

QUESTION 1

Alice has operated a successful athletic club for years. Although recovering from a stroke, she decided to add a spa to the club. Since she knew nothing about running a spa, she entered into a verbal arrangement with Barbara to manage it. Alice provided Barbara with an office and space to operate the spa and sell spa products and merchandise. Alice paid Barbara a regular salary plus a 10% commission on the gross sales of all spa products and merchandise she sold. She also agreed to pay Barbara \$25 for any new athletic club memberships she sold.

Barbara ordered merchandise for the spa under the "Alice's Athletic Club" name and signed Alice's name to delivery receipts. Alice was aware that Barbara conducted business in this fashion.

At the end of the first month Alice paid Barbara, in addition to her salary, the 10% commission Barbara earned selling spa products. Barbara also received \$200 for signing up eight new athletic club members. From the outset, however, the spa lost money. While some spa creditors were paid from the athletic club's account, Barbara failed to pay, or submit for payment, many spa creditor invoices. Seeing little or no prospect for improvement in the situation, Barbara quit a few months later.

Unbeknown to Alice, Barbara also worked for a major supplier of spa merchandise while she was employed by Alice. Barbara received payments from the supplier for all spa merchandise purchased for Alice's Athletic Club.

Barbara recently submitted a claim to Alice for sales commissions on the spa merchandise she sold before quitting, plus a \$300 bill for signing up twelve new members.

QUESTIONS:

Discuss Alice's:

1. liability to the creditors;
2. legal obligation to pay the commission and the sign-up bonus Barbara claims to be owed; and
3. ability to recover the commissions and sign-up bonuses already paid to Barbara.

QUESTION 2

In January 2003, Andy Agent, an undercover DEA agent, learned from William Witness, a paid government informant, that Don Defendant had a large supply of cocaine he was arranging to sell. At Agent's request, Witness set up a meeting between Agent and Defendant. At the meeting, Agent said that he was interested in purchasing a kilogram of cocaine, if it was of good quality. Defendant agreed to make the sale and gave Agent a small sample of cocaine. Agent immediately arrested Defendant. When Defendant was searched, only one-half an ounce of cocaine was found on his person. Later, in a search of Defendant's home, over a kilogram of cocaine was found.

Defendant has been charged with possession of cocaine with intent to distribute. Defendant claims that he was "just fooling around," and that he never intended to sell any of the cocaine to Agent.

At Defendant's trial, the prosecution intends to call Witness to testify. Witness will testify that, on three separate occasions in March of 2002, he personally found buyers for cocaine that Defendant wished to sell. Witness will further testify that, in each of those transactions, Defendant sold at least one-half of a kilogram of cocaine.

Witness has been working for the government as an informant since August 2002. Since that time, he has had no other source of income. None of the three purported buyers of the cocaine has been located.

QUESTION:

Discuss objections that Defendant's attorney should make if Witness testifies at trial. Assume that this case is being tried before a jury in a jurisdiction where the Federal Rules of Evidence have been adopted.

QUESTION 3

Carl was indicted for possession of cocaine. He could not make bail, so he was placed in jail to await trial. The police suspected that Carl had information concerning the killing of a police officer that had occurred during a drug raid. Through an arrangement with jail personnel, a police officer posing as a minister came to visit Carl in his jail cell. After several visits, the undercover officer/minister was able to gain Carl's confidence. During a casual conversation with Carl, the officer/minister asked Carl if there was anything that was bothering him; "anything he wanted to get off his chest?" Carl said there was, and admitted that he had killed a police officer in a drug raid.

Later, when Carl was charged with murder, his lawyer made a motion to suppress the incriminating statement that Carl made in jail. In his motion to suppress, Carl's lawyer claims the statement is inadmissible because it was obtained in violation of the U.S. Constitution.

QUESTION:

Discuss potential Constitutional claims that Carl may have.

QUESTION 4

Wanda and Harry have lived together in Colorado for twenty-three years. They never were formally married. They have twin daughters who are emancipated. Wanda did not work during the course of their relationship, and instead stayed at home to raise their daughters and maintain their home. Wanda recently got a job at a neighborhood elementary school as a teacher's aid, earning \$17,500 per year. Harry is a stockbroker who earns in excess of \$300,000 per year. While both Harry and Wanda had some assets prior to their cohabitation, they acquired most of their property and assets since living together with the money earned by Harry. The parties have enjoyed a very comfortable standard of living over the years.

Wanda and the daughters use Harry's surname: Green. Up until yesterday, Wanda had consistently worn a simple gold ring on her left hand, a gift from Harry upon the occasion twenty-three years ago when they agreed that they were true soul mates and would spend the rest of their days together. Harry and Wanda always introduced themselves as Mr. and Mrs. Green. They have filed joint tax returns since they have been together. Harry and Wanda celebrated their "anniversary" annually with friends and neighbors and represented to their daughters that they were married.

Yesterday, Harry told Wanda that their relationship was over and that he no longer loved her.

QUESTION:

Discuss Wanda's legal status with respect to her relationship with Harry and their respective rights to property and assets.

QUESTION 5

Winston Jones is a U.S. citizen who resides in Pueblo, Colorado. Jones is an avid baseball fan who spends many hours on his home computer visiting baseball related websites on the Internet. Jones discovered a website listing for sale a "genuine home run ball autographed by Babe Ruth." The price for the ball was \$25,000. The web offering was posted by Ramona Ortega, a U.S. citizen residing in Los Angeles, California. Her website listed various items for sale, including the baseball, and provided a home address in Los Angeles, an e-mail address, and a telephone number.

Jones communicated with Ortega by e-mail asking if the baseball was real and if the price was firm. Ortega answered by e-mail assuring Jones that the ball was authentic and the price was firm. Ortega then called Jones twice by telephone offering to sell him the ball and warning him that he might lose the chance to buy it if he didn't act quickly. Jones agreed to buy the ball and sent Ortega a check for \$25,000. Ortega cashed the check and then mailed the ball to Jones.

When Jones received the ball, he compared the autograph on it to photographs of Babe Ruth's autograph. He became convinced that the autograph on the ball was fake. He e-mailed and called Ortega attempting to get his money back, but Ortega never responded.

Jones commenced a civil action against Ortega in the Federal District Court for the District of Colorado. His complaint alleges breach of contract and fraud and demands actual damages in the amount of \$25,000 and exemplary or punitive damages in the amount of \$25,000.

Jones arranged for service of process by having his 17 year-old nephew, who resides in Los Angeles, deliver a summons and copy of the complaint to Ortega's home. Ortega was not home at the time of delivery, so the nephew left the summons and complaint with Ortega's next-door neighbor.

Ortega's attorney, pursuant to Federal Rule of Civil Procedure 12(b), filed a Motion to Dismiss all claims for lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, and insufficient service of process.

QUESTION:

Discuss how the judge should rule on Ortega's Motion to Dismiss.

QUESTION 6

Lorraine, Maureen, and Claudette entered into a verbal agreement to build a house on a piece of property owned by Lorraine. Maureen, who is a contractor, agreed to build the house. Claudette, who is a developer and realtor, agreed to arrange construction financing for the project and to market the house. (No money changed hands among the three women.) The women agreed that their respective contributions to the project were approximately equal and therefore, when the house sold, each would receive one-third of the gross proceeds.

At all times, title to the real estate was in Lorraine's name. The contracts for materials and labor for the house were executed by Maureen. Claudette obtained the financing in her name, although she did not have title to anything.

The project was begun and things went well for a while. Ultimately, the cost of construction exceeded the construction loan amount, and many of the suppliers and subcontractors were not paid.

QUESTION:

Discuss the relationship among Lorraine, Maureen, and Claudette and their legal obligations to the creditors. Do not discuss mechanic's or other liens, real property law, nor the application of the Statute of Frauds.

QUESTION 7

A state statute created the “Safe Signs Agency” (SSA). The statute allows SSA to promulgate rules relating to highway signs in order to “promote the safe operation of motor vehicles and advance the greater public good.”

At a meeting that was unannounced and not open to the public, the SSA promulgated “Regulation A” which provides:

No new houses shall be constructed in this state until the state’s accidental highway death rate decreases for at least two consecutive years.

The members of the SSA did not keep any meeting notes or other record of their discussions at the meeting. “Regulation A” did not set out any process for a challenge or variance.

Bob Benefactor wants to construct several new houses for low-income families. He is prohibited from doing so by “Regulation A” because the state’s rate of accidental highway deaths has yet to decrease.

QUESTION:

Discuss challenges to “Regulation A” that Benefactor may bring.

QUESTION 8

Daniels is one of three directors of Corporation, a duly-licensed and registered for-profit corporation. Daniels is also president of Charity, a non-profit, charitable association.

At a regularly scheduled board meeting of Corporation, all three directors voted to donate \$10,000 of Corporation's profits to Charity. Daniels had not informed the other two directors of his connection to Charity. The other directors had no affiliation with Charity.

Corporation's articles of incorporation and bylaws say nothing about making donations to charitable organizations.

QUESTIONS:

Discuss whether: (1) Corporation's gift to Charity is voidable; and (2) whether Daniels is liable to Corporation for the amount of the gift to Charity.

QUESTION 9

Peter Plaintiff works in Metropolis City. His office is next to Big Corporation's national headquarters. Recently, Corporation acquired two portable defibrillators; electronic devices used to restore heart rhythm. Corporation acquired the defibrillators in response to prominent public health officials' recommendations that large institutions and businesses purchase them and train personnel to use them in the event of an emergency. Corporation sent out public service announcements publicizing the acquisition, and invited local reporters to attend a press conference displaying the defibrillators and discussing their use.

Last week, as Plaintiff was walking to work and was just outside Corporation's headquarters, he began experiencing sharp chest pains. Plaintiff thought that he might be having a heart attack. He remembered that Corporation had purchased the defibrillators and had the presence of mind to tell his companion before he passed out. Plaintiff's companion immediately took Plaintiff into Corporation's headquarters.

Corporation's first-aid personnel, who came to help Plaintiff, informed Plaintiff's companion that they no longer had the defibrillators. They had sent the defibrillators back to their manufacturer because both were malfunctioning. The first-aid personnel then called 911, and an ambulance arrived about ten minutes later. Unfortunately, Plaintiff could not be resuscitated and was pronounced dead upon arrival at the hospital. Cause of death was listed as Sudden Cardiac Arrest (SCA).

Evidence shows that about forty percent of all SCA victims who are defibrillated at hospitals survive. Evidence further shows that about fifteen percent of all SCA victims defibrillated outside hospitals survive. Only five percent survive without defibrillation.

QUESTION:

Discuss possible claims of negligence that Plaintiff's family may bring against Corporation.

DISCUSSION FOR QUESTION 1

This question deals generally with the law of agency. Agency is a consensual, fiduciary relationship between two or more parties, concerning contractual and other rights, liabilities and duties. 2A C.J.S. AGENCY § 4. An agency arises when one person (the principal) manifests an intention that another person (the agent) shall act on behalf of the principal. 2A C.J.S. AGENCY § 17. Each party must have the capacity to form the agency relationship. Although Alice has recently had a stroke, there is nothing in the facts that would indicate a lack of mental capacity to enter into this transaction.

No consideration is required to establish an agency relationship and the agency agreement does not need to be evidenced by a writing. Thus, despite that the agreement between Alice and Barbara was verbal, it is nonetheless valid.

An agent has the power to create legal relationships for her principal especially where she is a general agent authorized to do all acts connected with a particular business. 2A C.J.S. AGENCY §§ 143, 144. Here, Barbara was hired to “manage” the spa and therefore, it appears that she was vested with general agent authority. An agent's authority can be **actual** (where the parties agree that the agency exists), **apparent** (where the principal holds one out to a third party as being his agent), or **ratified** (where the principal agrees to be bound by the previously unauthorized acts of another or retains the benefit of the bargain - i.e. the merchandise). Here, the authority can be seen to be actual (Alice hired Barbara to be the manager of the spa), apparent (Alice gave Barbara an office and allowed her to run the spa), or ratified (by paying at least some of the creditors through the business account). 2A C.J.S. AGENCY §§ 146, 147, 157. Also, by allowing Barbara to accept delivery of spa products, Alice authorized those transactions. Delivery to an agent with authority to receive is equivalent to delivery to the principal. 2A C.J.S. AGENCY § 145.

Despite this, an agent must act within the course and scope of her agency. Even if Barbara was cloaked with proper authority, she owed a fiduciary duty to act in the best interests of her principal. That duty is one of **undivided loyalty**. If an agent has interests adverse to the interests of her principal (e.g. self-dealing or obtaining secret profits), she breaches this duty by failing to disclose them. A breach of the duty of loyalty also may occur where the agent acts on behalf of two different principals with adverse interests. Barbara breached this duty of loyalty by selling products for both Alice and the supplier of spa merchandise.

Where the agent has committed an intentional tort or intentionally breached her fiduciary duty, the principal may, in addition to any other remedies she has, refuse to pay the agent for any compensation related to the fiduciary breach. 2A C.J.S. AGENCY § 63, 71. Thus Alice will not be liable for any commission claimed by Barbara that was related to Barbara's breach of loyalty. Alice will be liable, however, for purchases that Barbara made from suppliers where Barbara had actual or apparent authority (or for actions Alice ratified). Alice will not have to pay for the merchandise supplied to the spa upon which Barbara collected a sales commission.

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Alice will not be able to recover the \$200 bonus payment for spa memberships that Barbara sold, and she must pay the \$300 bonus payment Barbara earned before she quit. The bonus payment was related to bringing in new clients to the club and was not related to the breach of loyalty. Alice does not owe the unpaid commission for gross sales, however, and she may recover the commission already paid because of Barbara's breach of her fiduciary duty in that Barbara did not disclose that she was receiving payment from the merchandise supplier.

DISCUSSION FOR QUESTION 2

Defendant's attorney should object to the evidence on the ground that it involves improper use of character evidence. Evidence of other crimes is not admissible to prove the character of a person in order to show action in conformity therewith on a particular occasion. FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . ."). See also Michelson v. United States, 335 U.S. 469, 475-76 (1948) (Jackson, J.). Therefore, the prosecution may not offer Witness's testimony about Defendant's prior drug transactions to prove that Defendant is prone to sell cocaine, and therefore probably guilty of the crime charged in this case.

The prosecution may be able to offer the evidence of the prior cocaine sales for another purpose, besides propensity. Evidence of other crimes may be admissible for purposes besides proving action in conformity therewith (i.e., propensity). FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .").

Here, the prosecution can argue that it is not offering the testimony to show that Defendant is prone to commit this type of crime, but rather to show that, because Defendant had actually sold cocaine in the past, he likely intended to sell cocaine on this occasion. Offering this evidence to prove intent may be permissible, under Rule 404(b). Other permissible purposes could arguably include proving a plan, scheme, or modus operandi.

If the prosecution offers the evidence for a permissible purpose, such as proof of intent, then the judge will have to determine whether the evidence is probative on that point, and whether intent is a material issue in the case. United States v. Huddleston, 485 U.S. 681 (1988).

Here, intent is clearly a material issue -- the prosecution must prove that Defendant intended to distribute the cocaine, and Defendant claims that he did not. In addition, the prior sales are probative on the issue because one who has intentionally sold drugs in the past is more likely to have intended to do so in these circumstances.

Next, the judge must decide whether the evidence of Defendant's prior cocaine sales is sufficient for a reasonable jury to find, by a preponderance of the evidence, that Defendant actually engaged in the prior cocaine deals. United States v. Huddleston, 485 U.S. 681 (1988). Here, the only evidence of those prior deals is Witness's testimony that they occurred. William Witness has serious credibility problems. He arguably has strong incentives to create helpful information for the government, since his income depends entirely on his ability to feed the government useful information. In addition, his account is uncorroborated; none of

the buyers can be located. On the other hand, Witness claims that he was personally involved in arranging the deals, and he offers direct evidence of their occurrence. Given that the standard is low and that credibility generally goes to weight rather than admissibility, it is likely that the judge would find that the standard has been satisfied.

Finally, the judge must balance the probative value against the risk of unfair prejudice. The judge may exclude evidence if its probative value is substantially outweighed by the risk of unfair prejudice. FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

Here, the probativeness of the evidence is enhanced by the importance of the evidence: the issue of intent is critical, and it is difficult to prove. Further, the connecting generalization seems strong: someone who has frequently intentionally sold drugs in the past is more likely to have intended to do so in a situation like this one. On the other hand, the evidence itself is quite weak: there is only Witness's word that Defendant engaged in the prior deals, and Witness has credibility issues.

On the other side of the balance, the prejudice is substantial. The jury will likely not be able to avoid drawing an impermissible propensity inference, even with the help of a limiting instruction (especially since the propensity and intent inferences are so similar). In addition, there is a real risk that the jury will use the evidence as evidence that Defendant is a bad man who deserves punishment regardless of whether he committed this crime.

Because the test is heavily weighted in favor of admission, it is likely that the judge will admit the evidence. Although the risk of prejudice here is substantial, and the evidence itself is questionable, Witness' testimony nonetheless provides direct evidence that Defendant has intentionally sold drugs in the past. It is powerful and probative evidence of Defendant 's intent to sell the drugs to Agent, which is a critical issue in the case. United States v. Moore, 732 F.2d 983, 989 (D.C. Cir. 1984).

DISCUSSION FOR QUESTION 3

Fourth Amendment Claim. This claim is tenuous as a defendant has no legitimate interest protected under the Fourth Amendment from a misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. *Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. White*, 401 U.S. 745 (1971). Moreover, a prisoner has no constitutionally protected expectation of privacy in his prison cell. *Hudson v. Palmer*, 468 U.S. 517 (1984).

Fifth Amendment Right to Counsel Claim. The warning and waiver requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966) apply to a "custodial interrogation." Although the defendant clearly was in custody and was questioned by a police officer, *Miranda* only applies to situations in which the suspect knows he is conversing with a government agent. *Illinois v. Perkins*, 496 U.S. 292 (1990). When he does not know that he is talking to a government agent, the pressure that results from the interaction of custody and interrogation with which *Miranda* was concerned simply does not exist. *Id.* Therefore there was no need to advise Carl of the privilege against self-incrimination and the right to consult an attorney.

Sixth Amendment Right to Counsel Claim. Deliberate attempts by the State to elicit incriminating statements from an accused after an indictment, and in the absence of counsel, violates the Sixth Amendment right to counsel. *Massiah v. United States*, 377 U.S. 201 (1964). The right to counsel as to the possession of the cocaine charge attached when Carl was indicted on that charge. But, the investigation of a new or different offense to which the right of counsel has not yet attached is not precluded. *Maine v. Moulton*, 474 U.S. 159 (1985). Accordingly, Carl's Sixth Amendment right to counsel was not violated because no charges had been filed in the killing of the police officer. Carl will not be able to suppress his statement on this ground. *Illinois v. Perkins*, 496 U.S. 292 (1990).

Due Process Voluntariness. The Due Process Clause, as a means of suppressing confessions, typically applies to situations in which the suspect's will is overborne by coercion or pressure by the police. See, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). Police deception or trickery in itself probably is insufficient. *Frazier v. Cupp*, 394 U.S. 731 (1969) (misrepresentation that another had already confessed was relevant but did not in itself make an otherwise voluntary confession inadmissible). In *Leyra v. Denno*, 347 U.S. 556 (1954), a confession was involuntary when it was obtained by a police psychiatrist representing himself as a general practitioner brought in to relieve the suspect's acutely painful sinus attack. Police deception, if egregious enough to shock the sensibilities of a civilized society, would likely result in suppression of any statement obtained thereby. See *Moran v. Burbine*, 475 U.S. 412 (1986). Thus, a due process violation represents Carl's best chance of success.

DISCUSSION FOR QUESTION 4

Colorado Revised Statutes Section 14-2-101 et. seq. sets forth the criteria for statutory or “ceremonious” marriages. However, in Colorado, marriages may also exist by virtue of common law. In order to establish a common law marriage, Colorado law requires two elements: 1) mutual consent and 2) mutual assumption of the marital relationship. If a common law marriage is denied by one of the parties, then its existence may be inferred through evidence of cohabitation and general repute. No single fact or set of factors is required to establish a common law marriage. Rather, the trial court must examine the unique circumstances of each case to determine whether the parties are, indeed, married. People v. Lucero, 747 P.2d 660 (Colo. 1987).

Under the facts in this case, the parties' relationship is very likely a common law marriage for many reasons. The parties exchanged words of present intent on the evening that Harry gave Wanda a ring twenty three years ago; they cohabited for all that time; they raised two children together; they held themselves out to third parties as married by introducing each other as a spouse at social events; they filed joint tax returns; they told their children that they were married; they celebrated their "anniversary" on a regular basis; and Wanda and the children assumed Harry's surname of Green. Thus there is substantial evidence of the parties' intent to marry and their mutual assumption of that status.

If a court determines that parties are married under principles of common law, the marriage exists and can only be terminated by death or divorce. If the parties divorce, the dissolution of the relationship is governed by Colorado divorce law and marital property will be distributed. Property acquired by either Harry or Wanda after their marriage is marital property with the exception of:

1. Property acquired by gift, bequest, devise, or descent;
2. Property acquired in exchange for property acquired by gift, bequest, devise, or descent;
3. Property acquired by a spouse after a decree of legal separation;
4. Property excluded by valid agreement of the parties.

Colo. Rev. Stat. 14-10-113.

In this case, absent an agreement between Harry and Wanda to exclude assets acquired during the marriage from the marital estate, the property is presumptively marital. The same goes for the increase in value of any separate property acquired by either party before the marriage and the increase in value of any property acquired by gift or inheritance after the marriage. This marital property will be subject to division between Harry and Wanda.

In determining the division of property in this case, a court would first set apart Harry's and Wanda's separate property. The marital property would then be divided equitably based on the statutory criteria designed to consider the totality of the circumstances. A distribution of property must be 'just and equitable' not necessarily equal. In re Marriage of

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Gercken, 706 P.2d 809 (Colo. Ct. App. 1985). In determining how to divide the marital property, a court will consider the contribution of each spouse to the acquisition of the marital property (including contribution of a spouse as a homemaker); the value of the property; and the economic circumstances and needs of each spouse at the time of the division of the property. Id. and Colo. Rev. Stat. 14-10-113.

Despite the fact that most of their property was purchased with money earned by Harry, Wanda is entitled to a percentage of this property. A court would consider Wanda's contribution as a homemaker and her economic needs in the future and will undoubtedly award her an equitable portion of their joint property.

DISCUSSION FOR QUESTION 5

Subject matter jurisdiction

Subject matter jurisdiction must be based on diversity of citizenship because no other ground for federal jurisdiction is present. Diversity of citizenship jurisdiction requires that there be complete diversity of citizenship between the parties and that the amount in controversy exceeds \$75,000 (exclusive of setoffs, interest, or costs). 28 U.S.C. § 1332(a).

In this case, the citizenship of the parties is diverse, because Jones' place of citizenship is Colorado and Ortega's is California. To be a citizen under the statute, a natural person must be both a citizen of the United States and be domiciled in a state. Wolfe v. Hartford Life & Annuity Ins. Co., 148 U.S. 389 (1893)(holding averment of state residence insufficient); see generally Jack H. Friedenthal et al., Civil Procedure 29 (3d ed. 1999). The test for state citizenship under the statute is domicile, and domicile is defined as one's "true, fixed, and permanent home. . .to which he has the intention of returning . . ." Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954).

The amount-in-controversy requirement is normally governed by the total damages claimed by the plaintiff in good faith. "[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for more than the jurisdictional amount to justify a dismissal." St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

The amount claimed by Jones does not satisfy the requirement. Though the actual damages demanded do not satisfy the amount in controversy requirement, a plaintiff is permitted to join together all his claims and damages. Fed. R. Civ. P. 18(a)("A party asserting a claim . . . may join . . . as many claims . . . as the party has against an opposing party.") Punitive or exemplary damages are included in the amount in controversy and may be added to satisfy the statutory amount in controversy unless it is not possible under state law for a plaintiff to recover exemplary or punitive damages. Ryan v. State Farm Mut. Auto. Ins. Co., 934 F.2d 276, 277 (11th Cir. 1991); Klepper v. First American Bank, 916 F.2d 337, 341 (6th Cir. 1990). See generally Gene R. Shreve and Peter Raven-Hansen, Understanding Civil Procedure § 5.06 at 126-29 (3d ed. 2002); Charles Alan Wright, Law of Federal Courts § 33 at 195-204 (5th ed. 1994).

In this case, even though Jones may be entitled to reasonable exemplary damages under Colo. Rev. Stat. § 13-21-102(1)(a) (where an injury is attended by circumstances of fraud), the total amount of damages claimed does not exceed \$75,000 exclusive of interest and costs. Therefore, Jones does not satisfy the amount in controversy requirement, thus there is no subject matter jurisdiction.

Personal jurisdiction

A Federal Court has territorial jurisdiction coextensive with the "jurisdiction of a court

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of general jurisdiction in the state in which the district court is located." Fed. R. Civ. P. 4(k)(1). The Colorado state long arm statute extends to the state (and thus federal) court specific jurisdiction over causes of action against any person, resident or nonresident, who transacts any business within the state or who commits a tortious act within the state. Colo. Rev. Stat. § 13-1-124(1)(a)&(b) (jurisdiction of courts). The long arm statute has been construed to go to the constitutional limits. Jenner & Block v. District Court, 590 P.2d 964, 965 (Colo. 1979). Due process, however, limits the territorial reach of federal and state courts. U.S. Const. amends. V & XIV; International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 733 (1877). Defendant's contacts with the state of Colorado may not be so extensive that they establish "continuous and systematic general business contacts" that support the exercise of general jurisdiction over a defendant corporation, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). But such extensive contacts are not required in the present case.

The contract and fraud claims arise directly out of the defendant's contacts (business transactions) in the state; accordingly, due process may support the exercise of specific jurisdiction, because the defendant has purposely engaged in minimum contacts comprising a sale in the forum state from which the defendant derived benefits. In general, the defendant must engage in "some act by which the defendant purposefully avail[ed] [himself] of the privilege of conducting activities within the forum State. . ." Hanson v. Denkla, 357 U.S. 235, 251-54 (1958). See also International Shoe, 326 U.S. 310 (sales agents activity in state supports long arm jurisdiction over principal for taxes related to employment); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) (sale of magazines to distributors in state supports long arm jurisdiction over defendant for defamatory material published in magazines sent into state); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (negotiation with resident, agreement to send payments into state, and agreement that state law was to cover contract dispute supports exercise of long arm jurisdiction over nonresident who breached contract); Alchemie International, Inc. v. Metal World, Inc., 523 F. Supp. 1039, 1050 (D.N.J. 1981)(holding single commercial sale contract sufficient to establish personal jurisdiction). Defendant's communications and sale to Jones are similar to the contract found to support personal jurisdiction in McGee v. International Life Insurance Co., 355 U.S. 220, 222-24 (1957)(holding exercise of personal jurisdiction constitutional where "suit was based on a contract which had a substantial connection with" forum state). See generally Shreve & Raven-Hansen, Understanding Civil Procedure, pp.46-49.

Defendant's contacts with the forum included a passive web site that invited communications from prospective buyers. Passive web sites present a special problem because they may not evidence a defendant's purposeful connection to any particular forum. Accordingly, the passive web site posted on the Internet and accessible from anywhere in the world is by itself not a minimum contact. See Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997)(holding "something more" than passive web site required to show defendant purposely directed activities at forum state). But maintaining such a web site

coupled with additional acts directed towards the forum establishes a sufficient basis for constitutional exercise of personal jurisdiction. See CompuServ Inc. v. Patterson, 89 F.3d 1257, 1264 (6th Cir. 1996). See generally, Shreve and Raven-Hansen, Understanding Civil Procedure § 3.12 at 91-92. A single telephone call may establish a minimum contact. Brown v. Flowers Indus., Inc., 688 F.2d 328 (5th Cir. 1982). See also, Bellino v. Simon, No. 99-2208, 1999 U.S. Dist. LEXIS 18081 (E.D. La. Nov. 22, 1999)(finding jurisdiction where passive web site coupled with phone calls).

Here, Defendant's course of conduct in sending e-mails, making calls to Colorado and shipping goods to Colorado likely satisfies the state long arm statute and evidences minimum contacts so that application of the long arm does not violate the due process requirement of the U.S. Constitution.

Venue

Venue involves the designation of the proper district in which to bring an action. The general federal venue statute provides: "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is subject of the action is situated" 28 U.S.C. § 1391(a)(2). In this problem, a substantial part of the contract claim--negotiations, offer or acceptance, and delivery and nonperformance--occurred in the district. Likewise, a substantial part of the fraud claim--alleged misrepresentations, reliance, and loss--occurred in the district. Accordingly, venue in the District of Colorado is proper.

Sufficiency of Service of process

In Federal Court, process may be served pursuant to Federal Rule or pursuant to the methods authorized by the state law either of the place where the Federal Court is sitting or where process is served. Fed. R. Civ. P. 4(e)(1)&(2). See generally, Wright, Federal Courts, supra, § 65 at 453. Federal Rule 4 authorizes any person not a party to the action, who is at least 18 years old, to serve process personally upon the defendant or to leave service at the defendant's usual place of abode with one of suitable age and discretion residing therein, or upon an authorized agent of the defendant. Here, service was not made in accordance with the Federal Rule due to the age of the process server and improper leaving of service with one who neither resides at the defendant's place of abode or is authorized to accept service for her. Further, neither California nor Colorado state rules of civil procedure permit process to be served by an individual under the age of 18 or to be left with a neighbor who does not reside in the defendant's home and is not authorized to accept service for the defendant. Accordingly, service of process was insufficient.

DISCUSSION FOR QUESTION 6

I. Partnership

A partnership is defined as an association of two or more persons to carry on, as co-owners, a business for profit. Revised Uniform Partnership Act (“RUPA”) § 101(6). No specific form of agreement is necessary to constitute a partnership and it does not need to be in writing. Nor need there be subjective intent to form a partnership, only that the parties intend to run a business as co-owners. See RUPA §202(a). The parties’ intent may be implied from their conduct. See, Yoder v. Hooper, 695 P.2d 1182, (Colo. App. 1984), Aff’d 737 P.2d 852 (Colo. 1987). Nelson v. Seaboard Sur. Co., C.A. Minn., 269 F.2d 882. (Conduct may be sufficient to form a partnership.)

Intention of the parties, agreement, splitting profits, and co-ownership are indicative, but not conclusive, of the existence of a partnership. See, In re S & D Food, Inc., 1992, 144 BR 121. A person who receives a share of the profits of a business is presumed to be a partner unless the profits were received in payment of a debt, services, or as wages, rent, retirement or health benefits, interest on a loan, or sale of goodwill of a business. RUPA § 202(c)(3). Joint ownership of property may by itself, but does not necessarily, establish partnership. RUPA §202(c)(1). Neither does sharing of gross returns necessarily of itself establish partnership whether or not the persons sharing them have a joint or common interest in any property from which the returns are derived. RUPA §202(c)(2), and Yoder v. Hooper, supra.

In general partnerships, each of the partners is jointly and severally liable for all partnership debts and obligations. RUPA § 306(a). Partners are considered agents for each other and may bind the partnership when they act within the scope of their authority. RUPA, §301(1); Black v. First Federal Sav. and Loan Ass’n of Fargo, North Dakota, F.A., App. 1992, 830 P.2d 1103, certiorari granted, affirmed 857 P.2d 410. The partnership is bound where one partner acts within the scope of her actual or apparent authority, i.e., for apparently carrying on in the ordinary course the partnership business. The partnership is not bound where the partner had no authority to act for the partnership in the particular matter **and** the person with whom the partner was dealing knew or had received notification that the partner lacked authority. RUPA §301(1) and (2).

II. Joint Ventures

Joint ventures, sometimes known as “joint adventures,” have been defined as an association of persons with intent to engage in a single business venture for joint profit; also as a special combination of two or more persons for a specific venture seeking profit jointly, but without an actual partnership existing. See, Buck v. G.W.L. Const. Co., D.C. Mo, 114 F.Supp. 448, 449. Joint ventures are a relatively recent creation of the American court system. Buck v. G.W.L. Const. Co., supra; Aiken Mills v. U.S., CCASC 144 F.2d 23.

There has been a divergence in the opinions of commentators concerning the category of the entity known as a joint venture. Some jurisdictions hold that a joint venture is governed by

DISCUSSION FOR QUESTION 6
Page Two

partnership rules, whereas others may define it differently, if at all. See, State v. Laurendine, 196 So. 278, 283, 239 ALA. 620. The Uniform Partnership Act states that “a partnership is an association of two or more persons to carry on as co-owners of a business for profit . . . but any association formed under any other statute . . . is not a partnership under this act unless the association would have been a partnership . . . prior to the adoption of this act.” See, U.P.A. § 6. Also, comment 2 to the Revised Uniform Partnership Act § 202 provides “relationships that are called ‘joint ventures’ are partnerships if they otherwise fit the definition of a partnership. An association is not classified as a partnership, however, simply because it is called a ‘joint venture’”. See, RUPA § 202(a).

The authorities in various jurisdictions differ, and have historically differed, concerning classification of joint ventures. In some states, Colorado for instance, joint ventures have been traditionally considered to be a class of partnership. See, Yoder v. Hooper, supra. The most useful and reliable approach, however, is that of the RUPA, which requires that a partnership satisfy the specific definition in the Act to be classified as a partnership. The fact pattern indicates that although there may have been an “association” of the three persons, they were not operating a business as co-owners. The fact that they had interests in the gross revenues of this project in and of itself does not establish a partnership. The property itself was never in co-ownership, and the building was constructed and contracted for only by Maureen. Claudette specifically was stated as not having title to anything in this transaction. Because the facts do not suggest a partnership, under RUPA the arrangement is something other than a partnership. Liability therefore would be under common law, making Maureen responsible for the contracts she entered into.

It could be argued under various common law or statutory provisions that Lorraine, as the owner of property which property has presumably been improved or enhanced by the building, might have liability under a theory of unjust enrichment. That argument could equally apply to Maureen as the contractor for the project, but Maureen is liable anyway and that theory does not add new or different liability. In any case, Claudette does not appear to have unjust enrichment liability.

DISCUSSION FOR QUESTION 7

Because Bob wishes to build houses, he is an aggrieved party with standing to challenge Regulation A. Lot Thirty-Four Venture, L.L.C. v. Town of Telluride, 976 P.2d 303 (Colo.App.1998), aff'd on other grounds, Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30 (Colo. 2000). A plaintiff has standing to challenge an administrative regulation if: 1) the plaintiff suffered an actual or threatened injury in fact (the injury in fact may be economic, competitive, aesthetic or recreational); 2) the injury can be fairly traced to the challenged action; and 3) the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision. See generally, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982). Bob has suffered injury in fact in that before the passage of Regulation A he could build houses and now he is restricted from building.

Bob must also show that his challenge is ripe for review. The ripeness doctrine is designed to avoid litigating in the abstract, thus the regulation must be a final agency action. See generally, FTC v. Standard Oil Co., 449 U.S. 232 (1980). In this case there was no other agency action required before the regulation became applicable. The case is ripe for review because Regulation A will be applied to Bob if he tries to build. Bob may challenge the Regulation A in district court as there is no administrative appeal process.

Under the Administrative Procedure Act, Bob can file a declaratory judgment action in court challenging Regulation A. Mile High Greyhound Park, Inc. v. Colorado Racing Com'n, 2 P.3d 351, 352 (Colo. App. 2000); § 24-4-106, C.R.S. 2002. A declaratory judgment is appropriate when the rights asserted are present and cognizable. See Farmers Insurance Exchange v. District Court, 862 P.2d 944 (Colo. 1993). Bob will need to show that this is not merely an anticipatory issue, but that in fact he is going to build the houses.

A court may set aside an agency action if it concludes that the agency action: (1) is arbitrary or capricious; (2) is not properly promulgated in accord with the procedures or procedural limitations of the Administrative Procedure Act, or (3) is unsupported by substantial evidence when the record is considered as a whole. Studor, Inc. v. Examining Bd. of Plumbers of Div. of Registrations, Department of Regulatory Agencies, 929 P.2d 46, 50 (Colo. App. 1996).

Here, Bob can challenge Regulation A by arguing that a regulation concerning housing construction does not bear any relation to the safety of highway signs and is, therefore, arbitrary and capricious. He can also challenge Regulation A on the ground that the SSA did not comply with the APA when it promulgated the rule. To satisfy the requirements of the Administrative Procedure Act when performing rule making functions an agency must provide: (1) public notice; (2) an opportunity for, and full consideration of, any comments; and (3) a complete rule-making record. Sections 24-4-103(2), 24-4-103(4), & 24-4-103(8), C.R.S. 2002. Studor, Inc. v. Examining Bd. of Plumbers of Div. of Registrations, Department of Regulatory Agencies, supra. Bob must show that the agency, when

promulgating the rule, did not "substantially comply" with the rule making procedures. Charnes v. Robinson, 772 P.2d 62 (Colo. 1984). Substantial compliance is defined as more than minimal compliance but less than strict or absolute compliance. Here, the SSA failed to fulfill any of the rule making requirements.

Finally, Bob can challenge Regulation A on the ground that the SSA exceeded its statutory authority. Adams v. Department of Social Services, 824 P.2d 83 (Colo.App.1991). Administrative agencies are legally required to comply strictly with their enabling statutes. Sherrered v. Johnson, 32 Colo.App. 367, 311 P.2d 923 (1973). In doing so, the courts can consider the legislative intent and ends that the statute was designed to accomplish. In this case, Bob would argue that the purpose and intent of the enabling statute was to address safe roads and prevent traffic deaths, but not to regulate the construction of new housing.

DISCUSSION FOR QUESTION 8

Corporation's donation to Charity is within its corporate powers. Unless its articles of incorporation provide otherwise, a corporation has the power "to make donations for the public welfare or for charitable, scientific, or educational purposes." *Model Business Corporation Act* Sec. 3.02(13). No direct or immediate benefit to the corporation need be shown. See *Theodora Holding Corp. v. Henderson*, 257 A.2d 398 (Del. Ch. 1969); H. Henn & J. Alexander, *Laws of Corporations* 474-475 (3d ed. 1983).

The contribution also received the requisite vote from the board of directors. Ordinarily, unless the articles of incorporation or bylaws require a greater number, approval by a majority of the directors is sufficient for valid corporate action. *Model Business Corporation Act* Sec. 8.24(a).

The primary problem with the contribution to Charity is Daniel's management positions with both Corporation and Charity. Directors of corporations owe their corporations a general fiduciary duty of undivided loyalty. See *Generally*, R. Clark, *Corporate Law* 141-150 (1986); H. Henn & J. Alexander, *supra* at 628. Under the Model Business Corporation Act, a transaction presents a conflict of interest if another entity of which the corporation's director is a director or officer is a party to the transaction or has a beneficial interest in the transaction. *Model Business Corporation Act* Sec. 8.60(i)(ii)(A). Thus, the charitable contribution to Charity is a conflict of interest transaction.

Under the common law, conflict of interest transactions are not entitled to the usual presumptions of the business judgment rule, but are voidable. H. Henri & J. Alexander, *supra* at 65840. However, under the Model Act, no contract or transaction is voidable solely because it involves self-dealing if one of three conditions is satisfied: (1) the transaction is approved by a disinterested majority of the board after full disclosure of all material facts; (2) the transaction is approved by a majority of the corporation's shareholders after full disclosure of all material facts; or (3) the transaction was fair to the corporation. *Model Business Corporation Act*, Sec. 8.61(b). A disinterested majority of Corporation's board approved the transaction; see *Model Business Corporation Act*, Sec. 8.62; but they were unaware of Daniels' conflict of interest at the time of their approval. Therefore, Sec. 8.61(b)(1) is unavailable. *Model Business Corporation Act*, Sec. 8.60(4), 8.62(a), (b). The transaction is valid only if it was fair to the corporation. *Model Business Corporation Act*, Sec. 8.61(b)(3).

The measure of fairness is whether an independent corporate fiduciary in an arm's length bargain would bind the corporation to such a transaction. H. Henn & J. Alexander, *supra* at 659 and cases cited in note 7. The burden is on the interested directors to demonstrate that a challenged conflict of interest transaction is fair. See *e.g.*, *Lewis v. S.L. & E., Inc.*, 629 F.2d 764, 768 (2d Cir. 1980). Courts generally have been reluctant to upset charitable donations of reasonable amounts even when the interested director is closely connected to the charity. See *Theodora Holding corp. v. Henderson*, *supra*. Therefore corporation's contribution to Charity probably will be upheld.

DISCUSSION FOR QUESTION 9

This negligence question focuses on the applicant's knowledge of three special rules: the duty rules in cases of gratuitous undertakings (assumption of duty); the special causation rules for loss-of-chance; and the different elements of damage in wrongful death cases.

Generally, a *prima facie* case of negligence is established when the plaintiff proves the following elements: 1) the existence of a legal duty owed by the defendant to the plaintiff, 2) a breach of that duty, 3) injury to the plaintiff, and 4) a causal relationship between the breach and the injury. Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 929 (Colo. 1997); See also Connes v. Molalla Transp. Sys., Inc., 831 P.2d 1316, 1320 (Colo. 1992).

As a general rule, one is under no duty to aid others in peril. For one famous statement of this old common-law principle. See, Buch v. Amory Manufacturing Co., 44 A. 809 (N.H. 1897). There is, however, one recognized exception to this general rule. One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if: (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking. Restatement (Second) of Torts § 323 (1965). In other words, one who gratuitously acts for the benefit of another, although under no duty to do so in the first instance, once the undertaking begins, is then under a duty to act like an ordinary, reasonable, and prudent person and continue the assistance.

In these facts, Corporation publicly held out that it had two defibrillators, but it is not clear that they offered them to the public; it could be argued either way. Certainly, further factual investigation is necessary to determine whether Corporation assumed a duty to the public by its advertisement. Further factual investigation will also be necessary to determine whether Corporation failed "to exercise reasonable care to perform his undertaking." Would a reasonable corporation of ordinary prudence have done more? Perhaps it should have announced that its defibrillators were unavailable, to counter the effect of its prior publicity about their availability. Or perhaps it should have asked the manufacturer to borrow two replacement defibrillators to use during the period of repair of its original nonfunctioning defibrillators. These questions of negligence are almost always for the jury.

The facts show that Plaintiff relied on the public information about the defibrillators, however, it is necessary to show that "the harm is suffered *because of* the [plaintiff's] reliance upon the [Corporation's] undertaking." Restatement (Second) of Torts § 323(b). Even given Plaintiff's reliance, it is not clear that Corporation's negligence, if any, was the cause in fact of the harm. Corporation's negligence will have been a cause-in-fact only if, but for the negligence, the plaintiff would not have been harmed. The civil burden of proof requires that it must be more likely than not that had the Defendant not

DISCUSSION FOR QUESTION 9
Page Two

been negligent, the plaintiff would not have been harmed. See generally, John L. Diamond, Lawrence C. Levine, & M. Stuart Madden, Understanding Torts §§ 11.01, 11.02 (LEXIS Publishing 2000). Some courts apply this traditional but-for rule of causation to cases like this, and therefore hold against the Plaintiff. See, e.g., Cooper v. Sisters of Charity, Inc., 272 N.E.2d 97 (Ohio 1971). Here, if Corporation had announced that its defibrillators were no longer available, Plaintiff may have called an ambulance and gone directly to a hospital instead of going inside Corporation's headquarters. If Plaintiff had arrived at the hospital before dying, his chance of survival would have been increased by 25% (from 15% to 40%). Nevertheless, even if Corporation's defibrillators had been working, Plaintiff may have died anyway. If Corporation had obtained replacement defibrillators when it returned its nonfunctioning defibrillators, Plaintiff might have been defibrillated by Corporation's first-aid personnel. In this instance, Plaintiff's likelihood of survival would have been increased only 10% (from 5% to 15%).

Some jurisdictions allow the issue of causation in fact to go to the jury on any showing that the Corporation's negligence has significantly reduced the plaintiff's chances to survive. See, e.g., Herskovits v. Group Health Cooperative, 664 P.2d 474 (Wash. 1983) [allowing the case to go to the jury on evidence that the Corporation's late cancer diagnosis reduced the plaintiff's chance to survive from 39% to 25%. This is referred to as the "substantial factor" test. Other courts instruct the jury to apportion damages in proportion to the reduction in the plaintiff's chances to survive. See, Dan B. Dobbs, The Law of Torts, §178, at 436-437 (West Group 2000).

A cause in fact of the plaintiff's damages is also a proximate cause if it leads naturally to the plaintiff's damages, in a sequence not broken by efficient intervening causes. In general, considerations of proximate causation further judicial policies limiting the extent of possible liability for those harms which the conduct has actually caused. See generally, John L. Diamond, Lawrence C. Levine & M. Stuart Madden, Understanding Torts §§ 12.01, 12.02 (LEXIS Publishing 2000). Perhaps the single strongest test of proximate causation is the test of foreseeability: was the risk of this harm to plaintiff within the scope of risks, the foreseeability of which made this Corporation negligent? Marshall v. Nugent, 222 F.2d 604 (1st Cir. 1955). Intervening causes are among the major problems that raise issues of proximate causation, but generally if an intervening cause was foreseeable, it will not break the chain of proximate causation. (*I.e.*, it will not be a superseding cause.) Here, Proximate causation seem to be satisfied. Corporation, which publicly held out that it has defibrillators on the premises, had reason to foresee a request to use them, and be liable for resulting damages if they are absent or are nonfunctioning.

Wrongful Death Damages

There are several patterns of recovery for death damages, most of them falling into

DISCUSSION FOR QUESTION 9

Page Three

one of two large groups - wrongful death acts and survival acts. Almost all states have some kind of wrongful death act, compensating the decedent's closest relatives for the economic support (and sometimes personal support) which they lost when the decedent died. Many states also permit the survival of any tort claim which the decedent could have brought at the moment of death, but usually only those related to an intangible personal interest survive (e.g. defamation). See generally, Dan B. Dobbs, The Law of Torts, ch. 19, at 803-820 (West Group 2000).



21202

Essay 1 GradeSheet

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Please use blue or black pen
and write numbers clearly

1. Agency is a consensual relationship between two or more parties. 1. _____
2. Agency relationship is a fiduciary relationship. 2. _____
3. The duty of an agent to her principal is one of undivided loyalty.
(The Answer must use the word "loyalty" to receive credit). 3. _____
4. An agent has the power to create legal relationships for her principal or
power to bind principal. 4. _____
5. An agent must act within the course and **scope** of her agency. 5. _____
6. Each party must have the capacity to form the agency relationship. 6. _____
7. No consideration is required to form the agency relationship. 7. _____
8. An agent's authority may be **actual (express or implied)**. 8. _____
9. An agent's authority may be **apparent (inherent)**. 9. _____
10. A principal also may subsequently **ratify** an agent's actions. 10. _____
11. Alice will be liable for payment to creditors where Barbara had agent authority. 11. _____
12. Barbara breached her fiduciary duty (of loyalty) by selling spa merchandise
for a party other than Alice. 12. _____
 - 12a. Alice does not owe Barbara the commission Barbara claims she earned
by selling the spa merchandise. 12a. _____
 - 12b. Alice may recover the commission already paid because of Barbara's
breach of fiduciary duty (of loyalty). 12b. _____
13. The breach of fiduciary duty is not related to bonus payments. 13. _____
 - 13a. Bonus payments paid cannot be recovered. 13a. _____
 - 13b. Alice must pay the balance of bonuses owed. 13b. _____



21321

Essay 2 GradeSheet

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Please use blue or black pen
and write numbers clearly

1. Objection: improper use of character evidence (Rule 404). 1. _____
2. Rule 404 prohibits evidence of specific instances of conduct to prove action in conformity therewith. 2. _____
3. Rule 404(b), however, permits evidence of specific instances of prior conduct for other purposes, such as intent. 3. _____
4. Here, evidence of Defendant's past cocaine sales is probative of his intent to sell the cocaine, which is a material issue in the case. 4. _____
5. Before the judge can let the testimony into evidence, he must first decide whether the testimony is sufficient for a reasonable jury to find that Defendant actually engaged in the prior cocaine deals (*Huddleston*). 5. _____
 - 5a. Argument for: Witness was a participant in the transactions. 5a. _____
 - 5b. Argument against: Witness's story is uncorroborated; he is biased by his desire to please the government (his sole source of income). 5b. _____
6. If evidence is sufficient, then judge may still exclude it under Rule 403 if the probative value is substantially outweighed by the danger of unfair prejudice. 6. _____
 - 6a. Probative value: intent is a key issue and the prosecution greatly needs this proof, which makes probative value high, but the evidence itself is weak, given the lack of corroboration and William Witness's credibility problems, which lowers the probative value. 6a. _____
 - 6b. Prejudice: great risk that the jury will misuse the evidence of past sales as evidence of D's propensity, which is forbidden and creates great prejudice. 6b. _____



21382

Essay 3 GradeSheet

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Please use blue or black pen
and write numbers clearly

1. No 4th amendment expectation of privacy when statement voluntarily made to another. 1. _____
2. *Miranda* may apply here. 2. _____
3. *Miranda* requires custody. 3. _____
4. *Miranda* requires official interrogation. Carl did not know questioner was a police officer. 4. _____
5. 6th amendment right to counsel may attach here. 5. _____
6. Deliberate attempts to elicit incriminating statement from already indicted defendant violates 6th amendment right to counsel (cocaine charge). 6. _____
7. Right to counsel is offense specific. Therefore, no 6th amendment violation with regard to murder charge. 7. _____
8. 5th amendment due process is violated by police conduct that makes confession involuntary, i.e. obtained by coercion, pressure, or deception. 8. _____
9. Police deception, if egregious enough, would result in suppression. 9. _____



21453

Essay 4 GradeSheet

Seat

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Score

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Please use blue or black pen
and write numbers clearly

1. Colorado recognizes common law marriages. 1. _____

2. To establish must have:
 - 2a. Mental capacity; 2a. _____
 - 2b. Legal capacity; 2b. _____
 - 2c. Intent; 2c. _____
 - 2d. Habit and repute. 2d. _____

3. Here, there is overwhelming evidence that common law marriage existed.
(Must identify at least two: Cohabitation, exchanged words of present intent, raised two children together, children and wife shared surname, introduced themselves as husband and wife, filed joint tax returns, celebrated anniversary, told children they were married.) 3. _____

4. Common law marriage can be terminated only by death or divorce. 4. _____

5. Absent a marital agreement, property acquired by either Harry or Wanda after their "marriage" is marital property. 5. _____
 - 5a. Exceptions are: property acquired by gift, bequest, devise, or descent; property acquired in exchange for property by gift etc.; property acquired by a spouse after legal separation; property excluded by valid agreement. 5a. _____

6. Any increase in value of separate property after "marriage" is considered marital property. 6. _____

7. Division of marital property will be just and equitable, not necessarily equal. 7. _____

8. Court will consider contributions of each spouse, the value of the property, and the economic circumstances and needs of each at the time of the division. 8. _____



21551

Essay 5 GradeSheet

Seat

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Score

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Please use blue or black pen
and write numbers clearly

1. Recognition that diversity of parties is the basis for subject matter jurisdiction. 1. _____
2. Diversity of citizenship is satisfied because Jones and Ortega are citizens of, and reside in, different states. 2. _____
3. Diversity also requires that the amount in controversy exceed \$75,000. 3. _____
4. Here, amount in controversy requirement is not satisfied because total damages claimed by Jones do not exceed the required amount. 4. _____
5. Colorado federal district court can exercise personal jurisdiction over Ortega statutorily through the state's long-arm statute. 5. _____
6. Colorado's long-arm statute extends specific jurisdiction to persons who transact business, or commit a tortious acts, within the state. 6. _____
7. Under a constitutional due process analysis, minimum contacts with the state of Colorado are required for the exercise of personal jurisdiction 7. _____
8. A passive web-site coupled with other acts such as phone calls and delivery of goods to state may be enough to satisfy minimal contacts requirements and/or transaction of business within state. 8. _____
9. A further requirement of an action founded upon diversity is that the action may be brought only in a venue/judicial district in which a substantial part of the events or omissions giving rise to the claim occurred or where a substantial part of the property that is the subject of the action is situated. 9. _____
10. Service of process may be made according to federal rule, or the law of the state where the federal court sits or where process is served. 10. _____
11. Here, service of process was defective due to the age of the process server or improper service upon an individual who was not authorized to accept process for her. 11. _____



21610

Essay 6 GradeSheet

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Please use blue or black pen
and write numbers clearly

1. A partnership is defined as:
 - 1a. an association of two or more persons; 1a. _____
 - 1b. to carry on as co-owners a business; 1b. _____
 - 1c. for profit. 1c. _____
2. A partnership does not have to be evidenced by a written agreement. 2. _____
3. No requirement that the parties subjectively intend to form a partnership; their conduct may indicate a partnership. 3. _____
4. Sharing gross revenues or returns (as opposed to profits) does not of itself establish a partnership. Sharing of profits raises a presumption that a partnership exists. 4. _____
5. Joint or common interests in property do not necessarily indicate a partnership. 5. _____
6. Partners may bind the partnership when acting in the scope of their actual or apparent authority. 6. _____
7. A joint venture is an association of persons with intent to engage in a single business venture for joint profit; or as a special combination of two or more persons for a specific venture seeking profit jointly, but without an actual partnership existing. 7. _____
8. Partners in general partnerships and joint ventures have joint and several liability for all partnership or venture obligations. 8. _____
9. Because title to the property remained in Lorraine's name, it is presumed to be separate property. 9. _____
10. Maureen contracted with the contractors in her own name and thus remains liable under contract theories. 10. _____
11. Claudette contracted for financing in her own name and thus remains personally liable under contract theories. 11. _____
12. Lorraine may have liability under a theory of unjust enrichment. 12. _____



42345

Essay 7 GradeSheet

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Please use blue or black pen
and write numbers clearly

1. A plaintiff must have standing to challenge an administrative regulation, which requires:
 - 1a. injury in fact (which may be economic);
 - 1b. the injury can be fairly traced to the challenged action;
 - 1c. the injury can be redressed by a favorable decision.
2. The challenge to the regulation also must be ripe for review.
 - 2a. The regulation must be a final agency action or all remedies must be exhausted.
3. Bob must show that this is not merely an anticipatory issue, that he is going to build houses if allowed and therefore may seek a declaratory judgment.
4. A court may set aside an agency action if it is:
 - 4a. arbitrary or capricious;
 - 4b. not properly promulgated by agency procedures;
 - 4c. unsupported by the record.
5. Bob can argue that the regulation is arbitrary in that it bears no relationship to highway signs.
6. Bob can also argue that the agency substantially failed to comply with the APA or due process by not:
 - 6a. providing public notice;
 - 6b. giving opportunity for and consideration of comments;
 - 6c. having a complete record of the proceedings.
7. Additionally, Bob could argue that the agency exceeded its enabling statutory authority (ultra vires).
8. Bob could argue that there is a regulatory taking.



21686

Essay 8 GradeSheet

Seat

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Score

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Please use blue or black pen
and write numbers clearly

1. A Director has a fiduciary duty and a duty of care to the corporation. 1. _____
2. A Director has a duty of loyalty to the corporation. 2. _____
3. Unless its articles of incorporation provide otherwise, a corporation has the power to make charitable contributions. 3. _____
4. Daniels has a conflict of interest because he is an officer in both Charity and Corporation. 4. _____
5. Such conflict of interest transactions may be voidable. 5. _____
6. A conflict of interest transaction may be upheld if:
 - 6a. it is approved by the vote of a disinterested majority of the board of directors after full disclosure of all material facts; 6a. _____
 - 6b. approved by the vote of a majority of the shareholders after full disclosure of all material facts; or, 6b. _____
 - 6c. the transaction is fair to the corporation. 6c. _____
7. The burden of proving fairness is on the corporation or the interested directors. 7. _____
8. Courts have been reluctant to upset charitable contributions of reasonable amounts even when the interested director is closely connected to the charity. 8. _____
9. If the transaction is voidable, then Daniels may be required to repay the amount of the contribution to the charity. 9. _____



21741

Essay 9 GradeSheet

Seat

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Score

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Please use blue or black pen
and write numbers clearly

1. Elements of prima facie claim of negligence:
 - 1a. existence of a legal duty owed by the defendant to the plaintiff; 1a. _____
 - 1b. breach of that duty; 1b. _____
 - 1c. injury to the plaintiff; and 1c. _____
 - 1d. causal relationship between the breach and the injury. 1d. _____
2. A person is under no duty to come to the aid another in peril. 2. _____
3. Once a person has gratuitously acted for the benefit of another, however, he/she is required to continue to act without negligence. 3. _____
 - 3a. Because Corporation publicly held out that it had defibrillators, it may have assumed responsibilities under this exception. 3a. _____
4. Corporation's act (or failure to act) must be the cause *in fact* of the injury; that is, *but for* the Corporation's negligence, Plaintiff would not have been harmed. 4. _____
5. In addition to being the cause in fact of Plaintiff's injury, to hold Corporation liable, it must be demonstrated that Corporation's conduct was the *proximate cause* of that injury (*foreseeability*). 5. _____
6. Claims of Plaintiff's family will be based on wrongful death statutes unless a survival act allows for continuation of Plaintiff's claims. 6. _____



21797

PT am GradeSheet
SUAREZ

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Please use blue or black pen
and write numbers clearly

1. Is the answer in the form of a persuasive letter? 1. _____
2. The lease agreement is captioned a "net lease." 2. _____
3. However, the mere fact a lease is captioned a net lease does not conclusively make it a net lease. *Brown*. 3. _____
4. An examination of the specific lease terms is necessary to determine if the parties intended a net lease ("four corners" concept). 4. _____
 - 4a. It is also necessary to examine stricken lease language. 4a. _____
5. Net leases are typically found in long-term leases; this lease was for three years and renewed for another five years. 5. _____
6. Net leases typically place the entire financial burden on the tenant. 6. _____
 - 6a. Here, the landlord assumed certain financial obligations. 6a. _____
7. The tenant's assumption of certain financial obligations, indicates an intent that she be responsible for the cost of the seismic retrofit. 7. _____
8. Section 42 makes Ms. Suarez responsible for laws and orders regulating the "use" of the premises. 8. _____
9. Nothing in Ms. Suarez's use of the premises as a restaurant caused the city's rehabilitation order. 9. _____
10. Section 12 of the lease puts the obligation of maintenance and repair on Ms. Suarez. 10. _____
 - 10a. However, section 12 speaks of maintenance and repair from normal use of the premises and not the reconstruction from external causes like earthquakes. 10a. _____
11. Based upon an examination of the lease, the lease is probably not a "net lease." 11. _____
12. Because the lease language is not dispositive on who pays for the retrofit, it is necessary to examine the facts under the *Brown* six-factor analysis. 12. _____
13. First factor: the relationship of the cost of the repair to the total rent reserved under the lease. 13. _____
 - 13a. Here, unlike *Brown*, the cost of the repair is very large compared to the total rent reserved. 13a. _____

14. Second factor: the length of the lease term. 14. _____
- 14a. The longer the lease term, the greater the justification for placing the repair burden on the tenant. 14a. _____
- 14b. Here, the lease term is a short one. 14b. _____
15. Third factor: the amount of the benefit the tenant will receive from the repairs versus the benefit to the landlord. 15. _____
- 15a. Per the newspaper article, the building has a probable useful life of 10-20 years. 15a. _____
- 15b. The tenant will have only 5 years of benefit from the repairs, whereas the landlord will have at least as much benefit and probably more. 15b. _____
16. Fourth factor: whether the repair work is structural or non-structural. 16. _____
- 16a. Here, the repair work is structural. 16a. _____
- 16b. Per *Brown*, ordinarily the burden of making structural repairs fall on the landlord. 16b. _____
- 16c. However, the lease at Section 12A puts the burden of repairs, whether structural or non-structural, on the tenant and specifically says the landlord shall have no obligation to repair the premises. 16c. _____
17. Fifth factor: The degree to which the repairs will affect the tenant's enjoyment of the premises. 17. _____
- 17a. Because the tenant was able to remain open while the repairs were being made, this factor works against the tenant. 17a. _____
18. Sixth factor: the likelihood the parties contemplated the application of the particular law or order involved. 18. _____
- 18a. Newspaper article suggests it was common knowledge among building owners that building was in earthquake country and that building owners should have been making plans for repairs for the past five years. 18a. _____
19. Therefore, since there is no lease language specifically assigning to tenant the responsibility for earthquake retrofit and because six *Brown* factors are in favor of tenant, she has no responsibility to pay for the earthquake retrofit. 19. _____