

QUESTION 1

Fred Farmer participates in a federal program which pays him to let certain parts of his farm lie fallow. The agency that administers the federal program failed to act when Farmer requested a change in the way his payments are calculated. Oddly enough, Farmer's request would actually correct a problem that has existed because the agency has failed to follow its own regulations. The agency claims its regulations are merely guidelines and it is not required to follow them. The regulations, on their face, are mandatory and mirror the controlling statute. Both the regulations and the statute provide that payments to farmers shall be calculated in the manner that Farmer has requested.

Farmer demanded, in writing, that the agency make the requested change. The agency failed to respond to Farmer's request. Farmer then threatened to take the matter to court. The agency countered by saying it has not made a final decision and therefore, court action is unavailable. Farmer has gone through all available levels of agency review including a request for reconsideration, without success. At no time during this process has the agency given any substantial justification for its failure or refusal to act.

QUESTION:

Discuss the remedies available to Farmer and the standards that he will have to meet to obtain relief from a court.

DISCUSSION FOR QUESTION 1

This question raises issues of administrative law and remedies for lack of action, or improper or unlawful administrative action, pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704.

A person who seeks judicial review of an agency action must have exhausted the agency's appeal procedure(s). *See* APA § 704. In addition, the prerequisites to judicial review of agency action, in the absence of other statutory provisions, are final agency action and the absence of any other adequate remedy. *Klein v. Commissioner of Patents of U.S.*, 474 F. 2d 821, (C.A. Va.) The person must also have suffered a legal wrong. *See* 5 U.S.C. § 702; and *see Duba v. Shuetzle* 303 F.2d 570, 574 (8th Cir. 1962). The facts indicate that in this situation, Farmer has utilized the in-house agency appeal procedure. Therefore, exhaustion of administrative remedies is not an issue.

Review of an administrative agency decision involving a federal program, if available, will normally be in the federal district courts, which have original jurisdiction of all civil actions under the constitution or laws of the United States. 28 U.S.C. § 1331. There is a strong presumption that all agency actions are reviewable under the APA. *Woodsmall v. Lyng*, 816 F.2d 1241, 1243 (8th Cir. 1987); and *see* 5 U.S.C. § 702. The central purpose for judicial review under the Administrative Procedure Act is to provide "a broad spectrum of judicial review of agency action." *Bowen v. Massachusetts*, 108 S.Ct. 2722, 487 U.S. 879 (1988).

With regard to these facts, under the APA § 706, the reviewing court may:

1. compel agency action unlawfully withheld or unreasonably delayed; and
2. hold unlawful and set aside agency action, findings, and conclusions found to be
 - a. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - b. contrary to constitutional right, power, privilege, or immunity;

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- c. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- d. without observance of procedure required by law;
- e. unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- f. unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

The standard of review of agency action by a district court is rather narrow, and while the court reviews the entire record, it must defer to the agency's interpretation of its regulations. *Chevron U.S.A. v. Natural Resources Def. Council, Inc.*, 467 U.S. 873 (1984). Reversal can only occur when the agency action is without a rational basis. *Baltimore Gas & Elec. Co. v. National Resources Defense Council*, 462 U.S. 87, 105-06 (1963). The reviewing court examines an agency's conclusions of law de novo, but it must uphold the agency's factual findings if they are supported by "substantial evidence." That is defined as "more than a mere scintilla but less than a preponderance." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

Administrative agencies are limited in their powers by the congressional acts which grant them authority. *Garvey v. Freeman*, 397 F. 2d 600, (C.A. 10. Colo. 1968). In order to determine whether an agency acts within the scope of its authority, the court must review the scope of the agency's authority and whether the agency is acting within that range. *Olenhouse v. Commodity Credit Corp.*, 42 F. 3d 1560 (C.A. 10. Kan., 1994). A reviewing court must examine the relevant statutes to determine whether an agency has acted within the scope of its authority. *Lodge Tower Condominium Ass'n v. Lodge Properties, Inc.*, 880 F. Supp. 1370 (D. Colo., 1995). Here, the agency has not acted within its authority nor has it complied with regulatory requirements. If an agency fails to follow its own regulations that is an abuse of discretion. *Carter v. Sullivan*, 909 F.2d 1201, 1202 (8th Cir. 1990).

The agency here contends that its action was not "final agency action." Federal courts have considered questions of finality in many cases, including in the case of *Coalition for Sustainable Resources, Inc. v. United States Forest Service*, 259 F. 3d 1244, 1249 (10th Cir. 2001). In that case, the court principally considered issues of "ripeness" to determine whether there was final agency action. Although cases of an agency's failure to act are somewhat problematic, the court in *Coalition, id.*, stated that an examination must include not only fitness of the issues for a decision but also hardship of the parties if the court withholds action. "An agency cannot preclude judicial review by casting its decision in the form of inaction rather than in a form of an order denying relief." *Id. at* 1251. An action may be final when an agency either refuses to act, unreasonably delays, or fails to act before a deadline. *Id.* In a case where an agency refused to consider a fee application under EAJA, that was a final determination and reviewable by the Court. *Lane v. US Dept. of Agriculture*, 629 F. Supp. 1290, D.N.D. 1996, affirmed in part and reversed in part, 120 F. 3d 106.

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"Finality" generally refers to the conclusion of agency activity. *Bethlehem Steel Corp. v. E.P.A.*, 669 F. 2d 903 (C.A. 3rd 1982). 5 USC §706 provides for compelling of agency action which has been unlawfully withheld or unreasonably delayed. That has apparently happened in this case. The agency cannot be allowed to simply refuse or neglect to act, and then contend as a result of such refusal or neglect that final action has not occurred. Under 5 USC §706, if action is unlawfully withheld or unreasonably delayed, the agency has presumably not "finalized" its action. However, that is not an excuse nor is it a justification to deny judicial review and enforcement under the APA. *See also, Coalition for Sustainable Resources, supra* at 1250, citing *Sierra Club v. Yeutter*, 911 F. 2d 1405, 1410 (10th Cir. 1990).

The agency's failure and refusal to follow its own rules and statutes may constitute a violation of Farmer's property and due process rights. When questions of due process are the subject of appeal from an agency final decision, the District Court must conduct a plenary review of the facts and the agency's decision making process. *Olenhouse v. Commodity Credit Corp.*, 42 F. 3d 1560, 1565 (10th Cir. Kan. 1994). The District Court "must find and identify substantial evidence to support the agency's action...agency action must be set aside if it fails to meet statutory, procedural or constitutional requirements or if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Olenhouse, supra*, at page 1565, 1574, citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28, L.Ed.2d 136 (1971). Agency action will also be set aside if the administrative process employed violated "basic concepts of fair play." *Olenhouse, supra*, at 1583. The same theory applies where the agency has failed or refused to act, especially where the agency "failed to take a discrete agency action that it is required to take." *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2373 (2004) at pg 2380.

As applied to this case, Farmer is likely to be successful in obtaining judicial review of the agency's action, or more properly, the agency's failure to act. The agency appears to have clearly violated or ignored its own regulations and has taken action which is contrary to those regulations. Not only is this potentially unlawful, or arbitrary and capricious, but it may also be in excess of statutory authority or limitations, and without observance of procedure that is required by law. (5 U.S.C. § 706). Even though the agency's interpretation of its regulations is entitled to deference, this is probably a case of a clear error of judgment or an abuse of discretion by failure to follow its own regulations. *Citizens to Preserve Overton Park, Inc., supra*, and *Carter v. Sullivan, supra*. Farmer is therefore, likely entitled to judicial review of the administrative action and relief which either compels agency action or sets aside unlawful action.

ESSAY Q1

SEAT

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<u>ISSUE</u>	<u>POINTS AWARDED</u>
1. There is a general rule requiring the exhaustion of administrative remedies before a court will consider judicial review of an administrative agency decision.	1. <input type="radio"/>
2. In order to bring an action for judicial review, Fred must have standing.	2. <input type="radio"/>
3. For standing, Fred must be within the zone of interest ("person injured or affected").	3. <input type="radio"/>
4. Prerequisites for judicial review of agency action are:	
4a. "final" agency action;	4a. <input type="radio"/>
4b. the absence of any other adequate remedy ("redressible"); and	4b. <input type="radio"/>
4c. person must have suffered a legal wrong ("harmed").	4c. <input type="radio"/>
5. In this case, Fred has already utilized the agency appeal procedures and therefore exhausted administrative remedies.	5. <input type="radio"/>
6. Review of federal administrative agency decisions would be in federal district court.	6. <input type="radio"/>
7. A reviewing court may compel agency action unlawfully withheld or set aside agency action found to be:	
7a. arbitrary, capricious or abuse of discretion;	7a. <input type="radio"/>
7b. contrary to a constitutional right, power, privilege or immunity;	7b. <input type="radio"/>
7c. in excess of statutory jurisdiction or authority;	7c. <input type="radio"/>
7d. without observance of procedure required by law;	7d. <input type="radio"/>
7e. unsupported by substantial evidence in the case or hearing; or	7e. <input type="radio"/>
7f. unwarranted by facts in an applicable de novo hearing.	7f. <input type="radio"/>
8. Under the standard of review of agency action by the court, it must defer to the agency's interpretation of its regulation.	8. <input type="radio"/>
9. A review court must uphold an agency's factual findings if supported by substantial evidence.	9. <input type="radio"/>
10. In this case, Fred has a strong argument that the agency was not acting within its authority prescribed by the federal statutes and the mandatory regulations.	10. <input type="radio"/>
11. In this case, Fred could claim that failure by the agency to follow its own regulations.	11. <input type="radio"/>
12. Even though the agency is claiming that it has not taken "final" action, an action may be final when an agency refuses to act, unreasonably delays, or fails to act before a deadline ("futility").	12. <input type="radio"/>
13. Fred may bring a claim for violation of his due process rights.	13. <input type="radio"/>

QUESTION 2

Father wrote to his adult Son, "I want you to have my property Twelve Oaks as a wedding present, but I would need \$50,000 from you to pay off the mortgage on the property." Son replied in writing, "I will pay you \$50,000 for Twelve Oaks on March 1, provided I can get a loan from the bank before that date." Father replied by mail, "It's a deal." Both Father and Son knew that Twelve Oaks was reasonably worth \$100,000.

Although he tried, Son could not obtain a loan from the bank. Instead, his mother-in-law lent him \$50,000. Son then paid the \$50,000 to Father on March 2 and explained that he was out-of-town on business on March 1, and returned too late to make payment on that date.

Father accepted the money and discharged the mortgage. Later, however, having learned that Son obtained the \$50,000 from his mother-in-law and not from the bank, Father changed his mind about the wedding present and the sale and refused to deed Twelve Oaks to Son. Father gave as his reasons: (1) that there was no consideration to support the deal; (2) that the condition of obtaining a loan from the bank had not occurred; and (3) that Son was late in paying the \$50,000.

QUESTION:

Discuss the validity of Father's reasons for not delivering the deed to Twelve Oaks to Son.

DISCUSSION FOR QUESTION 2

The exchange of writings by Father and Son would effect an enforceable contract if there is consideration to support Father's promise to deliver the deed. The agreement is in writing and all the essential terms of a land contract are present – parties, description of the property, price, and time of performance.

Consideration consists of an act, forbearance, or return promise, bargained for and given in exchange for the promise. *Restatement (Second) of Contracts*, §71. On these facts, the only thing that could be consideration is Son's promise to pay \$50,000.

The courts are not concerned about the adequacy of the consideration or that what is bargained for is the equivalent of what was promised. *Id.* at §79(b). If it is bargained for it is irrelevant that Son is promising to pay only one-half the value of Twelve Acres.

In this case, Father has two motives for deeding Twelve Oaks to Son – to make a wedding gift (which cannot serve as consideration), and to receive \$50,000 from Son. “Even where both parties know that a transaction is in part a bargain and in part a gift, the element of bargain (here Son's paying \$50,000) may nevertheless furnish consideration for the entire transaction.” *Id.* at §71, comment c. It is clear that Father is bargaining for the \$50,000 so that he can pay the mortgage debt, and, therefore, there is bargained-for exchange to support his promise to deliver the deed. *See Id.* at §71, Illus. 6.

There is no doubt that obtaining the loan from the bank was a condition to Son's duty to pay \$50,000. The question is whether it was also a condition to Father's duty to deliver the deed. Since the origin of the money should make little or no difference to Father, in this kind of situation the courts will interpret the condition as applying only to Son's duty to pay. Farnsworth, *Contracts*, 3rd Ed., §8.4. Son has waived that condition, and so his duty to pay arose even though the condition was not met. *Id.* at §8.4. Since the bank loan was not a condition to Father's duty to deliver the deed, Father's duty to deliver the deed arose when he accepted Son's \$50,000 payment.

Unless it is clear that payment on time is essential to protect the promisor, courts are reluctant to conclude that late payment excuses the promisor from performing his promise. Absent other indications in the contract to the contrary, time of payment is not interpreted as a condition in a land contract. *Id.* at §8.18. Although Father may have an action for any damages he may have suffered because of the late payment, he cannot refuse to perform his promise to deliver the deed because of the one-day delay. Even if payment on time was a condition to Father's duty to deliver the deed, Father waived that condition when he accepted the payment, and, therefore, his duty to deliver the deed arose whether or not the condition was payment on time.

ESSAY Q2

SEAT

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ISSUE

POINTS
AWARDED

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| 1. | A valid Contract between Father and Son exists, as all of the elements are present. | |
| 1a. | Offer | 1a. ○ |
| 1b. | Acceptance | 1b. ○ |
| 1c. | Consideration | 1c. ○ |
| 2. | Since this is a Contract involving land, it must be in writing to comply with the Statute of Frauds. | 2. ○ |
| 3. | Son has given valid consideration for the Contract by his promise to pay \$50,000. | 3. ○ |
| 4. | The adequacy of consideration to Father is not a concern under the law, only the existence of consideration. | 4. ○ |
| 5. | The obligation of obtaining the loan from the Bank is not a condition of Father's duty to deliver the Deed. | 5. ○ |
| 6. | Unless the Contract is clear that the date of payment is essential to protect the parties, late payment does not excuse performance. | 6. ○ |
| 7. | Father cannot refuse to deliver the Deed because payment is late; he can only recover for damages he can prove by the delay. | 7. ○ |
| 8. | Father closed on the contract and waived any condition that payment must be made by March 1 when he accepted payment on March 2. | 8. ○ |

QUESTION 3

The Capital City Wolves are a professional football team. Dave Fan has season tickets to Wolves games. Very early in a Wolves game played after a snowfall, the head referee (Ref), announced a penalty against the Wolves. Fan became angry and, from his front-row seat, he threw a snowball at Ref. Ref saw the snowball coming and moved his head just in time to avoid being struck. Instead of striking Ref, the snowball struck the starting quarterback for the Wolves (Star). It hit the back of Star's helmeted head as he stood on the field talking with his teammates. Though Star was not injured by the impact, he was startled and jumped to the side in reaction to the snowball that struck him. In doing so, he collided with one of the Wolves' coaches (Coach) who was on the field because play had stopped. Coach was not wearing any protective gear (obviously) and broke his arm when he was knocked to the ground by Star.

QUESTION:

Discuss Fan's potential liability, including damages, to Ref, Star, and Coach.

DISCUSSION FOR QUESTION 3

The question raises several issues in tort. One of the issues raised is the distinction between the torts of battery and assault. Unlike battery, assault requires *apprehension* but no *contact*. Therefore, Dave is likely liable to Ref for assault but not for battery because Ref saw the snowball coming but moved just in time to avoid being struck. Dave is likely liable to Star for battery but not for assault because Star did not see the snowball coming but was actually struck by the snowball.

Another key issue in tort that is raised is the difference between torts requiring a showing of intent versus those requiring mere negligence. Given that distinction, Dave is also likely liable to Coach, at least, in negligence.

I. ASSAULT

The elements of the tort of assault are: (1) an act; (2) intent; (3) causation; (4) apprehension of imminent harmful or offensive contact; and, (5) lack of consent by the plaintiff. CJI-Civ. § 20:1; Restatement (Third) of Torts § 5, Restatement (Second) of Torts § 21, 24, and 33.

The elements of assault in actions by Ref and Star would likely be resolved as follows:

<u>Element</u>	<u>Ref v.Dave</u>	<u>Star v.Dave</u>
Act?	yes	yes
Intent?	yes	yes
Causation?	yes	yes
Apprehension?	yes	no
Lack of Consent?	yes	yes

To prove intent, Dave need only be shown to have acted with either the intent to cause the type of harm suffered or the intent to do the act that is “substantially certain” to cause that type of harm. Restatement (Third) of Torts § 1.

Although Dave had no intent to harm Star, his intent to harm Ref can be transferred to Star. *Id.* at § 33, CJI-Civ. § 20:8 (“It is not necessary that the defendant intended to make physical contact specifically with the plaintiff. Intent exists even if the defendant originally intended to make physical contact with someone else.”). Likewise, he may not have intended to harm anyone in particular.

Dave will argue that Ref suffered no true “apprehension” because apprehension must be somewhat significant. The plaintiff must have been in fear of imminent physical harm, not merely have suffered a “fright.” Restatement (Second) of Torts § 24 n.b. Still, Ref might argue that he suffered significant apprehension, the amount of which goes only to the potential for nominal damages. CJI-Civ. § 20:4 n. 7.

Dave might also argue that, by consenting to take the field during an admittedly violent activity (football), the various plaintiffs had somehow consented to a risk of injury while on the field; he might try to argue that, in fact, the threat of harm posed by his action (throwing a snowball) is generally less than any posed by football. However, his argument would not be well founded, as one's consent only bars torts that pose the same or substantially the same risk posed by the tort to which the plaintiff has consented. Restatement (Second) of Torts § 892(A), CJI-Civ. § 20:11. While the various defendants may have consented to the athletic risks associated with a game of football, there is no evidence that any consented to the risk of projectiles thrown by spectators.

II. BATTERY

The elements of the tort of battery are: (1) an act; (2) intent; (3) causation; (4) harmful or offensive bodily contact; and, (5) lack of consent by the plaintiff. CJI-Civ. § 20:5 and 6; Restatement (Third) of Torts § 5, and Restatement (Second) of Torts § 13-20.

The elements of battery in actions by Ref and Star would likely be resolved as follows:

<u>Element</u>	<u>Ref v. Dave</u>	<u>Star v. Dave</u>
Act?	yes	yes
Intent?	yes	yes
Causation?	yes	yes
Contact?	no	yes
Lack of Consent?	yes	yes

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Any of the potential plaintiffs might consider asserting a claim for the intentional infliction of emotional distress.

The elements of the tort of intentional infliction of emotional distress, a/k/a IIED, a/k/a outrageous conduct, are: (1) an act (by Dave) of outrageous conduct; (2) intent; (3) causation; and, (4) damages, including at least severe emotional distress. Restatement (Third) of Torts § 45, CJI-Civ. § 23:1.

To constitute outrageous conduct, the conduct must be so extreme that a reasonable person would exclaim, "That's outrageous." Restatement (Third) of Torts § 45. In other words, a reasonable person would view it as exceeding "all possible bounds of decency and utterly intolerable in a civilized community," quoting CJI-Civ. § 23:2. Dave will argue that the simple act of throwing a snowball, as bad and irregular as this was, is still not that far outside of normal social function. Additionally, he can argue that a single incident, such as this, is also less likely to constitute outrageous conduct. *Id.*, n. 5.

Dave also will argue that damages in such a claim must at a minimum include severe emotional distress. Restatement (Third) of Torts § 45. Severe emotional distress consists of highly unpleasant mental reactions, such as (nervous shock, fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry) and is so extreme that no person of ordinary sensibilities could be expected to tolerate and endure it. The duration and intensity of emotional distress are factors to be considered in determining its severity. CJI-Civ. 23:4. Some jurisdictions also require physical injury as a component of the plaintiff's damages. Restatement (Third) of Torts § 45, Restatement (Second) of Torts § 46(k). According to those definitions, Dave will argue that none of the plaintiffs suffered *severe* emotional distress.

IV. NEGLIGENCE

All three – Ref, Star and Coach – may also have a claim of negligence against Dave. If a tortfeasor's mental state is insufficient to constitute intent, it may still be sufficient to constitute negligence. Restatement (Third) of Torts § 1(d). The elements of a negligence claim are: (1) a duty owed by Dave; (2) a breach of that duty through the commission of negligent act; (3) causation; and, (4) damages. CJI-Civ. 9:1.

Dave owed a duty to exercise reasonable care. Restatement (Third) of Torts § 7, CJI-Civ. § 9:6 and 8. He may argue that he did not even consider Coach, but Coach will argue it was reasonably foreseeable that he, and anyone else standing on the field, could have been injured by Dave's act; therefore, Dave would owe them all a duty not to be negligent.

Dave also may argue he did not cause Coach's injury. To prove causation, Coach must show that Dave's act of throwing the snowball was both the actual ("but for") and proximate ("legal") cause of his injuries. Restatement (Third) of Torts §§ 26, 27, and 29, CJI-Civ. § 9:18 and 21. He will argue it was reasonably foreseeable that someone, at whom a snowball is thrown, would move as both Ref and Star did and, further, that someone could be hurt, as Coach was, especially because the players, like Star, are large, powerful, and effectively armored. In other words, Coach could argue Ref and Star's actions were foreseeable "reaction" forces for which Dave is liable, not an intervening force. Restatement (Third) of Torts § 34.

V. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The elements of the tort of negligent infliction of emotional distress are: (1) an act of negligence; (2) that created an unreasonable risk of physical harm to the plaintiff; (3) that caused the plaintiff to be in fear of his safety (not simply a "momentary fright"); (4) causation; and, (5) damages. Restatement (Third) of Torts §§ 46 and 47, CJI-Civ. § 9:2.

This tort only applies if the plaintiff was himself put in an unreasonable risk of physical harm, a/k/a, within the "target zone" or "zone of danger." (Although some exceptions exist to permit claims by family members, such as parents of children, no such exception is raised by these facts.) Restatement (Third) of Torts §§ 46 and 47, Restatement (Second) of Torts § 26.

VI. DAMAGES

Dave will argue that Ref and Star had little to no damage. Even then though, they might claim nominal damages and the value of any mental anguish they suffered. Dave also may argue that Coach's damages were not caused by his act of throwing the snowball but more so, or at least in part, by Star's movement to jump into Coach. Restatement (Third) of Torts § 34, CJI-Civ. § 9:20. The argument can be viewed as one of damages (e.g. comparative fault) and/or causation (intervening force). Restatement (Third) of Torts § 34 n. c-d.

As explained, Coach will argue, though, that Dave is liable under both theories since Star's action was the sort Dave should reasonably have foreseen (reaction force).

None would recover attorney fees.

ESSAY Q3

SEAT

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<u>ISSUE</u>	POINTS AWARDED
1. Dave may be liable for <i>assault</i> .	1. ○
1a. The elements of assault include intent, apprehension and lack of consent.	1a. ○
2. Apprehension must be reasonable.	2. ○
3. Dave may be liable for <i>battery</i> .	3. ○
3a. The elements of battery include intent, contact and lack of consent.	3a. ○
4. Dave may be liable for <i>intentional infliction of emotional distress (outrageous conduct)</i> .	4. ○
4a. The elements of IIED (OC) include intent, outrageous conduct and severe emotional distress.	4a. ○
5. Outrageous conduct is conduct so outrageous that a reasonable person would say "outrageous!" (or, say it was beyond all possible bounds of decency).	5. ○
6. Intent can be transferred (from Dave's intent v. Ref to Star and perhaps even Coach).	6. ○
7. Dave may be liable for <i>negligence</i> .	7. ○
7a. The elements of negligence include duty of reasonable care and breach (negligent act).	7a. ○
8. Dave may be liable for <i>negligent infliction of emotional distress</i> .	8. ○
8a. The elements of NIED include an unreasonable risk of physical harm to plaintiff and actual fear (not just "momentary fright").	8a. ○
9. NIED does not apply unless the plaintiff was put in an unreasonable risk of physical harm ("target zone" or "danger zone").	9. ○
10. Causation requires both actual ("but for") cause and proximate ("legal") cause.	10. ○
11. Whether the mousetrap-like series of events is viewed as an issue of duty or causation/damages, the plaintiffs' damages must have been "reasonably foreseeable."	11. ○

QUESTION 4

Last month, on a rural tract of land located in the State of Bliss, the Ku Klux Klan (KKK) held a “membership rally.” A secretly made film of the rally shows twelve hooded figures gathered around a large wooden cross, carrying firearms, and ultimately burning the cross. During the rally, speakers made derogatory references about ethnic and religious groups. One speaker, Jones, stated “We’re not a vengeful organization, but if our President, our Congress, our Supreme Court, continue to suppress the white, Caucasian race, it’s possible that there might have to be some revenge taken.”

When the film was made public, Jones was arrested and charged under two Bliss statutes. One statute, Bliss’s Syndicalism Statute, makes it a crime to advocate the “duty, necessity or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform,” and also prohibits people from “voluntarily assembling with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” The second statute, Bliss’s Cross Burning Statute, makes it “unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway, or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.” The Cross Burning Statute goes on to state that: “Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.”

QUESTION:

Discuss whether in light of protections offered under the First Amendment to the United States Constitution, Jones’ will be convicted under the Bliss statutes.

DISCUSSION FOR QUESTION 4

This question focuses on the test taker's knowledge of the First Amendment to the United States Constitution's protections for freedom of expression. It also focuses on the United States Supreme Court's advocacy of illegal action cases, in particular the holding in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), in light of the Court's more recent decisions in two cross burning cases. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Virginia v. Black*, 538 U.S. 343 (2003).

I. Recognition that Defendant Has Engaged in "Speech" Within the Meaning of the First Amendment to the United States Constitution.

The initial question is whether the defendant's rally involved "freedom of expression" within the meaning of the First Amendment. The simple answer is "yes." In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which involved nearly identical facts (except that the events occurred in Ohio rather than in Bliss), the United States Supreme Court had no difficulty concluding that defendant had engaged in protected expression. In regard to the oral speech (in which *Brandenburg* called for "revenge"), the Court concluded that defendants were engaged in political advocacy, and that they were exercising their right to associate for First Amendment purposes. As a result, the Court held that defendant's speech was protected under the First Amendment.

Jones' cross burning also involves protected expression. In a number of decisions, the United States Supreme Court has held that "symbolic speech" is entitled to protection under the First Amendment. As a result, in *Texas v. Johnson*, 491 U.S. 397 (1989), when defendant burnt a United States flag to express his opposition to the Reagan administration's policies, although the Court characterized the burning as "conduct," it concluded that the flag burning also had communicative elements. See also *Spence v. Washington*, 418 U.S. 405, 409 (1974) ("Conduct" may be "sufficiently imbued with elements of communication"); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (students who wore black arm bands to protest the Vietnam War were found to have engaged in protected expression).

In two major decisions, the Court has treated cross burning as protected speech. In the first case, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court struck down a City of St. Paul ordinance as applied to a cross burning. Subsequently, in *Virginia v. Black*, 538 U.S. 343 (2003), the Court recognized that cross burning can constitute symbolic expression: "The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner." *Id.*, at 359.

II. Recognition that the First Amendment to the United States Constitution is Incorporated into, and Applied to the States by Virtue of, the Fourteenth Amendment.

By its terms, the First Amendment to the United States Constitution applies only to Congress ("Congress shall make no law . . ."). Despite the literal terms of the Amendment, the

protection for freedom of expression has been applied to other branches of the federal government. *See Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001); *New York Times Company v. United States*, 403 U.S. 713 (1971). In addition, because of the due process clause of the Fourteenth Amendment to the United States Constitution, the First Amendment also applies to the states. *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Near v. State of Minnesota*, 283 U.S. 697 (1931). Since defendant's conviction rests on speech and conduct that is allegedly protected under the First Amendment, the protections of that Amendment must be considered in evaluating the conviction.

III. Bliss's Syndicalism Statute is Unconstitutional as Applied to This Case.

At one point in United States history, defendants might have been subject to prosecution under such a statute. In a number of early decisions, the United States Supreme Court held that defendants could be prosecuted for advocating illegal action. *See, e.g., Whitney v. California*, 274 U.S. 37 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919). In these early decisions, defendants were convicted without regard to whether they came close to accomplishing their objectives.

However, in the United States Supreme Court's landmark decision in *Brandenburg* at 444 - 447, the Court articulated a new approach to illegal advocacy cases. The Court held that: "[L]ater decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The facts in *Brandenburg* were nearly identical to the facts of the present case. In *Brandenburg*, the Court reversed defendant's convictions, stating that: "[W]e are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California*, cannot be supported, and that decision is therefore overruled." *Id.*, at 449.

Under the *Brandenburg* precedent, it would be extremely difficult to convict Jones under the Bliss Syndicalism Statute. As in that case, a statute that "purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action" falls "within the condemnation of the First and Fourteenth Amendments."

IV. Bliss's Cross Burning Statute is Unconstitutional as Applied to This Case.

The United States Supreme Court has decided two major cross burning cases. In the first decision, *R.A.V. v. City of St. Paul, supra*, the Court struck down the City's cross burning

ordinance because it involved “content-based” and “viewpoint-based” discrimination against speech. In the second decision, *Virginia v. Black, supra*, the Court partially upheld Virginia’s cross burning statute which was nearly identical to the Bliss Cross Burning Statute. The Court traced the history of cross burning in the United States and elsewhere. Although Scottish tribes burnt crosses to call warriors to arms, the practice was heavily associated with the KKK in the United States. The KKK used burning crosses to send a warning to those who opposed it, and the warning carried with it a threat of impending violence. Moreover, many of these threats were followed by action with the targets of cross burnings being killed or maimed. For these reasons, the Court held that Virginia’s cross burning statute could be justified under the “true threats” doctrine which allows the state to prohibit “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” The Court viewed the Virginia cross burning statute as designed to prohibit threats of violence, or intimidation, “where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 359 - 360.

The Court distinguished *R.A.V.* on the basis that the Court, in that case, did not prohibit all content-based discrimination. On the contrary, *R.A.V.* held that content-based discrimination against speech is permissible when “the basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable, no significant danger of idea or viewpoint discrimination exists.” The Court viewed cross burning with intent to intimidate as proscribable within the category of “true threats.”

Despite the holding in *Black*, there are two reasons why Jones should not be convicted. First, before the true threat doctrine will apply, there must be an intent to intimidate. In other words, the threat must be focused on a particular person who the cross burner seeks to intimidate with a threat of violence. In the present problem, the threat was more diffuse. It is not clear that Jones was actually threatening anyone with violence in other than an abstract way. *Black* involved two separate and distinct cross burning incidents. One was a KKK rally, like the one involved in this case, in which one speaker went so far as to state that “he would love to take a .30/30 and just random[ly] shoot the blacks.” The Court dismissed the case against participants in the KKK rally, concluding that the facts did not present sufficient evidence of an intent to intimidate. The KKK rally threat was not directed at anyone in particular, and constituted nothing more than rhetorical flourish. The other incident involved two men who burned a cross in a neighbor black man’s yard. The Court remanded this incident back to the lower courts for further hearings. The facts of this case are similar to the KKK rally in *Black*, and therefore would not warrant conviction.

V. Is Bliss's Prima Facie Evidence Provision Valid?

Even if Bliss's Cross Burning Statute were otherwise valid, Jones should not be convicted because of the statute's prima facie evidence provision. That provision reads: "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." In *Black*, the Court struck down Virginia's prima facie evidence provision which was identical to the provision in Bliss's statute. The Court concluded that there must be actual evidence of defendant's intent to intimidate. Such intent could not be presumed. As a result, in *Black*, the Court overturned defendant's conviction because it was based on the provision.

CONCLUSION

Bliss's Syndicalism Statute, and Bliss's Cross Burning Statute, are unconstitutional as applied to the facts of this case. Under the Syndicalism Statute, there is no evidence that defendant's speech was "directed to inciting or producing imminent lawless conduct," or that the speech was "likely" to produce such conduct. As for the Cross Burning Statute, there is no proof that the burning was undertaken with intent to intimidate any particular person. In any event, the prima facie evidence provision, which allows a jury to assume that defendant had the intent to intimidate, is unconstitutional.

ESSAY Q4

SEAT

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ISSUE

POINTS
AWARDED

1. First Amendment protects freedom of speech and expression. 1. ○
2. First Amendment applies to states via the due process clause of the 14th Amendment. 2. ○

STATUTE ONE: SYNDICATE STATUTE

3. Jones' oral speech constitutes "political expressions" within First Amendment. 3. ○
4. Even oral speech that advocates violence or illegal action is protected. 4. ○
5. Content based & viewpoint based prohibition on free speech generally not allowed. 5. ○
6. Statute can forbid advocacy of use of force/violation of law where speech is directed to inciting imminent lawless "fighting words" action and is likely to produce such. 6. ○
7. Jones statement, 'possible there might have to be some revenge taken' not likely to produce imminent lawless action or incite such action. 7. ○
8. Statute forbids assembly with others to advocate actions protected by First Amendment. 8. ○
9. Bliss Syndicate Statute is unconstitutional/not valid. 9. ○
10. Jones will not likely be convicted under the Bliss Syndicate Statute. 10. ○

STATUTE TWO: CROSS BURNING

11. Symbolic expression, such as cross burning, is protected by the First Amendment. 11. ○
12. State can prohibit cross burning if combined with intent to intimidate – true threat. 12. ○
13. The prima facie evidence provision of the Bliss Statute doesn't allow analysis of 'intent to intimidate.' 13. ○
14. Bliss cross burning statute is unconstitutional/not valid. 14. ○
15. No intent to intimidate: Rally where cross burned held on private property of group member (or) not directed at individual or group (no intent to intimidate) 15. ○
16. Jones will not likely be convicted under the cross burning statute. 16. ○

QUESTION 5

On May 1, Amy and Bill entered into an oral agreement to open a dance studio called Kickers. Kickers leased space from Dubliner, agreeing to pay Dubliner 15% of the gross fees Kickers collected from its students for the right to use the leased space. Dubliner had no involvement in the management or operation of Kickers. The lease required a deposit of \$500 which Amy paid. Amy and Bill both taught classes, and Bill handled the bookkeeping. They agreed to split the profits equally.

On May 15, Amy signed a contract with a sign fabricator to make a store-front sign for Kickers. The contract required Kickers to pay \$4,000 for the design and fabrication of the sign and a monthly fee of \$200 for a pole on which to display the sign.

Unbeknownst to Amy, on June 1, Bill started giving some of the more competitive dancers private classes in his basement, keeping the money he earned from those classes. He told the students Kickers was using his basement as an annex. On July 1, a student tripped on loose carpeting in Bill's basement and was injured.

Business was booming at Kickers, so on July 15, Amy and Bill hired another dance instructor, Maureen. Soon thereafter, they sold Maureen a 10% ownership interest in Kickers for \$10,000 and deposited the money in Kickers' business account. Maureen agreed to share equally in the profits of Kickers.

On September 1, Amy and Maureen discovered Bill's side business when the injured student sued Amy, Bill, Maureen, Kickers and Dubliner. They also discovered that Bill had failed to pay the sign fabricator.

QUESTIONS:

Discuss:

1. the nature of the relationships between Amy, Bill, Maureen, and Dubliner;
2. which of the defendants can be held liable for the student's injuries and the debt to the sign fabricator;
3. the extent of each party's liability (if any); and,
4. what claims Amy and Maureen can assert against Bill.

DISCUSSION FOR QUESTION 5

I. Relationships Between the Parties

A. Amy and Bill are General Partners

The Revised Uniform Partnership Act (RUPA) defines a partnership as an association of two or more persons to carry on as co-owners of a business for profit. The parties' agreement need not be in writing to form a valid partnership. Community Capital Bank v. Fischer & Yanowitz, ___ N.Y.S.2d ___ (N.Y.A.D. 2 Dept.,2008); Montgomery County v. Wildwood Medical Center, L.L.C., 176 Md.App. 731, 934 A.2d 484 (2007)(dissenting opinion); Cooley Inv. Co. v. Jones, 780 P.2d 29 (Colo. App. 1989); § 7-60-106(1), C.R.S. 2007.

A partnership may be formed by the conduct of the parties. Qubain v. Granberry, 181 N.C.App. 149, 639 S.E.2d 454 (2007). Partners can contribute property, money or services to the partnership and their contributions need not be equal. In re Estate of Goldstein, 293 Ill.App.3d 700, 688 N.E.2d 684 (1997); Kennedy v. Miller, 221 Ill.App.3d 513, 582 N.E.2d 200 (1991). The sharing of profits is prima facie evidence of a partnership. Mardanlou v. Ghaffarian, 135 P.3d 904 (Utah App. 2006); Yoder v. Hooper, 695 P.2d 1182 (Colo. App.1984); § 7-64-202(3)(c), C.R.S. 2006.

Here, Amy and Bill's verbal agreement and conduct establish a partnership. They agreed to share profits equally, and both contributed to the partnership. The fact that Amy contributed money and services, while Bill contributed only services, is immaterial. Kickers was a general partnership when it was formed and Amy and Bill are general partners.

B. Dubliner is a Landlord, not a Partner

Amy, Bill, Maureen, and Kickers have a landlord-tenant relationship with Dubliner. Dubliner has no involvement in the management of Kickers. The fact that Dubliner receives a share of profits as rent does not make Dubliner a partner. See Ehrhardt v. Abbate, 2002 WL 1265569 (Ohio App. 8 Dist.); § 7-64-202(3)(c)(III), C.R.S. 2007; §14-8-7(4)(c), Ga. Stat. Ann. 2007.

C. Maureen is a Partner

Maureen started out as an employee or independent contractor of Kickers, but became a partner when she bought an ownership interest.

II. Potential Liabilities of the Parties

A. Amy

Partners are jointly liable for the debts and obligations of the partnership, whether the obligations are in contract or tort. Ederer v. Gursky, ___ N.E.2d ___ (2007 WL 4438937); Shar's Cars, L.L.C. v. Elder, 97 P.3d 724 (Utah App.,2004); Zimmerman v. Dan Kamphausen Co., 971 P.2d 236 (Colo.App. 1998).

A partnership is liable for injury caused to a person 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. Partners are liable for any torts committed by a partner in the ordinary course of partnership business or with authority of the partnership. Ederer v. Gursky, supra; Gildon v. Simon Property Group, Inc., 158 Wash.2d 483, 145 P.3d 1196 (2006).

An act of a partner that is apparently carried out in the ordinary course of partnership business binds the partnership and other partners, unless the partner has no authority to act for the partnership in the particular matter and the person with whom the partner was dealing had notice that the partner lacked authority. See Ederer v. Gursky, supra; see also § 7-64-301(1)(a), C.R.S. 2007.

Because Bill led the student to believe he was teaching classes in his basement as an extension of Kickers, the student was not on notice that Bill did not have authority to do so. Accordingly, Amy is liable for the student's injuries.

Amy is also liable for the full amount of the partnership debt to the sign fabricator.

B. Bill

As a partner Bill is liable to the sign fabricator because the contract was made by a partner in the scope of the partnership business and was authorized by the partners. (RUPA 305-306). Bill is liable as a partner for the injury to the student and is separately liable for the student's injuries, since he was the tortfeasor (the fall was caused by Bill's negligent maintenance of his carpet).

C. Maureen

A person admitted as a partner into an existing partnership is not personally liable for any partnership obligations incurred before the person's admission as a partner. Trizechahn Gateway LLC v. Titus, 930 A.2d 524 (Pa.Super. 2007); §§ 7-62-303, 7-64-306(2) and (4), C.R.S. 2007.

Maureen is personally liable only for debts incurred after she became a partner. However, the \$10,000 she contributed as capital to the partnership is at risk for satisfying existing partnership obligations. R.U.P.A. 306(b). Thus, she is not liable to the sign fabricator for the sign itself, but can be held liable for the unpaid rent for the sign pole which was incurred after she became a partner. Since the student's injury occurred prior to the date of her becoming a partner, Maureen is not liable for the student's injuries.

D. Kickers

A partnership can sue or be sued. Pennsy Corp. v. Pinter, 17 Misc.3d 1116(A) (2007 WL 3037559) (N.Y.Sup. 2007); Gravel Resources of Arizona v. Hills, 217 Ariz. 33, 170 P.3d 282 (Ariz.App. Div. 1, 2007); People ex rel. Totten v. Colonia Chiques, 156 Cal.App.4th 31, 67 Cal.Rptr.3d 70 (Cal.App. 2 Dist.,2007); § 7-64-307(1), C.R.S. 2007. As pertinent here, the partnership's liability is the same as the liability of the general partners. See §§ 7-64-301, 7-64-305, 7-64-307, C.R.S. 2007. Accordingly, the partnership is liable for the student's injuries and the debt to the sign fabricator. All assets of a partnership, including capital accounts, are subject to the claims of creditors.

E. Dubliner

Because it is not a partner, Dubliner has no liability to either the injured student or the sign fabricator.

III. Claims Amy and Maureen Can Assert Against Bill

Partners owe a fiduciary duty of loyalty and due care to the partnership and each other and they must discharge their fiduciary duties in a manner consistent with the obligation of good faith and fair dealing. See J & J Celcom v. AT & T Wireless Services Inc., 169 P.3d 823 (Wash. 2007); § 7-64-404, C.R.S. 2007.

Partners may not compete with the partnership's business, and must disclose to the partnership any benefits or profits they receive without consent of the other partners from any transaction connected with the partnership business. Jarl Investments, L.P. v. Fleck, ___ A.2d ___ (2007 WL 4180969) (Pa.Super. 2007); Yoder v. Hooper, *supra*; Tucker v. Ellbogen, 793 P.2d 592 (Colo. App. 1989); UPA §404; § 7-64-404(1)(c), C.R.S. 2007.

Every partner has a right to an accounting as to partnership affairs. Cadwalader, Wickersham & Taft v. Beasley, 728 So.2d 253 (Fla.App. 4 Dist. 1998); Braden v. Strong, (2006 WL 369274) (Tenn.Ct.App. 2006); §§7-64-403 and 7-64-404, C.R.S. 2006. The right to an accounting may be enforced by constructive trust for profits which have been wrongfully withheld from the partnership.

Bill conducted private classes in the name of the partnership, but kept the profits for himself. Amy and Maureen may demand an accounting and sue Bill for breach of his fiduciary duties.

ESSAY Q5

SEAT

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<u>ISSUE</u>	<u>POINTS AWARDED</u>
1. A partnership is an association of two or more persons to carry on as co-owners of a business for profit.	1. ○
2. The agreement need not be in writing to form a partnership. May be formed by words or express conduct of parties.	2. ○
3. Although Dubliner receives a share of the profit, its relationship is as landlord and not a partner.	3. ○
4. Maureen became a partner when she bought an ownership interest.	4. ○
5. Partners are liable for the debts and obligations of the partnership.	5. ○
6. A partnership is liable for injuries or claims arising out of the actions of the partners in the ordinary course of business of the partnership.	6. ○
7. Partners are liable for torts of a partner committed in the ordinary course of partnership business.	7. ○
8. A person admitted as a partner into an existing partnership is not personally liable for partnership obligations incurred before the admission as a partner.	8. ○
9. Partners are fiduciaries for the partnership and each other – they owe a duty of loyalty to the partnership and to each other.	9. ○
10. Acts of a partner apparently carried out in the ordinary course of business binds the partnership.	10. ○
11. Partners must disclose to the partnership any benefits or profits they receive in the ordinary course of the partnership business and an accounting may be demanded for profits wrongfully withheld.	11. ○
12. Amy is liable for the student's injuries and for the debt to the sign fabricator.	12. ○
13. Bill is liable for the student's injuries and for the debt to the sign fabricator.	13. ○
14. Maureen's \$10,000 contribution to the partnership may be used to satisfy partnership obligations.	14. ○
15. Maureen is not liable for the cost of the sign or the injury to the student because both obligations occurred prior to the time she became a partner.	15. ○
16. Maureen is liable for unpaid sign rent incurred after she became a partner.	16. ○
17. Kickers is liable for the student's injuries and for all of the sign company debt.	17. ○
18. Partners may sue Bill for his breach of fiduciary duties.	18. ○

QUESTION 6

Before they got married over twenty years ago, Fred and Martha signed an agreement regarding the division of property and their financial responsibilities for their children should they divorce. They both were represented by separate attorneys during the negotiation process and each made full disclosure of their respective financial circumstances. The agreement provided that, in the event of divorce, they would bear equal financial responsibility for supporting any children of the marriage and that neither would be required to pay child support to the other. The agreement did not address maintenance.

During the marriage, Fred and Martha had twin boys, William and Charles.

In 2006, Martha started having an affair with Paul. She became pregnant in 2007. When Fred discovered Martha's infidelity, he filed for divorce.

The divorce became final in 2007. Martha was not granted maintenance in the divorce. At that time, the twins were 18. William was stationed in Germany with the United States military and Charles was in college.

Martha married Paul three months after the divorce became final, and the baby was born two weeks later. Shortly thereafter, Martha filed a motion requesting that Fred be required to pay child support for the baby. Fred responded by denying that the baby was his.

QUESTIONS:

Discuss:

1. whether the premarital agreement is enforceable in whole or in part;
2. whether either party can be required to pay child support for, or otherwise financially support, William and Charles; and
3. how the court should rule on the pending motion regarding child support for the baby.

DISCUSSION FOR QUESTION 6

I. Validity of the Premarital Agreement

To be valid, a premarital agreement must be in writing and signed by both parties, the parties must make full and fair disclosure regarding their assets and liabilities, and the agreement must be entered into voluntarily without duress, fraud, or overreaching. Section 14-2-307(1), C.R.S. 2007.

Here, the facts indicate that the agreement was signed, so it was necessarily also written. The facts also indicate that Fred and Martha had independent counsel during the negotiation process, so the examinees can presume that the agreement was voluntary. The examinees should conclude that, assuming the parties made full financial disclosure, the portions of the agreement regarding the division of property are enforceable. *See In re Marriage of Ross*, 670 P.2d 26 (Colo. App. 1983)

However, the Colorado Marital Agreement Act specifically states that a “marital agreement may not adversely affect the right of a child to child support.” Section 14-2-304(3), C.R.S. 2007; *In re Marriage of Ikeler*, 161 P.3d 663 (Colo. 2007); *In re Marriage of Chalat*, 112 P.3d 47 (Colo. 2005). Thus, the parties’ agreement that they would bear equal financial responsibility for supporting the children and that neither would be required to pay child support is unenforceable.

II. Financial Support of William and Charles

A. William

Generally, a parent’s child support obligation continues until the child reaches the statutory age of emancipation, which is 19 in Colorado. However, a child who is serving in the military is considered emancipated, even if he or she is under 19 years old. If William returns to the family before age 19, then child support may be owed. §14-10-115(13)(a)(V), C.R.S. 2007. The facts indicate that William is 18, but neither party can be required to pay child support for him during his service in the military.

B. Charles

The Colorado statute regarding a parent’s obligation to pay for a child’s college education has changed over the years. After 1997, a court cannot order a parent to pay for any college costs unless the parents entered into an agreement after July 1, 1997 that provides otherwise. Sections 14-10-115(13)(a) and (b), C.R.S. 2007. The facts do not indicate that the parties’ agreement addressed the issue of post-secondary education. Because their divorce was final in 2007, the post-1997 statute applies, and neither parent can be required to contribute to Charles’ college expenses. However, because he is 18, and has not yet reached the age of emancipation, either parent can be required to pay child support to the other for Charles.

III. Pending Motion regarding Child Support for the Baby

The issue of paternity may be raised in conjunction with a determination of child support in a dissolution of marriage proceeding, but the procedures of the Uniform Parenting Act (UPA), §§ 19-4-101, et seq., C.R.S. 2007, must be followed. *In re Marriage of De La Cruz*, 791 P.2d 1254 (Colo.App. 1990). A man is presumed to be the natural father of a child if he “and the child's natural mother are or have been married to each other and the child is born during the marriage . . . [or] within three hundred days after the marriage is terminated. . . .” Section 19-4-105(1)(a), C.R.S. 2007. A presumption of paternity may be rebutted only by clear and convincing evidence. Section 19-4-105(2)(a), C.R.S. 2007.

The burden of proof is on the moving party (in this case, Martha) to establish paternity. *C.K.A. v. M.S.*, 695 P.2d 785 (Colo. App. 1984). Once paternity is established through a court order, the court may enter orders concerning child support. Section 19-4-116(3)(a), C.R.S. 2007.

Because Martha is seeking child support, she has the burden of proving Fred is the father of the baby. Fred and Martha were married when the baby was conceived, and the baby was born within 300 days after their divorce became final (the facts indicate that the baby was born 3 ½ months after the divorce). Thus, Fred is the presumptive father. But Martha was married to Paul when the baby was born, so he is also presumed to be the father. The presumption of either as the father may be rebutted. When two or more presumptions arise which conflict with each other, “the presumption which on the facts is founded on the weightier considerations of policy and logic controls.” Section 19-4-105(2)(a), C.R.S. 2007. However, in weighing competing presumptions, the best interests of the child standard must also be applied *N.A.H. v. S.L.S.*, 9 P.3d 354 (Colo. 2000).

Because two presumptions arise here, one or more of the parties will request a genetic test, and the results of the test will determine who the father is. If Fred is the father, he can be required to pay child support for the baby. If the results of the blood test show the probability of Paul as the father, Fred likely will not be required to pay support.

ESSAY Q6

SEAT

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<u>ISSUE</u>	POINTS AWARDED
1. To be valid, a premarital agreement must be in writing and signed by both parties, contain full and fair disclosure of each party's assets and financial obligations (liabilities), and the agreement must be entered into voluntarily.	1. ○
2. The portions of the agreement regarding the division of property are enforceable.	2. ○
3. Because a marital agreement may not adversely affect a child's right to support, the agreement not to pay child support is unenforceable.	3. ○
4. Child support obligations continue until the child reaches the age of 19 (emancipation).	4. ○
5. A child serving in the military is considered emancipated.	5. ○
6. Because Charles is 18 and has not yet reached the age of emancipation, either parent can be required to pay child support for Charles.	6. ○
7. However, because there was no agreement to pay for college, the court cannot order either parent to pay for Charles' college expenses.	7. ○
8. A man is presumed to be the father of a child if the child is born during a marriage.	8. ○
9. A man is presumed to be the father of a child if the child is born within 300 days of the legal termination of the marriage.	9. ○
10. Fred may be presumed to be the father because the child was conceived during his marriage to Martha and born within 3 ½ months following the divorce.	10. ○
11. Paul may also be presumed to be the father because the child was born during his marriage to Martha.	11. ○
12. It is Martha's burden to proof to establish paternity.	12. ○
13. If a blood test determines Fred is the father, he can be required to pay child support for the baby.	13. ○

QUESTION 7

One day, the local First Federal Bank was robbed. Less than one mile from the bank, the police lawfully stopped Dan Defendant for speeding. Thinking he might be fleeing the bank robbery, the police took Defendant into custody and questioned him. Based on reports provided by bank tellers, Defendant's proximity to the bank, and his speeding, Defendant was charged with bank robbery.

The trial court appointed Al Attorney to represent Defendant. Attorney met with Defendant at the arraignment. Defendant explained that he was home with his mother at the time of the robbery, and that he was speeding because he was late for work. Attorney took notes, but never contacted Defendant's mother or employer to attempt to verify Defendant's story.

Before trial, the prosecutor made a plea bargain offer to Attorney. Attorney rejected it outright, never communicating the offer to Defendant.

At trial, the prosecutor presented the bank tellers as witnesses and they identified Defendant as the robber. The prosecution introduced a bank security camera video that showed a person resembling Defendant committing the robbery. After a brief deliberation, the jury found Defendant guilty.

At the sentencing hearing, Defendant asserted that he was not guilty. He told the judge that he wanted to appeal. The judge appointed Carl Counselor to represent Defendant for purposes of the appeal. Counselor met with Defendant who explained that he wanted to appeal. Counselor told Defendant that he would take care of it. Counselor reviewed Attorney's notes from the trial and decided that there were not any meritorious issues he could raise on appeal. Counselor did not file a notice of appeal.

QUESTION:

Discuss whether Defendant's constitutional right to counsel was violated by the actions of his two attorneys.

DISCUSSION FOR QUESTION 7

The issues in this question involve a criminal defendant's right to effective assistance of counsel. The Supreme Court has held that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). In *Strickland v. Washington*, 466 U.S. 668, 691-696 (1984), the United States Supreme Court recognized that the Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel. The test for ineffective assistance of counsel requires the defendant to show that counsel provided deficient performance and the deficient performance prejudiced the defendant.

Failure to investigate alibi

Al met with Defendant at the arraignment and Defendant explained that he had an alibi defense – that was home with his mother at the time of the robbery and that he was speeding because he was late for work. Al failed to contact Defendant's mother or employer to develop this defense.

In assessing the reasonableness of an attorney's investigation, a court would consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). While a cursory investigation may be sufficient, a reviewing court must consider the reasonableness of the investigation that supported that strategy. *Strickland*, 466 U.S. at 691.

Al knew of Defendant's alibi claim but Al failed completely to investigate this potential defense. Al's failure to investigate constituted deficient performance. In light of the other evidence of guilt (eyewitness identifications, security camera video), however, Defendant may not be able to establish prejudice. There is an argument to be made on either side.

Failure to communicate plea offer

The prosecutor made a plea bargain offer to Al. Al rejected the offer without communicating it to Defendant or seeking Defendant's input.

An attorney has a duty to consult with the client regarding "important decisions," including questions of overarching defense strategy. *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Strickland*, 466 U.S. at 688. There are decisions---regarding the exercise or waiver of basic trial rights---that are of such importance that counsel cannot make them on behalf of the defendant. *Nixon*, 543 U.S. at 187. The defendant has the ultimate authority to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). For these significant decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action. *Nixon*, 543 U.S. at 187.

An attorney's failure to convey a plea offer to the client constitutes deficient performance. See *Arredondo v. United States*, 178 F.3d 778 (6th Cir.1999); *United States v. Blaylock*, 20 F.3d 1458 (9th Cir.1994); *United States v. Rodriguez*, 929 F.2d 747 (1st Cir.1991);

Johnson v. Duckworth, 793 F.2d 898 (7th Cir.1986); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3d Cir.1982); see also *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* § 4-6.2(b) (3d ed. 1993) (“Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.”).

Al received a plea bargain offer from the prosecution. Al should have communicated that offer to Defendant. Whether to plead guilty is a decision of such importance that Al could not make it on behalf of Defendant. *Nixon*, 543 U.S. at 187. Defendant had the ultimate authority to determine whether to plead guilty. *Barnes*, 463 U.S. at 751. For this significant decision, Al should have both consulted with Defendant and obtained consent to the recommended course of action. *Nixon*, 543 U.S. at 187. Al’s failure to communicate the plea offer to Defendant satisfies the deficient performance prong of the ineffective assistance of counsel test.

Failing to communicate a plea offer to a defendant constitutes prejudice if there is a reasonable probability that the defendant would have accepted the offer if it had been timely communicated. See *United States v. Blaylock*, 20 F.3d at 1466-67.

Defendant cannot establish prejudice. Defendant maintained his innocence from the time he was stopped until he asked for counsel for an appeal. In light of Defendant’s conduct before, during, and after the trial, Defendant cannot establish prejudice from Al’s deficient performance. Therefore, Defendant was not denied the right to effective assistance of counsel by Al’s failure to communicate the plea bargain offer to him.

Failure to appeal

A criminal defendant has the right to the effective assistance of counsel in a direct appeal of his conviction. *Evitts v. Lucey*, 469 U.S. 387, 394 (1985).

“[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Counsel’s failure “cannot be considered a strategic decision.” *Id.* Thus, an attorney’s failure to file a notice of appeal after his client directs him to do so constitutes deficient performance.

In such a case, the appellant is not required to demonstrate that his appellate claims are meritorious, because the prejudice resulting from the failure to file a notice of appeal is not in the outcome of the proceeding, but in the forfeiture of the proceeding itself. *Flores-Ortega*, 528 U.S. at 483. Accordingly, the defendant need not show a likelihood of success on appeal to prevail on an ineffective assistance of counsel claim based on counsel’s failure to perfect an appeal. *Rodriguez v. United States*, 395 U.S. 327, 330 (1969); see also *United States v. Snitz*, 342 F.3d 1154 (10th Cir.2003).

Rather, to satisfy the prejudice prong of the ineffective assistance of counsel analysis in this context, the defendant need only establish that there is a reasonable probability that, but for counsel's deficient performance, he would have timely appealed. Evidence of nonfrivolous grounds for appeal or the defendant's prompt request for counsel to prosecute the appeal are highly relevant. *Flores-Ortega*, 528 U.S. at 486.

The facts indicate that Defendant told the judge at the sentencing hearing that he wanted to appeal. The court appointed Carl Counselor to represent Defendant on appeal, and Carl met with Defendant who directed Carl to file a notice of appeal on his behalf. However, after Carl reviewed Al's trial notes, he concluded there were no meritorious appellate issues, and did not file a notice of appeal.

Carl acted in a professionally unreasonable manner by failing to follow Defendant's express instructions to pursue an appeal. Defendant can thus satisfy the deficient performance prong of the ineffective assistance of counsel analysis. Defendant can also satisfy the prejudice prong, because he made a prompt request for appellate counsel by indicating at the sentencing hearing that he intended to appeal and directed Carl to file an appeal on his behalf. These facts demonstrate that, but for Carl's deficient performance, Defendant would have filed a timely appeal.

ESSAY Q7

SEAT

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ISSUE

POINTS
AWARDED

- | | |
|---|--------------------------|
| 1. Recognition that the Sixth Amendment guarantees the right to effective assistance of counsel. | 1. <input type="radio"/> |
| 2. Violation of effective assistance of counsel requires defendant show his counsel's performance was deficient, and that resulted in prejudice. | 2. <input type="radio"/> |
| 3. Counsel's performance is judged by an objective standard of reasonableness. | 3. <input type="radio"/> |
| 4. Al's failure to investigate alibi amounts to deficient performance. | 4. <input type="radio"/> |
| 5. It's arguable whether Al's failure to investigate defendant's alibi prejudiced defendant. | 5. <input type="radio"/> |
| 6. Al's failure to communicate plea offer amounts to deficient performance. | 6. <input type="radio"/> |
| 7. It's unlikely that Al's failure to communicate the plea offer prejudiced defendant in view of defendant's consistent protestations of innocence. | 7. <input type="radio"/> |
| 8. Carl's failure to file notice of appeal amounts to deficient performance. | 8. <input type="radio"/> |
| 9. Carl's failure to file notice of appeal did prejudice defendant by denying him of right to appeal. | 9. <input type="radio"/> |

QUESTION 8

Lisa rented a house to Tim for a period of three years with a written lease specifying monthly rental payments. Shortly after moving in, Tim purchased and installed, with Lisa's permission, a window air conditioning unit and a new in-wall fireplace.

The day after the lease expired, Lisa called Tim reminding him that he needed to move out. She also told Tim that a friend wanted to use the house the following week to film a TV commercial and was willing to pay \$1,500, but only if the house was vacant. Tim did not vacate by the following week, so Lisa's friend chose to film the TV commercial elsewhere. Several weeks later, Tim called Lisa and told her that he had mailed her a rent check and wished to remain in the house.

QUESTION:

Discuss Lisa's legal rights and remedies regarding Tim's ongoing occupancy of the house, and whether Tim, if he must vacate the house, can legally take the air conditioning unit and fireplace he purchased and installed.

DISCUSSION FOR QUESTION 8

1. Lisa's legal rights and remedies regarding Tim's occupancy.

Once the lease term expired, Tim no longer had any right of possession in the house and a tenancy-at-sufferance" arises. See FJK Assocs. v. Karkoski, 725 A.2d 991, 993 (Conn. App. 1999); 49 Am.Jur.2d Landlord and Tenant § 284 (2006). Applicants should also receive credit if they describe Tim as a "holdover tenant." See Restatement (Second) of Property, Landlord and Tenant, § 14.1 (1976) (describing tenant-at-sufferance as "tenant improperly holding over.") During this period, Tim is still responsible for paying Lisa a reasonable rental value of the property which typically will be the rental rate under the expired lease. See Mack v. Fennell, 171 A.2d 844, 846 (Pa. 1961) (tenant is liable for use and occupancy during such interval); Restatement (Second) of Property, Landlord and Tenant, § 14.5 (1976).

When faced with a tenancy-at-sufferance, Lisa has two options. First, she can treat Tim as a trespasser and utilize available common law or statutory remedies, including a wrongful detainer action, to remove or evict Tim from the property. See id.; Bryan v. Big Two Mile Gas Co., 577 S.E.2d 258, 267 (W. Va. 2001); 49 Am.Jur.2d Landlord and Tenant §§ 273-274 (2006). Under this option, Lisa can also recover damages proximately resulting from Tim's wrongful withholding of possession. See 49 Am.Jur.2d Landlord and Tenant §§ 277-278 (2006); Restatement (Second) of Property, Landlord and Tenant, § 14.6 (1976). In this case, it appears that Lisa's damages would include \$1500 for the lost opportunity to rent the house to her friend for the TV commercial.

Alternatively, Lisa has the unilateral option of binding Tim to a new periodic tenancy. See Restatement (Second) of Property, Landlord and Tenant, § 14.4 (1976). The term of the periodic tenancy can be agreed upon by the parties, but absent such an agreement, courts will look to the terms of the original lease. If, as here, the lease term exceeds one year, some authorities indicate that a year-to-year tenancy is created. See Sinclair Refining Co. v. Shakespeare, 175 P.2d 389, 391 (Colo. 1946); 49 Am.Jur.2d Landlord and Tenant § 286 (2006). However, other authority provides that if rent under the expired lease was computed on a monthly basis, a month-to-month periodic tenancy is created. See Restatement (Second) of Property, Landlord and Tenant, § 14.4, comment (f) (1976); Roth v. Dillavou, 835 N.E.2d 425, 430 (Ill. App. 2005) (acceptance of monthly rental payments by the landlord will generally create a month-to-month tenancy).

2. If Tim vacates the house, can he legally take the air conditioning unit and fireplace?

Whether Tim can legally remove these items from the house when he leaves depends on whether the items have retained their status as personal property or, instead, have become "fixtures" to the real property. A fixture is former personal property that is so affixed or connected with real property that it is considered to be part of the real property. See 35A Am.Jur.2d Fixtures § 1 (2001).

DISCUSSION FOR QUESTION 8
Page Two

In landlord/tenant scenarios, the most important factor in determining whether an item of personal property has become a fixture is whether the owner of the personal property (the tenant) intended for the item to become part of the real property. See 8 Powell on Real Property § 57.04[4] (2001); 35A Am.Jur.2d Fixtures § 13 (2001); Hartberg v. Am. Founders' Sec. Co., 249 N.W. 48, 49 (Wis. 1933). An express agreement between the landlord and tenant regarding the status of the item will control. See Alexander v. Cooper, 843 S.W.2d 644, 646 (Tex. App. 1992). However, absent such an agreement (and in the present case), a court will look to various factors including (1) whether the nature of the item makes it essential to the use of the real property, (2) the manner or mode of attachment of the item, (3) whether the item is specially adapted to the real property, and (4) whether removal of the item will cause damage to the real property. See 8 Powell on Real Property § 57.05[5][b] (2001). In landlord/tenant cases, there is often a presumption that a tenant would not intend to make such a donation to the property owner. See 8 Powell on Real Property § 57.05[2][b] (2001); see also C.J.S. Fixtures § 54 (2004).

Applying the above listed factors, the window air conditioning unit that Tim installed would likely not be deemed a fixture and, therefore, may be removed by Tim. See Bay State York Co. v. Marvix, Inc., 119 N.E.2d 727, 730 (Mass. 1954) (detachable air conditioning units held to be removable by tenant). In contrast, the in-wall fireplace would appear to be more substantially attached to, and specially adapted for, Lisa's house and removal would probably result in damage to the house walls. Thus, it is likely to be deemed a fixture and not removable. See Wells v. Clowers Const. Co., 476 So.2d 105, 106 (Ala. 1985) (once affixed to a house, a fireplace becomes as much a part of that house as the four walls); see also 35A Am.Jur.2d Fixtures § 80 (2001).

ESSAY Q8

SEAT

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ISSUE

POINTS
AWARDED

Lisa's Legal Rights Regarding Tim's Occupancy

- | | | |
|---|----|-----------------------|
| 1. Recognition of "tenancy-at-sufferance" or Tim as "holdover" tenant . | 1. | <input type="radio"/> |
| 2. As holdover/tenant-at-sufferance, Tim is still liable for reasonable value of use (rent). | 2. | <input type="radio"/> |
| 3. Lisa's first option (treat Tim as trespasser and seek eviction/wrongful detainer/removal). | 3. | <input type="radio"/> |
| 4. Can recover damages for TV commercial. | 4. | <input type="radio"/> |
| 5. Lisa's second option (bind Tim to new periodic tenancy). | 5. | <input type="radio"/> |
| 6. Term of tenancy is either year-to-year or month-to-month. | 6. | <input type="radio"/> |

Lisa's Legal Rights Regarding Tim's Occupancy

- | | | |
|---|-----|-----------------------|
| 7. Depends upon whether items are "fixtures." | 7. | <input type="radio"/> |
| 8. Focus is on <u>intention</u> of tenant. | 8. | <input type="radio"/> |
| 9. Intent factors: | | |
| 9a. Prior Agreement? | 9a. | <input type="radio"/> |
| 9b. Essential to use? | 9b. | <input type="radio"/> |
| 9c. Degree of attachment/ease of removal. | 9c. | <input type="radio"/> |
| 9d. Specially adapted. | 9d. | <input type="radio"/> |
| 9e. Causes damage? | 9e. | <input type="radio"/> |
| 10. General presumption favoring tenants. | 10. | <input type="radio"/> |
| 11. Air conditioner (not a fixture/Tim may remove). | 11. | <input type="radio"/> |
| 12. Fireplace (a fixture/Tim cannot remove). | 12. | <input type="radio"/> |

QUESTION 9

As she was nearing death in the hospital, Jane (a widow) phoned Friend and stated: "I'm going to dictate a will to you and ask you to type it out and sign it for me." Friend agreed and Jane dictated the following to her over the telephone:

I, Jane, make this my last will and testament. I want my sister, Susie, and my two surviving brothers, Ben and Jerry, to have everything, share and share alike. Susie will be executor of my estate.

After Friend read back to Jane what she had typed, Jane instructed: "OK, that's fine. Please print it out, sign it on my behalf, and keep it in a safe place." After hanging up the phone, Friend printed the will and signed Jane's name to it as Jane had directed. Friend's husband and daughter signed as witnesses.

Jane died the following day. The total value of Jane's estate is \$300,000. She is survived by siblings Susie, Ben, and Jerry, and her sons, Sam and Sal. Her only daughter, Dora, predeceased Jane years before. Dora has two sons, David and Harry. Sam had no children, and Sal has two daughters, Thelma and Louise.

A few years before she died, Jane had given Dora \$100,000. Jane enclosed the following letter when she sent the money to Dora:

I know you are in desperate need of this money now, so I'm giving it to you now and will deduct it from your inheritance later.

Several months before Jane died, Sal won the lottery. Shortly thereafter, Sal sent his mother the following note:

Dear Mother,
As you know, I'm now well off financially and don't need whatever I might inherit from you. I would rather that you think of the rest of our family and not consider me in your estate planning. Love, Sal.

Sal's note was found among Jane's effects following her death.

QUESTION:

Discuss how Jane's estate will be distributed. Assume the Uniform Probate Code is in effect in the jurisdiction where the will is to be probated. Also, assume Jane was competent at the time she dictated her will.

DISCUSSION FOR QUESTION 9

Did Jane execute a valid will?

Whether Jane's will is valid will be determined by UPC § 2-502(a) and (b). Those sections read:

(a) a will must be

(1) in writing;

(2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and

(3) signed by at least two individuals, each of whom signed within a reasonable time after having witnessed either the signing of the will as described in (2) or the testator's acknowledgment of that signature or acknowledgment of the will;

(b) a will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

Jane's will was in writing and signed by two witnesses. In addition, the will was signed by Friend at Jane's direction, but it was not signed "in the testator's conscious presence" as required by section 2-502(a)(2). "Signing [by another person] is sufficient if it was done in the conscious presence, i.e., within the range of the testator's senses such as hearing; the signing need not have occurred within the testator's line of sight." UPC § 2-502 (comment). Rather, Friend signed the will in another location and after ending her telephone conversation with Jane. Because the signing occurred outside of range of Jane's senses, the will does not meet the requirements of section 2-502(a). As the material portions of the will are not in Jane's handwriting, it is not a valid holographic will. Accordingly, the will is invalid, and Jane has died intestate.

Did Jane make an advancement to Dora?

According to UPC § 2-109(a): If an individual dies intestate as to all or a portion of his or her estate, property the decedent gave during the decedent's lifetime to an individual who, at the decedent's death, is an heir is treated as an advancement against the heir's intestate share only if ... the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement.

The letter that Jane sent to Dora with the check stated, "I know you are in desperate need of this money, so I'm giving it to you now and will deduct it from your inheritance later." This makes clear that Jane intended the gift of \$100,000 to be an advancement to Dora. However, Dora predeceased Jane. "If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the division and distribution of the decedent's intestate estate, unless the decedent's contemporaneous writing provides otherwise." UPC § 2-109(c). Therefore, the amount of the advancement will not be deducted from the intestate shares of Dora's sons, David and Harry.

Has Sal disclaimed his interest in Jane's intestate estate?

According to the Uniform Disclaimer of Property Interests Act (UDPIA), “[a] person may disclaim, in whole or in part, any interest in or power over property.” UDPIA § 2-1105(a)(formerly UPC § 2-801):

To be effective, a disclaimer must be a writing or other record, declare the disclaimer, describe the interest or power disclaimed, be signed by the person making the disclaimer, and be delivered or filed [with the decedent estate's personal representative or a court having jurisdiction to appoint a personal representative].

UDPIA § 2-1105(c); see also UDPIA § 2-1112(c)(delivery or filing). “The disclaimer takes effect ... if the interest arose under the law of intestate succession, as of the time of the intestate's death.” UDPIA § 2-1106(b)(1). “The disclaimed interest passes ... as if the disclaimant had died immediately before the time of distribution.” UDPIA § 2-1106(b)(2).

Sal's letter to Jane stating that he did not “need whatever I might inherit from you” and that he “would rather that you think of the rest of our family and not consider me in your estate planning” will serve as a disclaimer of his interest in Jane's intestate estate. The disclaimer, which was in a written note and signed by Sal, unambiguously disclaimed any right of inheritance. The disclaimer was delivered to Jane and was found with Jane's effects. The disclaimer took effect upon Jane's death and Sal's interest in the estate will pass by representation to his daughters, Thelma and Louise.

How will Jane's intestate estate be distributed?

The total value of Jane's estate is \$300,000. According to UPC § 2-101(a), “any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs”. UPC § 2-103(1) further directs that the intestate estate “if there is no surviving spouse, passes ... to the decedent's descendants by representation.” When the decedent's estate passes by representation, UPC § 2-106(6) instructs:

The estate ... is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the decedent which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

DISCUSSION FOR QUESTION 9

Page Three

The \$300,000 will be distributed by representation by dividing it into three equal shares representing the surviving descendants, Sam and Sal, and the predeceased descendant, Dora, as they are in the generation nearest to Jane containing one or more surviving descendants. Sam will receive \$100,000. Due to his disclaimer, Sal will be treated as if he predeceased Jane. See UDPIA § 2-1106(b)(3)(A). Thus, the remaining shares of Dora and Sal will be combined, and the total amount of \$200,000 will be divided into equal shares and distributed by representation to Dora's sons, David and Harry, and to Sal's daughters, Thelma and Louise, with each receiving \$50,000. Siblings Susie, Ben, and Jerry receive nothing.

ESSAY Q9

SEAT

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ISSUE

POINTS
AWARDED

- | | | | |
|-----|---|-----|---|
| 1. | To be valid, a will must be (1) in writing; (2) signed by the testator; and (3) signed by at least two others, each of whom signed within a reasonable time after having witnessed either the signing of the will or the testator's acknowledgment of that signature or acknowledgment of the will. | 1. | ○ |
| 2. | Even though Jane's will was in writing and signed by two witnesses, it is not a valid will because it was not signed by her or by another within her conscious presence. | 2. | ○ |
| 3. | Because Jane's will is invalid, her estate will pass to her descendants by intestate succession. | 3. | ○ |
| 4a. | Property Jane gave her daughter Dora during her lifetime may be treated as an advancement. | 4a. | ○ |
| 4b. | Because Jane declared in a contemporaneous writing that the gift was an advancement, such gift will therefore be counted against Dora's share. | 4b. | ○ |
| 4c. | Because Dora failed to survive Jane, the advancement is not taken into account in computing the division and distribution of Jane's intestate estate to Dora's sons, David and Harry. | 4c. | ○ |
| 5. | A person may disclaim any interest in property if it is in writing, describes the interest disclaimed, is signed by the disclaimant, and is delivered to the decedent estate's personal representative. | 5. | ○ |
| 6. | Sal's note to Jane was a disclaimer of interest in Jane's intestate estate which took effect upon Jane's death so that Sal's interest in the estate will pass by representation to his heirs, Thelma and Louise. | 6. | ○ |
| 7. | Son Sam receives \$100,000 (1/3). | 7. | ○ |
| 8a. | Nephews David and Harry receive \$50,000(1/6) each. | 8a. | ○ |
| 8b. | Nieces Thelma and Louise receive \$50,000(1/6) each. | 8b. | ○ |
| 9. | Siblings Susie, Ben, and Jerry receive nothing. | 9. | ○ |