function, and absent a breach of fiduciary duty, lack of good faith or self dealing there is generally a presumption that decisions made by the board are in the best interest of the corporation. 15 Pa. C.S.A. 1715(d).

   FarmCo’s board has the luxury of operating with a surplus but, based on information received from its counsel and accountant, has cause to protect the surplus. A decision to retain the surplus rather than declare a dividend would most likely be upheld by a court in equity given the sound basis for the board’s decision.

3. HVAC’s services probably would not support a claim under the Code because they did not involve a transaction in goods.

   Section 2102 of the Code provides, inter alia, “Unless the context otherwise requires, this division applies to transactions in goods. . . .” 13 Pa. C.S.A. §2102. The Code defines “goods” as all things (including specially manufactured goods) which are movable at the time of
identification to the contract for sale other than the money in which the price is to be paid, investment securities (Division 8) and things in action. 13 Pa. C.S.A. 2105. Most courts, including those in Pennsylvania, use the “predominant factor” test to decide whether the Code applies to a particular contract. In other words, were services or goods predominant in the contract. Courts will often focus on the relative costs of the services and goods in making the determination. The Pennsylvania Courts have indicated that “when a transaction involves predominately the rendition of services, the fact that tangible, movable goods may be involved in the performance of the contract does not bring the contract under the Code.” Turney Media Fuel, Inc. v. Toll Bros., Inc. 725 A.2d 836, 840 (Pa. Super. 1999).

In the instant matter the work performed by HVAC was to service the refrigeration system. The invoice submitted by HVAC demonstrates that 90 percent of the invoice was for labor and only 10 percent was for parts. It appears that the contract involved predominately the rendition of services and that the parts or materials supplied, which would constitute goods, were only incidental to the services provided. It is likely, therefore, that a court would conclude that the contract to provide the HVAC services was a service contract that would not support a breach of warranty claim under the Code. See, White and Summers, Uniform Commercial Code, 4th Ed., §9-2.

4. Able should make it clear to Tom that he represents the corporation and not Tom and should try to convince Tom to reconsider his plan and if unsuccessful should bring the information to FarmCo’s board.

Rule 1.13 of the Pennsylvania Rules of Professional Conduct addresses this situation and Able’s responsibilities and duties as follows:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

Able should make it clear to Tom that he represents FarmCo and not Tom and that his duty is to FarmCo. Able should make sure that Tom understands that there will be criminal and civil penalties imposed on FarmCo if Tom goes through with his plan and that Able will need to protect the interests of FarmCo against the substantial harm which will be caused by Tom’s action. Able should advise Tom to reconsider the release of the tainted juice to FarmCo’s customers. Given the substantial risk to the corporation Able should take the matter to the board if Tom fails to yield to Able’s advice. If the board persists in following Tom’s plan and Able feels the injury to the corporation will be substantial or if Able feels that he can no longer, in good faith, represent the interests of the company or that continued representation could expose Able himself to liability, then Able should consider resigning as corporate counsel pursuant to the Rules of Professional Conduct governing withdrawal.

Able should also consider whether or not he should disclose the information that he has received regarding the plan to ship the tainted juice to outside authorities. Rule 1.6 provides, “A lawyer may reveal such information [confidential information] to the extent that the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm.” The facts suggest that the tainted juice, if ingested, could cause “more serious problems” for young children or infants. It is not clear that this rises to the level of “certain death or substantial bodily harm” but one should at least consider whether disclosure might be warranted.
Question No. 6: Grading Guidelines

1. **Confirming memo between merchants**

   Comments: The candidates should recognize that the transaction involves a sale of goods between merchants and that the memo that was received, read and not objected to satisfies the requirements of the statute of frauds resulting in an enforceable contract.

   7 points

2. **Declaration of a Dividend**

   Comments: The candidates should recognize that the declaration of dividends rests with the board of directors and that absent fraud or abuse the court will not overturn a decision not to declare a dividend even though a surplus exists.

   5 points

3. **Applicability of the Uniform Commercial Code to services**

   Comments: The candidates should recognize that the contract was predominately for services and not for the sale of goods and that as such it does not support a breach of warranty claim under the Code.

   3 points


   Comments: The candidates should recognize that Able represents the corporation and has a duty to try to prevent it from engaging in illegal activity. If the corporation fails to heed the advice given Able should consider withdrawal and disclosure to protect the public.

   5 points
Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
February 22, 2011

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File
Memorandum

To: Applicant
From: Steven Suite
Date: February 22, 2011
Re: Beaker Non-Compete Agreement

Our client, Bob Beaker, was employed by Crabgrass Connections, Inc. (“Crabgrass”) in 2010 as a part time junior chemist, and while working there, had signed an agreement containing a non-compete clause. On January 31, 2011, Beaker resigned his position with Crabgrass, and on February 1, 2011, he accepted a full time position as an associate chemist with Bridges to the Future, Inc. (“Bridges”), a competitor of Crabgrass. Fred Flask, Esquire, the lawyer for Crabgrass, had written to Beaker and demanded that Beaker terminate his employment with Bridges immediately. When Beaker refused, Crabgrass filed suit in the Madison County Court of Common Pleas. The complaint, less the notice to defend and verification, is contained in the File. A copy of the employment agreement is attached to the complaint.

Your assignment consists of two tasks. The first is to prepare a responsive pleading in the form of a draft answer to the complaint, which also raises in New Matter all affirmative defenses and any other defenses to the enforceability of the non-compete agreement that are sustainable based on the facts set forth in the File. The answer should be prepared in compliance with the requirements of the Pennsylvania Rules of Civil Procedure, but you should omit the caption, signature, and verification, all of which will be supplied later. Each separate defense raised in the New Matter should be stated under a separate heading followed by the averments of fact that support that defense. You should include a demand for judgment after the answer and after the New Matter.

The second task is to provide an analysis of each defense that you set forth in New Matter so that I can assess which defenses should be incorporated in the answer that we are required to file with the court. This portion of your assignment should begin with the heading “Analysis” and contain a separately numbered statement of each defense raised in New Matter. Following each statement of a defense, you should provide a legal argument which applies the relevant and controlling legal principles to the facts to support the defense. Cite the legal authorities relied upon using a short form of citation (Bluebook format is not required) and reference any arguments that the plaintiff is likely to make in response to the defense. The File and Library which are provided contain the only facts and legal principles you should consider and rely upon in completing this assignment.
Bob Beaker is currently an employee of Bridges to the Future, Inc. (“Bridges”). Beaker lives and resides in Madison County, Pennsylvania. Bridges is a chemical research company which is attempting to develop an alternative fuel source by fermenting and distilling kudzu, a fast growing weed. Bridges’s offices and laboratories are located in Madison County, Pennsylvania.

Crabgrass Connections, Inc. (“Crabgrass”) is a competitor of Bridges, and it is trying to develop its product by fermenting and distilling crabgrass, which grows abundantly in Pennsylvania. Its headquarters and laboratories are located in Iroquois County, Pennsylvania, which is diagonally across the state and about 400 miles from Madison.

On July 1, 2010, Crabgrass hired Bob Beaker as a part time junior chemist assigned to a project in which it was trying to develop an alternate fuel source by fermenting and distilling crabgrass. Beaker had just received a two-year associate degree in chemistry from the Iroquois campus of the state university before beginning his employment. There was no written employment agreement, but the parties orally agreed that Beaker would be paid $11.00 per hour and receive two weeks of vacation every year. As a part time employee, Beaker was not eligible to participate in Crabgrass’s fringe benefit plans. Three months after he was hired, Beaker was asked to and did sign an employment agreement that contained a non-compete clause. At the time, Beaker was told that he would be terminated if he did not sign the agreement. A copy of the employment agreement is attached to the complaint that was filed by Attorney Flask on behalf of Crabgrass.

During his employment with Crabgrass, Beaker was to assist the senior chemists by, among other things, cleaning equipment, running errands, and filing laboratory notebooks that contained the records of experiments, both successful and unsuccessful. Each notebook and each page of each notebook is stamped in red with the following legend:

**WARNING!**

**THE MATERIAL IN THIS NOTEBOOK IS CONFIDENTIAL AND THE PROPERTY OF CRABGRASS CONNECTIONS, INC.**

**UNAUTHORIZED COPYING OR DISCLOSURE OF THIS MATERIAL IS STRICTLY PROHIBITED**

On January 31, 2011, Beaker resigned his position with Crabgrass, and on February 1, 2011, he accepted a full time position with Bridges as an associate chemist and moved to Madison County. He receives a salary of $40,000 per year, and after his 6 month probationary period, he will be able to participate in Bridges’s benefit plans. At Bridges, Beaker uses complex scientific equipment such as the four barreled, turbo charged gas chromatograph to perform quantitative and qualitative analysis of distillate products, and enters the results into the laboratory notebooks. When not busy doing this, he also assists the senior chemists in designing and running the experiments.
In the Court of Common Pleas of Madison County

CRABGRASS CONNECTIONS, INC.

Plaintiff

v.

Civil Action No. 2011-17

BOB BEAKER

Defendant

COMPLAINT

Plaintiff comes, by its attorney, and complains against defendant upon a cause of action of which the following is a statement.

1. Plaintiff is Crabgrass Connections, Inc., a Pennsylvania corporation with a principal place of business in Iroquois County, Pennsylvania.

2. Plaintiff is in the business of developing alternative fuels by, among other things, fermenting and distilling common weeds, such as crabgrass.

3. Defendant Bob Beaker is a resident of Madison County, Pennsylvania.

4. Defendant Beaker is an employee of Bridges to the Future, Inc. ("Bridges"), and a former employee of plaintiff.

5. Bridges is a Pennsylvania corporation with a principal place of business in Madison County, Pennsylvania.

6. Bridges is in the business of developing alternative fuels by, among other things, fermenting and distilling common weeds, such as kudzu.

7. On or about July 1, 2010, defendant Beaker was hired by plaintiff as a part time junior chemist.

8. In connection with his being hired, defendant Beaker executed an employment agreement with plaintiff pursuant to which he agreed to not be employed in the chemical industry anywhere in the United States for a period of three years after termination of his employment with plaintiff. A true and correct copy of the employment agreement is attached hereto as exhibit “A” and is incorporated herein by reference.
9. On or about February 1, 2011, defendant Beaker breached the employment agreement by accepting a position in the chemical industry with Bridges.

10. As a result of such breach, plaintiff has been and will continue to suffer immediate and irreparable damage which will be difficult if not impossible to quantify.

11. Plaintiff has demanded that defendant cease his wrongful conduct, but he has failed and refused to do so.

WHEREFORE, plaintiff respectfully requests that the court issue an order in its favor and against defendant, preliminary until final, enjoining defendant Beaker from engaging in employment in the chemical industry for a period of three years, requiring defendant Beaker to terminate his employment with Bridges to the Future, Inc., awarding damages in such amount as the court deems just and proper, and awarding reasonable counsel fees and costs against defendant Beaker.

Fred Flask
Fred Flask, Esquire
Attorney for plaintiff
EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT is made on October 1, 2010, between Crabgrass Connections, Inc. (hereafter referred to as “Employer”) and Bob Beaker (hereafter referred to as “Employee”).

Employer and Employee agree as follows:

1. Employer shall continue the part time employment of Employee in the capacity of Junior Chemist. Employee shall perform such duties as may be assigned from time to time by the Senior Chemist in charge of Employee’s shift.

2. Employee’s salary shall be $11.00 per hour.

3. As a part time employee, Employee shall not be entitled to participate in any of Employer’s benefit plans. However, Employee shall be entitled to two (2) weeks of vacation with pay every twelve months.

4. As the chemical industry is extensive in scope, and as Employee will be exposed to processes and procedures which Employer deems proprietary, Employee agrees never to divulge to any unauthorized person any of Employer’s trade secrets or materials designated as confidential, and to not work for any other employer in the chemical industry anywhere in the United States for a period of three (3) years after the termination of this employment unless Employer terminates Employee’s employment without cause. Because damages for breach of this non-competition agreement may be difficult to compute, Employee agrees that Employer shall be entitled to seek preliminary and permanent injunctive relief for any such violation.

5. Nothing in this agreement shall be construed as creating any employment relationship except that of an “at will” employment.

IN WITNESS WHEREOF, the parties have signed this agreement as of the date written above.

CRABGRASS CONNECTIONS, INC.

By:  
Paul Propane
President

Bob Beaker
Employee
Library
Pennsylvania Rules of Civil Procedure

Rule 1017. Pleadings Allowed

(a) . . . the pleadings in an action are limited to

(1) A complaint and an answer thereto

(2) A reply if the answer contains new matter, a counter claim or a cross-claim

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Rule 1019. Contents of Pleadings. General and Specific Averments

(a) The material facts on which a cause of action or defense is based shall be stated in a concise and summary form.

(b) Averments of fraud or mistake shall be averred with particularity. Malice, intent, knowledge, and other conditions of mind may be averred generally.

(c) In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of such performance or occurrence shall be made specifically and with particularity.

(d) In pleading an official document or official act, it is sufficient to identify it by reference and aver that the document was issued or the act done in compliance with law.

(e) In pleading a judgment, order or decision of a domestic or foreign court, judicial or administrative tribunal, or board, commission or officer, it is sufficient to aver the judgment, order or decision without setting forth matter showing jurisdiction to render it.

(f) Averments of time, place and items of special damage shall be specifically stated.

(g) Any part of a pleading may be incorporated by reference in another part of the same pleading or in another pleading in the same action. A party may incorporate by reference any matter of record in any State or Federal court of record whose records are within the county in which the action is pending, or any matter which is recorded or transcribed verbatim in the office of the prothonotary, clerk of any court of record, recorder of deeds or register of wills of such county.

(h) When any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written.

***
Rule 1021. Claim for Relief. Determination of Amount in Controversy

(a) Any pleading demanding relief shall specify the relief sought. Relief in the alternative or of several different types, including an accounting may be demanded.

***

Rule 1022. Paragraphing

Every pleading shall be divided into paragraphs numbered consecutively. Each paragraph shall contain as far as practicable only one material allegation.

Rule 1029. Denials. Effect of Failure to Deny

(a) A responsive pleading shall admit or deny each averment of fact in the preceding pleading or any part thereof to which it is responsive. A party denying only a part of an averment shall specify so much of it as is admitted and shall deny the remainder. Admissions and denials in a responsive pleading shall refer specifically to the paragraph in which the averment admitted or denied is set forth.

(b) Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivisions (c) … of this rule, shall have the effect of an admission.

(c) A statement by a party that after reasonable investigation the party is without knowledge or information sufficient to form a belief as to the truth of an averment shall have the effect of a denial.

Note: Reliance on subdivision (c) does not excuse a failure to admit or deny a factual allegation when it is clear that the pleader must know whether a particular allegation is true or false. See Cercone v. Cercone, 254 Pa.Super. 381, 386 A.2d 1 (1978).

***

Rule 1030. New Matter

(a) Except as provided by subdivision (b), all affirmative defenses including but not limited to the defenses of accord and satisfaction, arbitration and award, consent, discharge in bankruptcy, duress, estoppel, failure of consideration, fair comment, fraud, illegality, immunity from suit, impossibility of performance, justification, laches, license, payment, privilege, release, res judicata, statute of frauds, statute of limitations, truth and waiver shall be pleaded in a responsive pleading under the heading "New Matter". A party may set forth as new matter any other material facts which are not merely denials of the averments of the preceding pleading.

(b) The affirmative defenses of assumption of the risk, comparative negligence and contributory negligence need not be pleaded.
In June, 1969, appellee, Edward J. Bettinger, and one of the individual appellants, Carl E. Berke, negotiated an employment agreement whereby Berke began his employment with Bettinger as a salaried salesman in Bettinger's temporary-help division. Berke's duties were to become familiar with Bettinger's business and attempt to expand the temporary-help division. In February, 1970, Berke and Bettinger negotiated a new employment contract that was reduced to writing on March 2, 1970. The contract gave Berke a raise in salary and a promotion to sales manager of the temporary placement division of Bettinger's business. The contract also provided for Berke to receive commissions as of February, 1970, on the gross monthly billings of the temporary-help division. The contract contained the following restrictive covenant:

"... In the event of termination of employment more than three months after the date hereof, Employee shall not, for a period of one year after the termination of said employment, either directly or indirectly, enter into the employment agency or employment placement business, nor will he enter into the employ of anyone who is engaged in a similar business within fifty miles of City Hall, Philadelphia, Pennsylvania. In the event that Employee engages directly or indirectly, in the employment agency or employment placement business, as employee or otherwise, within said period but beyond said fifty mile radius, Employee shall not solicit employers or employee-applicants which were on Employer's customer lists during the term of this agreement. If Employee violates the provision of this paragraph, then in that event ... Employee shall forfeit all claim to all commissions otherwise due to him."

During the period from March, 1970, through December, 1972, Berke fulfilled his contractual duties. In December of 1972, Berke entered into competition with Bettinger. Berke also induced the other two appellants, Dorothye R. Herbert and Emily Simon, to leave the employ of Bettinger, where they had previously been employed without written contracts in the temporary-
help division, and come to work for him in his own temporary-help business. Their duties for Berke were the same as their duties had been for Bettinger -- the placement of temporary help in accordance with the needs of customers.

In April of 1973, Bettinger filed a complaint in equity, seeking, among other things, to enjoin appellants from competing in the temporary-help field. A hearing was held and the chancellor entered a decree granting the relief sought by Bettinger. Exceptions were argued and denied, the decree was made final and this appeal followed.

Appellant Berke first alleges that the court erred in granting the injunction due to the fact that Bettinger failed to establish irreparable harm. While it is generally true that injunctions will only be issued upon a showing of irreparable harm, we are here dealing with a restrictive covenant in an employment contract. In Jacobson & Co. v. Int. Environment Corp., 427 Pa. 439, 235 A. 2d 612 (1967), we stated: "... employment contracts containing general covenants by an employee not to compete after the termination of his employment are prima facie enforceable if they are reasonably limited as to duration of time and geographical extent ... within such territory and during such time as may be reasonably necessary for the protection of the employer."

Consequently, to determine whether Bettinger was entitled to have the restrictive covenant enforced, we need only concern ourselves with the reasonableness of the covenant. To be enforceable, the covenant must meet the three-pronged test laid out in Jacobson, supra. The covenant must be (1) reasonable in time, (2) reasonable as to geographical extent, and (3) otherwise reasonably necessary to protect the employer, without imposing an undue hardship on the employee. The record supports a finding that the restrictive covenant was reasonable with regard to all three prongs of the test. When asked if Bettinger's company had regularly placed temporary help with the customers on its list, Berke replied: "Not regularly. It's a constant going-back repetitive process in order to keep your contacts, to maintain it, because if you're not doing it, your competition is; and if you're not there and your competition comes in there and talks to these people, the next time they have business is going to be with your competition. So nothing is regular situation unless you keep it regular." Thus, Berke was admitting the crucial importance of customer contact in the business.
Bettinger also testified that it was his experience that if close personal relationships were kept with his customers, they would for the most part turn their entire temporary-help needs over to him. Thus, it is reasonable for Bettinger to seek protection from competition from former employees, like Berke, whose sole job was to maintain the close affiliations with prospective employers of temporary help. Moreover, there was no showing that the restrictive covenant's enforcement would work an undue hardship on Berke. The covenant is only enforceable for a year and during that time, Berke is free to pursue the many other areas of sales and industry with which he is familiar.

In addition, Bettinger reduced the geographic area in which Berke was precluded from working. The original covenant had called for an area of fifty miles from City Hall in Philadelphia. This was reduced to include only the city limits of Philadelphia. Berke was, therefore, free to operate his business in the area adjacent to Philadelphia proper, which was one of the areas that Bettinger, himself, had contemplated as one in which to open a branch office. From these facts, we believe that the chancellor was correct in finding the covenant was reasonable.

***

Also involved in this appeal are appellants Dorothee R. Herbert (Herbert) and Emily Simon (Simon) who were former employees of Bettinger. Neither of these two appellants had entered into restrictive covenant agreements with Bettinger. Nevertheless, both were enjoined from working for Berke and were ordered to return certain lists of customers and job applicants to Bettinger . . . .

The chancellor admitted that Herbert and Simon, since they had not signed agreements with restrictive covenants ‘may work generally for whomever they please.’ However, the chancellor explained that he believed that ‘the conduct of Herbert and Simon in copying lists of customers and applicants and in using the information contained therein to syphon plaintiff’s business constitute elements . . . of engaging in unfair competition . . . .’

The lists involved in the instant case are not the particular secrets of Bettinger. . . . Consequently, lists of either group of names were not entitled to protection. . . . Therefore, the injunction decreed against Herbert and Simon was in error.

Decree affirmed as to Berke; decree reversed as to Herbert and Simon. Each party to bear own costs.
GEORGE W.
KISTLER, INC.
v.
William J.
O'BRIEN,
Appellant

Supreme Court of
Pennsylvania
October 30, 1975

OPINION
Appellee, George W. Kistler, Inc., commenced this action in equity seeking to enforce a restrictive covenant in a written employment contract between itself and its employee, appellant William J. O'Brien. On May 14, 1974, the Court of Common Pleas issued a Decree Nisi enjoining appellant from engaging in selling or servicing fire equipment within a 50 mile radius. Appellant's exceptions were dismissed by the court en banc and a Final Decree granting relief was entered. This appeal followed.

Appellant seeks to vacate the ruling of the court below on several grounds. One of his contentions is that the covenant restricting appellant from engaging in a competitive business was not supported by adequate consideration. We agree with this argument and therefore reverse. Accordingly, we need not address appellant's other contentions.

A review of the record reveals the following pertinent facts. Appellee, George W. Kistler, Inc., (Kistler) is a Pennsylvania corporation engaged in the sale and service of fire equipment and fire prevention services. About a year prior to May of 1970, appellant, William J. O'Brien (O'Brien) was contacted by representatives of Kistler with respect to O'Brien's possible employment with their company. No decision was made at that time and the matter was left open for further discussion. Subsequently, some time in the late Winter or early Spring of 1970, Kistler again solicited O'Brien and after various negotiations relating to wages, duties, insurance benefits and other terms of employment but not including any mention of a restrictive covenant, it was agreed that O'Brien would leave his present employer and work for Kistler. O'Brien gave his then employer two weeks notice and began to work for Kistler on May 11, 1970.

On or about that same day, O'Brien questioned one of the clerks at the business with regard to his insurance benefits. Upon doing so, he was handed various forms to complete and sign, among them a document...
entitled Employment Contract which contained the following clause:

"In consideration of the said OWNER granting such requested employment to the said EMPLOYEE and in further consideration of the payment of ONE ($1.00) DOLLAR lawful money of the United States, this day made by the OWNER to the EMPLOYEE, he, the EMPLOYEE, agrees with the OWNER that for a period of two (2) years after said employment is terminated for any cause whatsoever by either or both of the parties, that he will not directly or indirectly manufacture, sell, distribute, handle on his own account or by association or employment by or with any other persons whosoever within an area of fifty (50) miles, extending from the City of Allentown, Lehigh County, Pennsylvania, any product equal in character or in any way similar to the products handled, bought, sold or serviced or to be handled, bought, sold or serviced by said OWNER."

O'Brien worked at various times in the capacity of Service Manager and Branch Manager for Kistler until November 16, 1973, when he was discharged for reasons that are disputed.

Upon his departure from Kistler, O'Brien went into business for himself servicing hand portable fire extinguishers. He solicited business from concerns located in large buildings and also did service work by subcontract for distributors of hand portable fire extinguishers. This activity was to some extent in competition with the activities of his former employer.

It is axiomatic in our law that in order for a covenant in restraint of trade to be enforceable the covenant must 1) relate to (be ancillary to) a contract for the sale of the good will of a business or to a contract of employment, 2) be supported by adequate consideration, and 3) be reasonably limited in both time and territory.

Appellant asserts that the covenant is unenforceable because it lacks consideration. It is his position that the negotiations prior to May 11th constituted a complete and binding oral contract for which the consideration was the employment itself. Thus he argues that the employment as consideration was not available to support the subsequent written restrictive covenant. Moreover, he contends that the entering into an agreement containing a restrictive covenant was not a factor considered in arriving at the oral agreement of employment. It was not until O'Brien had commenced work and inquired about his Blue Cross benefit forms that he
was requested by a clerk to sign the "Employment Contract" supposedly in accordance with the general practice of the firm. It is particularly significant that Kistler, who was then operating a sole proprietorship and personally participated in the final negotiations, never discussed this requirement.

Thus we must first determine at what point a final and binding employment contract was executed before determining what, if any, consideration passed for the signing of the covenant.

The Chancellor, in reviewing the evidence, rejected appellant's claim that an oral contract existed and found that the written contract was the sole agreement of employment between the parties. Based upon this premise he concluded that the employment itself was the consideration for the covenant. While the Chancellor's findings, approved by the court en banc, have the force and effect of a jury's verdict, they must also be supported by adequate evidence in order that they be affirmed on appeal. Our reading of the record, and especially the testimony of appellee, Kistler, forces us to conclude that the Chancellor's finding was contrary to the evidence and that a final and binding oral contract of employment which did not contain a restrictive covenant did exist prior to the date the written contract was signed.

Under the law of this Commonwealth it has been held that even where a later formal document is contemplated, parties may bind themselves contractually prior to the execution of the written document through mutual manifestations of assent. [Citations omitted] Thus evidence of mutual assent to employ and be employed which contains all the elements of a contract may be construed as a binding contract of employment though not reduced to writing. Under this test, it is clear that the testimony recited above requires a finding of the existence of an oral contract of employment at least two weeks prior to the written contract. Not only was it agreed that O'Brien would cease working for his present employer and begin working for Kistler, but all aspects of the employment relationship such as wages, duties and benefits were also agreed upon. Kistler's testimony admits mutual assent regarding the employment. Moreover, there was no evidence that the parties understood that O'Brien "was not to become a regular employee until he signed the restrictive covenant, and was not to receive any commissions . . . or other confidential information prior to that time." (citation
omitted) Indeed the record establishes that both parties understood that O'Brien was to leave his then employment and become a regular employee of Kistler without any promise not to engage in a competitive enterprise.

Having concluded that a valid oral contract of employment, without a covenant to compete, existed prior to the written contract of employment, we cannot accept the Chancellor's view that the employment itself constituted the consideration for the covenant. In our judgment, such consideration would clearly be past consideration.

While a restrictive covenant, in order to be valid need not appear in the initial contract, if it is agreed upon at some later time it must be supported by new consideration. (citations omitted)

As stated by the Supreme Court of North Carolina:

". . . when the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon a new consideration." James C. Greene v. Kelley, 261 N.C. 166, 168, 134 S.E.2d 166, 167 (1964).

Furthermore, we have stated that continuation of the employment relationship at the time the written contract was signed was not sufficient consideration for the covenant despite the fact that the employment relationship was terminable at the will of either party. [Citations omitted] Thus the covenant which is the basis of this action is not enforceable for lack of consideration and the decree of the court below must be reversed. 5

5 The seal and $ 1.00 nominal consideration for the covenant recited in the clause are insufficient to support equitable enforcement of a restrictive covenant which is not favored in our law. (citations omitted)

Decree reversed.
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 in the answer 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.
Question No. PT: Examiner’s Analysis

The ability to draft pleadings is an important task that a lawyer must be able to perform. This practical question is intended to assess the applicant’s ability to review and apply the Rules of Civil Procedure in drafting an answer to a complaint, and to analyze the facts and substantive law in raising appropriate defenses that will protect the client’s position. The applicant is assigned two tasks. The first task is to draft a responsive pleading in the form of an answer to a complaint that has been filed to enforce the terms of a non-competition clause. The second task is to provide a legal analysis supporting the defenses raised in New Matter in the answer.

Task 1  Drafting the Answer and New Matter. 8 points

The applicant must utilize the Rules of Civil Procedure to draft an answer and New Matter. The applicant should:

- Utilize numbered paragraphs, each of which has one subject and corresponds to the paragraph of the complaint being addressed.
- Paragraphs 1 -7 should be admitted. Credit will also be given if paragraphs 2 and 6 are denied in part for lack of sufficient knowledge with respect to the averment that “other things” are also used to attempt to develop alternative fuels.
- Paragraph 8 should be admitted in part and denied in part. The denial should be specific that the employment agreement was not executed in connection with his being hired.
- Paragraph 9 should admit taking the position, but state that whether there was a breach of the employment agreement is a legal conclusion that does not require an answer. Recognizing that the Rules require a response to each averment of fact but do not specifically authorize the “legal conclusion” response, a denial that there was a breach of the employment agreement will also be acceptable.
- Paragraph 10 should be specifically denied that there was a breach that caused damages.
- Paragraph 11 should be denied with respect to the characterization of the conduct which was not ceased as wrongful.
- A demand for judgment should follow the numbered paragraphs.
- Plead New Matter, raising under separate headings the issues that the employment agreement is unenforceable because:
  - It is not supported by consideration
  - The employer does not have a protectable interest that outweighs the harm to the employee
  - It is overly broad as to time, area and industry

- The material facts supporting each of the defenses should be pleaded in the New Matter
- Following the New Matter, there should be another demand for judgment.

Task 2  Analysis 12 Points

The analysis should apply the relevant and controlling legal principles to the facts to support each defense raised in New Matter in the answer.
1. The agreement is not enforceable because it was not executed at the inception of employment, but three months later, and was not supported by additional consideration.

(a) A covenant not to compete must be supported by adequate consideration. (Kistler)
(b) If the covenant not to compete is set forth in the original employment agreement, the employment itself serves as consideration. (Kistler)
(c) Parties can bind themselves contractually to an employment agreement by a mutual manifestation of assent, even if there has not been a written agreement. (Kistler)
(d) Beaker’s employment with Crabgrass began on July 1, 2010 at which time there was no mention of a non-compete clause.
(e) An agreement not to compete which is executed after employment has commenced requires additional consideration to support it. (Kistler)
(f) The non-compete clause was not enforceable because it was executed 3 months after Beaker was employed and was not supported by any new consideration.
(g) Continued employment is not sufficient consideration to support a non-compete clause. (Kistler)

2. The agreement is not enforceable because the former employer has no protectable interest, given the nature of Beaker’s job duties and lack of exposure to secrets, and the agreement will be an undue hardship on Beaker in that he will be severely limited in being able to follow his profession as a chemist.

(a) A covenant not to compete must be reasonably necessary to protect the employer’s interests without imposing an undue hardship on the employee. (Bettinger)
(b) Beaker’s job was to perform menial duties such as running errands and filing notebooks. There is nothing in the facts to suggest that he has been exposed to any secret processes of his employer or that he possessed any inside knowledge of trade secrets.
(c) Even if Beaker obtained access to confidential material contained in the notebooks when he was filing the notebooks, the employer’s interest was adequately protected by the non-disclosure agreement and there was no apparent protectable interest served by the non-compete agreement.
(d) Based on the minimal need for protection which resulted from the menial nature of his job, it was unreasonable to impose such an extreme burden on the employee by prohibiting his employment in the chemical industry.

3. The agreement is unenforceable because it is overly broad as to time, area, and industry.

(a) A covenant not to compete must be reasonable as to time and geographical extent. (Bettinger)
(b) The total ban on employment in the chemical industry anywhere in the United States for a period of three years was not reasonable.