QUESTION 1

Paul decided to take up golf and arranged a series of lessons from Dale, the veteran professional instructor at the local country club. Dale has a unique approach to the golf swing, which he calls the "Unnatural Golf Method." To begin instruction, Dale manipulated Paul's shoulders by pushing them hard from behind. As he did so, Paul cried out in pain. Paul claimed that Dale injured his back and that he incurred medical expenses for treatment. Paul sued Dale for professional negligence in an attempt to recover for his injuries.

QUESTIONS:

Applying the Federal Rules of Evidence, discuss the admissibility of each of the following items of evidence that were offered at trial. Assume proper objections were made.

Offered by Paul:

1. Testimony from two other novice golfers, also former students of Dale, that they too had injured their backs when Dale negligently pushed too hard on their shoulders while giving them a golf lesson.

2. Testimony from Dale's former wife, Martha, that when they were married Dale once privately told her that the "Unnatural Golf Method," although it produced long, accurate shots, was a "back killer."

Offered by Dale:

1. An article from "Today's Golfer," a well-known golf magazine, that contradicted the testimony of Elroy "Bear" Clubs, famous golf pro. Clubs had testified at trial that, in his opinion, the "Unnatural Golf Method" is absurd and ineffective. Clubs admitted, under oath, that "Today's Golfer" is a reliable authority.

2. Testimony from Sal Hutton, another famous golf pro, that in his opinion "Bear" Clubs is dishonest.

QUESTION 2

Owner placed the following notice in the local newspaper:

Help! My dog, Fluffy, is lost!
Fluffy is a 100 pound, brown and black 4-year old Rottweiler-Doberman mix.
I will pay $1,000 reward to whomever returns my beloved Fluffy to me.

Finder came upon an illegal dog fight and rescued one of the dogs. Finder took the dog to a veterinarian for necessary treatment, and then, believing the dog to be a stray, took him home to keep him as a family pet. The veterinarian's bill, which Finder paid, was $100. Finder also spent $25 for food for the dog.

A few days later, Owner saw the dog in Finder's yard. Owner explained to Finder that the dog was his beloved Fluffy and demanded that Finder return Fluffy to him. Finder could tell that Fluffy was Owner's dog by Fluffy's reaction to seeing Owner. He felt that returning Fluffy to Owner was the right thing to do, so he agreed.

The next day Finder learned about the reward and demanded that Owner pay him $1,125; $1,000 as payment for the advertised reward and $125 as reimbursement for the cost of the dog food and the veterinarian's bill. Owner responded, "I don't owe you anything, but because you took care of Fluffy, I will pay you $500 if you are willing to wait until the first of the month." Finder agreed.

On the first of the month, Finder asked Owner for the $500; Owner refused. Finder then sued Owner seeking $1,125.

QUESTION:

Discuss whether Finder is likely to recover any monetary damages from Owner.

QUESTION 3

Drake beat and seriously injured his wife. When police officers arrived at the scene, Drake walked up to them and said, "I'm guilty. I did it. Arrest me." One of the officers asked, "What is it that you did?" Drake again said that he was guilty and that he knew he was going to jail. While the officers were waiting for medical assistance to arrive, Drake commented that he should have killed his wife.

A few minutes later, Drake started screaming and behaving erratically. Drake was then handcuffed, taken to the police station, and arrested. After one of the officers read Drake his "Miranda" rights, Drake said "I messed up. I'm sorry. I don't want to say any more." Although the officer had advised Drake that he had the right to an attorney, Drake did not request one.

An hour later, an officer returned to the room where Drake was being held. The officer did not re-advise Drake of his rights, but reminded him that he was still under "Miranda." The officer asked whether Drake wanted to make a statement. The officer also told Drake that he understood that Drake had assaulted his wife because he suspected her of having an affair. The officer said that if Drake was really sorry, he would make a statement. Drake then signed a form waiving his "Miranda" rights and gave a full confession.

Drake filed a pre-trial motion to suppress all of his statements.

At the trial, Drake was acquitted of the attempted murder charge, but was convicted of battery. He appealed his conviction, claiming that he had ineffective counsel. The prosecutor told defense counsel that if Drake prevailed on appeal, and had his convictions overturned, Drake would be re-tried on all of the original charges, including the attempted murder charge. The prosecutor also told defense counsel that if Drake was reconvicted of battery, the prosecutor would request that Drake receive a longer sentence than the one originally imposed.

QUESTIONS:

1. Discuss how the court should have ruled on Drake's motion to suppress.

2. Assume that Drake appealed his convictions and they were reversed. Discuss the permissible scope of the new trial and the sentence that could be imposed if Drake is reconvicted.

QUESTION 4

Arnold and Benedict agreed to pool their resources and labor and open an ice cream parlor which they called Conezone. Each contributed $50,000 to start the business, but they never entered into any written agreement. Arnold and Benedict shared duties at the shop and always split any profits or losses "right down the middle."

During the second year of operation, Arnold used $3,500 his mother had given him to purchase a used pick-up truck which he titled in his name. The truck was always parked at Conezone, and both Arnold and Benedict used the truck to make deliveries and get supplies.

Recently, Dreamworld, a resort in a neighboring county approached Benedict about providing $25,000 worth of ice cream for a special event. Even though Benedict knew Conezone would be incapable of delivering such a large volume on short notice, he fraudulently accepted Dreamworld's money and agreed to the deal. Conezone failed to provide any ice cream to Dreamworld.

Arnold learned of the Dreamworld deal only after Conezone failed to deliver the ice cream. When Benedict explained the situation, Arnold exclaimed "I'm through with this business and with you."

QUESTIONS:

1. Discuss the legal relationship, if any, between Arnold and Benedict.

2. Discuss the ownership status of the pick-up truck.

3. Discuss whether Conezone will be liable to Dreamworld concerning the non-delivery of ice cream.

4. Discuss the legal effect, if any, of Arnold's final exclamation to Benedict.

QUESTION 5

Note: all dates refer to the year 2004.

On March 1, BigBank made a $1 million loan to Music Makers, Inc., a corporation chartered under the laws of the state of Euphoria. Music Makers sells and leases pianos through its retail stores located throughout Euphoria. To secure repayment of the loan, Music Makers granted to BigBank an enforceable security interest in its inventory and equipment. The security agreement included an after-acquired property clause. On March 10, BigBank filed a financing statement against the collateral, which was proper in all respects, with the appropriate Euphoria officials.

On June 1, Music Makers changed its legal name to Essex Keyboards Company, effective as of that date, and requested its new name through the Euphoria Secretary of State.

On August 1, PianoMax sold ten grand pianos to Essex Keyboards. PianoMax retained an enforceable security interest in the grand pianos to secure repayment of the purchase price. On August 5, PianoMax sent a written notice of its security interest in the pianos to BigBank. The contents of the notice satisfied the statutory requirements of UCC Article 9. On August 9, BigBank received the notice. On August 16, PianoMax filed its financing statement, proper in all respects, with the appropriate Euphoria official. On August 18, PianoMax shipped the grand pianos from its New York City warehouse and delivered them to Essex Keyboards.

On November 1, Essex Keyboards bought a photocopier from the seller, Acorn Systems. Acorn retained an enforceable security interest in the photocopier to secure repayment of the purchase price. On November 7, Acorn delivered and installed the photocopier. On November 29, Acorn filed a proper financing statement against the photocopier with the appropriate Euphoria official. Acorn had knowledge of BigBank's financing statement, but Acorn never gave notice of its interest to BigBank.

QUESTIONS:

1. Discuss whose security interest in the ten grand pianos enjoys priority, BigBank's or PianoMax's. Assume that Essex Keyboards still owns all ten grand pianos.

2. Discuss whose security interest in the photocopier enjoys priority, BigBank's or Acorn's. Assume that Essex Keyboards still owns the photocopier.

QUESTION 6

Howard and Wendy were married in 1990 in Colorado. Howard was an engineer at a small firm, and Wendy was an artist and math teacher in the public schools. They had no children.

In 1998, Howard and Wendy divorced. By this time, Howard was nearing partnership at his firm and earning $150,000 per year. Wendy was increasingly devoting her time to painting, and had stopped teaching. In 1998, Wendy earned about $14,000 selling her paintings. Howard and Wendy's 1998 separation agreement, as set forth in their divorce decree, required spousal maintenance for Wendy in the following terms:

> Howard shall pay spousal maintenance to Wendy of $1,000 per month, such maintenance to terminate January 31, 2007 or upon the death or remarriage of Wendy, which ever occurs first. Both parties waive any rights to modify the amount or duration of such maintenance.

In January 2002, Wendy met Steve, who was the founder and president of a large design business in Colorado. After six months of dating, Wendy moved in with Steve. Six months later, Steve and Wendy drafted an agreement and signed it in the presence of a notary public. The agreement stated that the parties were cohabitants who "would not assume responsibilities for each other's support, except that Steve would provide a place for them to live so long as they were living together." It further provided that "assets titled in each party's separate name would remain separate," and that Wendy would "never hold Steve responsible for the support of any children Steve fathered with Wendy." Four months later, and to her complete surprise, Wendy became pregnant by Steve. Their child, Chris, was born February 1, 2005.

Shortly thereafter, Howard filed a court petition to end spousal maintenance on the grounds that Wendy and Steve were married, or alternatively, on the grounds that Wendy no longer needed maintenance. In April, 2005, Wendy and Chris moved out of Steve's home into their own apartment. Wendy filed an action against Steve seeking child support and a share of Steve's assets. At that time, Wendy was earning $14,000 annually and Steve was earning over $100,000 annually.

QUESTIONS:

1. Discuss whether Howard will succeed in his action to end spousal maintenance.

2. Discuss whether Wendy will succeed in her action against Steve.

QUESTION 7

The State of Shangri-la recently added the Women Aviator's College (WAC) to its public college system. WAC is the only state supported institution of higher education in Shangri-la offering pilot and astronaut training. Although WAC became co-ed in the 1970's, it still has a policy that 70% of the incoming class be female. This policy is based on increasing the small number of women who are currently pilots and astronauts.

The college denied admission to the following three applicants:

Andy Able: Andy was denied because all male slots had been filled by the time he applied. Andy can prove, however, that he is more qualified than some already admitted female students.

Betty Biplane: Betty is Caucasian of non-Hispanic descent. Although the college does not have any race-based quotas, the college does consider race, along with many other factors (economic background, high school activities, first generation college student) in order to obtain the educational benefits that flow from a diverse student body. Betty can show that she is more academically qualified than some already admitted minority-race students.

Diane Diminutive: Diane is 4'11". Since most graduates of WAC will become pilots or astronauts, and those positions require that individuals be at least 5'1" (and no taller than 6'6"), WAC requires that 80% of the class meet the generally accepted height restrictions.

QUESTION:

Discuss what constitutional claims each student may raise in challenging his/her denial of admission.

QUESTION 8

Stop Pollution Now (STOP), a public interest organization, wants to challenge recent actions of the Internal Revenue Service (IRS) granting special tax relief to the oil and gas industries. STOP filed a complaint alleging that unless the IRS is enjoined from granting special tax relief to such industries, drilling activity in the national forests will increase and recreational users of the forests, as well as the forests themselves, will suffer harm from such increased activity. STOP also argued that it should be allowed to bring the action because it has "a special interest and expertise in the conservation, appropriate recreational use, and sound maintenance of the national forests."

QUESTION:

Discuss whether the IRS action complained about by STOP is reviewable by the courts and whether STOP has standing to sue the IRS. Do not discuss jurisdiction or venue. Assume that the Federal Administrative Procedures Act is applicable.

QUESTION 9

Tenant rented a five room residential apartment from Landlord for two years, to begin immediately. In the standard written lease, one provision prohibited Tenant from having any pets on the premises. After tenant moved in, he noticed that a number of other tenants had pets. Tenant wrote Landlord a letter stating that he wanted a dog and asked if Landlord had any objection. Landlord never answered the letter. Two weeks later Tenant obtained a dog. A few months later, on adjoining property, Landlord fenced in a yard where tenants could exercise their pets.

Twelve months later, Landlord sent a notice to all residents of the apartment building stating that he was enforcing the ban on pets. He ordered the residents to find alternative homes for pets within two weeks.

Tenant did not comply with Landlord's order. A few weeks later Tenant returned to his apartment to find that Landlord had changed the lock on one of the doors to Tenant's apartment. As a result, Tenant could use only three of the five rooms that he was renting. Tenant stopped paying rent and continued to occupy the remaining three rooms.

QUESTION:

Discuss whether Tenant may legally continue to keep his dog in the apartment and occupy the three rooms without paying rent.

DISCUSSION FOR QUESTION 1

Testimony of Novice Golfers

To be admissible, evidence must be relevant. FRE 402. It is a close question whether this testimony is relevant. FRE 401 defines "relevant evidence" as evidence that tends to make the existence of any fact that is of consequence to the determination of the action more or less probable.

The contention that two other golf students were injured when Dale pushed on their shoulders does make it more probable that Dale's teaching method does injury to the back. This probability, however, is not high. Prior acts of negligence are generally not relevant to the issue of whether a defendant was negligent during the incident in question. The reason for this general conclusion is that Dale might have, for instance, pushed against many students' shoulders without any adverse consequences. The fact that Dale pushed these two golfers too hard lends little to the conclusion that he pushed Paul too hard. In addition, other causes, unique to each of the golfers, could better explain each golfer's back injury; moreover, their injuries could differ in significant ways.

Paul might have argued that this evidence constitutes admissible habit. FRE 406 specifically allows the admission of evidence of the habit of a person to prove action in conformity therewith. Although, the answer is not obvious, the better answer is that two injured students drawn from the presumably high number of students from this "veteran" instructor is insufficient, alone, to provide an adequate basis to establish a habit of injuring students during golf lessons.

Finally, this evidence also appears to be inadmissible character evidence. FRE 404(a) prohibits evidence of a person's character to show action in conformity therewith. To the extent that the novices' testimony showed Dale to be a rough, careless golf instructor who was likely to be rough and careless in instructing Paul, it is character evidence and is inadmissible. None of the "non-character" purposes found in FRE 404(b) are pertinent.

Testimony of Dale's Former Wife

Dale confessed his doubts about his teaching method to his wife while they were married. He spoke to her in confidence. As a result, Dale's statement falls within the Marital Communications Privilege recognized at common law. Trammel v. United States, 445 U.S. 40 (1980). The Federal Rules of Evidence adopts the common law of privileges. FRE 501. At common law, the privileged status of Dale's communication continues even after his marriage has ended. Both the testifying spouse (Dale's former wife) and the non-testifying spouse (Dale) are "holders" of the privilege; in other words, both must consent to allow the privilege to be waived. Dale did not consent, as evidenced by his objection to its admissibility. As a result, the testimony of Dale's former wife is inadmissible.

Note that the testimony would not be inadmissible on hearsay grounds. Hearsay is an extra-judicial statement offered for the truth of the matter asserted therein. FRE 801. Dale's statement meets this definition. However, Dale is a party, and hearsay statements of a party are admissible as "not hearsay" if offered by the party opponent. FRE 801(d)(2).

Article from Magazine

Clubs testified that Dale's method is absurd and ineffective. Dale offered an article from a golf magazine that contradicts Clubs' contention. The article constitutes impeachment evidence, as the article contradicts Clubs' assertion. As impeachment, the article is not being used as substantive evidence, to prove the truth of the contention that the Unnatural Golf Method is a sound and accepted system of golf. It is only used to show that the fact that a popular magazine would present the method belies Clubs' contention that the method is ineffective.

In addition, the article is also admissible as substantive evidence, not just as impeachment. Although it is hearsay, it meets the "Learned Treatise" exception described in FRE 803(18). This exception allows into evidence, among other items, articles in periodicals if established as a reliable authority by testimony of a witness. Clubs testified that the magazine was reliable. Pursuant to the provisions of FRE 803(18), this article could be read to the jury but not received as an exhibit; the article serves as a substitute for live testimony by its author.

Testimony of Sal Hutton

FRE 607 provides that the credibility of a witness may be attacked. Clubs is a witness, and Hutton attacked his credibility, testifying that Clubs is dishonest. Character evidence is generally inadmissible on the grounds of relevance. FRE 404. However, FRE 404(a)(3) creates an exception for evidence that attacks the character of a witness. Hutton's evidence is in the form of an opinion. Opinion evidence is allowed on the character of a witness, provided that the evidence refer only to the character trait of truthfulness or untruthfulness. FRE 608(a).

As a result, Hutton's testimony is admissible as he attacked Clubs' credibility. An opinion as to Clubs' character is an acceptable form, although Hutton's character testimony is limited to Clubs' character for untruthfulness.

DISCUSSION FOR QUESTION 2

In order to be successful, Finder's demand for $1,125 necessitates a finding that Owner was contractually obligated to pay the $1,000 reward and the expenses Finder incurred in caring for Fluffy. Before there can be a contractual obligation to pay anything, Owner must have made a promise or promises to pay. *Restatement (Second) of Contracts,* §1.

The $1,000 Reward:

In order to establish the existence of a contract, Finder must first establish that there was mutual assent among the parties. Mutual assent is shown by an offer and acceptance of that offer. Manifestation of assent may be made by words or by conduct. *Id. at* §3, *Comment d.* Owner made an offer to the public by way of his advertisement in the local paper to pay $1000 to the person who returned Fluffy. Under the U.C.C. and the Restatement, this qualifies as a traditional unilateral contract. This type of offer contemplates acceptance by performance rather than by a promise, and only the performance requested in the offer will manifest acceptance.

In order for Finder successfully claim the $1,000 reward, he must have acted with knowledge of the offer and been motivated by it. In this case, Finder did not know of the reward and only returned Fluffy to Owner because he believed Owner to be Fluffy's rightful owner and believed returning the dog to him was 'the right thing to do.' Finder has no contractual right to the $1,000 reward money; he did not know there was an offer and therefore couldn't accept it – there was no mutual assent and therefore no agreement.

The Claim for $125 in Expenses:

Finder might be able to assert a quasi-contractual claim against Owner for the expenses he incurred in caring for the dog. A quasi-contract is a legal fiction designed to avoid injustice by preventing unjust enrichment of one party to the detriment of another. Finder need not show the elements of a traditional contract to recover under this theory. In order to recover under these circumstances Finder must show that he conferred a benefit on Owner, that he had a reasonable expectation of being compensated, that the benefits were conferred at the expressed or implied request of Owner, and that if Owner is allowed to retain the benefits without compensating Finder, Owner will be unjustly enriched.

In this case, Finder is not likely to succeed in a claim based on unjust enrichment. Finder did confer a benefit on Owner and could argue that Owner would be unjustly enriched by not repaying Finder. However, Finder did not have a reasonable expectation of being compensated and did not undertake the expenses of the veterinarian or purchasing the dog food at Owner's request (either implied or express). Rather, he did these things because he believed Fluffy to be a stray and wanted to keep him as a pet.

Enforcing the Promise to Pay $500:

The only other promise made by Owner was the promise to pay $500, "...because you took care of Fluffy." Argument could be made that this promise was a promise to pay for past

benefits received by Owner from Finder. A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice. *Restatement (Second) of Contracts,* §86(1). *Promise for a Benefit Received.* One limitation on § 86 is that if the promisee renders the services with 'donative' (volunteer) intent, the subsequent promise to pay by the promisor is not enforceable. *Id. at* §86. In this case, Finder performed the acts of paying the veterinarian's bill and purchasing the dog food for two reasons, he felt it was the morally appropriate thing to do, and he wanted to keep Fluffy for himself as a pet. This situation more closely resembles a 'gift' or the act of someone volunteering their time/money as opposed to an act done by Finder to benefit Owner. Therefore, Owner's promise to pay Finder $500 is likely unenforceable.

Alternatively, when Finder demanded $1,125 from Owner, Owner denied that he owed anything to Finder but did promise to pay $500. This promise could be construed as an offer to compromise a disputed claim which Finder accepted. In such case, the consideration to support Owner's promise would be Finder's implied promise to surrender his claim to $1,250. Such forbearance will be consideration even if Finder's claim is invalid, if the claim is in fact doubtful, or if Finder honestly believes that he has a valid claim. *Id. at* §74. However, there was no agreement between the parties or even discussion of settlement for a potential claim, so Finder is not likely to prevail under this theory either.

Conclusion: Finder is not likely to recover any damages against Owner.

DISCUSSION FOR QUESTION 3

Motion to Suppress

There are two distinct constitutional bases for the requirement that a confession or inculpatory statement be voluntary in order to be admissible into evidence: the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment privilege against self-incrimination. People v. Rivas, 13 P.3d 315 (Colo. 2000). Most examinees will probably only address the latter.

Under the Due Process voluntariness test, the trial court must take into consideration the totality of the circumstances under which the statement was made in determining whether it was made voluntarily or was the result of coercive police conduct. People v. Rhodes, 729 P.2d 982 (Colo. 1986). This test applies to any out-of-court statement made by the accused, whether or not the statement was made during a custodial interrogation. People v. Rivas, supra.

The Fifth Amendment privilege against self-incrimination prohibits the admission of inculpatory statements made during the course of a custodial interrogation unless the prosecution establishes by a preponderance of the evidence that the person making them has been advised of his rights under Miranda and has made a voluntary, knowing, and intelligent waiver of those rights. People v. Rivas, supra; People v. Blankenship, 30 P.3d 698 (Colo. App. 2000).

Only if the totality of the circumstances surrounding the custodial interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that a valid waiver has been made. People v. Owens, 969 P.2d 704 (Colo. 1999); People v. Blankenship, supra.

A. Statements Drake made at the scene of the crime were not the result of an improper custodial interrogation.

1. First statement "I'm guilty. I did it. Arrest me." This statement constituted Drake's initial encounter with the police. He was thus neither in custody nor subject to interrogation or coercion by the police when he made the statement.

2. Second Statement made in response to officer's question "What is it that you did?" The facts specifically indicate that Drake was not handcuffed and arrested until after he made all of the at-the-scene statements, and nothing in the facts suggests that he had any objective basis for believing he was not free to leave. He was thus not in custody when he responded to the officer's question "What is it that you did." Accordingly, although the statement was made in response to the officer's question, and even if the question constituted police interrogation, Drake's response was not made during a custodial interrogation.

3. Third Statement "I should have killed my wife." Drake's comment that he should have killed his wife was likewise not the result of a custodial interrogation. He was not in custody when he made the statement, and he made it spontaneously

(not in response to any coercion or improper police questioning).

The examinees should thus conclude, with respect to both the Due Process Clause and the Fifth Amendment, that under the totality of circumstances test all three of Drake's at-the-scene statements were voluntarily made and should not be suppressed. See People v. Requejo, 919 P.2d 874 (Colo. App. 1996).

B. Statements Drake made after being advised of his Miranda rights

There is no indication in the fact pattern that Drake's Miranda advisement was incorrect or incomplete. Accordingly, the examinees should not discuss that issue.

A confession or inculpatory statement is involuntary if coercive police conduct, physical or mental, plays a significant role in inducing the accused to make it. People v. Valdez, 969 P.2d 208 (Colo. 1998); People v. Gennings, supra.

Similarly, in order for a waiver of Miranda rights to be valid, the prosecution must prove that the waiver was knowingly, intelligently, and voluntarily made. A waiver is voluntary if it is the product of a free and deliberate choice rather than intimidation, coercion, or deception. People v. Gray, 975 P.2d 1124 (Colo. App. 1997). Coercive police conduct includes not only threats or physical abuse, but also subtle forms of psychological coercion. People v. Valdez, supra; People v. Branch, 805 P.2d 1075 (Colo. 1991); People v. Grant, 30 P.3d 667 (Colo. App. 2000), aff'd, 48 P.3d 543 (Colo. 2002). The determination whether governmental conduct is actually coercive and induces a challenged waiver or statement must be made by assessing the totality of the circumstances under which the waiver or statement was made. People v. Cardenas, 25 P.3d 1258 (Colo. App. 2000).

Police may resume questioning after a defendant has invoked his right to remain silent or indicated that he does not want to make a statement if they wait a sufficient amount of time before reinitiating questioning and don't badger or coerce the defendant into talking. Because he had been arrested and was at the police station when he made the post-advisement statements, Drake was obviously in custody. The examinees should simply note that Drake was in custody and should not discuss the issue. The examinees also should not discuss whether there was a violation of Drake's Sixth Amendment right to counsel because the police advised him of his right to an attorney, but he never requested one.

1. First post-advisement statement "I messed up. I'm sorry." The statement Drake made immediately after he was advised of his rights but before he told the officer he didn't want to say more was spontaneous and was not made in response to any police interrogation or coercion. The court should conclude that this statement was voluntary and deny the motion to suppress it.

2. Waiver of Miranda rights and the full confession made after the officer reinitiated questioning. The court could rule either way with respect to Drakes waiver of his rights and the statements he made when the officer came back into the room an hour after Drake had said he did not want to make any more statements. Other examinees will conclude that: (a) the officer waited a sufficient amount of time before resuming questioning, (b) the officer's interrogation style did not rise to the level of coercion, and (c) under the totality of the circumstances, the waiver and subsequent statements were voluntary and should not be suppressed. To be balanced, these examinees should acknowledge that the officer's "soft technique" of commenting that if Drake were "really sorry" he would make a statement and telling him that he understood the motive for the crime may have created an atmosphere in which Drake was more likely to make an inculpatory statement. But the conclusion that the officer's method of interrogation was not coercive is a legitimate one.

Procedure Upon Re-Trial and Re-Conviction

Under the Double Jeopardy Clause of the Fifth Amendment, once jeopardy attaches, the defendant may not be retried for the same offense. Drake was convicted by a jury, and jeopardy attached when the jury was sworn in. Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). One of the exceptions to the general rule is that a defendant may be retried after a successful appeal, unless the ground for reversal was insufficient evidence to support the guilty verdict. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

Here, the reversal was based on the ground that Drake received ineffective assistance of counsel, not that the evidence was insufficient to support his convictions. Accordingly, he may be re-tried on all of the charges he was convicted of after the first trial without violating his right against double jeopardy. However, the attempted murder charge may not be reinstated because Drake was acquitted of that charge.

In addition to double jeopardy concerns, a defendant may not be "punished" for exercising his right to appeal. Thus, prosecutorial vindictiveness against a defendant for having exercised his appellate rights must play no part in the sentence he receives upon reconviction. See North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); People v. Williams, 916 P.2d 624 (Colo. App. 1986). The Double Jeopardy Clause does not prohibit imposition of a harsher sentence on conviction after retrial, but if after successfully appealing a conviction, the defendant receives a more severe sentence than the one originally imposed, it is presumed that the sentence was the result of prosecutorial vindictiveness. People v. Williams, supra.

Here, the prosecution told Drake's lawyer that if he prevailed on appeal, they would request a harsher sentence upon his reconviction. This threat is an obvious attempt to discourage Drake from pursing the appeal, and following through on the threat would constitute prosecutorial vindictiveness. Accordingly, unless some other legitimate reason is presented for imposing a longer sentence, Drake may not receive a sentence that exceeds the one originally imposed.

DISCUSSION FOR QUESTION 4

1. Legal Relationship Between Arnold and Benedict.

The facts reveal that Arnold and Benedict entered into a partnership. A partnership is defined as an association of two or more persons to carry on as co-owners of a business for profit. See Uniform Partnership Act of 1997 (UPA) § 101(6) No writing is necessary to create a partnership, and the parties' intent may be implied by conduct. See 59A Am.Jur.2d Partnership § 90. Thus, the fact that Arnold and Benedict did not enter into a written partnership agreement is not determinative. If, as here, there is no specific agreement concerning the duration of the enterprise, it is deemed a partnership at will. See 59A Am.Jur.2d Partnership § 82. In addition to reaching the correct legal conclusion that a partnership existed, the examinee should receive points for discussing the facts that tend to establish the partnership such as the joint contribution of $50,000 in capital and splitting of profits and losses.

2. Ownership Status of the Pick-up Truck.

This calls for a discussion of whether the pick-up is partnership property or personal property belonging to Arnold. Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property (i.e. not belonging to the partnership), even if used for partnership purposes. See UPA § 204(d). This is precisely the situation with the pick-up truck. It was purchased with Arnold's own money and titled in his own name with no reference to the partnership. Thus, despite the fact that it was used for partnership purposes, the truck presumptively belongs to Arnold.

3. Conezone's Liability to Dreamworld.

A partnership is liable for loss or injury caused as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership. See UPA § 305(a). This covers liability for tortious conduct including fraud. See 59A Am.Jur.2d Partnership § 429.
Here, Benedict's fraudulent conduct involved a promise to deliver ice cream. This conduct appears to have been committed in the "ordinary course of the partnership." Consequently, Conezone will be liable to Dreamworks for Benedict's fraud.

4. Legal Effect of Arnold's Exclamation.

This question raises the issue of the partnership's dissolution. Once again, because Arnold and Benedict did not agree as to any specific duration of the partnership, this is a partnership at will. A partnership at will is dissolved if it receives notice of a partner's express will to withdraw as a partner. See UPA § 801(1); 59A Am.Jur.2d Partnership § 552.
Here, Arnold's statement that he is through with the business and with Benedict seems sufficient notice that he is withdrawing as a partner. Thus, the partnership is dissolved. However, dissolution does not entirely end the partnership because it continues to exist for the sole purpose of winding up business. See UPA § 802(a); 59A Am.Jur.2d Partnership § 584.

DISCUSSION FOR QUESTION 5

Whose security interest in the ten grand pianos enjoys priority between BigBank and PianoMax?

The facts state that BigBank has an "enforceable security interest" in the inventory and equipment of Music Makers. Therefore, a general discussion of attachment under UCC 9-203 is not required. Music Makers acquired the pianos after it executed the security agreement with BigBank, but the security agreement included an after-acquired property clause (as permitted by UCC 9-204(a)). The after-acquired property clause permitted BigBank's security interest to attach to the pianos because the collateral description included "inventory." The pianos are inventory under UCC 9-102(a)(48)(B) because Music Makers holds the pianos for sale or lease in its ordinary course of business.

BigBank may perfect its security interest in the pianos under UCC 9-310 by filing a financing statement. The proper place to file the financing statement under UCC 9-301(1) is in the state where the debtor is located. Music Makers is chartered under Euphoria law and is an example of a "registered organization" under UCC 9-102(a)(70). As a registered organization, Music Makers is deemed to be located in the state of its incorporation, Euphoria, under UCC 9-307(e). Therefore, BigBank filed its financing statement in the proper jurisdiction (Euphoria) on March 10.

When "Music Makers, Inc." changed its name to "Essex Keyboards Company" on June 1, BigBank had four months to refile its financing statement under the new name (if the change is "seriously misleading") to have continued and uninterrupted perfection under UCC 9-507(c). The change is almost certainly seriously misleading because a filing under "Music Makers, Inc." would not be found in a search against "Essex Keyboards Company." BigBank's financing statement remained effective to perfect collateral owned by Essex Keyboards at the date of the change (June 1) and any collateral acquired by Essex within four months after the change (through September 30). Therefore, BigBank's filing remained effective to perfect a security interest in the pianos because Essex purchased them in August (within the four-month period).

The facts state that PianoMax has an "enforceable security interest" in the pianos. Therefore, no discussion of attachment under UCC 9-203 is warranted. For reasons previously discussed, PianoMax perfected its security interest by filing a financing statement with the appropriate Euphoria official.

Under the first-to-file-or-perfect rule of UCC 9-322(a)(1), BigBank's security interest enjoys priority because BigBank filed its financing statement on March 10 and PianoMax did not file its financing statement until August 16. As the pianos were acquired by Essex after BigBank filed its financing statement on March 10, its filing date trumps any later perfection date of either party.

Notwithstanding the result under UCC 9-322(a), PianoMax may argue that its security interest enjoys superpriority under UCC 9-324(b), available to a creditor holding a purchase-money security interest in inventory. (UCC 9-324(b) trumps UCC 9-322(a) under UCC 9-322(f)(1).) PianoMax has a purchase-money security interest in the pianos under 9-103(a) and (b), as PianoMax

sold the pianos to Essex Keyboards and the security interest secures repayment of the unpaid purchase price. The pianos are inventory because Essex Keyboards is in the business of selling and leasing pianos. PianoMax also must satisfy four other statutory requirements. PianoMax satisfied UCC 9-324(b)(1) because it perfected its security interest by filing on August 16, before delivering the pianos on August 18. PianoMax met UCC 9-324(b)(2) by sending a notice of its security interest to BigBank on August 5. The notice was timely under UCC 9-324(b)(3) because BigBank received the notice on August 9, before Essex Keyboards received the pianos on August 18. And UCC 9-324(b)(4) is met because the facts state that the contents of the notice satisfied the requirements of UCC Article 9. Therefore, because PianoMax has satisfied all of the statutory requirements of UCC 9-324(b), its purchase-money security interest in the pianos enjoys superpriority over BigBank's perfected security interest.

Whose security interest in the photocopier enjoys priority between BigBank and Acorn?

As Essex Keyboard is in the business of selling and leasing pianos, the photocopier is "equipment" under UCC 9-102(a)(33). BigBank's security interest extends to the photocopier because its collateral description in the security agreement included "equipment" and the security agreement included an after-acquired property clause (as permitted by UCC 9-204(a)). However, Essex Keyboards acquired the photocopier on November 1, more than four months after its "seriously misleading" name change on June 1. Therefore, BigBank's financing statement is no longer effective to perfect the interest in this item under UCC 9-507(c)(2). Accordingly, BigBank has a security interest in the photocopier, but its security interest is unperfected.

The facts state that Acorn retained an "enforceable security interest" in the photocopier. As mentioned earlier, filing a financing statement with the appropriate Euphoria official will perfect a security interest in equipment. Therefore, Acorn's security interest became perfected when it filed its financing statement on November 29.

Acorn sold the photocopier to Essex Keyboards and retained a security interest in the item to secure repayment of the purchase price, so Acorn has a purchase-money security interest in the photocopier under UCC 9-103(a) and (b). Accordingly, Acorn may argue that its purchase-money security interest is entitled to superpriority under UCC 9-324(a) (available to non-inventory collateral, such as equipment), which does not require the purchase-money creditor (Acorn) to give any notice to any pre-existing creditor (BigBank). But Acorn filed its financing statement on November 29, more than twenty days after delivering the photocopier to Essex Keyboards on November 7, so Acorn is not entitled to superpriority under UCC 9-324(a). Nevertheless, Acorn's security interest enjoys priority under UCC 9-322(a)(2) because Acorn's security interest is perfected and BigBank's security interest in unperfected.

DISCUSSION FOR QUESTION 6

Howard's Action to End Spousal Maintenance

Colorado law terminates spousal maintenance at the death of either party or upon the remarriage of the recipient. §14-10-122(2) C.R.S. Howard and Wendy's settlement agreement incorporated these terms as well. Wendy and Steve did not have a formal marriage that was licensed, solemnized and registered according to §14-2-104 C.R.S. Neither did Wendy and Steve have a common law marriage. A common law marriage requires at the least: mutual consent and agreement of the parties to be married, followed by mutual open assumption of a marital relationship, including behavior such as cohabitation and acquiring a reputation of a marital relationship. See, People v. Lucero, 47 P.2d 660, 663 (Colo. 1987). Wendy and Steve did not intend to marry. In their written agreement they referred to themselves as "cohabitants" who did not intend to assume responsibilities for each other's support. Because Wendy is not married, the portion of the settlement agreement providing for termination of maintenance at remarriage does not apply.

Furthermore, cohabitation is not by itself sufficient grounds for suspending or reducing maintenance. It is not, in other words, equivalent to marriage for the purpose of terminating maintenance. Dwyer v. Dwyer, 825 P.2d 1018, 1019 (Colo. App. 1991). The question remains whether cohabitation is such a change in circumstances that it could be cause for a modified maintenance order. See §14-10-114 C.R.S. In the case of Howard and Wendy, the answer is "no" because their agreement, as set forth in the divorce decree, stated that the amount and duration of maintenance was not modifiable by either party. For this same reason, Howard will not be able to seek early termination of his obligation on the grounds that Wendy can support herself.

Wendy's action against Steve

Courts have the power to enforce agreements between parties who are cohabiting and having sexual relations. Courts will refuse to enforce agreements in which the SOLE consideration for the contract is sexual relations, versus agreements where sexual relations are only a portion of the benefits or incidental to the agreement. Salzman v. Bachrach, 996 P.2d 1263, 1267 (Colo. 2000). It is not likely that Wendy and Steve's agreement will be characterized as founded solely upon sexual relations. Consequently, Wendy will be bound to that part of her agreement with Steve barring her from receiving a share of Steve's property.

A court will refuse to enforce that part of the agreement discharging Steve from any responsibility to support his child. Parents owe support to minor children, §14-10-115(1) C.R.S.and may not enter into agreements that undermine the child's best interests. See Abrams v. Connolly, 781 P.2d 651 (Colo. 1989); Wright v. Wright, 514 P.2d 71 (Colo. 1973). Steve will therefore be required by pay child support according to the guidelines for support established in Colorado. §14-10-115 C.R.S. The statutory guidelines' calculation will constitute the presumptive amount of the child support obligation.

DISCUSSION FOR QUESTION 7

Andy Able

Andy will raise an equal protection challenge to the school's gender quota under the 14th Amendment. Gender-based decisions in admissions to state schools are subject to a heightened review standard. A state seeking to defend a gender-based admission decision to public schools must demonstrate an "exceedingly persuasive justification" for that action. U.S. v. Virginia, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). The state must show "at least that the challenged classification serves an important governmental objective and that the discriminatory means employed is substantially related to the achievement of that objective." Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). The justification cannot be hypothesized or invented *post hoc* in response to challenge, and cannot rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. U.S. v. Virginia, supra.

While a state may evenhandedly support diverse educational opportunities, including single-sex schools, it cannot support an exclusion if the educational opportunity at the gender-segregated school is a "unique" opportunity available only at a premier educational facility. Id. Here, the educational opportunity is unique, and the exclusion is substantial. Therefore, it is likely that the quota will be found unconstitutional.

Betty Biplane

Betty will raise an equal protection challenge to the school's use of race as a factor in admission decisions under the 14th Amendment. All racial classifications imposed by government must be analyzed under strict scrutiny. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). To pass constitutional muster under the strict scrutiny test, the racial classification must be *narrowly tailored* to further a *compelling governmental interest*. Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). Attaining a diverse student body can be a compelling state interest. Grutter v. Bollinger, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Good faith on the part of a university is presumed absent a showing to the contrary. Richmond v. J.A. Croson Co., supra; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). To be narrowly tailored, the means chosen must fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. Grutter v. Bollinger, supra.

Here, it is likely that Betty will not succeed on a constitutional challenge. A university cannot use racial quotas, but may consider race or ethnicity as a "plus" in a particular applicant's file, so long as it does not insulate the individual from comparison with all other candidates for the available seats. Grutter v. Bollinger, supra.

Diana Diminutive:

Diana will raise a 14th Amendment equal protection challenge to the height requirement. Since this requirement does not affect a suspect class such as race or gender, the Court will employ the rational basis test. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441, 105

S.Ct. 3249, 3255, 87 L.Ed.2d 313 (1985). Under the 14th Amendment, at a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17, 93 S.Ct. 1278, 1288, 36 L.Ed.2d 16 (1973). A court should be reluctant to overturn governmental action on the ground that it denies equal protection of the laws under the rational basis test. Cleburne v. Cleburne Living Center, Inc., supra. Thus, the burden is upon the challenging party to negate "any reasonably conceivable state of facts that could provide a rational basis for the classification"—the state does not even have to articulate its basis at the moment the decision is made. Heller v. Doe, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993)

Where a group possesses "distinguishing characteristics relevant to interests the state has the authority to implement," the state can prove a rational basis, and the action does not give rise to a constitutional violation. Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 121 S.Ct. 955, (2001). Here, the state has an interest in promoting aerospace and aeronautics, and therefore Diane will not be able to show that there is no rational basis to exclude applicants who do not meet the height restriction.

DISCUSSION FOR QUESTION 8

The purpose of this question is to test the examinees on certain procedural obstacles to judicial review of agency actions other than jurisdictional matters, specifically the reviewability of agency actions and standing.

Reviewability

Sections 703 and 704 of the Administrative Procedures Act (APA) provide for judicial review of final agency actions. There is a **presumption of reviewability** of agency actions unless there is clear evidence of Congressional intent to preclude review or where agency action is committed to agency discretion by law. APA, Section 701(a); See also Briscoe v. Bell, 432 U.S. 404 (1977). Here, examinees are not given any language from IRS statutes or rules and regulations that indicates that review of agency actions is specifically precluded or that agency action is committed to agency discretion by law. Accordingly, examinees should discuss the likelihood that the agency action in question is reviewable by the courts.

Although examinees have been given no facts about whether administrative remedies were available to STOP within the IRS, they should recognize the general principle concerning **exhaustion of administrative remedies prior to seeking judicial review**. See, e.g., Meyers v. Bethlehem Shipping Corp., 303 U.S. 41 (1938) (judicial review not appropriate until administrative remedies have been exhausted); Darby v. Cisneros, 509 U.S. 137 (1993) (APA requires exhaustion only where the relevant statute or rules mandate it.) Two additional closely related concepts also may come into play in determining whether STOP resorted to the courts prematurely, the **final order rule** and **ripeness**. Section 704 of the APA provides that only **final** agency orders or actions are reviewable. The requirement of ripeness also ensures that courts are deciding only actual "cases and controversies." See Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) (balancing test should be employed weighing the fitness of the issues for review against the hardship to the parties of delaying consideration.)

Standing

Standing concerns whether a particular plaintiff can obtain judicial review. The courts currently use a three-part test for determining whether a party has standing to challenge government action. The first question is whether the plaintiff alleges that the challenged action has caused it **injury in fact**. See Association of Data Processing Serv. Organs. (ADAPSO) v. Camp, 392 U.S. 150, 152 (1970). Such injury can be economic, recreational, environmental, aesthetic, etc. See, e.g., United States v. Students Challenging Regulatory Agency Procedure (SCRAP), 412 U.S. 669, 686 (1973); Sierra Club v. Morton, 405 U.S. 727, 734 (1972). Even where an organization such as STOP has recognized expertise in conservation, however, standing will not be granted absent allegations of injury to the organization or its members. See id. at 739. As a practical matter, this requires that STOP allege that some of its members actually use the affected area for their activities. See id. at 740 n.15.

The second question is "whether the interest sought to be protected by the complainant is arguably **within the zone of interests** to be protected or regulated by the statute or constitutional guarantee in question." ADAPSO, supra, at 153. In this case, standing, if it is to exist, must be based on § 10 of the Federal Administrative Procedures Act (APA), 5 U.S.C. § 702 (1982), which provides that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The third part of the test is whether **causation** exists between any "injury in fact" that could be claimed by STOP and the government action challenged. The "case or controversy" limitation of Article III still requires that a "federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42 (1976). Thus, to establish standing, causation must be reasonably clear in that STOP's injury could be remedied by favorable judicial review of the IRS actions at issue. See id. at 45 (plaintiff must establish "that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.")

Given the fact pattern, there is no right or wrong answer as to whether STOP will be able to establish standing. Examinees should identify the specific principles involved and discuss whether STOP has met its burden with regard to each aspect of the test.

DISCUSSION FOR QUESTION 9

Tenant can argue that he can keep his pet on two grounds. First, Landlord waived his right to enforce the contrary lease provision; and second, Landlord is estopped from enforcing the lease provision.

Landlord's waiver of the right to enforce the "no pets" provision is evidenced by his failure to answer Tenant's letter. Landlord's waiver is also evidenced by his failure to enforce the "no pets" provision for a year, a lengthy period of time. Third, Landlord also evidenced waiver by fencing in the yard for the purpose of exercising pets.

Landlord is also estopped from enforcing the "no pets" provision because Landlord engaged in conduct on which Tenant could rely as evidencing that Landlord was rendering the lease provision unenforceable. Estoppel requires affirmative conduct on the part of the party being estopped and/or detrimental reliance on the part of the party seeking estoppel. Here, there is affirmative conduct on the part of Landlord because he built the exercise area for the tenants' pets. There is also detrimental reliance on the part of Tenant in that he went out and got a dog on the basis of Landlord's behavior.

There is an implied covenant of quiet enjoyment in all leases which provides that a landlord will not interfere with a tenant's quiet enjoyment and possession of the premises. The covenant of quiet enjoyment may be breached by actual eviction, partial actual eviction, or constructive eviction. Tenant has the right to stop paying rent and remain in the remaining three rooms because of the doctrine of partial actual eviction. The doctrine applies when a landlord has deprived a tenant of some part of the tenant's premises. Here, Landlord deprived Tenant of two of the five rooms that Tenant had rented. Under the doctrine of partial eviction, the tenant need not pay the proportionate part of the rent represented by the continued use of the part that remains accessible. According to the doctrine, rent issues from the entire premises and cannot be apportioned. In addition, the landlord cannot apportion his own wrong. Therefore, Tenant has no obligation to pay any rent. For the same reasons, the doctrine permits the tenant to remain in possession of the property that remains accessible. Robert S. Schoshinski, American Law of Landlord and Tenant (1980) §5:10 at 251-55 (waiver and estoppel); §3:4 at 95-97 (partial actual eviction).

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ESSAY Q1

SEAT

ISSUE	POINTS AWARDED
Testimony of novice golfers	
1. To be admissible, evidence must be relevant (FRE 402).	1. o
1a. Relevant evidence tends to make the existence of any fact, that is of consequence to the determination of the action more or less probable.	1a. o
1b. Prior acts of negligence generally not relevant.	1b. o
2. FRE 406 authorizes admission of "habit" evidence:	2. o
2a. Evidence must tend to show a habit that a person would have acted in conformity therewith (injuring students).	2a. o
2b. Two students testimony probably not enough to constitute "habit."	2b. o
3. This evidence also is probably inadmissable character evidence. (FRE 404(a) (generally) prohibits admission of "character" evidence.)	3. o
Testimony of Dale's former wife	
4. Dale's statement to his wife falls under the "Marital Communications Privilege" ("Spousal Immunity") ("Husband-Wife Privilege")(FRE 501).	4. o
4a. The privilege continues even after the marriage ends.	4a. o
4b. To waive privilege, both Dale and his former wife must consent; Dale can (therefore) prohibit his former wife from testifying.	4b. o
5. Dale's statement meets definition of hearsay.	5. o
5a. Hearsay is an extra-judicial statement, offered for the truth of the matter asserted.	5a. o
5b. Hearsay statements are admissible if offered by party opponent (FRE 801(d)(2)).	5b. o
Article from Today's Golfer	
6. A witness' testimony (Club's) may be impeached with extrinsic evidence.	6. o
7. Article also admissible as substantive evidence ("Learned Treatise") ("reliable") (FRE 803(18)).	7. o
Testimony of Sal Hutton	
8. Opinion testimony allowed on character of witness, provided the evidence refers only to truthfulness.	8. o

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ESSAY Q2

SEAT

ISSUE		POINTS AWARDED
$1,000 reward		
1.	To establish a contract must establish mutual assent - offer and acceptance.	1. o
2.	Ad in paper constitutes unilateral contract.	2. o
3.	Only way to show acceptance is through performance.	3. o
4.	In order for Finder to get the reward, he must have acted with knowledge of the offer and been motivated by it.	4. o
5.	Finder did not know of the reward - no offer- no acceptance - no mutual assent.	5. o
Quasi-contract		
6.	Identify quasi-contract.	6. o
7.	Avoid injustice by preventing unjust enrichment of one party at other's expense.	7. o
8.	Finder must show that he conferred a benefit on Owner;	8. o
9.	that he had a reasonable expectation of being compensated; and	9. o
10.	that the benefits were conferred at the expressed or implied request of Owner.	10. o
11.	Finder had no expectation of being compensated and benefits were not conferred at request of Owner. Therefore, no recovery.	11. o
Promise to pay $500		
12.	A promise made in recognition of a past performance or moral obligation is enforceable.	12. o
13.	Finder, however, rendered the services voluntarily, therefore the subsequent promise to pay is not enforceable.	13. o
14.	Promise to pay $500 could be construed as an offer to compromise a disputed claim. (Consideration is surrender of Finder's claim.)	14. o

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ESSAY Q3

SEAT

ISSUE		POINTS AWARDED
1.	Issue Recognition: Miranda warnings.	1. o
2.	Legal test: Miranda warnings are triggered by custodial interrogation.	2. o
3.	Issue Recognition: Due Process Clause of the Fourteenth Amendment.	3. o
4.	Legal test: Due Process Violation requires, in the totality of circumstances, state action (law enforcement) overbearing the will of the accused.	4. o
5.	"I'm guilty. I did it. Arrest me." - no Miranda violation.	5. o
6.	"I'm guilty. I did it. Arrest me." - no Due Process violation.	6. o
7.	Response to officer's question, "what is it that you did," defendant repeated he was guilty and going to jail - no Miranda violation.	7. o
8.	Response to officer's question, "what is it that you did," defendant repeated he was guilty and going to jail, - no Due Process violation.	8. o
9.	Defendant's statement that he should have killed his wife - no Miranda violation.	9. o
10.	Defendant's statement that he should have killed his wife - no Due Process violation.	10. o
11.	"I messed up. I'm sorry. I don't want to say any more." - no Miranda violation.	11. o
12.	"I messed up. I'm sorry. I don't want to say any more." - no Due Process violation.	12. o
13.	Defendant's "full confession" after signing waiver of Miranda rights.	
	13a. Waiver of Miranda rights must be knowing, intelligent and voluntary.	13a. o
	13b. Did the police fail to scrupulously honor the defendant's assertion of his right to remain silent? If so, then Miranda violated.	13b. o
	13c. In the totality of the circumstances, was the statement the product of the police Officer overbearing the defendant's will? If so, then Due Process violated.	13c. o
14.	Defendant's retrial on battery after appeal is not barred by Double Jeopardy.	14. o
15.	No retrial on attempted murder - prior acquittal bars retrial.	15. o
16.	The imposition of a harsher sentence upon reconviction gives rise to presumption that it is the product of vindictiveness.	16. o

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ESSAY Q4

SEAT

ISSUE		POINTS AWARDED
Legal Relationship		
1a.	A partnership is an association of two or more persons to carry on as co-owners of a business for profit (or similar language).	1a. o
1b.	No writing necessary.	1b. o
1c.	Discussion of facts supporting formation of partnership (joint contribution of capital **or** splitting profits and losses).	1c. o
1d.	Conclusion that A and B formed a partnership.	1d. o
1e.	Conclusion that partnership was "at will."	1e. o
Pick-up Truck		
2a.	Property acquired in name of individual partner with his own funds presumed to be individual partner's property, even if used for partnership purposes.	2a. o
2b.	Purchase of pick-up satisfies above rule so it is presumed to belong to Arnold.	2b. o
Conezone's Liability to Dreamworld		
3a.	Partnership is liable for tortious conduct (fraud) of partner who was acting in ordinary course of business of partnership.	3a. o
3b.	Partnership is liable for breach of contract where partner had apparent/actual authority (agency principles).	3b. o
3c.	Conclusion that Conezone is liable for fraud.	3c. o
3d.	Conclusion that Conezone is liable for breach of contact.	3d. o
Arnold's Exclamation		
4a.	Partnership at will is dissolved if it receives notice of a partner's express intent to withdraw as a partner.	4a. o
4b.	Arnold's statement is sufficient notice so partnership is dissolved.	4b. o
4c.	Partnership continues after dissolution for purposes of winding up business.	4c. o

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ESSAY Q5

SEAT

ISSUE		POINTS AWARDED
1.	BigBank may claim that it has priority on the 10 pianos because of its "after-acquired property" clause.	1. o
2.	To perfect its interest BigBank must file in Euphoria, the State of MMI's registration.	2. o
3.	When MMI changed its name to Essex Keyboards, Big Bank needed to file its UCC statement under the new name within 4 months to remain perfected.	3. o
4.	Normally, BigBank would have priority over PianoMax because it filed its UCC statement first.	4. o
5.	PianoMax would have priority over BigBank because it has a Purchase Money Security Interest in the 10 pianos.	5. o
6.	PianoMax filed its UCC Statement before delivery of the pianos.	6. o
7.	PianoMax sent a proper notice to BigBank before delivery of the piano.	7. o
8.	The Notification sent asserted a PMSI and described the Inventory.	8. o
9.	BigBank's UCC filing did cover the photocopier, as it is after-acquired equipment.	9. o
10.	Since the photocopier was not acquired until more than four months after Music Maker/Essex Keyboard's name change, BigBank's UCC filing is ineffective.	10. o
11.	Since BigBank is unperfected on November 29, Acorn's UCC filing gives it priority.	11. o

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ESSAY Q6

SEAT

ISSUE		POINTS AWARDED
SPOUSAL MAINTENANCE		
1.	The agreement terminates spousal maintenance at the death of either party or upon the remarriage of the recipient.	1. o
2.	Common law marriages are recognized in Colorado.	2. o
3.	Common law marriage requires: Mutual agreement of the parties to be married.	3. o
4.	Mutual open assumption of a marital relationship (holding their relationship to the public as a marital relationship).	4. o
5.	Wendy and Steve did not have a common law marriage.	5. o
6.	Maintenance will not be terminated.	6. o
7.	Cohabitation is not remarriage and will not terminate maintenance, but may constitute a change of circumstances that could be a cause for modification of maintenance.	7. o
8.	Here the separation agreement prohibited any modification of maintenance.	8. o
9.	The separation agreement may not be enforceable if entered into under fraud, duress or coersion.	9. o
ENFORCEMENT OF CO-HABITATION AGREEMENT		
10.	The agreement is enforceable. The agreement is supported by adequate consideration and the division of property provision will be enforced.	10. o
11.	The court will not enforce a waiver of child support. Steve will be required to pay child. Waiver of child support is support against public policy.	11. o
12.	Parents owe child support to their children and may not enter into an agreement that is not in the best interests of the child. Courts will not enforce a waiver of child support.	12. o

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ESSAY Q7

SEAT

ISSUE		POINTS AWARDED
Andy		
1.	Andy can raise an equal protection challenge to the school's gender quota under the 14th Amendment.	1. o
2.	Gender-based decisions in admissions to state schools are subject to a heightened or intermediate review standard.	2. o
3.	Gender-based decisions must	
3a.	serve an important governmental objective;	3a. o
3b.	substantially related to the achievement of that objective.	3b. o
Betty		
4.	Betty can raise an equal protection challenge to the school's use of race as a factor in admission decisions under the 14th Amendment.	4. o
5.	All racial classifications imposed by government must be analyzed under a strict scrutiny standard.	5. o
6.	The strict scrutiny test requires that racial classifications must be	
6a.	narrowly tailored;	6a. o
6b.	to further a compelling governmental interest.	6b. o
7.	Attaining a diverse student body can be a compelling state interest.	7. o
8.	A university cannot use racial quotas, but may consider race or ethnicity.	8. o
Diana		
9.	Diana can raise a 14th Amendment equal protection challenge to the height requirement.	9. o
10.	Height is not a suspect classification; a court will employ the rational basis test.	10. o
11.	A statutory classification must be	
11a.	rationally related;	11a. o
11b.	to a legitimate governmental purpose.	11b. o
12.	Courts are reluctant to grant equal protection claims on the rational basis test,	12. o
12a.	unless the challenger can negate "any reasonably conceivable state of facts that could provide a rational basis for the classification."	12a. o

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ESSAY Q8

SEAT

ISSUE		POINTS AWARDED
1.	Recognition of principle that agency actions are *presumptively reviewable.*	1. o
2.	Presumption of reviewability defeated only where congressional intent to preclude review or where agency action is committed to agency discretion by law.	2. o
3.	Plaintiff is generally required to *exhaust available administrative remedies.*	3. o
4.	Agency action must be *final* to be reviewable ("final order rule.").	4. o
5.	Issue must be *ripe* for review in that it must present an actual case or controversy.	5. o
6.	Standing test – recognition of principle of "injury in fact."	6. o
7.	Injuries other than economic harm are cognizable (aesthetic, environmental, recreational, etc.)	7. o
8.	General statement of injury insufficient; there is a requirement of specific allegations of harm to members of group or group itself.	8. o
9.	Standing test – recognition of principle of "within the zone of interests" to be protected.	9. o
10.	Standing test – recognition of principle of "causation."	10. o
11.	Causation must be reasonably clear in that asserted injury was a consequence of agency action or that requested relief will remove the harm.	11. o
12.	Recognition of issue of *associational* or *organizational standing.*	12. o
13.	Three part test for associational standing: (a) individual members would have right to sue on their own behalf, **and** (b) injury to members must be related to organization's purpose, **and** (c) no participation of individual members required for relief (only injunctive relief sought).	13. o

COLORADO SUPREME COURT
Board of Law Examiners

JULY 2005 BAR EXAM
Regrade

ESSAY Q9

SEAT

ISSUE		POINTS AWARDED
1.	Landlord waived breach of the no dog provision of the lease.	1. o
2.	Waiver evidenced by Landlord:	
	2a. failing to respond to letter in negative;	2a. o
	2b. failing to enforce the provision against other tenants;	2b. o
	2c. fencing in yard for pets.	2c. o
3.	Estoppel requires active conduct on the part of Landlord or detrimental reliance with a change in position of Tenant.	3. o
4.	Landlord is estopped from enforcing the lease because he fenced in yard and/or Tenant relied on Landlord's failure to respond to letter informing him of dog purchase.	4. o
5.	Landlord breached implied covenant of quiet enjoyment.	5. o
6.	Tenant has defense of partial actual eviction.	6. o
7.	Under doctrine of partial eviction, there is no duty to pay <u>any</u> rent.	7. o
8.	Under doctrine of partial eviction, Tenant can continue to occupy the part of the premises that remains accessible.	8. o