QUESTION 1

Ana, Jane, and Rosa planned to open a restaurant called “The Three Amigas” and agreed to form a partnership. Each contributed $50,000 to the partnership. They agreed to invest the money for a short time in the stock of Floogle Inc., and authorized Ana to act on their behalf to purchase the shares. Ana deposited the $150,000 in a bank checking account under the name “Three Amigas Partnership.” Ana then wrote a check on the account for $150,000 to buy Floogle stock. Ana registered the stock shares under the name “Three Amigas Partnership.”

A few days later, the partners had a meeting. Ana reported that she had purchased the Floogle stock. Rosa, who was responsible for hiring employees, discussed hiring her cousin Donny as a server. Jane objected because she thought Donny lazy; Ana had no opinion about Donny. Jane, who was charged with looking for a restaurant location, reported that she had found two suitable locations. Location 1 was a vacant building. Location 2 also had a vacant building, but the owner owned an adjacent vacant lot and wanted to lease it along with the building. Jane favored Location 2 because she thought she could develop the vacant lot for the partnership, as well as procuring a suitable building for “Three Amigas.” Jane drove Ana and Rosa by both locations. Ana and Rosa voted to lease Location 1, while Jane voted for Location 2. Despite the vote, Jane signed a ten-year lease for Location 2 on behalf of the partnership.

The next day, Ana sold $50,000 worth of Floogle stock and absconded with the money.

Rosa, that same day, hired Donny.

QUESTIONS:

Assuming that a partnership existed, discuss:

1. Ana’s responsibility to the partnership with regard to the stock;

2. whether the partnership leased Location 2; and

3. whether Donny was properly hired.

Assume that the Uniform Partnership Act (1997) has been adopted in the jurisdiction where all of these events occurred.

Fill in bubble for points awarded

1. Definition of a partnership (two or more persons operating a business for profit). 1. 0

2. No writing required to form a partnership. 1. 0

3. Definition of partnership property (property acquired by the partnership). 1. 0

4. Property is partnership property if acquired/held in the name of the partnership. 1. 0
   4a. Or, if originally acquired/held in another name but then transferred to the name of the partnership. 1. 0

5. Property is presumed to be partnership property if acquired with partnership assets. 1. 0

6. The Floogle stock was partnership property. 1. 0

7. Whether a partnership is bound by the acts of a partner depends, first, on whether the acts were in the ordinary course of the partnership's business. 1. 0
   7a. If so, the partnership is bound, unless the partner had no (actual) authority and the third party was on notice of that. 1. 0
   7b. If not, the partnership is not bound, unless the partner had (actual) authority. 1. 0

8. Arguably, the lease of the property was in the ordinary course of a business. 1. 0

   8a. But, if it is, Ana was not authorized to lease it because of the vote. 1. 0
   8b. However, the landlord arguably did not know/was not on notice of that, although one might argue it did since, here, it leased a restaurant a vacant lot. 1. 0

9. Therefore, if the lease was in the ordinary course of business for a restaurant, the partnership is bound to the lease. 1. 0

   9a. If it was not in the ordinary course, the restaurant is not bound. 1. 0
   9b. Hiring a server/Donny was in the ordinary course of business for a restaurant. 1. 0
   9c. Therefore, the restaurant is bound by Donny's hire. 1. 0

10. Partners owe the partnership a duty of are. 1. 0

    10a. Duty of care includes the duty not to engage in gross negligence, or, 1. 0

    Reckless conduct, or,
    Intentional misconduct, or,
    A knowing violation of the law.

11. Ana violated her duty of care. 1. 0

12. Jane arguably also violated her duty of care. 1. 0

13. Rosa probably did not. 1. 0

14. The partnership can sue each partner individually for a violation of the duties of loyalty and care. 1. 0

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ESSAY Q1

SEAT

ISSUE		POINTS AWARDED
1.	A partnership is defined as two or more persons operating a business for profit.	1. ○
2.	No writing required to form a partnership.	2. ○
3.	Partnership property is any property acquired by the partnership.	3. ○
4.	Property is partnership property if acquired/held in the name of the partnership, or if originally acquired/held in another name but then transferred to the name of the partnership.	4. ○
5.	Property is presumed to be partnership property if acquired with partnership assets.	5. ○
6.	The Floogle stock was partnership property.	6. ○
7.	If the acts of a partner were in the ordinary course, the partnership is bound, unless the partner had no (actual) authority and the third party was on notice of that.	7. ○
8.	If the acts were not in the ordinary course, the partnership is not bound, unless the partner had (actual) authority.	8. ○
9.	Arguably, the lease of the restaurant property was in the ordinary course of a business.	9. ○
9a.	Even so, Jane was not authorized to lease it because of the vote.	9a. ○
9b.	However, the landlord arguably did not know/was not on notice of that, although one might argue it did since, here, it leased a restaurant a vacant lot.	9b. ○
10.	Hiring a server/Donny was in the ordinary course of business for a restaurant.	10. ○
11.	Partners owe the partnership a duty of loyalty.	11. ○
12.	The duty of loyalty includes a duty to account and a duty to hold partnership property in trust.	12. ○
13.	Ana violated her duty of loyalty.	13. ○
14.	Jane violated her duty of loyalty.	14. ○
15.	Rosa probably did not violate her duty of loyalty.	15. ○
16.	Partners owe the partnership a duty of care.	16. ○
17.	Duty of care includes the duty not to engage in gross negligence, reckless conduct, intentional misconduct, or a knowing violation of the law.	17. ○
18.	Ana violated her duty of care.	18. ○
19.	Jane arguably also violated her duty of care.	19. ○
20.	Rosa probably did not.	20. ○
21.	The partnership can sue for a violation of the duties of loyalty and care.	21. ○

QUESTION 2

In a signed writing, Wholesaler contracted to deliver to Baker "10,000 pounds of granulated cane sugar on the fifth day of each month during the calendar year," for Baker's use in his baking business. During the first four months of the year Wholesaler made the following deliveries:

January 5------9,950 pounds
February 5----9,960 pounds
March 5-------10,010 pounds
April 5---------9,980 pounds

After each delivery, Wholesaler billed Baker only for the amount delivered, and Baker, without complaint, accepted each delivery and paid the amount billed.

On May 4, Wholesaler attempted to deliver 9,700 pounds of sugar to Baker and explained to him that he would deliver the remaining 300 pounds the next day. Baker refused to accept the delivery. On May 5, Wholesaler again attempted to make a delivery. This time he had a total of 10,000 pounds of sugar. Baker refused to accept that delivery as well and canceled the contract.

QUESTION:

Discuss Wholesaler's chances of success if he sues Baker for breach of contract.

DISCUSSION FOR QUESTION 2

Sugar is "goods" within the definition of U.C.C. §105. Goods are defined as all things movable at the time they are identified as the goods to be sold under the contract. This contract for the sale of sugar is a "transaction in goods," under the provisions of §2-102. This contract, therefore, is governed by the provisions of Article 2 of the Uniform Commercial Code.

Since the contract calls for goods to be delivered in lots and to be separately accepted, this is an "installment" contract under the provisions of the Uniform Commercial Code and §2-612 governs whether an installment may be rejected. In addition, the first four deliveries under the contract establish a "course of performance," and, therefore, under the provisions of §2-208(1), these performances are relevant in determining the meaning of the agreement. The express language of the agreement calls for delivery of 10,000 pounds of sugar each month. Because the first four deliveries were not exactly 10,000 pounds, but were accepted nonetheless, the course of performance indicates that Baker was satisfied with "about 10,000 pounds" each month. The code provides that wherever reasonable, the express language of the contract and the course of performance should be construed as consistent with each other. §2-208(2). In this case, therefore, it seems reasonable to construe "10,000 pounds" to mean "about 10,000 pounds." The courts have been lenient in using this kind of construction. Nanakuli Paving & Rock Co. v. Shell Oil Co., Inc., 664 F.2d 772 (9th Cir. 1981).

In an installment contract, a buyer can reject an installment only if the nonconformity ***substantially impairs*** the value of ***that installment*** and ***cannot be cured.*** The ***whole*** contract is breached if the nonconformity ***substantially impairs*** the value of the ***entire contract.*** Assuming that the delivery of only 9,700 pounds of sugar substantially impaired the value of the May installment, Baker was entitled to reject the delivery, provided that Wholesaler did not give adequate assurance of curing the defect. In this case, however, Wholesaler did give assurance of curing, and did cure by delivering 10,000 pounds of sugar on May 5. §2-612(2). Baker, therefore, was not entitled to reject either the May 4 or the May 5 delivery.

Further, Baker was entitled to cancel the contract only if the delivery on May 5 was defective and constituted a defect that substantially impaired the value of the whole contract, or, if the first four installments were defective, and cumulatively with a defective May 5 installment, constituted a substantial impairment of the whole contract. §2-612(3). Because the first four installments were not defective, and even if the May 4 delivery was defective, the May 4 delivery did not substantially impair the whole contract. Further, that delivery was cured on May 5. By rejecting the May 5 delivery and canceling the contract Baker was guilty of breach of contract, and, therefore, Wholesaler should succeed in his breach-of-contract action.

When Baker repudiated or refused to accept the sugar, Wholesaler was entitled to recover incidental damages plus either a) the difference between the contract price and the market price, or b) the difference between the contract price and the resale price of the goods. If damages based on these methods do not make Wholesaler whole, Wholesaler may recover lost profits plus incidental damages. §§2-706, 2-708, 2-710.

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ESSAY Q2

SEAT

ISSUE		POINTS AWARDED
1.	The contract concerns a transaction in goods, and, therefore, Article 2 of the U.C.C. controls.	1. ○
2.	Acceptance of the first four installments established a course of performance.	2. ○
3.	Wherever reasonable, course of performance and the express language of the contract should be construed as consistent with each other.	3. ○
4.	The quantity term of the contract should be construed to be "about 10,000 pounds per month."	4. ○
5.	The contract is an installment contract, and, therefore, is controlled by U.C.C. §2-612.	5. ○
6.	A buyer can reject a defective installment in an installment contract if it substantially impairs the value of that installment and the seller does not give assurance of a cure.	6. ○
7.	Because Wholesaler gave adequate assurance of the cure on May 4 and did cure the defective installment on May 5, Baker was not entitled to reject the installment.	7. ○
8.	A buyer may cancel an installment contract only if the non-conformity of one or more installments substantially impairs the value of the whole contract.	8. ○
9.	Because the first four installments were not defective, and the May 5 installment was cured, the value of the whole contract was not substantially impaired.	9. ○
10.	Baker was not entitled to reject the May 5 installment nor cancel the whole contract, and, therefore, Wholesaler should succeed in his action against Baker.	10. ○
11a.	Wholesaler is entitled to recover incidental damages,	11a. ○
11b.	plus either the difference between the contract price and the market price, or	11b. ○
11c.	the difference between the contract price and the resale price of the goods.	11c. ○
12.	If damages based on these methods do not make Wholesaler whole, Wholesaler may recover lost profits plus incidental damages.	12. ○

QUESTION 3

Seller and Buyer had been negotiating the sale of property located at 200 N. Main Street in Smallville. On March 1, Seller sent the following letter to Buyer:

> I will sell you the 200 N. Main Street property for $100,000 cash, the deed to be delivered and the cash paid on June 1. If I do not hear from you by March 30, I will assume that you have accepted this offer. I would not sell this property for this price to anyone but you.
>
> (signed) Seller

Buyer received the letter while he was ill and in bed. He showed the letter to his son and told him that he intended to accept Seller's offer. Buyer died on March 25 without replying to Seller's offer.

On April 5, Seller learned that Buyer had died. Seller made no attempt to confer with anyone representing the Buyer about the property.

On June 1, the executor of Buyer's estate tendered $100,000 to Seller for 200 N. Main. (Assume that Buyer's executor was the proper party to purchase the property if there was a contract for its sale.) Seller refused to accept the money or to execute and deliver a deed to the property.

QUESTION:

Discuss the issues involved in this dispute and the probable outcome.

DISCUSSION FOR QUESTION 3

An express contract is formed by language, oral or written. A contract is formed if the subject matter is sufficiently identified, there is mutual consent, and consideration. Mutual consent occurs when there is an offer followed by an acceptance. Here the subject matter (the property at 200 N. Main) and the consideration ($100,000) are sufficiently identified and the document is in writing. The question is whether there is mutual consent.

All of the states have enacted statutes of frauds which require a writing for all contracts for the sale of real estate to be signed by the party sought to be bound. The contract itself need not be in writing. The statute can be satisfied by a note or memorandum in writing containing the essential terms of the contract. Restatement (Second) of Contracts, §133. A signed letter that contains the essential terms will satisfy the requirement. *Aragon v. Boyd*, 450 P.2d 614 (N.M. 1964). Neither does the statute require the signature of both parties, only that of the "party to be charged," which has been interpreted to mean the party being sued. Farnsworth on Contracts, 3rd Ed., §6.8, p. 401. The writing may be the offer to enter into the contract. Restatement (Second) of Contracts, §133, Illus. 2. In this case, Seller's letter is an offer to sell and contains all the essential terms and is signed by Seller. This action is brought against Seller and he is, therefore, "the party to be charged." Buyer is not required to sign the document. If there is a contract for the sale of the property, the requirements of the statute of frauds have been met.

There is a question whether Buyer, by remaining silent, has accepted Seller's offer. Ordinarily silence cannot constitute an acceptance. Restatement (Second) of Contracts, §69. Subsection (1)(b) of §69, however, provides "Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree, remaining silent and inactive, intends to accept the offer" his silence will constitute an acceptance. Buyer's intent to accept by remaining silent can be shown by his conversation with his son. Since Seller had invited Buyer to assent by remaining silent, Buyer's silence through March 30 could have constituted an acceptance of the offer if his power of acceptance had not been terminated before then.

According to §48 of the Restatement, the death of either "the offeree or the offeror" terminates the offeree's power of acceptance. Buyer's acceptance in this case would have been effective until March 30, but his death on March 25 terminated his ability to accept. "An offer can be accepted only by a person whom it invites to furnish the consideration." *Id.* at §52. It is clear from Seller's offer that it is intended only for Buyer. Buyer's death before his acceptance terminated the offer and thus there was no acceptance; and, therefore, no contract.

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ESSAY Q3

SEAT

ISSUE		POINTS AWARDED
1.	A contract is formed if the subject matter is sufficiently identified; there is mutual consent (offer and acceptance); and consideration is given.	1. ○
2.	Statute of Frauds requires a written document for the sale of real estate.	2. ○
2a.	It must be signed by the party sought to be bound (Seller).	2a. ○
2b.	It must contain the essential terms (identity of parties to be charged, subject matter, terms & conditions, consideration).	2b. ○
3.	The letter signed by Seller satisfies the requirement.	3. ○
4.	Usually, silence may not constitute acceptance.	4. ○
4a.	Unless offeror (Seller) has stated that assent may be manifested by silence, and	4a. ○
4b.	Offeree (Buyer) by remaining silent intends to accept.	4b. ○
5.	Death occurred March 25th and therefore the offer terminated prior to the effective date (March 30th).	5. ○
6.	An offer may be accepted only by a person to whom it is given (here, Buyer).	6. ○
7.	Therefore, there was no contract for the sale of the property.	7. ○

QUESTION 4

Doug worked at ABC, Inc., until he was fired for tardiness. When he left, Doug hid the laptop computer the company had let him use in his briefcase and took it with him.

The next day Violet, Doug's former manager at ABC, Inc., discovered the laptop was missing. Violet telephoned Doug and told him that she planned to call the police about the missing laptop. Doug apologized and pleaded with Violet not to call the police and said he would meet with her to return the laptop. Before his meeting with Violet, Doug slipped a pistol into his pocket.

At the meeting with Violet, Doug explained that he took the laptop because the company had never paid him what he was worth and urged her not to call the police. Violet disagreed with Doug's claim that he was underpaid and called the police. Doug took out the pistol and shot Violet in the chest. Although she didn't die, Violet was rendered unconscious. Doug dragged Violet outside and put her in the trunk of his car. He then drove out of town and dumped Violet by the side of the road.

Violet was in a coma for six months, but died after her husband took her off life support.

QUESTION:

Discuss the common law crimes Doug could be charged with, and any defenses he might offer.

DISCUSSION FOR QUESTION 4

Doug can be charged with larceny, battery, and murder. The examinees should not argue that the prosecution should charge Doug with involuntary manslaughter. The mental state required for involuntary manslaughter is criminal negligence, and the facts indicate that Doug acted with greater mental culpability (deliberation or recklessness).

Doug will argue that he is not guilty of murder because Violet's death was the result of an intervening cause. In the alternative, he will claim he killed Violet in a sudden heat of passion, and is thus guilty of voluntary manslaughter, not murder.

Note that the question asks the examinees to discuss the crimes Doug can be charged with, not whether he will be convicted of those crimes. Accordingly, the examinees should not discuss the fact that if convicted of all the charges, some of the convictions would merge.

Larceny

Larceny is the wrongful or trespassory taking and carrying away of tangible personal property of another with intent to permanently deprive the other of the property.

Here, Doug's hiding the laptop in his briefcase, and carrying it away was wrongful or trespassory. Although as an employee of ABC Doug had been permitted to use the laptop, after he was fired and told to leave, that permission expired. By hiding the laptop, he undercuts any claim that he might have somehow been entitled to take it. The element of intent to permanently deprive applies to the time of the taking and carrying away; Doug's later offer to return the laptop does not vitiate that intent to deprive ABC of the laptop permanently.

Battery

Battery is an unlawful application of force to another person resulting in either bodily injury or an offensive touching. People v. O'Rear, 220 Cal. App. 2d Supp. 927, 34 Cal. Rptr. 61 (1963). In most jurisdictions, a battery need not be intentional, and may be the result of recklessness or criminal negligence. See e.g. Bentley v. Commonwealth, 354 S.W.2d 495 (Ky. 1962); Banovitch v. Commonwealth, 42 U.S.C. 83 S.E.2d 369 (Va. 1954).

In most jurisdictions and under the Model Penal Code, heat of passion is a defense only to specified forms of murder. See Dandova v. State, 72 P.3d 325 (Alaska App. 2003); Model Penal Code* 210.3; but see Colo.Rev.Stat. 18-3-202(2)(a) (providing that the felony classification of an assault conviction is reduced if the defendant acted

under a sudden heat of passion). Thus, the examinees should discuss the heat of passion defense in the context of the murder charge, not the battery charge.

Murder

Murder is the unlawful killing of a human being with malice aforethought. 2 Wharton's Criminal Law (15th Edition), §§ 114 and 139; Model Penal Code, § 210.2. Malice aforethought exists if the defendant has the intent to kill, or the intent to inflict great bodily injury, or if he acts with reckless indifference to an unjustifiably high risk to human life, or if the killing is done in the course of the commission of a felony. 2 Wharton's Criminal Law (15th Edition), § 139. Intentional use of a deadly weapon gives rise to a permissive inference of intent to kill. Wilson v. State, 832 S.W.2d 777 (Tex. App. 1992); see also 2 Wharton's Criminal Law (15th Edition), § 141.

Here, the fact that Doug concealed a pistol in his pocket suggests that he planned and intended to kill Violet if he could not talk her out of calling the police. But even if a jury were to conclude that Doug did not act with specific intent, the facts support the alternative conclusion that he acted recklessly.

A person acts recklessly when he consciously disregards a substantial or unjustifiable risk that a certain result will follow, and this disregard constitutes a gross deviation from the standard of care that a reasonable person would use under similar circumstances. 2 Wharton's Criminal Law (15th Edition), § 145. By shooting Violet in the chest with a pistol, Doug consciously disregarded the risk that she would be killed.

Heat of Passion/Voluntary Manslaughter

Doug will raise a "heat of passion" defense to the murder charge. A killing that otherwise constitutes murder is mitigated to voluntary manslaughter at common law if it occurs in a "sudden heat of passion." The elements of the provocation mitigator are: (1) the provocation must have been one that would arouse sudden and intense passion in the mind of an ordinary person, such as to cause him to lose his self-control; (2) the defendant must have in fact been provoked by the victim; and (3) there must not have been a sufficient time between the provocation and the killing for the passions of a reasonable person to cool off. Coston v. People, 633 P.2d 470 (Colo. 1981); People v. Wadley, 890 P.2d 151 (Colo. App. 1994); see also 2 Wharton's Criminal Law §§ 155-57, 166; Model Penal Code, § 210.3(1)(b).

Although the facts do not support the argument that Doug acted under a sudden heat of passion, the examinees should point out that Doug will argue that they do.

Intervening Cause

Doug will argue that, although he caused Violet's injuries, her death was the result of an intervening cause (her husband taking her off life support).

To be criminally liable for another person's death, the defendant's conduct must be the proximate cause of the death (i.e., the result would not have occurred but for the defendant's conduct). The general rule is that a defendant is responsible for all results that occur as a "natural and probable" consequence of the conduct, even if he did not anticipate the precise manner in which the injuries would occur.

However, unlawful conduct that is broken by an independent intervening cause cannot be the proximate cause of death to another. People v. Stewart, 55 P.3d 107 (Colo. 2002)(an independent intervening cause is an act of an independent person or entity that destroys the causal connection between the defendant's act and the victim's injury and thereby becomes the cause of the victim's injury); People v. Saavedra-Rodriguez, 971 P.2d 223, 225 (Colo. 1998).

The majority of jurisdictions hold that the removal of a brain-dead victim from life support does not constitute an independent intervening cause capable of breaking the chain of causation triggered by the defendant's wrongful actions. See e.g., State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (S.C.App. 2006); State v. Pelham, 176 N.J. 448, 824 A.2d 1082 (N.J. 2003); Williams v. State, 782 N.E.2d 1039 (Ind.App. 2003); Ewing v. State, 719 N.E.2d 1221 (Ind. 1999); People v. Bowles, 234 Mich.App. 345, 594 N.W.2d 100
(Mich.App. 1999); State v. Guess, 244 Conn. 761, 715 A.2d 643
(Conn. 1998).

ESSAY Q4

SEAT

ISSUE		POINTS AWARDED
1.	Recognition of Larceny.	1. ○
2.	Elements of Larceny: wrongful taking and carrying away of tangible personal property of another with intent to permanently deprive the other of the property.	2. ○
3.	Recognition of Battery.	3. ○
4.	Elements of Battery: unlawful application of force to another person resulting in either bodily injury or an offensive touching.	4. ○
5.	Recognition of Murder.	5. ○
6.	Elements of Murder: unlawful killing of a human being with malice aforethought.	6. ○
7.	"Malice Aforethought" supplied by Intent to kill.	7. ○
8.	"Malice Aforethought" supplied by "Depraved heart" - reckless indifference to unjustifiable risk to others.	8. ○
9.	"Malice Aforethought" supplied by Intent to cause grave injury.	9. ○
10.	"Malice Aforethought" supplied by Felony murder - killing during commission of felony.	10. ○
11.	Recognition of independent intervening cause defense.	11. ○
12.	Recognition of Manslaughter.	12. ○
13.	Elements of Manslaughter: killing provoked by heat of passion.	13. ○
14.	Element of Heat of Passion: provocation arousing sudden and intense passion without sufficient time for cooling off.	14. ○

QUESTION 5

Bob worked as a delivery driver for ShipFast, a package delivery company located in the state of Scenic. One day, Bob became involved in a verbal altercation with Jack, an independent contractor who ShipFast had hired for a two-week period to update its computer system. As a result of the altercation, ShipFast fired Bob. Bob then filed a claim for unemployment compensation benefits with the Scenic Division of Labor & Employment.

At a hearing on Bob's claim for benefits, Bob's former supervisor and Jack both testified that Bob cursed at Jack and threatened him. However, Bob testified that it was Jack who used profanity and made threatening statements. Bob testified that he did not respond to Jack's statements and threats and tried to walk away from the incident.

In a written decision, the hearing officer found that Bob used profanity and verbally threatened Jack. The hearing officer then concluded that Bob's claim for benefits should be denied based upon Scenic Code § 317.6 which provides as follows:

> A claim for unemployment benefits shall be denied in cases where the employee was terminated because of rude, insolent, or offensive behavior towards a co-worker.

Bob filed an appeal with the Scenic Board of Unemployment Compensation Appeals in which he argued that the hearing officer's factual findings were erroneous and that Scenic Code § 317.6 did not apply because Jack was not a co-worker within the meaning of the statute. The Board affirmed the hearing officer's decision.

Bob filed an action in the Scenic District Court seeking judicial review of the decisions of the hearing officer and the Board.

QUESTIONS:

Discuss Bob's chances of success

1. in challenging the hearing officer's factual findings about the altercation; and

2. in challenging the conclusions of the hearing officer and the Scenic Board's decision that § 317.6 applies.

DISCUSSION FOR QUESTION 5

1. Challenge to Hearing Officer's Factual Findings

Bob will probably not succeed in his challenge of the hearing officer's factual findings. For quasi-judicial/record-based administrative proceedings such as the unemployment compensation hearing at issue here, the factual findings of the administrative body will be sustained on judicial review if there is "substantial evidence" in the record as a whole to support those findings. See Federal Administrative Procedure Act, 5 U.S.C. §706(2)(e)(providing that reviewing court shall set aside agency findings found to be unsupported by substantial evidence); Goetz v. United States, 99 F.Supp.2d 1308 (D. Kan. 2000)(an agency's findings of fact are conclusive when they are supported by substantial evidence in the record); see also Speedy Messenger & Delivery Serv. v. Indus. Claim Appeals Office, 129 P.3d 1094 (Colo. App. 2005)(in unemployment compensation proceedings, hearing officer's factual findings are binding on judicial review if supported by substantial evidence). "Substantial evidence" means such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion... it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." Durango Transp., Inc. v. Colo. Pub. Utilities Comm'n, 122 P.3d 244 (Colo. 2005). "Substantial evidence" means more than a mere scintilla of evidence. See Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994).

In determining whether there is substantial evidence sufficient to support a finding, the reviewing court should consider the entire record, not just those parts that could support the finding. See On-Line Careline, Inc. v. Am. Online, Inc., 229 F.3d 1080 (Fed. Cir. 2000)(review for substantial evidence involves examination of the record as a whole, taking into account evidence that both justifies and detracts from an agency's decision).

Some jurisdictions may apply a slightly different deferential standard of review such as "clearly erroneous," "arbitrary and capricious," or "without any basis in fact." Here, although there was conflicting testimony at the hearing concerning the workplace altercation, the testimony of both Bob's supervisor and Jack (indicating that Bob cursed at and threatened Jack) probably are sufficient to constitute substantial evidence to support the hearing officer's factual findings. Thus, it would be unlikely that a reviewing court would disturb those findings and Bob's challenge will fail.

2. Challenge to Conclusions of Hearing Officer and Board

Bob probably also will fail in his challenge of the conclusions of the hearing officer and the Board that Scenic Code § 317.6 applies to the altercation with Jack. Whether the statute applies to temporary independent contractors (i.e. whether a temporary independent contractor is considered a "co-worker" under the statute) is an issue of statutory interpretation and, therefore, a question of law.

Generally, judicial review of a legal determination made by an administrative agency is de novo. Thus, the reviewing court is free to substitute its judgment for that of the administrative decision making body. See Koch v. United States Dept. of Interior, 47 F.3d 1015 (10th Cir. 1995). However, on legal issues closely related to the agency's expertise, including the interpretation of ambiguous statutory provisions the agency is responsible for administering and enforcing, a court should give some deference to the agency's interpretation. See G & T Terminal Packaging Co. v. U.S. Dept. of Agric., 468 F.3d 86 (2nd Cir. 2006) citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); see also Williams v. Kuna, 147 P.3d 33 (Colo. 2006)(court will extend deference to agency's interpretation of its own statutes but is not bound by that interpretation). Under this deferential standard, the agency's interpretation will be upheld if it is a permissible construction of the statute (not unreasonable, arbitrary, capricious, or manifestly contrary to the statute). See G & T Terminal Packaging Co. v. U.S. Dept. of Agric., supra.

Here, Scenic Code § 317.6 is within the Division of Labor & Employment's area of expertise and administration. Moreover, that statute does not define the term "co-worker" and it is unclear whether that term includes temporary independent contractors such as Jack. Under these circumstances, a reviewing court would likely give some deference to the agency's construction. Moreover, because the agency's interpretation that the statute does apply to independent contractors appears to be a reasonable and permissible construction, a reviewing court would be inclined to accept that construction. Consequently, Bob would likely fail in this challenge.

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ESSAY Q5

SEAT | | | | |

ISSUE		POINTS AWARDED
Procedural Hurdles for Judicial Review (any mention or discussion)		
1.	Standing (injury in fact/causation/zone of interest).	1. ○
2.	Exhaustion of administrative remedies.	2. ○
3.	Final administrative order.	3. ○
4.	Ripeness.	4. ○
Hearing Officer's Factual Findings		
5.	Recognition of deferential standard for factual findings.	5. ○
6.	Identification of "substantial evidence" or related standard (arbitrary & capricious/clearly erroneous/without basis in fact).	6. ○
7.	Based upon review of entire record/record as a whole.	7. ○
8.	Standard satisfied here based on testimony of witnesses.	8. ○
9.	Bob will fail in factual challenge.	9. ○
Legal Conclusions of Hearing Officer and Board		
10.	Recognition of less deferential standard for factual findings.	10. ○
11.	Identification of general standard (de novo/substitute own judgment).	11. ○
12.	Court may defer to agency's legal conclusion because within agency expertise or involves ambiguous statutes agency enforces.	12. ○
13.	Division's interpretation is reasonable/not arbitrary or capricious.	13. ○
14.	Bob will fail in legal challenge.	14. ○

QUESTION 6

Molly, a minor, skied down a difficult slope at Ski Mountain. Because the slope proved to be too difficult for Molly's level of skill, she lost control and ran into a packed snow-retention barrier. Molly suffered severe injuries as a result.

Peter, who was employed on Ski Mountain's ski patrol, went to Molly's aid. In hauling Molly down the mountain in a sled, Peter slipped and fell injuring himself and further injuring Molly.

QUESTION:

Discuss the tort claims Molly may have against Ski Mountain and that Peter may have against Molly. Also discuss any defenses to the claims.

DISCUSSION FOR QUESTION 6

Molly Against Ski Mountain

Molly will assert two claims against Ski Mountain, one based on negligence in maintaining the retaining barrier and the other based on negligence of Peter in rescuing her. Ski Mountain will claim the defense of assumption of the risk regarding the barrier. Ski Mountain also will claim no negligence, or in the alternative contributory negligence, on the part of Molly. Molly will assert that Ski Mountain is responsible for the actions of Peter under the doctrine of *Respondeat Superior*. Ski Mountain and Peter had the relationship of employee-employee, and Peter was acting in the scope of his employment. *Okl Semicondoctor Co. v. Wells Fargo Bank, N.A.*, 298 F.3d 768 (9th Cir. 2002).

It is widely held that one assumes the risks of dangers inherent in engaging in a sports activity. *Trembling v. West Experience, Inc*., 745 N.Y.S. 2d 311 (App. Div. 2002). Where the plaintiff assumes such a risk, the defendant sports provider owes the participant no duty of care, and the doctrine of comparative fault has no applicability. *Allen v. Dover Co-Recreational Softball League,* 807 A.2d 1274 (N.H. 2002). This no-duty rule is often described as primary assumption of the risk by the sports participant.

The elements of negligence are the existence and breach of a duty, causation, and damages. It is doubtful whether the Ski Mountain could be found negligent in maintaining the retaining barrier, since such a barrier may be necessary for the safety of the skiers and its presence was obvious. In view of the no-duty rule, the question of negligence does not even arise.

Molly will claim vicarious liability of Ski Mountain through negligent rescue by the patrol. No negligence may be present, however, since the slip may have been accidental through no fault of the patrol.

Many states have a Good Samaritan statute, whereby one who rescues a victim without charging the victim compensation therefor will not be liable for negligence in the rescue, but will only be liable if the rescue attempt is reckless or willful and wanton. *Hutton v. Logan*, 566 S.E.2d 782 (N.C. App. 2002). If such a statute is present here Ski Mountain should not be liable, because there is no evidence that Peter's rescue was reckless.

If Ski Mountain could be found liable, Molly's negligence in causing her own injury and thus creating the need for a rescue could reduce her recovery in a comparative fault jurisdiction, or bar recovery under a modified comparative fault or contributory negligence rule. Molly as a minor would be held to a standard of care of a child of like age, intelligence and experience. *Goss v. Allen,* 360 A.2d 388 (N.J. 1976). The standard would be that of an ordinary adult if Molly were engaged in an adult activity, but it has been held that skiing is not an adult activity. *Id.*

If Molly could recover for the injuries attributable to the rescue, these damages would need to be separated from those attributable to the initial injury, for which Ski Mountain would not be liable. If the two types of damages were practically indivisible, there is a division of

authority as to who has the burden of proof. Compare *La Moureaux v. Totem Ocean Trailer Express, Inc.*, 632

Peter Against Molly

In the case of Molly against Ski Mountain, the child standard of care will be raised as a defense in Peter's suit against Molly for skier negligence which precipitated the rescue attempt and Peter's consequent injury. As considered above, the child standard may apply with no adult-activity exception applicable.

It is widely held that a rescuer can recover for injuries incurred in effecting a rescue, whether the injuries be caused by the negligence of the person to be rescued or by the negligence of another who made the rescue necessary. *Minnich v. Med-Waste, Inc*., 564 S.E.2d 98 (S.C. 2002).

A number of states, however, bar the professional rescuer from recovery for injuries caused by the negligence which made the rescue necessary. *Farmer v. B & G Food Enterp., Inc.*, 818 S.2d 1154 (Miss. 2002). Some limit the professional rescuer rule to firefighters and police, *Lees v. Lobasco,* 625 A.2d 573 (N.J. Super. 1993), while others extend it to all professional rescuers. *See* Annot., 89 ALR 4th 1079 (1991). Some jurisdictions, as in *Minnich supra*, have abolished the rule altogether. Depending on the applicable law, Peter may or may not have an action against Molly for her negligence in causing the accident which necessitated the rescue.

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ESSAY Q6

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ISSUE		POINTS AWARDED
1.	Molly may assert Negligence against Lodge.	1. ○
2.	The elements of Negligence are:	
2a.	Breach of Duty:	2a. ○
2b.	Causation:	2b. ○
2c.	Damages:	2c. ○
3.	Lodge is responsible for Peter's actions under *Respondeat superior/vicarious liability*	3. ○
3a.	Actions by the agent must be in the scope of the relationship.	3a. ○
4.	Molly may have a claim for negligent rescue against Peter and the Lodge.	4. ○
5.	Peter/Lodge would defend on the doctrine of assumption of the risk.	5. ○
6.	Peter/Lodge would defend on the doctrines of contributory or comparative negligence.	6. ○
7.	Peter can assert a claim of negligence against Molly.	7. ○
8.	Molly would be held to a standard of care commensurate with her age.	8. ○
9.	Peter's professional status may be a factor in his claim against Molly.	9. ○

QUESTION 7

In an interview related to a criminal domestic violence case, the victims, a mother/wife and her twelve year old son, stated that although this incident is the first they've reported, there is a long history of physical and emotional abuse. They claim that almost every evening for the past three or four years, the father/husband ridiculed both of them, and frequently hit, slapped, and punched them.

Three years ago, father/husband beat his son at a family gathering in front of several of their relatives. When the mother/wife tried to help her son, father/husband punched her in the face and then dragged her across the ground by her hair, causing multiple bruises and cuts. The mother/wife did not make a criminal complaint at that time, although she did take refuge in a shelter for a month.

Last year, the father/husband hit his son on one occasion causing injuries severe enough that he had to go to the emergency room. The son convinced the doctor not to report the incident to the authorities, claiming that it would just upset things further.

The occasion for which father/husband is charged now occurred in June 2006. On that date, father/husband slapped his wife on the back, precisely where she had had recent surgery. When the son tried to intercede on his mother's behalf, father/husband knocked him to the ground and then kicked him several times, causing extensive bruising to the son's torso and upper legs. (The defendant is 6'2" and weighs 195 pounds; the son was then 5'0" and weighed 95 pounds).

At trial, father/husband intends to offer two defenses to the latest charges. First, that he did not mean to touch his wife, but lost his balance and bumped into her. Secondly, he will claim that he was only disciplining his son for his insubordinate behavior.

QUESTION:

Discuss whether evidence of father's/husband's earlier abuse may be introduced at trial; the objections father/husband will raise; and the likely rulings by the judge.

DISCUSSION FOR QUESTION 7

The issue here is the applicability of the "prior bad acts" doctrine. Under Rule 404(a) FRE, character evidence is not admissible for the purpose of proving action in conformity therewith on a particular occasion. This rule directly contradicts common experience in which we routinely use our knowledge of a person's character to predict how he or she has behaved or will behave. Thus, if we know that someone is temperamental, for instance, we more easily believe that he flared up on the occasion in question, or we predict that she will flare up under pressure in the future. However, Rule 404 specifically prohibits use of this information in the trial setting.

The Advisory Committee Note to the federal version quotes from the California Law Revision Commission: "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

There are some exceptions to 404(a)'s prohibition against the use of character evidence. In criminal cases, the defendant's pertinent character trait can be proven, but only if the defendant makes the offer first. *See,* 404(a)(1). Here, although we do have a criminal case, the evidence is of the prior abuse, which itself is not evidence of character but rather conduct. Further, the defendant himself has not offered any character evidence which would allow the prosecutor to rebut the defense view of defendant's character. If the defendant had offered a witness to say "Harry is a non-violent person," the prosecutor could then offer witnesses who knew Harry, or his reputation, to testify about their opinions of Harry's violent nature or their knowledge that Harry has a reputation fro violence. In sum, this exception would not allow the prosecution's character evidence to be admitted.

Rule 404(b) does apply more directly. It continues the prohibition against character evidence by closing the loophole whereby a prosecutor might invite the jury to infer a violent character through evidence of a pattern of violent incidents. "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." Thus, Rule 404(b) generally prevents the prosecutor from asking either victim about earlier abuse by the defendant to lead the jury to infer that defendant was likely to have abused them this time because he'd done so many other times.

Rule 404(b) *does* permit evidence of prior acts for purposes *other than* proving character to prove action in conformity therewith. The rule actually specifies several of these other permissible purposes: proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In this instance, the defendant has offered two defenses. With regard to his slap on the wife's back, the husband defends on the ground of accident: "he did not mean to touch the wife but just lost his balance as he was going by her." This fits squarely into the rule's allowable purpose

of "absence of mistake or accident." Thus, the prosecutor should be able to admit all the prior instances of assaults on the wife, even if they were not reported. (Rule 404(b) allows evidence of "other acts" so there is no requirement that the prior abuse have been reported or that the defendant was tried or convicted to qualify).

Similarly, the defendant claims that his motive was to discipline the son, not simply to inflict pain. This is not quite as clearly within the grounds specified by the rule, but likely still will fit within "proof of motive." The defendant claims he had a permissible motive, so lacks criminal intent; the prior acts of abuse negate this contention because he did not have any colorable disciplinary purpose in those events. Further, the rule is not exclusive: it allows other prior acts to be introduced "for other purposes, such as...".

In *People v. Rath*, a 2002 Colorado Supreme Court opinion, the Court affirmed the trial court's admission of prior act evidence against a defendant. The defendant was charged with kidnapping and sexual assault of a young woman to whom he had offered a ride. The prosecutor put on evidence from four other young women who had similar experiences with the defendant, each of whom said they accepted rides and then that the defendant had taken them to remote wooded sites against their will and sexually assaulted them. [t]he combination of all four incidents added substantial weight to the inference of a technique to isolate young women for the purpose of having sex. A greater number of incidents of similar behavior is important in proving that it is directed or purposive rather than coincidental. *See Spoto, 795 P.2d at 1320; Wigmore, supra, § 302*."

The judge will make the admissibility determination under Rule 104, to a preponderance of the evidence standard. *See Rath, supra*. So long as the defendant maintains these defenses, the judge should allow the prosecutor to use prior acts evidence under 404(b) not to show action in conformity, but to disprove the intent defenses. The defendant will not be able to prevent the admission of this evidence unless he gives up one or both defenses. The judge may grant a limiting instruction, however, telling the jury that they may consider the prior acts only for the purpose of assessing the defendant's intentions, and not for inferring that the defendant is a violent or abusive person.

Note that some jurisdictions, including the FRE, require advance notice of the use of 404(b) evidence in order to give the defendant a chance to try to exclude such evidence before the jury hears it. This answer assumes that this requirement has been met.

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ESSAY Q7

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ISSUE		POINTS AWARDED
1.	Character evidence not admissible for purpose of proving action in conformity therewith on a particular occasion. FRE 404(a)	1. ○
1a.	Character evidence is of slight probative value and may be very prejudicial.	1a. ○
2.	One exception is in criminal cases where defendant's pertinent character trait can be proven, but only if defendant makes an offer first.	2. ○
2a.	Husband hasn't made first offer of character evidence.	2a. ○
2b.	Prosecutor will argue the evidence s/he wants to introduce isn't of character, it is of conduct.	2b. ○
3.	Evidence of other crimes, wrongs or acts is not admissible to prove character of a person to show conformity with those acts. FRE 404(b)	3. ○
3a.	404(b) does permit evidence of prior acts for purposes other than proving character to prove action in conformity therewith.	3a. ○
3b.	Specifically 404(b) allows evidence of prior acts as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, or accident (need only ID one).	3b. ○
4.	Husband will offer that with respect to his wife, that he didn't mean to touch her.	4. ○
5.	Prosecutor will argue that Husband's touching of Wife was intentional and fits within exception of "absence of mistake or accident" and other incidents may be brought in.	5. ○
6.	Husband will claim he was only disciplining his son (permissable motive)	6. ○
7.	Prosecutor will argue this is "proof of motive" and past acts should be admissible.	7. ○
8.	Judge will make the determination under Rule 404 by a preponderance of the evidence.	8. ○
9.	Limiting instruction may be granted - jury shouldn't infer defendant is an abusive person.	9. ○

QUESTION 8

Tom leased a building from Lola for five years with the expectation of converting it into a fast food drive-in restaurant. The building had formerly housed a restaurant. The lease included the following clause:

> **Paragraph 7**: The tenant's use of the premises is restricted to carrying on a restaurant business.

After Tom leased the property, he applied for a license to operate a fast food drive-in restaurant. The local zoning authority denied his application. Although the property is zoned to permit "eating establishments," the zoning authority construed the zoning ordinance to forbid drive-in restaurants. Before Tom leased the property, neither he nor Lola was aware of the zoning restriction.

Tom attempted to obtain a variance or legal permission to operate a drive-in restaurant on the leased property, but failed. Because he could not operate a drive-in restaurant as planned, Tom claimed that the lease had an illegal purpose and therefore was invalid. He then abandoned the premises.

Lola advised Tom that she intended to hold him to the terms of the lease. Lola immediately found a new tenant who agreed to rent the property for the duration of Tom's lease term, but at a much lower rate. (The law in the jurisdiction where the property is located permits landlords to rent on the account of a defaulting tenant.)

Lola sued Tom for the difference between (a) the rent Tom would have paid and (b) the rent that the new tenant is paying for the balance of Tom's term. Tom's lease contained no acceleration clause making the balance of the rent due and payable upon default of a payment.

QUESTION:

Discuss Tom's liability to Lola under the lease agreement.

DISCUSSION FOR QUESTION 8

1. The lease is valid and enforceable, because its purposes are not illegal.

When a lease limits the tenant to a specific use and the use is invalid because of a zoning restriction, the tenant may terminate the lease. Here, however, under the lease, Tom still could validly use the property for a restaurant, a use permitted under the zoning ordinance's provision permitting an "eating establishment." This is a use that the premises formerly had and thus a use that is not unreasonable or impractical. When a lease permits more than one use and not all uses specified violate the zoning ordinance, the lease is valid. Here, the zoning ordinance permits other reasonable uses, such as an "eat-in" eating establishment." Therefore, the lease permits legal purposes and is valid. Robert S. Schoshinski, *American Law of Landlord and Tenant* §5:14 at 261-63 (Lawyers Co-op [now West] 1980) & 2000 Supp.

2. Because Lola has refused Tom's offer of surrender, Lola can choose to hold Tom to the lease and rent it out as his agent on his account. She may sue Tom for a rental payment (minus the rent of the new tenant) only after the payment becomes due.

If a landlord relets the premises, the Tenant's liability rests on whether the landlord has accepted surrender of the premises. If the landlord's reletting for the landlord's own account constitutes acceptance of surrender, the abandoning tenant is relieved of any rental liability accruing after abandonment. Lola has clearly refused to accept Tom's offer of surrender and therefore can choose to rent out the premises as an "agent" for Tom. Her express notification to Tom of her intention eliminates any ambiguity. Because Lola has refused to accept surrender, she cannot treat Tom's conduct as an anticipatory breach and sue for damages of all the rent. The lease does not contain an acceleration clause for rental payments upon default. Because Lola has refused to accept surrender, she may sue Tom for the rental payments that he owes minus the rental payments that she is receiving from the new tenant. However, she may sue for Tom for each installment of rent (minus the new tenant's rental) only after each payment becomes due. She may not sue for the balance of the entire rental (minus the new tenant's rental) until the end of the lease. Ralph E. Boyer, Herbert Hovencamp & Sheldon Kurtz, *The Law of Property* § 9.9 at 253-54, 282-84 (West 1991).

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ESSAY Q8

SEAT

ISSUE		POINTS AWARDED
1.	A lease will not be enforced if the activity is illegal.	1. ○
2.	In this case, the leased premises could be legally used as a restaurant consistent with zoning and the language of the lease and therefore could not be terminated on the basis of illegal purpose.	2. ○
3.	Tom breached the lease by unjustifiably abandoning the property.	3. ○
4.	Tenant's liability of a default depends on whether the Landlord has accepted surrender of the premises.	4. ○
5.	If Landlord is deemed to have accepted surrender of the premises and relets for the Landlord's own account, then the Tenant may be released from any further rent liability after abandonment.	5. ○
6.	If surrender is not found, the Tenant is liable for the difference between the lease rent and the fair value rent which is generally the rent received from the reletting.	6. ○
7.	The act of reletting to mitigate damages does not constitute surrender for the purpose of relieving the Tenant of its rental obligations consistent with the majority of jurisdiction.	7. ○
8.	Since Lola did not have an acceleration clause in the lease and did not accept surrender, she may only sue Tom for rent (minus the new tenant rental amounts) only after such rental is due.	8. ○

QUESTION 9

The administration of State University is considering a policy that would establish a free speech zone for students. The proposed site is a lecture hall that typically has been reserved for classes. The policy would establish the following conditions for access to the free speech zone. First, to avoid any appearance of the university endorsing religion, student expression must avoid any discussion of religion. Second, to facilitate the orderly use of the facility and universal access to the amplification system, each speaker must adhere to a ten minute rule in which to make comments at the microphone if other speakers are waiting, but speakers are not limited in the number of times they can speak so long as they wait for additional turns at the microphone. Third, speakers must avoid any speech that is obscene. The proposed policy defines obscenity as "any speech that is sexually explicit."

QUESTION:

Discuss the constitutionality of the three proposed limitations on use of the free speech zone.

DISCUSSION FOR QUESTION 9

State University, if it opens the lecture hall to student speech, would create a limited or designated public forum. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45-46 (1983). This type of forum is subject to the same First Amendment principles governing traditional public forums, except that the university reserves the power to close it altogether on a non-discriminatory basis. *Id*.

Religious Expression

Regulation of religious speech in a limited/designated forum is subject to strict scrutiny and would be permissible only if necessary to account for a compelling government interest and it is narrowly drawn. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). The ban on religious speech reflects a concern that by allowing religious speech, the University would be advancing religion in violation of the Establishment Clause. Because otherwise protected speech would be abridged and free exercise interests burdened by this restriction, this concern does not rise to the level of a compelling governmental interest. *Id*. at 276. The prohibition of religious speech would be an impermissible exercise in content discrimination. *Id*.

Time, Place and Manner Restrictions

Because speech is conveyed through physical action, the government can regulate the time, place and manner in which speech is conveyed in limited/designated public forums with reasonable regulations. To be valid, regulation of speech and assembly in limited/designated public forums must be (i) content neutral, (ii) narrowly tailored to serve a significant governmental interest, and (iii) leave open alternative channels of communication. *Ward v. Rock Against Racism, 491 U.S. 781 (1989).* Because the ten-minute rule is not based upon the content of the speaker's remarks but rather on an important interest by the University to facilitate access to the public address system by all users, it is likely a constitutional restriction on the time, place and manner of speech. Moreover, a speaker is not limited in the number of times s/he may speak; thus, the regulation does not burden substantially more speech than is necessary to accomplish the University's objective of facilitating access to the limited/designated public forum.

Obscenity

Obscenity is not protected speech. *Roth v. United States, 354 U.S. 476 (1957).* For speech to be classified as obscene, it must satisfy a three-part test. The inquiry is whether the "(i) average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (ii) work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (iii) work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973). The proposed policy's definition of obscenity encompasses "sexually explicit" speech without qualification, and thus would include expression that does not necessarily appeal to the prurient interest. The proposed policy also fails to define with specificity the prohibited depiction or description of sexual conduct. Finally, it makes no allowance for sexually explicit material that may have literary, artistic, political, or scientific value. The proposed policy thus fails the test for establishing that the banned speech is obscene.

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ESSAY Q9

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ISSUE		POINTS AWARDED
1.	This is state action restricting free speech (First Amendment).	1. ○
2.	Limited/designated forums are subject to same First Amendment principles governing traditional public forums.	2. ○
3.	Regulation of the content of speech, such as religious speech, is subject to strict scrutiny and is permissible only if:	3. ○
3a.	necessary to effectuate a compelling governmental interest;	3a. ○
3b.	the regulation is narrowly drawn.	3b. ○
4.	University's concern with an Establishment Clause violation likely does not constitute a compelling governmental interest.	4. ○
5.	The limitation on time for speaker's comments is a restriction on conduct or the time, place and manner of speech.	5. ○
6.	To be valid, governmental regulation of conduct in a limited/designated public forum must be:	
6a.	content neutral;	6a. ○
6b.	narrowly tailored to serve an important/significant government interest;	6b. ○
6c.	open alternative channels of communication.	6c. ○
7.	Obscenity is not constitutionally protected speech.	7. ○
8.	For speech to be classified as obscene, the inquiry is whether:	
8a.	it appeals to the prurient interest;	8a. ○
8b.	the work is patently offensive; and	8b. ○
8c.	the work lacks serious literary, artistic, political, or scientific value.	8c. ○
9.	Statutes regulating obscenity must not be vague.	9. ○