QUESTION 1

Paula Plaintiff filed a civil lawsuit against Don Defendant in the United States District Court for the District of Colorado. In that action, Plaintiff timely and properly served on Defendant a set of ten interrogatories. Defendant, based on his belief that all ten interrogatories call for disclosure of privileged information, knowingly failed to respond in any way to the interrogatories.

QUESTION:

Under the Federal Rules of Civil Procedure, discuss what courses of action are available to Plaintiff in light of Defendant's failure to respond to the set of ten interrogatories.

QUESTION 2

Acme Moving Company, Inc. (Acme) advertises its services in a variety of publications and provides a toll free number to contact them. Customer called Acme, and Acme sent one of its employees to Customer's home. Acme's employee assessed what the move would cost and provided a written proposal. Customer agreed to the cost and signed the proposal.

When Acme receives a proposal, Acme posts the proposal on its web site which is accessible only to moving companies used by Acme. The first company to respond is given the job. The moving company then contacts the customer directly and makes all the arrangements for the move. In this case, Interstate Carriers, Inc. (Interstate) was awarded the job.

Interstate owns its own truck and other necessary moving equipment. The Interstate employee assigned to the moving job was Moe Mover. Mover works for Interstate, is paid by the hour, and does the work according to Interstate's direction.

Pursuant to its agreement with Acme, as soon as a job is awarded, Interstate places Acme magnetic signs on its truck and gives a hat and shirt with Acme's logo to Mover to wear while moving. Also by agreement, Interstate is not permitted to collect payment from customers. Instead, Interstate is to tell customers to mail payment to Acme and, in turn, Interstate is to receive its payment for the move from Acme.

After successfully moving Customer's furniture, Customer paid Mover, in cash, for the cost of the move. Interstate had failed to tell Customer to mail payment to Acme. Mover absconded with the money.

QUESTION:

Discuss the relationships among Acme, Interstate, and Mover, and whether Acme can successfully seek payment for the move from Customer or Interstate.

QUESTION 3

Paula Hanson Dean, a well respected scientist who had just won the Nobel Prize in chemistry, became engaged in negotiations with Pfizer Kline, the president of Giant Drug Company. On May 1, Dean sent Kline a letter stating:

> I would agree to work as vice-president in charge of research for a period of four years at a salary of $500,000 per year. /s/ Paula H. Dean

On May 3, Kline received Dean's letter and called Dean stating: "Your salary request is too high. Will you reduce it?" Dean replied: "You cheapskate! I am far too accomplished to work for peanuts. That's as low as I can go."

Outraged by Dean's flip answer on the phone, Kline immediately sent Dean a letter (first letter) which read:

> Resented your statement. No longer interested in hiring you. /s/ Pfizer Kline

Later that same day (May 3), Kline decided to accede to Dean's demands and sent a properly addressed, stamped express mail letter (second letter) to Dean which read:

> Accept your terms, although I wish you would reconsider a lower salary. /s/ Pfizer Kline

On May 4, Dean's personal secretary received Kline's express mail letter (second letter) and placed it on Dean's desk. Kline's first letter had not yet arrived. That same day, before reading her mail, Dean entered into a contract to become Research Director for HealthCo Drugs, a competitor of Giant. She immediately called Kline and stated: "I just agreed to work for HealthCo Drugs." Kline replied: "You can't. I already accepted your offer."

QUESTION:

Discuss whether Giant has a valid contract with Dean and, if so, whether Giant can force Dean to work for them.

QUESTION 4

Oliver Owner ("Owner") held a fee simple absolute to a tract of land located in what was the undeveloped outskirts of a large city. In 1970, Owner leased the tract for 50 years to Developer Corporation ("Developer"). Owner and Developer signed a lengthy, written lease agreement which, among other things, permitted Developer to construct improvements on the site. Additionally, the lease agreement provided that "Developer, its successors and assigns shall never permit intoxicating drinks to be sold or consumed on the leased premises."

Owner and Developer also executed a single page document styled a "Memorandum of Lease" which recited that the parties had entered into a lease agreement for a term of 50 years. The "Memorandum of Lease" did not mention any of the other terms of the lease. The parties recorded the "Memorandum of Lease" but not the longer lease agreement.

Developer timely paid all of the lease payments and built apartment buildings, townhouses, and a few storefronts on the tract. Early in 2004, Developer entered into a ten year written agreement with Sally's Saloon, Inc. in which Sally's leased a storefront located on the edge of the tract. Several nightclubs were located across the street from this storefront on land Owner did not own. Between 1970 and the present, the city had grown considerably and now surrounds Owner's tract.

After signing the lease, Sally's began a six-month, $750,000 remodeling project on the storefront, converting the property from retail use to a saloon and restaurant. During the remodeling project, Sally's repeatedly ran large ads in the local newspaper proclaiming "Opening soon, the longest bar in the West" and posted a sign on the exterior of the premises with the same wording.

Two nights after Sally's opened for business, Owner filed a lawsuit seeking to enjoin Sally's from selling liquor on the site.

QUESTION:

Discuss all defenses Sally's could raise against Owner.

QUESTION 5

Dan offered to pay Steve ten thousand dollars to kill Vince. Steve declined. The next day, however, Steve called Dan and offered to kill Vince for fifty thousand dollars. Dan agreed to the proposal. Steve bought an antique knife and used it to stab Vince to death. Days later, when Steve went to collect the money from Dan, Dan pointed a gun at Steve and demanded that Steve give him the antique knife. As Dan took the knife from Steve, Steve grabbed Dan's gun. The gun discharged, killing Steve.

QUESTION:

Discuss what common law crimes Dan has committed.

QUESTION 6

Peter Perry owns ten percent (10%) of the common stock of SKI Corporation (SKI) which specializes in the manufacture and distribution of ski bindings. One day, Perry was reading the latest edition of Downhill Magazine and happened upon a story about SKI which detailed the lifestyle of one of SKI's directors, Tom Turner. In the article, Turner was quoted as saying that he had recently been appointed President of SKI. In the accompanying picture, Turner was shown outside his beautiful new house in Aspen.

Perry was disturbed by the article. Not only did he not know that Turner had been appointed President, but he also was upset that Turner appeared to be living a lavish lifestyle at a time when SKI's stock was floundering. Perry decided to investigate SKI's financial dealings. As a result of his investigation, Perry discovered that SKI's Board of Directors had properly followed all procedures in approving Turner's appointment as President. However, Perry also found out that the Board of Directors had voted to lend money to Turner to help him buy his Aspen house. Perry believes that this action was a flagrant example of corporate mismanagement of funds which may have impaired the value of his stock.

QUESTION:

Discuss any action that may be available to Peter Perry against SKI's Board of Directors for lending money to Tom Turner.

QUESTION 7

Subzero, a manufacturer of air conditioners, in response to an inquiry from Big Appliances, a retail seller of large appliances, sent the following letter:

> Per your request, we are pleased to quote
> you 1000 air conditioners at $175 each.

Upon receiving this letter, Big sent Subzero its purchase order for 1000 air conditioners. Included on the back of the Purchase Order Form were the following provisions:

1. By accepting this order, seller expressly warrants that the goods provided are fit for the ordinary purposes for which they are used.

2. All disputes arising out of this agreement shall be submitted to binding arbitration.

When Subzero received Big's Purchase Order Form, Subzero immediately returned an Acknowledgment of Order Form which included the following language:

> THANK YOU FOR YOUR ORDER. BEFORE ACCEPTING GOODS FROM CARRIER, MAKE SURE THAT EACH ARTICLE IS IN GOOD CONDITION. THIS IS NOT AN INVOICE. AN INVOICE WILL BE SENT TO YOU WITHIN A FEW DAYS. OUR ACCEPTANCE OF YOUR ORDER IS EXPRESSLY MADE CONDITIONAL ON YOUR ASSENT TO THE FOLLOWING TERMS. SELLER MAKES NO WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO THE MATERIAL, WORKMANSHIP, OR QUALITY OF THE GOODS SPECIFIED HEREIN.

Big made no objection to Subzero's acknowledgment. Within two weeks, Big accepted and paid for the air conditioners. Almost all of the air conditioners proved to be defectively manufactured. Big gave notice of the defects and served a demand for arbitration. Subzero refused to arbitrate.

QUESTION:

Discuss the rights and obligations of each party, and any damages to which the parties may be entitled.

QUESTION 8

Andrea Apprentice recently moved to Metropolis and began working for real estate tycoon Donald Defendant. During a meeting one afternoon, Defendant caught Apprentice surfing on her computer. Defendant became extremely angry with Apprentice, as Defendant strictly prohibits employees from working on their computers during his meetings. He ordered Apprentice to leave the meeting, go directly to her office, and stay there until Defendant came to talk to her. Defendant had been known to fire persons for similar rules infractions. Apprentice was so flustered and embarrassed that when she left the meeting, she not only forgot to take her laptop, but also her purse which contained both her wallet and her car keys.

Apprentice went to her office and waited, as told, for Defendant. She knew that Defendant always left the office at 6:00 pm each evening. However, unbeknownst to Apprentice, Defendant received an emergency telephone call at 5:00 pm informing him that an important deal was about to fall through, and he was needed right away. Defendant left the building shortly thereafter and did not return that evening.

At 8:00 p.m., Defendant suddenly remembered that he had left Apprentice waiting in her office. Defendant decided he could not be bothered to call Apprentice and didn't give it another thought.

Apprentice remained in her office until 10:00 pm, at which time she decided to go home. She went back to the meeting room to retrieve her purse and laptop, but the door was locked and she could find no one to unlock it for her. Because she didn't have her wallet or car keys, Apprentice spent the night at the office.

QUESTION:

Discuss the elements required to establish a claim for false imprisonment and whether Apprentice might successfully assert such a claim against Defendant.

QUESTION 9

MaryAnn and Willie were married in 1980. During their marriage, they had two children, Rose and Rob.

In 1995, Willie became deeply involved with the Animal Rescue Society. At that time he adopted Spot, a terrier, upon whom he lavished most all of his attention.

In 1996, Willie secretly handwrote and signed the following will:

> I, Willie, being of sound mind and body, do hereby leave all of my worldly possessions to my furry friend, Spot. The Animal Rescue Society to act as Trustee during Spot's lifetime and which Society shall become the successor recipient of my estate upon Spot's death.
>
> My wife, MaryAnn, should receive nothing from my estate. My two children, Rose and Rob, should receive nothing as well because they have rejected me. /s/ Willie

Willie and MaryAnn were legally separated in 2002 and ceased living together at that time, but never divorced. Willie died in 2004, and the will was discovered shortly thereafter.

QUESTION:

Discuss whether the will is valid and any claims that MaryAnn, Rose, or Rob may have to Willie's estate. Assume the Uniform Probate Code is in effect in this jurisdiction.

DISCUSSION FOR QUESTION 1

Plaintiff has two primary options under FRCP 37. The first option is a **motion to compel answers** to the interrogatories under FRCP 37(a), which provides that "[i]f . . . a party fails to answer an interrogatory submitted under Rule 33 . . ., the discovering party may move for an order compelling an answer." FRCP 37(a)(2)(B). *See, e.g., Toma v. City of Weatherford*, 846 F.2d 58, 60 (10th Cir. 1988); *Pham v. Hartford Fire Ins. Co.*, 193 F.R.D. 659, 661 n.2 (Dist. Colo. 2000); *Ecrix Corp. v. Exabyte Corp.*, 191 F.R.D. 611, 616 (D. Colo. 2000); *In re M & L Bus. Mach. Co., Inc. v. Bank of Boulder*, 167 B.R. 631, 633 (D. Colo. 1994).

The second option is a **motion for sanctions** under FRCP 37(d), which provides that "[i]f a party . . . fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just . . . ." FRCP 37(d) (sentence one). *See, e.g., Toma v. City of Weatherford*, 846 F.2d 58, 60 (10th Cir. 1988).

The former motion is designed primarily to obtain the information sought by the interrogatories; the latter motion is designed primarily to impose one or more sanctions on the noncomplying party. The latter motion is available even though Defendant has not violated a court order.

Motion to compel. A Rule 37(a) motion to compel must "include a certification that the movant has in good faith conferred or attempted to confer with the . . . party failing to make the discovery in an effort to secure the information or material without court action." FRCP 37(a)(4)(2)(B); *see also* Rule 7.1.A., Local Rules, U.S. Dist. Ct. Dist. Colo. ("The court will not consider any motion, other than a motion under Fed. R. Civ. P. 12 or 56, unless counsel for the moving party or a *pro se* party, before filing the motion, has conferred or made reasonable, good-faith efforts to confer with opposing counsel or a *pro se* party to resolve the disputed matter. The moving party shall state in the motion, or in a certificate attached to the motion, the specific efforts to comply with this rule."); *Exum v. United States Olympic Comm.*, 209 F.R.D. 201, 208 (Dist. Colo. 2002); *Echostar Communications Corp. v. News Corp. Ltd.*, 180 F.R.D. 391, 393-94 (Dist. Colo. 1998).

In addition to obtaining an order compelling Defendant to respond to the interrogatories, Plaintiff may also be able to obtain an award of reasonable expenses incurred in making the motion, including attorney fees. FRCP 37(a)(4)(A); *cf. Exum v. United States Olympic Comm.*, 209 F.R.D. 201, 208 (Dist. Colo. 2002) (awarding reasonable expenses incurred in opposing motion to compel). Expenses are not to be awarded if (1) the movant fails to make a good faith effort to obtain the discovery without court action, (2) the nondisclosure is "substantially justified," or (3) "other circumstances make an award of expenses unjust." *Id.*

Motion for sanction (s). A Rule 37(d) motion for sanctions must "include a certification that the movant has in good faith conferred or attempted to confer with the part failing to answer or respond in an effort to obtain such answer or response without court action." FRCP 37(d) (sentence two); *see also* Rule 7.1.A., Local Rules, U.S. Dist. Ct. Dist. Colo. ("The court will not

consider any motion, other than a motion under Fed. R. Civ. P. 12 or 56, unless counsel for the moving party or a *pro se* party, before filing the motion, has conferred or made reasonable, good-faith efforts to confer with opposing counsel or a *pro se* party to resolve the disputed matter. The moving party shall state in the motion, or in a certificate attached to the motion, the specific efforts to comply with this rule."); *Exum v. United States Olympic Comm.*, 209 F.R.D. 201, 208 (Dist. Colo. 2002); *Echostar Communications Corp. v. News Corp. Ltd.*, 180 F.R.D. 391, 393-94 (Dist. Colo. 1998).

Defendant's total failure to respond to the set of interrogatories exposes Defendant to "such orders . . . as are just." FRCP 37(d) (sentence one). Such orders may be as drastic as the striking of defenses and even the entry of final judgment, *id.* (incorporating by reference FRCP 37(b)(2)(C)); *Resolution Trust Corp. v. Rossmiller*, 140 B.R. 1000, 1003 (D. Colo. 1992). This is so if the failure to respond is intentional (as is Defendant's failure) and not involuntary. *See, e.g., M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869, 872 (10th Cir. 1987).

In lieu of or in addition to a sanction such as judgment by default, Plaintiff may also be able to obtain an award of reasonable expenses caused by Defendant's failure, including attorney's fees. FRCP 37(d) (sentence three). Expenses are not to be awarded if a party's failure "was substantially justified" or if "other circumstances make an award of expenses unjust." *Id.*

Privilege. Although Defendant may be correct that Plaintiff's discovery requests were inappropriate because they sought privileged information, Plaintiff can argue Defendant has waived that objection. All objections must be raised on or before the deadline for responses, or they are deemed waived. FRCP 33(b)(4). Objections as to privilege must be raised in a privilege log, which specifically describes the information being withheld. FRCP 26(b)(5). Thus, Defendant's failure to respond "may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c)." FRCP 37(d) (sentence four). Nonetheless, the resolution of a discovery motion is left to the sound discretion of the trial court to enter such orders as it deems "just." FRCP 37(d). Defendant may throw himself upon the trial court's mercy and try to argue he should be allowed to resurrect the privilege-objections.

DISCUSSION FOR QUESTION 2

Creation of Agency between Acme and Interstate.

Both Acme and Interstate are independent business entities. In determining if Interstate is an employee or an independent contractor, the key element is the right to control. In determining the right to control, the factors considered include working for different employers, owning the tools of the trade, the amount of control over the specific job, payment of a flat amount for the work performed and the length of the employment. When Interstate does a job for Acme, however, it is acting on behalf of Acme by actually carrying out work that a customer hired Acme to do. By acting in this capacity, Interstate may be an agent for Acme. *See Restatement of Agency,* Section 1, which defines an agency as a relationship that arises when one person (principal) manifests an intent that another (agent) shall act on his behalf.

An agency relationship can be created expressly by agreement or by the conduct of the parties. In this case, Acme posts the jobs on its web site and the first contractor to respond gets the job. These actions establish that Acme and the responding contractor have created a consensual agency relationship with Acme as the principal and Interstate as the agent.

Scope of Agency.

An agency relationship can be created in three different ways: (1) the principal and agent can agree that the agency exists and the scope of the authority (actual authority); (2) the principal may hold out another as his agent (apparent or implied authority); and (3) the principal may agree to be bound by previously unauthorized acts of the agent (ratification).

1. Actual authority. Here Interstate had actual authority to move Customer's furniture. The actual authority is expressed in the agreement between Acme and Interstate to move the Customer's furniture, but the agreement expressly prohibits Interstate from receiving payment. Therefore, Interstate had no actual authority to receive payment from Customer.

2. Ratification. Ratification may be shown by an express statement of the principal or it may be implied such as through silence. At no time did Acme ratify Mover's acceptance and retention of the payment for services.

3. Apparent (or implied) authority. Mover has apparent or implied authority to do all things necessarily related to the moving of the furniture. Customer could reasonably believe that Mover had authority to receive payment for the work since Customer was not told otherwise. From all appearances, Mover was a general agent of Acme. An agent has general authority to collect payment for services rendered. Acme's failure to notify Customer of the payment requirement and Mover's apparent authority to receive payment relieves Customer from any liability to Acme for further payment.

Creation of Agency between Interstate and Mover.

Mover is an employee of Interstate. An employee is one who is subject to the supervision of the principal in the details of the work and who is compensated on a time basis. Interstate has the right to control the work done by Mover. Mover is an employee of Interstate and is therefore an agent of Interstate. Interstate as the principal is liable for the actions of its employees under the doctrine of *respondeat superior* if the actions of the employee occurred within the course and scope of the employment. In determining if the employee was acting in the course and scope of employment, three tests are used: (i) Was the conduct of the same general nature as, or incident to the employee's job; (ii) was the conduct substantially removed from the authorized time and space limits of the employment; and (iii) was the conduct actuated at least in part by a purpose to serve the employer?

Here, Mover was acting within the course and scope of his employment when he received the payment. The conduct of receiving payment was related to the job Mover was hired to do, it was related in time and space to the job of moving Customer's property, and receiving the money for payment was actuated at least in part by a purpose to serve the employer. Since the principal is liable for the actions of its agent, Interstate is liable for the actions of Mover and Interstate is liable to Acme for payment of the money.

DISCUSSION FOR QUESTION 3

An offer is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that assent to that bargain is invited and will conclude it. *See Restatement (Second) Contracts § 24.* In this case, Dean's letter, made after negotiations, is an offer, because under the objective test of intent, a reasonable person in Kline's position would understand that Dean was in fact seeking Kline's assent to her invitation. Furthermore, the language is sufficiently certain or definite in its essential terms.

A counter-offer is an offer made by an offeree to the offeror, relating to the same matter as the original offer and proposing a substituted bargain differing from the original offer. *See, id.* at § 39. In this case, Kline's call was not a counter-offer, but merely an inquiry regarding the possibility of different terms. This type of response is generally considered too tentative to be a counter-offer.

A rejection is a manifestation of intention not to accept an offer. *See id.* at § 38. In this case, Kline's first letter was a rejection since under the reasonable person test, Dean would understand that Kline was no longer interested in going forward with the employment agreement.

An acceptance is a manifestation of assent to the terms of an offer made by an offeree in the manner required or invited by the offer. *See id.* at § 50. Here, Kline's second letter of May 3 was an acceptance because a reasonable person in Dean's position would understand that Kline was assenting to the offer, and mail was a reasonable means of acceptance.

A rejection sent by mail is not effective (and does not terminate the power of acceptance) until received by the offeror. Thus, a letter of acceptance sent after mailed rejection, but received by the offeror before the rejection, is effective. *See id.* at § 40. In other words it's a race between the two pieces of correspondence. Whichever is received first is effective.

A written revocation, rejection, or acceptance is received when the writing comes into the possession of the person addressed, or of some person authorized to receive it for such person. *See id.* at § 68. When Dean's personal secretary, a person authorized to receive her mail, accepted Kline's express mail acceptance letter from the postal carrier, it was received even though Dean did not know of this fact. Because such receipt occurred before Dean received Kline's rejection letter, a contract was formed between Dean and Giant, notwithstanding the fact that Dean was unaware of this and later entered into the contract with HealthCo.

Where any promise in a contract cannot be fully performed within a year from the time the contract is made, all promises in the contract are within the Statute of Frauds until one party to the contract completes his or her performance. *See id.* at § 130. Here, the four-year employment contract between Giant and Dean cannot be fully performed within one year because of the four-year term. Thus, it falls within the Statute of Frauds.

A contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed by or on behalf of the party to be charged, which (a) reasonably identifies the subject

matter of the contract, (b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and (c) states with reasonable certainty the essential terms of the unperformed promises in the contract. *See id.* at § 131.

In the present case, there is such a writing which is signed by both parties. Thus, the Statute has been satisfied.

A promise to render personal service will not be specifically enforced. *See id.* at § 367. The refusal is based in part upon the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone and, in some instances, of imposing what might seem like involuntary servitude. To this extent the rule is an application of the more general rule under which specific performance will not be granted if the use of compulsion is contrary to public policy. *See id.* at § 365. The refusal is also based upon the difficulty of enforcement inherent in passing judgment on the quality of performance. To this extent, the rule is an application of the more general rule on the effect of difficulty of enforcement. *See id.* at § 366. Therefore, Dean cannot be forced to work for Giant.

DISCUSSION FOR QUESTION 4

Here, Owner is seeking to enforce a real estate covenant in equity. To put it simply, he is seeking an injunction. To enforce a covenant in equity: (1) the covenant must "touch and concern" the land; (2) the parties must intend that the covenant run with the land; and (3) the party against whom enforcement is sought must have notice of the covenant.[1] *Tulk v. Moxhay,* 41 Eng. Rep. 1143 (1848).

A covenant is said to "touch and concern" the land if it affects the parties' legal interests in their capacity as owners of the land and not merely as members of the community in general. *Neponsit Property Owners' Association, Inc. v. Emigrant Industrial Savings Bank*, 15 N.E.2d 793, (N.Y., 1938). Covenants which restrict the use of the land are generally held to satisfy "touch and concern" requirements. Covenants banning the sale and consumption of liquor have uniformly been held to "touch and concern" the land although they have sometimes failed other standards for enforcement. *E.g., Baker v. Seneca*, 329 Mass. 736, 739; 110 N.E.2d 325, 327 (1953); *Sorrentino v. Cunningham,* 111 Ind. App. 212, 39 N.E.2d 473 (1942); *Leach v. Larkin*, 1993 Tenn. App. LEXIS 631, 14.

The requirement that the parties intend a covenant to run also presents little opportunity for a defense on the facts of the problem. Owner and Developer specifically agreed that Developer's "successors and assigns" would be bound by the covenant. They thus made their intention manifest.

The final requirement of notice, however, may present some grounds for a defense. Sally's Saloon had no actual notice of the restrictions against liquor. The "Memorandum of Lease" did not mention the restrictions. Sally's Saloon therefore had no record notice of the prohibitions. The key issue is whether the Memorandum's reference to the ground lease put Sally's Saloon on inquiry notice.

Many jurisdictions have held that a title examiner must inquire as to the contents of unrecorded instruments if they have been referred to in a recorded document. *Harper v. Paradise*, 233 Ga. 194, 210 S.E.2d 710 (1974). Other jurisdictions, however, have tried to limit the extent to which an examiner must look into unrecorded material in order to reduce the costs of title examination. *See*, COLO. REV. STAT. § 38-35-108 (1997). Not surprisingly, courts have split on whether a recorded memorandum of lease imparts constructive notice of the full, unrecorded lease. *Compare, Howard D. Johnson v. Parkside Development Corp.*, 169 Ind. App. 379, 348 N.E.2d 656 (1976)(the recorded memorandum does not impart notice of the provisions of the full lease) *with Mister Donut of America, Inc. v. Kemp*, 368 Mass. 220, 330 N.E.2d 810 (1975)(the memorandum does give constructive notice).

If conditions have changed since a restrictive covenant was put in place, a court of equity may refuse to enforce the restriction. The law focuses on whether the covenant still serves its purpose within the confines of the restricted land. Changes outside the restricted land ordinarily

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[1] When a covenant is enforced in equity it is frequently labeled an "equitable servitude." Black's Law Dictionary, 539 (6th ed. 1990)

do not justify a refusal to enforce the covenant if parcels covered by the restriction still substantially benefit from it. *Western Land Company v. Truskolaski*, 88 Nev. 200, 495 P.2d 624 (1972); *Baker v. Seneca*, 329 Mass. 736, 739; 110 N.E.2d 325, 327 (1953).

Conditions have clearly changed around the tract of land subject to the ground lease; the city has grown around the site and a number of nightclubs are located just outside the tract (these presumably serve liquor). Thus, the facts of the problem do present an opportunity to raise the changed conditions defense. However, the restricted land was primarily developed for residential use. The residents of the townhouses and apartments built by Developer may still benefit from the restriction on liquor sales. Changes outside the restricted land, like the nightclubs, may be disregarded by the court if the restriction still serves the residents of the development.

A court of equity will not enforce a servitude if the plaintiff has unreasonably delayed in bringing suit to the detriment of the defendant. A plaintiff who knows or should know of a right to bring a claim must not unreasonably delay in bringing suit. If such a delay prejudices the defendant, a court of equity will apply the doctrine of laches and bar the claim to the extent necessary to prevent injustice. 1 DOBBS, LAW OF REMEDIES § 2.4(4) (2d ed. 1993).

The defendant in the injunction action, Sally's Saloon, engaged in a lengthy and expensive remodeling project to make the store suitable for a saloon. During the period of the remodeling, Sally's Saloon repeatedly ran ads announcing its intention to operate a bar on the property. Under these circumstances a court could find that laches barred Owner's claim. A court could hold the newspaper ads and posted notice were sufficient to give Owner notice of the breach of lease. Sally's expenditures during the course of the remodeling might have been avoided had Owner brought suit earlier, and Owner's delay might be seen to have been unreasonable. Nevertheless, if the Owner is found to have brought suit promptly, laches will not bar the suit even if the defendant is prejudiced.

In answering the question, an examinee may rely on concepts related to laches like estoppel, acquiescence, or waiver. Courts do not always distinguish these doctrines. Waiver is an intentional relinquishment of a known right. Acquiescence is waiver implied by non-action. The defense of estoppel is appropriate whenever the defendant has detrimentally relied on words of conduct by the plaintiff. There are only subtle differences between these doctrines. The courts often apply them with laches without differentiation. *See*, 1 DOBBS, LAW OF REMEDIES § 2.3(5) (2d ed. 1993). Waiver does not appear to fit the facts of the problem. An examinee could, however, address Owner's delay in bringing suit in terms of acquiescence or estoppel.

DISCUSSION FOR QUESTION 5

Dan committed the crime of solicitation to commit murder by offering Steve money to kill Vince. A person commits solicitation by inducing another to commit a felony with the specific intent that the other person commit the crime and under circumstances strongly corroborative of that intent. People v. Washington, 865 P.2d 145, 148 (Colo. 1994). W.LaFave, Substantive Criminal Law, §11.1. The offense is complete at the time the solicitation is made. People v. Hood, 878 P.2d 89, 95 (Colo. App. 1994).

Dan committed the crime of conspiracy when Steve agreed to commit the murder and bought the knife. A person commits conspiracy if he or she is a party to an agreement between two or more persons to commit a crime and one of the participants commits an overt act, such as preparation, in furtherance of the conspiracy. People v. Hood, supra, 878 P.2d at 92; LaFave, §12.1

Dan committed the crime of murder when Steve killed Vince with malice aforethought. By his actions, Dan not only agreed with Steve that Steve would kill Vince, but he also induced and encouraged the killing. Dan would therefore be responsible as an accomplice to the murder. LaFave, §13.2(c).

Dan committed the crime of robbery when he took the antique knife from Steve by threatening him with a weapon. A person commits robbery by taking personal property from the person or presence of another by force or by intimidation. People v. Borghesi, 40 P.3d 15, 21 (Colo. App. 2001).

Dan committed felony murder when Steve was shot during the robbery and died. A person commits felony murder if an accidental killing occurs during the commission of a dangerous felony, such as armed robbery, and the killing is a foreseeable result. State v. Amado, 254 Conn. 184, 201, 756 A.2d 274, 284 (Conn. 2000).

DISCUSSION FOR QUESTION 6

This question deals with the issue of shareholder derivative actions. Shareholder derivative actions are those lawsuits brought by a shareholder of a corporation to obtain relief for alleged wrongs committed against the corporation. Brooks v. Land Drilling Co., 564 F. Supp. 1518 (D.C. Colo. 1983). They are often described as representative actions, since the shareholders are enforcing the rights of another, *i.e.*, the corporation. Such actions are to be used only where it is clear that a corporation will not act to redress an injury to itself -- in other words, in those situations where it is evident that the facts and circumstances are such that a corporation will not take action to remedy a particular situation that is injurious to the corporation. Id.

The basic premise for the action here is that the corporation, by the authority of its Board of Directors has lent money to an individual who is both an officer and a director of the corporation, and this resulted in corporate mismanagement of funds, affecting the value of the stock of the corporation. This type of issue would be proper for a shareholder derivative action, since, generally, a shareholder cannot maintain an individual action against the directors (or other third parties) whose actions caused some type of harm to the corporation, because the harm done in actuality has been done to the corporation and not to the individual. Nicholson v. Ash, 800 P.2d 1352 (Colo. App. 1990). A shareholder may maintain a personal action against a corporation only if the type of injury complained of is unique to that individual shareholder. See id. In this instance, since that does not appear to be the case from the facts presented, the claim is beneficially owned by the corporation itself, and the purpose of any action would be to redress the wrong done to the corporation and not to the individual. See Greenfield v. Hamilton Oil Corp., 760 P.2d 664 (Colo. App. 1988).

Section 7.42 of the Revised Model Business Corporation Act ("RMBCA") requires that to commence or maintain a derivative proceeding, a shareholder must have been a shareholder of the corporation at the time of the act or omission complained of, or have become a shareholder through transfer by operation of law from one who was a shareholder at that time. Since the fact statement here discusses a relatively recent action by the Board of Directors, and since it also reveals that Peter owned the shares during the past year, we can assume that this threshold requirement of the law is met.

Beyond this threshold inquiry, the RMBCA, and general principles of corporation law as well, require that certain preliminary steps be taken by any potential plaintiff prior to filing suit in a shareholder derivative action. First, the shareholder must make a written demand on the corporation to take suitable action. A derivative proceeding may not be commenced until 90 days after the date of the demand, unless: the shareholder has been earlier notified that the corporation has rejected the demand; or irreparable injury to the corporation would occur by waiting 90 days. RMBCA § 7.42. While previous law excused a demand if it would be futile, such as where the board would be unlikely to approve an action accusing the board of self-dealing, it has been argued this exception does not apply under the RMBCA. There are two arguments advanced: the RMBCA does not provide for the exception, and, even though it may seem futile, the demand gives the corporation the opportunity to resolve the issue without litigation.

In a derivative action, the corporation must be named as a party defendant, because the failure of the corporation to assert its own claim justifies making it a defendant. If a majority of the directors, at least two, who have no personal interest in the suit find in good faith after reasonable inquiry that the suit is not in the corporation's best interests, the suit may be dismissed on the corporation's motion. RMBCA § 7.44. The shareholder has the burden of proof to prove the decision was not made in good faith. If a majority of directors had a personal interest, however, the burden would shift to the corporation. A derivative suit may be discontinued or settled only with court approval.

DISCUSSION FOR QUESTION 7

A contract for the sale of air conditioners is a contract for the sale of goods and thus the provisions of Article 2 of the UCC will apply. A contract for the sale of goods can be made in any manner sufficient to show agreement. A manifestation of willingness to enter into a bargain, however, is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent. Restatement (Second) of Contracts §26. A price quotation is usually a statement of intention to sell at a given price. Id., comment c; *Calamari & Perillo On Contracts*, 5th Ed. (2003) at 43. Absent other circumstances, even if the word "quote" is used in a letter addressed to only one person, it is commonly understood to mean that an offer is invited. *Interstate Indus. v. Barclay Indus.*, 540 Fd2d 868 (7th Cir. 1976). In the present case, Subzero's response merely stated its price for 1000 air conditioners. It did not use the words "we offer" or "we will sell" which would have manifested a present intent to sell. Therefore, the letter constituted preliminary negotiations and was not an offer.

Big's purchase order is an offer to purchase 1000 air conditioners at $175 each and proposes an express warranty and arbitration. It manifested the required present intent to enter into a contract and is sufficiently definite. (2-204, 2-208).

Subzero's acknowledgment is not an acceptance of Big's offer, but a counter offer. Section 2-207(1) provides that a definite and seasonable expression of acceptance, or a written confirmation which is sent within a reasonable time operates as an acceptance, even though it states terms additional to or different from those offered or agreed upon, unless acceptance is EXPRESSLY MADE CONDITIONAL on assent to the additional or different terms. Subzero's acknowledgment did contain a statement that it was expressly conditioned on assent to it terms, including the warranty disclaimer. Such an expressly conditional acceptance would not result in the formation of a contract. White and Sommers, Uniform Commercial Code, at 33.

Between merchants additional terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received. In this case both parties are merchants under the UCC. UCC section 2-207 (2) expressly notes that even between two merchants additional terms will not become part of the contract if the offer expressly limits acceptance to the terms of the offer once a commercial undertaking has in fact been closed.

Under section 2-207(3), conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract although the writings of the parties do not otherwise establish a contract. Here, however, the writings of the parties do not establish a contract. Big made an offer to Subzero, and Subzero replied with a counter offer (expressly conditional acceptance). The contract between Big and Subzero was not formed until both parties perform, Subzero shipping the air conditioners and Big accepting and paying for them.

In the case where conduct by both parties creates the existence of a contract, the terms of the contract would be those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any provisions of the UCC. 2-207(3). There would be

no arbitration of the claims since only Big's offer (purchase order) contained this provision. Likewise there would be no express warranty that the air conditioners were fit for their ordinary purposes. Subzero's warranty disclaimer would also not be included since it only appeared in its acknowledgement. Since the seller is a merchant, there would be an implied warranty of merchantability under UCC 2-314, which among other things, requires that goods are fit for the ordinary purposes for which such goods are used. UCC 2-314(c).

Where the buyer has accepted goods as Big has done in this case, it can recover damages "for any non-conformity of tender the loss resulting in the ordinary course of events from seller's breach." UCC 2-714(1). In this case, Big can bring suit for breach of warranty for the defective air conditioners. The measure of Big's damages will be the "difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted." UCC 2-714(2). Big should also be able to recover any incidental damages such as expenses incurred in the return of the air conditioners and also consequential damages. UCC 2-715(1). Incidental damages could include (i) expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected; (ii) any commercially reasonable charges, expenses or commissions in connection with effecting cover; and (iii) any other reasonable expenses incident to the breach. Cover is defined in UCC 2-712(1) as the reasonable purchase of or contract to purchase goods in substitution for those due from the seller if made in good faith and without unreasonable delay. Big could also seek consequential damages for any loss of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover.

DISCUSSION FOR QUESTION 8

For the plaintiff to have a good *prima facie* false imprisonment claim, she must show three elements: (1) An act or omission on the part of the defendant that confines or restrains the plaintiff to a bounded area; (2) Intent on the part of the defendant to confine the plaintiff to a bounded area; and (3) Causation. There is no requirement that the plaintiff show damages.

Did Defendant Confine or Restrain Apprentice?

Confinement legally means approximately what it does in ordinary speech: restriction to a relatively discrete area, bounded on all sides, of the defendant's choosing. *Bird v. Jones*, 7 Ad. & El. 742, 115 Eng. Rep. 668 (1845). Confinement or restraint can be shown by any of the following: physical barriers, physical force, direct threats of force, indirect threats of force, failure to provide means of escape and invalid use of legal authority. Plaintiff must be forced to choose between injury to herself or her property and her freedom of motion. Moral pressure or threats of future action are not sufficient.

In this case, Apprentice may argue that Defendant's conduct was threatening and that she felt forced to remain in her office. However, there are no facts indicating that Defendant threatened to physically harm either Apprentice or her property. Defendant's threat was that of terminating Apprentice's employment. This threat of future action is insufficient to establish this element of the prima facie case.

Intent and Causation to Confine Apprentice.

There are two alternative legal definitions of the requisite intent in false imprisonment: 1) the plaintiff must show that it was the defendant's purpose to cause the plaintiff's confinement, or 2) plaintiff must show that the defendant knew that the plaintiff's confinement was substantially certain to result from the defendant's conduct. RESTATEMENT (SECOND) OF TORTS §§ 8A, 35 (1965).

In this case, Defendant explicitly told Apprentice that she was to remain in her office, so it could be argued that Defendant had the purpose to confine Apprentice for at least a limited amount of time. Apprentice also could argue that Defendant had the intent to confine her to the office as he knowingly left her there. Thus, Apprentice would have a good argument that sufficient causation exists.

Conclusion

While Apprentice might be able to establish intent and causation, she can't establish that she was actually confined or restrained. Apprentice was not 'bound' in her office, the door was not locked. Plaintiff's fear of termination was insufficient to establish confinement, nor was the fact that her belongings were locked in the meeting room. A reasonable person in Apprentice's position would not have felt as though she or her possessions were at risk of injury if she ignored Defendant's instructions to remain in her office. Further, a reasonable person in Apprentice's

position would have called a taxi or found another means of getting home and would not have felt forced to remain in the office overnight. Apprentice does not have a valid claim for false imprisonment against Defendant.

DISCUSSION FOR QUESTION 9

There are several issues to consider in this scenario: 1) whether the form of the will is valid as a holographic will; 2) whether the bequest to Spot and thereafter to the Animal Rescue Society is valid; 3) whether Willie's stated desire to disinherit his estranged spouse and children will be allowed; and 4) whether MaryAnn, Rose or Rob may make claims against Willie's estate under the UPC or Colorado law regardless of whether the will is upheld as valid.

Whether the will is valid as a holographic will.

The 1996 handwritten will signed by Willie constitutes a valid holographic will. UPC § 2-502(b) provides: "A will . . . is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting." The will was written entirely in Willie's handwriting and was signed by Willie. Accordingly, the will was a valid holographic will when executed.

Whether the bequest to Spot and the Animal Rescue Society is valid.

A way in which the will might be invalidated, because it leaves all of Willie's estate to a dog, would be if it was held to be capricious or against public policy. The courts, however, try to honor the intentions of the decedent as much as possible. The modern American rule is that such a trust to take care of the dog is valid because it can be performed indirectly by a trustee. So as long as the trustee agrees to perform the purpose of the trust, then the trust will be upheld. See Shaffer, Mooney and Boettcher, The Planning and Drafting of Wills and Trusts (4th ed. 1991, Foundation Press). Another avenue might be to try to have the will declared invalid because, by leaving all of his estate to his dog and thereafter the Animal Rescue Society, Willie may be found to have lacked testamentary capacity. (If either approach is successful, Willie's will would be invalidated and it would be as if he died intestate. MaryAnn, Rose, and Rob then would be able to take a share of Willie's estate under intestacy rules. UPC Section 2-102.)

Whether Willie's stated desire to disinherit his estranged spouse and children will be allowed.

The will was executed in 1996, while Willie and MaryAnn were still married. However, Willie explicitly sought to omit MaryAnn from his will. Although the Uniform Probate Code ("UPC) refers to omitted spouses in Section 2-301, these references only apply to marriage that occurs after the execution of a will, which was not the case here. Under the UPC and Colorado law, a testator may dispose of property in any way he wishes.

Willie can also "write out" his children from his will. The UPC only addresses pretermitted children within the context of children born or adopted after the execution of the will. See UPC Section 2-302. Here, there are no afterborn children, and so the pretermitted heirs language of the UPC would not apply. Moreover, the omission of Rose and Rob from the will is clearly intentional, so if the will is upheld, they would be foreclosed from any share in the estate.

Whether MaryAnn, Rose or Rob may make claims against Willie's estate.

A surviving spouse has the right to elect against the will under the UPC. Under these provisions, a surviving spouse can take possession of up to one-half of a testator's augmented estate. UPC Section 2-201(a) (amount of surviving spouse's election relates to the number of years of the marriage). Despite the fact of separation between Willie and MaryAnn, MaryAnn still qualifies as a surviving spouse under the UPC. Separation, even a formal decree of separation, "which does not terminate the status of husband and wife is not a divorce." UPC Section 2-802(a). Only divorce or annulment voids the relationship of surviving spouse under the UPC. Id. Thus, MaryAnn has the option to follow the statutory provisions to make this election and to receive at least a portion of Willie's estate. However, when MaryAnn dies, the unexpended amounts of her share of Willie's estate as a surviving spouse will most likely pass according to the residuary clause of Willie's will, or to the trust set up to care for Spot the dog and thereafter the Animal Rescue Society. See C.R.S. Section 15-11-206.

Another source from Willie's estate for MaryAnn, Rose, and Rob could be the homestead allowance, referenced in UPC Section 2-401, and the family allowance, referenced in UPC Section 2-403. The homestead allowance would go to MaryAnn. Id. at Section 2-401. The family allowance would apply if Rose and Rob were still minors, and would continue during the period of administration of the estate, but not for more than one year. Id. at Section 2-403.

COLORADO SUPREME COURT
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ESSAY Q1

SEAT

ISSUE		POINTS AWARDED
1.	First option is motion to compel answers.	1. o
2.	Second option is to move for sanctions.	2. o
3.	Sanctions may include the striking of defenses.	3. o
4.	Sanctions may include the entry of judgment.	4. o
5.	Plaintiff may be able to obtain reasonable expenses (including attorney fees) incurred in filing either motion.	5. o
6.	Each motion must be accompanied by a certificate that they met and conferred.	6. o
7.	On either kind of motion, reasonable expenses are unavailable if Defendant's failure was substantially justified or if other circumstances make such an award unjust.	7. o
8.	Defendant was obligated to make timely objections.	8. o
9.	Defendant was obligated to provide a privilege log.	9. o
10.	Defendant may file for a protective order.	10. o
11.	Defendant's failure to meet any or all of the above three (nos. 8-10) may trigger a waiver of those rights.	11. o
12.	Still the court is vested with the sound discretion to rule as it deems just.	12. o

COLORADO SUPREME COURT
Board of Law Examiners

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ESSAY Q2

SEAT

ISSUE		POINTS AWARDED
	Acme's Relationship with Interstate	
1.	Principal liable for torts committed by agent.	1. ○
2.	Agency is a consensual relationship which arises when one person manifests an intent that another shall act on his behalf.	2. ○
3.	An agency relationship may be created by express agreement or by conduct of the parties.	3. ○
4.	The actions of posting the information on the web site and the acceptance by IC creates an agency relationship between IC and AMC.	4. ○
5.	The scope of the agency is determined by:	
	5a. Actual authority	5a. ○
	5b. Implied apparent authority	5b. ○
	5c. Ratification	5c. ○
6.	IC had actual authority to move the furniture but not to receive payment.	6. ○
7.	IC had implied authority to receive the payment.	7. ○
8.	AMC may not collect a second time from Customer.	8. ○
9.	Interstate may be independent contractor.	9. ○
10.	The single overriding factor in determining if an independent contractor relationship exists is the right to control.	10. ○
	Ed's Relationship with Interstate	
11.	Ed was subject to the supervision of IC and therefore Ed is an employee of IC.	11. ○
12.	An employer is liable for the actions of its employees under the *respondeat superior* doctrine if the action occurred within the course and scope of the employment.	12. ○
13.	Respondeat superior applies only if the act is within the course and scope of employment. Three tests are used to determine course of employment:	13. ○
	13a. Was the conduct of the same general nature as, or incident to the employee's job.	13a. ○
	13b. Was the conduct substantially removed from the authorized time and space limits of the employment.	13b. ○
	13c. Was the conduct actuated at least in part by a purpose to serve the employer.	13c. ○
14.	Ed received the payment within the course and scope of his employment.	14. ○
15.	IC is liable to AMC for payment.	15. ○

COLORADO SUPREME COURT
Board of Law Examiners

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ESSAY Q3

SEAT

ISSUE		POINTS AWARDED
1.	Dean's letter of May 1 was an offer.	1. ○
2.	Kline's May 3 call was not a counter-offer/or was mere negotiation.	2. ○
3.	Kline's first letter was a rejection.	3. ○
4.	Kline's second letter was an acceptance.	4. ○
5.	Recognition of rule that when a rejection is followed by an acceptance, first to be received is effective.	5. ○
6.	Receipt of letter by Dean's personal secretary constituted receipt by Dean.	6. ○
7.	Contract was formed (either by mailbox rule or based on rule in #5).	7. ○
8.	The contract fell within the Statute of Frauds.	8. ○
9.	The Statute of Frauds was satisfied (signed writing).	9. ○
10.	Giant's employment contract with Dean is not specifically enforceable.	10. ○

COLORADO SUPREME COURT
Board of Law Examiners

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ESSAY Q4

SEAT

ISSUE		POINTS AWARDED
1.	An equitable servitude/covenant in a ground lease is enforceable against an assignee of the original tenant if:	1. o
	1a. The original parties to the ground lease intend that it run;	1a. o
	1b. The covenant touches and concerns the land; and	1b. o
	1c. The assignee has notice of the restriction.	1c. o
2.	A recital in a recorded Memorandum of Lease referring to a full ground lease may put an assignee on inquiry notice of the provisions of the ground lease.	2. o
3.	There is no constructive (record) notice because the Memorandum did not mention the restriction.	3. o
4.	There was no actual notice because Sally was not told or otherwise informed of the restriction.	4. o
5.	A Court will not enforce an equitable servitude if conditions have so changed within the burdened land that the restriction can no longer achieve its original purpose.	5. o
6.	A Plaintiff who knew, or should know, of a right to bring a claim must not unreasonably delay in bringing suit (laches).	6. o
7.	Plaintiff's delay may have prejudiced Defendant, given he has expended substantial sums during the delay (estoppel/waiver).	7. o
8.	Sally may have a claim against the Developer for indemnification against the Developer; there was no privity of contract between Sally and Owner.	8. o

COLORADO SUPREME COURT
Board of Law Examiners

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ESSAY Q5

SEAT

ISSUE		POINTS AWARDED
1.	Recognition of Solicitation.	1. o
2.	Elements of Solicitation: (1) inducing another to commit a felony (2) with specific intent that the other person commit the crime.	2. o
3.	Recognition of Conspiracy.	3. o
4.	Elements of Conspiracy: (1) agreement between two or more parties; (2) intent to enter into an agreement; (3) intent to achieve the objective of the agreement.	4. o
5.	Purchase of the knife is evidence of an overt act, or the intent to achieve the objective of the agreement.	5. o
6.	Recognition of Murder (of Vince).	6. o
7.	Elements of Murder: (1) killing of another human (2) with malice aforethought.	7. o
8.	Definition of Malice Aforethought: (1) intent to kill, (2) intent to inflict great bodily injury, (3) reckless indifference to human life, or (4) intent to commit a felony.	8. o
9.	Recognition of Robbery.	9. o
10.	Elements of Robbery: (1) taking of personal property of another (2) from his person or presence (3) by force or intimidation (4) with intent to permanently deprive.	10. o
11.	Recognition of (Felony) Murder (of Steve).	11. o

COLORADO SUPREME COURT
Board of Law Examiners

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ESSAY Q6

SEAT

ISSUE		POINTS AWARDED
1.	A shareholder seeking redress for a wrong done to the corporation, may sue only by means of a shareholder derivative suit.	1. o
2.	Generally, a shareholder cannot bring an individual suit against a corporation for harm done to the corporation.	2. o
2a.	A shareholder can bring a direct action for a harm unique to that shareholder.	2a. o
3.	A shareholder must have been a shareholder (through legal or beneficial title to stock) of the corporation at the time of the act or omission complained of, or have become a shareholder through operation of law from one who was a shareholder at that time.	3. o
4.	A shareholder must make a demand upon the Board of Directors of the Corporation to take suitable action prior to filing suit.	4. o
5.	A derivative proceeding may not be commenced until 90 days after the demand unless:	5. o
5a.	the shareholder has been notified that the corporation rejected the demand, or	5a. o
5b.	it would cause irreparable harm to the corporation to wait.	5b. o
6.	Arguably a demand may be excused if it would be futile, but:	6. o
6a.	the RMBCA does not explicitly provide this exception;	6a. o
6b.	though futile, a demand gives the corporation the opportunity to resolve the issues without litigation.	6b. o
7.	The corporation must be named as a party defendant.	7. o
7a.	The failure of the corporation to assert its own claim justifies making it a defendant.	7a. o
8.	The suit may be dismissed if at least two directors determine in good faith after reasonable inquiry that the suit is not in the corporation's best interests.	8. o
9.	A derivative suit may be settled or dismissed only with court approval.	9. o

COLORADO SUPREME COURT
Board of Law Examiners

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ESSAY Q7

SEAT

ISSUE		POINTS AWARDED
1.	The contract for the sale of air conditioners is a contract for the sale of goods and is governed by Article 2 of the UCC.	1. o
2.	Subzero and Big are both merchants under the UCC.	2. o
3.	Subzero's first letter to Big was not an offer to sell; it merely was an invitation to make an offer.	3. o
4.	Big's purchase order was an offer (sufficiently definite).	4. o
5.	Subzero's acknowledgement was NOT an acceptance but a counter offer.	5. o
6.	Between merchants, additional terms become part of the contract unless:	
6a.	offer expressly limits acceptance to the terms of the offer;	6a. o
6b.	they materially alter it;	6b. o
6c.	notification of objection to them has already been given or is given within a reasonable time after notice of them is received.	6c. o
7.	Even though this is a sale between two merchants, no additional terms would be included in the contract since Subzero expressly limits acceptance. UCC 2-207	7. o
8.	Even though the writings of the parties did not establish a contract, a contract was formed by the conduct of the parties. UCC 2-207(3).	8. o
9.	The terms of the contract are those upon which the writings of the parties agree plus those supplied by the UCC. UCC 2-207(3).	9. o
10.	The writings do not agree on arbitration or express warranty, thus:	
10a.	No arbitration provisions in the contract;	10a. o
10b.	No express warranty in the contract.	10b. o
11.	The Uniform Commercial Code supplies an implied warranty of merchantability. UCC 2-314.	11. o
12.	Big's remedy is actual damages equal to the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had as warranted. UCC 2-714	12. o
13.	Big may also be entitled to recover incidental damages which could include expenses reasonably incurred in inspection, transportation and care of the rejected goods, cover and any other incidental expenses reasonably incurred from the breach.	13. o
14.	Big could seek consequential damages if at the time of contracting the seller had reason to know of such loss and Big could not reasonably prevent such loss by cover. UCC 2-715(2).	14. o
15.	Cover is defined as the reasonable purchase of substitute goods.	15. o

COLORADO SUPREME COURT
Board of Law Examiners

FEBRUARY 2005 BAR EXAM
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ESSAY Q8

SEAT

ISSUE		POINTS AWARDED
1.	Elements of prima facie case: Act or omission to act that confines or restrains person to a bounded area; intent to confine; and causation. (identify all)	1. o
2.	Confinement/restraint shown by: physical barriers or force; or by failure to provide means of escape.	2. o
3.	Moral pressure and future threats not enough.	3. o
4.	Person must be forced to choose between injury to her person or property, and her freedom of motion.	4. o
5.	Apprentice could reasonably have found Defendant's behavior threatening, however, there were no actual threats of physical violence, only of possible termination, a future action which is not enough to establish this element.	5. o
6.	Apprentice's belongings were left in the conference room, but there is no indication that, if she left her office, Defendant would destroy or harm them.	6. o
7.	A 'bounded area' is a place where freedom of movement in all directions is limited.	7. o
8.	No facts indicating that the door was locked preventing her from leaving, not a bounded area.	8. o
9.	Intent: must show either that it was Defendant's purpose to cause her confinement, or must show that Defendant knew that her confinement was substantially certain to result from his conduct.	9. o
10.	Causation: confinement must have been legally caused by Defendant's action or inaction.	10. o
11.	Defendant intended Apprentice to remain in her office as shown by his order to go to her office and/or by failing to call her later that evening.	11. o
12.	No requirement of damages.	12. o
13.	Apprentice is not likely to succeed in a claim against defendant for false imprisonment.	13. o

COLORADO SUPREME COURT
Board of Law Examiners

FEBRUARY 2005 BAR EXAM
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ESSAY Q9

SEAT

ISSUE		POINTS AWARDED
1.	In order to be valid as a holographic will, the document must (a) be in the testator's handwriting and (b) signed by the testator.	1. o
2.	Willie's 1996 secret will likely will be considered to be a valid holographic will because it meets these requirements.	2. o
3.	MaryAnn could argue that the will is invalid due to lack of testamentary capacity/mental capacity.	3. o
4.	Devise to dog Spot and Animal Rescue Society will likely be upheld as courts try to honor intentions of testator.	4. o
5.	Only divorce (not a legal separation) has the effect of nullifying a spouse's rights.	5. o
6.	MaryAnn is the surviving spouse because she and Willie were still married at the time of his death.	6. o
7.	MaryAnn can take an elective share of Willie's augmented estate despite his attempt to disinherit her in his will.	7. o
8.	MaryAnn's elective share will be a percentage of Willie's augmented estate calculated according to the length of the marriage.	8. o
9.	If the will is upheld, and if MaryAnn takes her elective share, the remainder of the estate shall pass to Spot the dog with the Animal Rescue Society as Trustee and ultimate beneficiary.	9. o
10.	If the will is invalidated, MaryAnn will take an intestate share as the surviving spouse.	10. o
11.	MaryAnn may also claim a homestead allowance and/or family allowance.	11. o
12.	Willie can disinherit his children Rose and Rob so long as it is intentional.	12. o
13.	The only way Rose and Rob may have a claim to Willie's estate is if the will is invalidated and they take an intestate share as heirs.	13. o
14.	Rose and Rob may be able to claim a family allowance while the estate is probated if they were minors at the time of Willie's death.	14. o