

QUESTION 1

Wife and Husband have been married for five years and have lived in Colorado at all relevant times. They have one child, born two years ago. Recently, Wife discovered that Husband was having an affair. When she confronted him, he said that he intended to continue the affair. Wife then told Husband to leave the house, which he immediately did.

Although Husband has not been violent, nor has he made any threats, Wife is concerned that if she files for divorce, Husband may come back to the house and be upset with her. She does not think he will harm her physically, but she thinks he might yell at her, insult her, or otherwise verbally harass her.

Husband's family lives in Kansas, as does his mistress. Wife believes there is a good possibility that Husband will return to Kansas if they get divorced.

QUESTIONS:

1. What may Wife claim as grounds for divorce?
2. Does the law do anything to prevent Husband from harassing Wife pending the divorce?
3. What protections exist to keep Husband from taking the child with him if he decides to move back to Kansas after the divorce?
4. How long must Wife wait after she files for divorce before a court dissolves the marriage?
5. What do the terms "parenting time" and "parental responsibility" mean, and what is the standard the court will apply and the factors it will consider when deciding how to allocate them?
6. What effect, if any, will Husband's infidelity have upon the court's award of parenting time and parental responsibility?

Assume Colorado law controls.

QUESTION 2

John and his wife Susan were married in 1981, and divorced in 1991. They had two children, Mary and Mike, during the course of their ten year marriage.

In 1995, John married Jane who had a daughter from a prior marriage named Amy. That same year, John met with his attorney and prepared a will by which he gave one-half of his estate to his second wife, Jane, and one-half of his estate to his children from his first marriage, Mary and Mike. At the direction of his attorney, John executed two duplicate originals of his will. He kept one with his important papers, the other he gave to his ex-wife Susan.

In 1998, John decided to make some changes to his will. He, however, did not want to pay the cost of having a lawyer make the changes, so he went to the public library and read a few self-help legal books on will drafting. When he was ready to draft his new will, his computer was "on the blink," and so he wrote it out in longhand.

In the new will, John expressly revoked the 1995 will and left the entire balance of his estate to Jane, except for his 1990 Buick which he left to Amy. He also specifically stated that he was not leaving any of his estate to his two children, Mary and Mike, "because they have rejected me." John signed and dated the handwritten will and then carefully destroyed his original of the 1995 will, forgetting that he had given a duplicate original to his ex-wife Susan.

In January of 2000, John sold the 1990 Buick for \$5,000 and replaced it with a BMW for which he paid \$40,000 in cash. John died in November of 2000. At the time of his death John had the following assets: 1) the BMW, 2) a home owned with Jane in joint tenancy with right of survivorship, 3) a brokerage account valued at \$20,000 payable on death to his children Mary and Mike, 4) a \$25,000 life insurance policy with his ex-wife Susan named as the beneficiary, 5) a valuable Rolex watch, and 6) a bank account containing \$100,000 held in his name alone.

When John died, Jane attempted to probate the 1998 handwritten will. Susan produced the duplicate original of the 1995 will and challenged the 1998 handwritten will as invalid.

QUESTION:

Discuss the validity of the wills, and how all items of John's property will be distributed. Assume that the Uniform Probate Code is in effect.

QUESTION 3

Thelma and Louise live together in a trailer in Paradise Acres. Louise hatched a plan to steal Thelma's diamond jewelry to sell to buy drugs. To keep Thelma from blaming her, Louise asked her friend Slim to break into the trailer on Friday night while Thelma was at work. He was to break into the trailer, ransack the bedroom, particularly Thelma's dresser where the jewelry was kept, and then leave taking nothing. Louise planned to come home shortly thereafter, steal the jewelry herself, and report the "crime" to the police. Louise promised Slim \$100 for his part in the plot.

On Friday night, Thelma returned home early from work because she felt sick. At the appointed hour, Slim entered the trailer by picking the lock on the front door, not realizing that Thelma was asleep in the bedroom. As Slim began to ransack the bedroom, Thelma awakened and reached for the loaded pistol that she kept on the night stand. Slim immediately ran from the bedroom and out of the trailer. Thelma leapt out of bed, ran to the open front door, and fired at Slim. Slim was critically wounded, but lived long enough to relate the facts of the plot to the police.

QUESTION:

Discuss the criminal charges that may be brought against Thelma, Louise, and Slim (had he lived), and any possible defenses to such charges.

QUESTION 4

For several years, Arcane has sold goods to Billy Bob on thirty day credit terms. Recently, however, Arcane heard that Billy Bob was not paying suppliers and was about to go out of business. Arcane called Billy Bob to ask about the rumor and to seek payment for goods which Arcane had delivered to Billy Bob over thirty days ago. Billy Bob told Arcane not to worry, his business was good, so good, in fact, that he wanted to place a substantial new order. Arcane took the order, but only on the condition that Billy Bob pay C.O.D. for the new order, and at the same time pay all Arcane's outstanding invoices. Arcane also asked Billy Bob to send him a letter stating that he was not going out of business. Billy Bob agreed to the terms set out by Arcane.

The new order was scheduled to be delivered in two shipments. When the first shipment was delivered, the delivery service neglected to get the C.O.D. payment. Five days later, but before the second shipment was delivered to Billy Bob, Arcane discovered that Billy Bob filed bankruptcy after he received the first shipment of goods. Billy Bob never sent the confirmation letter indicating his intent to stay in business.

QUESTION:

What rights and remedies are available to Arcane to recover the goods from Billy Bob, and what steps, if any, should be taken to preserve those rights and remedies?

QUESTION 5

Mary is employed by Copy-O's, an all-night photo-copying store which has several outlets in her city. Mary works long hours, including late night shifts. Last January, at about 3 a.m., while Mary was working, two men wearing ski masks and carrying guns burst through the front door of Copy-O's. They ran through the store cursing, screaming threats, and brandishing their guns. Mary, overwrought and near the end of her shift, started sobbing loudly. As a result, one of the men shook his gun at her and motioned for her to sit in a chair, whereupon he ordered her to "stay there and shut up." After the other employees were locked up in a small room, Mary, with a gun pointed at her, was escorted by the arm to the back room where the safe was kept and forced to open it.

After the two men departed, the head of Copy-O's security force, who was known to the employees, came into the store and explained to the stunned staff that the entire "robbery" was staged by Copy-O's security force. The staged robbery was done in response to robberies which had occurred at other Copy-O locations, and was an effort to teach employees how to properly react in these situations.

Mary now hates her job and claims to have recurring nightmares about the incident which disrupt her sleep.

QUESTION:

Discuss the potential causes of action in tort Mary might have against her employer. Do not discuss damages or defenses.

QUESTION 6

On December 1, 2000, Dan Defendant was walking around the Barex train station asking people for money. When he approached Vic Tem and asked him for money, Vic Tem summoned a nearby police officer. The officer arrested Defendant and charged him with panhandling in Capital City. The Capital City panhandling statute provides: "No person shall knowingly ask for money without a license."

At Defendant's trial, Vic Tem testified about his encounter with Defendant at the train station. He testified that Defendant asked: "Will you give me money so I can eat?" Defendant's attorney objected.

The City then called Ms. Keeper to testify about panhandling licenses. The parties stipulated that Keeper worked in, and was responsible for, the city records office, and that she alone processed panhandling licenses. Keeper testified that she searched all office records and found no evidence of a panhandling license issued to Defendant as of January 15, 2001. Defendant's attorney objected to Keeper's testimony and conclusion.

The trial court then took judicial notice that Defendant had submitted an application for a panhandling license on November 25, 2000. The City objected.

At the close of the City's case, Defendant's attorney moved to dismiss because the City failed to introduce evidence that Defendant's conduct took place in Capital City. The trial court took judicial notice that Barex Train Station is in Capital City, and denied the motion to dismiss. Defendant's attorney objected.

Defendant's attorney then called Peter Psych, a psychologist, to testify as a stipulated expert. Psych testified that Defendant, because he submitted an application and thought he was properly licensed, did not act knowingly when he asked for money in the train station. The City objected to Psych's testimony.

QUESTION:

Applying the Federal Rules of Evidence, rule on each objection and discuss the basis for each ruling.

QUESTION 7

In 1981, Alice Able purchased a tract of land on the side of a mountain. A portion of the tract was suitable for building, but it could be reached only over a dirt road that ran through a neighboring ranch belonging to Bill Baker. Able asked Baker if she could use the road to access her property and he agreed. The parties, however, never reduced their agreement to writing. Able built a house on the site and has lived there and used the road ever since.

Last year, Baker sold his ranch to Carl Client, providing a warranty deed to Client at the time of the sale. Client paid for a thorough title search by a title company before purchasing the ranch. The search confirmed that record title belonged to Baker; however, the search did not reveal any use of the road. Shortly after the sale, Client discovered Able using the road and told her to stop.

QUESTIONS:

Discuss any potential theories under which Able may regain use of the road. Also discuss any liability that the title company may have for not discovering and reporting Able's use of the road.

QUESTION 8

Detective Smith lawfully arrested Dan Defendant at his house for the murder of John Jones. On the way to the police station, Smith pulled the patrol car into an alley, took out his pistol, and laid it on the front seat within view of Defendant. Smith read Defendant his Miranda rights and then told him that they would not be going anywhere until Defendant told him about the murder. When Defendant said that he wanted to see an attorney, Smith showed him a picture of Johnny Cochran. Defendant then said he would like a light for his cigarette. Smith responded, "Speaking of light, how would you like to shed a little on the murder of John Jones?" Defendant then confessed to the murder.

QUESTION:

Discuss whether Defendant's confession can be used against him at his trial for the murder of John Jones.

QUESTION 9

The city code of Big City establishes a ceiling of 3,000 taxi licenses for the town. The code further provides that the Transportation Commissioner shall regulate taxis within Big City. The code states, in part:

The commissioner shall have the authority to revoke, deny, or otherwise alter a taxi license for reasons of health condition or other impairment of the licensee. The commissioner shall consider such evidence as is relevant in reaching a decision, including that submitted by the licensee. Such revocation, denial, or alteration shall be final.

Danny Driver, a licensed taxi operator, was hit from behind while stopped at a light. Talking with the police afterward, Danny casually mentioned that he was taking some prescription medicine and feeling a little light-headed. The police report said Danny was not at fault, but stated that he was "under medication and exhibiting the effects of drugs."

Based on this report, the commissioner immediately revoked Danny's taxi license. The notice of revocation sent to Danny stated that his use of medication impaired his ability to operate a taxi safely. The notice also stated that he was free to apply for a new license after 30 days and satisfactory completion of a physical exam and drug test. There is currently an 18 month waiting list of approved applicants for taxi licenses.

QUESTION:

Discuss Danny's potential avenues for appealing the commissioner's decision and to what relief he might be entitled.

DISCUSSION FOR QUESTION 1

CRS 14-10-106 and CRS 14-10-110 provide that the only ground for dissolution of marriage in Colorado is whether the marriage is "irretrievably broken." In other words, Colorado is a "no fault" jurisdiction. Therefore, proof of Husband's infidelity is irrelevant to proving the ground for dissolution of marriage. Pursuant to CRS 14-10-110, a presumption of an "irretrievable breakdown" arises if both parties agree (under oath) that the marriage is irretrievably broken. Otherwise, the court will consider all of the relevant evidence, "including the circumstances that gave rise to the filing of the petition and the prospect of reconciliation."

CRS 14-10-107 provides for an automatic temporary injunction (or "restraining order") in every dissolution action. The temporary injunction prohibits, among other things, Husband and Wife from molesting or disturbing each other's peace. CRS 14-10-107's automatic temporary injunction (or "restraining order") also enjoins Husband (and Wife) from removing the child from the state of Colorado without prior consent or court order.

Once Husband is served with divorce papers, the mandatory ninety day waiting period before the divorce can become final begins to run.

Pursuant to CRS 14-10-101, the phrase "parenting time" refers to what was formerly called "visitation." The standard for allocating parenting time is the "best interests" of the child. CRS 14-10-123.4 and CRS 14-10-124. Quoting CRS 14-10-124(1.5)(a), the factors for determining what is in the child's best interests include the following:

- (I) The wishes of the child's parents as to parenting time;
- (II) The wishes of the child if he or she is sufficiently mature to express reasoned and independent preferences as to the parenting time schedule;
- (III) The interaction and interrelationship of the child with his or her parents, his or her siblings, and any other person who may significantly affect the child's best interests;
- (IV) The child's adjustment to his or her home, school, and community;
- (V) The mental and physical health of all individuals involved, except that a disability alone shall not be a basis to deny or restrict parenting time;
- (VI) The ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party;
- (VII) Whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support;
- (VIII) The physical proximity of the parties to each other as this relates to the practical considerations of parenting time;
- (IX) Whether one of the parties has been a perpetrator of child abuse or neglect under section 18-6-401, C.R.S., or under the law of any state, which factor shall be supported by credible evidence;
- (X) Whether one of the parties has been a perpetrator of spouse abuse as defined in subsection (4) of this section, which factor shall be supported by credible evidence;

- (XI) The ability of each party to place the needs of the child ahead of his or her own needs.

If Husband violates the temporary injunction with violence or threats of violence, or by taking the child out of state, these factors would weigh against him. If Husband simply moves out of state without taking the child with him, these factors would still weigh against him. Husband's infidelity is not relevant to the issue of the child's best interests for purposes of allocating parenting time, and there is no presumption in favor of Wife simply because the child is of "tender years" (only two years of age).

Pursuant to CRS 14-10-103, "parental responsibility" refers to what was formerly known as "custody."

The standard for allocating parental responsibility is again the "child's best interest." CRS 14-10-123.4 and CRS 14-10-124. Quoting CRS 14-10-124(1.5)-(4), the factors for determining the child's best interest include all of the above factors regarding parenting time and the following:

- (I) Credible evidence of the ability of the parties to cooperate and to make decisions jointly;
 - (II) Whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support that would indicate an ability as mutual decision makers to provide a positive and nourishing relationship with the child;
 - (III) Whether an allocation of mutual decision-making responsibility on any one or a number of issues will promote more frequent or continuing contact between the child and each of the parties;
 - (IV) Whether one of the parties has been a perpetrator of child abuse or neglect under C.R.S. 18-6-401, or under the law of any state, which factor shall be supported by credible evidence. If the court makes a finding of fact that one of the parties has been a perpetrator of child abuse or neglect, then it shall not be in the best interests of the child to allocate mutual decision-making with respect to any issue over the objection of the other party or the representative of the child.
 - (V) Whether one of the parties has been a perpetrator of spouse abuse as defined in subsection (4) of this section, which factor shall be supported by credible evidence. If the court makes a finding of fact that one of the parties has been a perpetrator of spouse abuse, then it shall not be in the best interests of the child to allocate mutual decision-making responsibility over the objection of the other party or the representative of the child, unless the court finds that the parties are able to make shared decisions about their children without physical confrontation and in a place and manner that is not a danger to the abused party or the child.
- (1) The court shall not consider conduct of a party that does not affect that party's relationship to the child.

- (2) In determining parenting time or decision-making responsibilities, the court shall not presume that any person is better able to serve the best interests of the child because of that person's sex.
- (3) If a party is absent or leaves home because of spouse abuse by the other party, such absence or leaving shall not be a factor in determining the best interests of the child. For the purpose of this subsection, "spouse abuse" means the proven threat of or infliction of physical pain or injury by a spouse or a party on the other party.

DISCUSSION FOR QUESTION 2

Is the 1998 handwritten will valid? Under the Uniform Probate Code, holographic wills are valid whether or not witnessed if the signature and material portions of the document are in the Testator's handwriting. See UPC §2-502(b). Thus, the holographic will is valid. As to the 1995 will, UPC §2-507(a) states that "a will or any part thereof is revoked: (1) by executing a subsequent will that revokes the previous will...." Revocation of a duplicate original will raises the presumption that a testator intended to revoke the original will in the possession of another. See 619 P.2d 91; see also UPC §2-507(1).

Thus, the 1995 will produced by Susan after John's death, although appearing to be valid, was revoked by the 1998 will. Because John revoked his duplicate original, the law will presume that he intended to revoke the original duplicate in Susan's possession.

May John exclude his children? The UPC only addresses pretermitted children within the context of children born or adopted after the executing of the will. See UPC §2-302. Under the UPC, those children would be given a statutory share of the estate. However, if the omission is intentional, UPC §2-302(2)(a), then the afterborn children do not receive a share of the estate. Here, we have no children who are afterborn, and so the pretermitted heirs language would not apply. Moreover, here the omission of the two children is clearly intentional, so the children are foreclosed from any share in the estate.

The BMW. At common law, if a testator executed a will containing a specific devise and the subject of that gift is not in the estate at the time of death, the specific devise is adeemed. See PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 111 (2d ed. 1994). However, the UPC changes the common law to protect specific devisees from ademption in various situations. In particular, it provides that a specific devisee is entitled to tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised tangible personal property. UPC §2-606(a)(5). Here, the gift of the Buick to Amy was a specific devise because it is a gift of a particular item. Although John sold the Buick, he purchased the BMW to replace it. Amy gets the BMW.

The Personal Residence. The home would pass by right of survivorship to Jane as the joint owner. See UPC §6-104. The will does not control the disposition of joint tenancy property.

The brokerage account. John's 1998 will, although valid, will not control the disposition of the brokerage account which was payable on death to his children Mary and Mike. According to UPC §6-104(b), if the account is a P.O. D. account, the balance in the account will belong to the P.O.D. payees — here, Mary and Mike, upon John's death.

The life insurance policy. Virtually all insurance policies require that the company receive notice of change of beneficiary signed by the insured and that the notice be received before the date of death. See *ITT Life v. F. Damm*, 567 P2d 809 (Colo. App. 1977). Thus, if the examinee concludes that Susan is the beneficiary under the policy because no notice of change was given, the answer is correct. However, since the facts do not state the requirements of the policy, the examinee could rely on UPC §2-804 regarding the revocation of probate and non-probate transfers by divorce. UPC §2-804(2) revokes by statute all designations which name the ex-spouse as beneficiary if the designation was made before the date of the final decree of divorce. Under this analysis, Susan is not the recipient of the insurance proceeds and the proceeds become a part of the residuary estate.

Residuary. The personal items including the valuable Rolex watch and the bank account containing \$100,000, will pass to Jane because they are assets of the estate and she is the beneficiary under the 1998 will.

DISCUSSION FOR QUESTION 3

This question involves a variety of potential charges that could be brought against either Thelma or Louise, or both, including burglary, larceny or theft, conspiracy to commit burglary and theft, attempted burglary and theft and homicide (murder, voluntary manslaughter and/or involuntary manslaughter.) Slim is dead, so no criminal charges can be brought against him. However, responsibility for Slim's death by Thelma or Louise, or both, is at issue in this question, as well as Slim's participation in possible conspiracies with Louise.

Burglary is a crime against a habitation, and requires a breaking and entering of a dwelling of another at night with the intent of committing a felony therein. *Perkins*, Criminal Law (3d ed.) at 261. The entry must be unauthorized, i.e., without the consent of the lawful occupants. See *People v. Gauze*, 15 Cal. 3d 709, 712 (1975). Thus, a co-tenant such as Louise could not be guilty of burglary when breaking into her own dwelling no matter how criminal her intent. *Id.* Given that Louise and Thelma live in the trailer together, ownership or lease of the trailer by one or the other is irrelevant; burglary is a crime against lawful occupancy. *Id.* Nor could Slim, had he not died, been guilty of burglary because he had received Louise's consent to enter the premises. The fact that Slim's entry was without Thelma's consent would not have been controlling because Slim was authorized by a lawful occupant to enter. Slim's intent to commit a felony would also have been in question, given that Slim had only agreed to break in and ransack the premises, not steal the jewelry.

Larceny or theft consists of taking and carrying away the personal property of another without consent with the intent to deprive the owner permanently thereof. *Perkins* at 292. Although Louise certainly intended to steal Thelma's jewelry, a charge of larceny will likely fail because Louise never got to the point of actually taking or carrying away the jewelry.

A conspiracy is an agreement by two or more persons to accomplish an unlawful purpose which must amount to a crime. See *People v. Dowell*, Colo. 510 P.2d 436 (1973). At common law the agreement required knowledge and intent by both parties. See *Gebardi v. U.S.* 289 U.S. 112 (1932) (this bilateral agreement requirement has since been broadened to include unilateral agreements by the Model Penal Code, Sec 5.04(1) and a few state modifications.) A charge of conspiracy to commit larceny/theft is possible here because Louise and Slim agreed that Slim would enter and ransack the trailer with the ultimate goal of Louise stealing Thelma's jewelry. However, while Louise had larceny in mind, she did not include Slim in on the act of stealing, and thus there may have been no agreement to commit larceny. A charge of conspiracy to commit burglary may also be viable. Although neither Slim's or Louise's entry into the trailer would have constituted burglary, it has been held in most jurisdictions that impossibility (either legal or factual) is not a defense to a charge of conspiracy to commit a crime. See *People v. Elkhatib*, 198 Colo. 287, 599 P.2d 897, 899 (1979) (impossibility is not a defense to conspiracy under our law.)

An attempt in criminal law requires the intent to do a criminal act and sufficient steps towards its completion to go beyond mere "preparation" and arrive at "dangerous proximity" to accomplishing the unlawful act. See *People v. Rizzo*, 246 N.Y. 334, 158 N.E. 888 (1927). While Louise intended to take Thelma's jewelry and sent Slim in to prepare her cover story, Louise never came into close proximity of the jewels themselves. Thus, there may be no basis for a charge of attempted larceny. A charge of attempted burglary is also problematic because neither Louise's nor Slim's conduct would have constituted the offense of burglary. Impossibility has been determined to be a viable defense to a charge of attempt, with legal impossibility (the underlying intended act was not a crime) sometimes prevailing, and factual impossibility (the intended act would have been criminal had the facts been as the defendant believed them

DISCUSSION FOR QUESTION 3
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to be) rarely prevailing except in cases of entrapment. *See also Darr v. People*, 193 Colo. 445, 568 P.2d. 32 (1977) (defense of factual or legal impossibility is not available in a prosecution for the crime of attempt.)

Homicide is a crime encompassing both intentional and negligent states of mind. Murder is the unlawful killing of another with malice aforethought or reckless indifference. *Perkins* at 57-60. Voluntary manslaughter is intentional homicide with mitigating circumstances. *Perkins* at 84-85. Involuntary manslaughter is homicide by criminal negligence. *Perkins* at 104-5. Thelma shot Slim intentionally, as he was leaving the premises. Her physical safety did not appear to be in jeopardy at the time of the shooting, hence a complete self-defense likely would not be available. She was, however, defending her habitation and/or preventing what appeared to her to be a burglary or other felony. *Perkins* at 1109, 1198. Defense of dwelling/habitation and prevention of a felony at common law also allowed the use of deadly force where that force was necessary for that purpose. The question here is whether deadly force was justified in these circumstances. With regard to Louise, it appears that she did not intend to kill or even injure Slim, but her sending Slim into her trailer which was occupied by Thelma and a loaded pistol could be characterized as a degree of reckless indifference necessary for a murder charge or criminal negligence necessary for a charge of involuntary manslaughter.

DISCUSSION FOR QUESTION 4

Generally speaking, tender of delivery of goods is a condition of the buyer's duty to accept goods and pay for them. UCC 2-507(1). A buyer must pay at the contract rate for any goods accepted and which are not either rejected or are the subject of any breach. UCC 2-607. Because Billy Bob has received some goods that were not rejected or subject of any breach, he is required to pay for them.

If the seller discovers a buyer is insolvent, he may refuse delivery except for cash. He may also stop delivery if that is possible. UCC 2-702(1) and 2-705. In this case, Arcane did not stop the delivery of the first shipment, but did demand payment C.O.D. for the new goods and the amounts owing on previously delivered goods. Arcane also may stop delivery of the second shipment.

Where a seller discovers a buyer has received goods on credit while he is insolvent, the goods may be reclaimed upon demand made within ten days after the receipt of goods. UCC 2-702(2). Thus, Arcane should make immediate demand for return of the recently shipped goods and follow up by attempting to gain possession. In re Colacci's of Am., 490 F2d 1118 (10th Cir. 1974). If Arcane successfully reclaims the last goods sold, Arcane will have no other remedies with respect to them. UCC 2-702(3).

UCC 2-702(2) also provides that if a written misrepresentation of solvency has been made within three months before delivery, the 10-day limitation does not apply. However, any representation of solvency by Billy Bob, to the extent that it occurred, was verbal and not written, and therefore the three months extended time would not be available to Arcane to claim the newly shipped goods. UCC 2-702(2) goes on to state that except for remedies provided therein, a seller cannot base a right of reclamation on a buyer's fraudulent or innocent misrepresentation of solvency or intent to pay. Therefore, it does not appear that Arcane can make a claim for fraud that would enhance its right to reclaim the goods; although Arcane could argue that the misrepresentation was fraudulent in a claim for damages. See, seller's remedies in general, UCC 2-703, including right to damages.

Because no written representation of solvency was given to Arcane by Billy Bob prior to the shipment of goods thirty or more days ago, the extended time for reclamation of those goods is not available. Consequently, Arcane is outside the ten day limit with regard to the goods delivered thirty or more days ago and therefore has no right to reclaim those goods. Thus, Arcane will have to file a claim (excluding reclamation) in bankruptcy court for the goods delivered more than thirty days ago (e.g., any goods delivered more than 10 days ago).

DISCUSSION FOR QUESTION 5

In considering Mary's potential tort causes of action against her employer, five possible bases sounding in tort are presented in the fact pattern. These are:

1. Assault;
2. Battery;
3. False Imprisonment;
4. Intentional infliction of severe emotional distress; and
5. Negligent infliction of emotional distress.

Each of these possible tort claims is discussed below.¹

Assault

The tort of assault is concerned with the duty to abstain from intentional injury to others. Intentional torts, such as assault and battery (discussed below), generally require that the actor *intended the consequences of the act*, and not simply the act itself. RESTATEMENT (SECOND) OF TORTS, Sect. 8A (comment)(emphasis added) (1965). The tort of assault generally protects a person's interest in freedom from apprehension of a harmful or offensive contact with the person accused of committing the tort. Assault is committed when: 1) a defendant acts, intending to cause a harmful or offensive contact with the person of the plaintiff or a third party, or an imminent apprehension of such contact, and 2) thereby puts the plaintiff in imminent apprehension of such contact. *Id.* at Sect. 21. Assault is also committed when there is an intent to cause an imminent apprehension of contact, even if no actual contact is intended by the defendant. *Id.* at Sect. 21(1); *Bohrer v. DeHart*, 943 P.2d 1220, *1224 (Colo. App. 1996), rev'd on other grounds, 961 P.2d 472 (Colo. 1998).

To constitute the tort of assault, generally some overt act is required, such as pointing a gun in a threatening manner. Although words and threats alone cannot constitute the tort of assault, when words are accompanied by a threat of physical violence, under conditions that indicate the present ability to carry out the threat, an assault may be committed. *Dahlin v. Fraser*, 288 N.W. 851 (Minn. 1939). The display of force must be such as to cause the plaintiff reasonable apprehension of imminent bodily harm. RESTATEMENT (SECOND) OF TORTS Sect. 21(2) (1965). Moreover, although courts typically look to the intent to cause contact or the apprehension of same, intent may be inferred from all of the facts and circumstances, including threats and gestures. *Dahlin v. Fraser*, 288 N.W. 851 (Minn. 1939).

In the present case, it is clear that Mary experienced threats of bodily harm. Also, because the "robbers" held guns and acted in a menacing manner, it was evident to Mary that they had the ability to carry the threat into effect. Mary, scared by all of the commotion, was clearly put in imminent apprehension of a harmful or offensive contact. Even though there was little actual contact, there was

¹ Although not a torts issue, examinees should discuss initially the threshold consideration regarding the action of the purported robbers in this staged robbery, and should at least mention that since the "robbers" were acting under the direction of and at the behest of the employer, principles of agency would apply and their actions would be imputed to the employer, thus allowing a suit against the employer to go forward.

clearly an intent to cause imminent apprehension of bodily harm. Further, the fact that the "robbers" were running around and threatening people would meet the standard that an overt act is required for assault. And, although the "robbers" took no affirmative action to harm Mary, because there was a threat of physical violence, along with the ability to carry out such a threat, most likely Mary would have a viable claim of assault against her employer.

Battery

The tort of battery recognizes an individual's interest in freedom from intentional and unpermitted contact. McCracken v. Sloan, 252 S.E. 2d 250 (N.C. App. 1979). Generally, a battery includes an act constituting an assault, and an assault is often an attempted battery. Stark v. Epler, 117 P. 276 (Or. 1911). A defendant will be found civilly liable for a battery for 1) directly or indirectly causing a harmful or offensive contact with the plaintiff by an act which was 2) intended to result in the harmful or offensive contact with the plaintiff, or intended to place the plaintiff in imminent apprehension of such contact. Hall v. McBryde By and Through McBryde, 919 P.2d 910, *912 (Colo. App. 1996); RESTATEMENT (SECOND) OF TORTS Sects. 13 (harmful conduct), 18(1) (offensive contact) (1965). Also, a defendant can be found liable for a harmful or offensive contact if the defendant's intent was to put the plaintiff or another in imminent apprehension of such contact. Id. at Sects. 13(a), 18(1)(a). The defendant's intent need not be hostile, since no proof of a hostile intent is required to make out a claim for battery. However, fear or shock alone may not be actionable. Id. at Sect. 15.

In the present case, Mary may have a harder time making out a claim for battery than for assault, simply because there appears to be no harmful or offensive contact. The intent required for battery can be met because clearly there was an intent to put Mary in imminent apprehension of harmful contact, and this is especially witnessed by the shouting and waving of weapons in the fact pattern. Mary will argue that the robber's act of taking her by the arm was offensive contact. Examinees may also argue that the tort of battery would lie because Mary was required to sit in a chair and also taken to the back room; however, neither of these acts, at least as stated in the facts, would probably be enough to make out a cause of action for battery. As noted above, however, Mary's fear or shock alone would probably not be actionable as battery.

False Imprisonment

The tort of false imprisonment is the unlawful violation of a person's right of personal liberty or the restraint of that person without legal authority. False imprisonment deprives a person of liberty of movement or freedom of choice to move about as one would wish. Bender v. Seattle, 664 P.2d 492 (Wash. 1983). False imprisonment requires the following elements: 1) that the defendant intended to restrict the plaintiff's freedom of movement; 2) that the plaintiff's freedom of movement was in fact restricted for a period of time, however short, either directly or indirectly by an act of the defendant; and 3) that the plaintiff was aware that her freedom of movement was restricted. RESTATEMENT (SECOND) OF TORTS Sect. 35 (1965); Goodhoe v. Gabriella, 663 P. 2d 1051, 1056 (Colo. App. 1983). Such confinement need not be unlawful confinement to meet the requirements for this tort. See RESTATEMENT (SECOND) Sect. 118 (1965). Further, there have been some cases which have held

that employers can be held liable for false imprisonment of their employees, so long as the employee was held against her will, for an appreciable time, under threat of force. See, e.g., *Fermiro v. Fedco, Inc.*, 872 P.2d 559 (Cal. 1994) (court said that false imprisonment committed by an employer against an employee is almost always outside the scope of the compensation/employment bargain and therefore actionable).

In the present case, examinees should note that Mary was told to sit in a chair and to stay there by one of the “robbers.” While the men continued to move about, Mary was forced to remain in the chair until she was taken to the back room where she opened the safe. Her movement was restricted by an act of the defendant for some period of time and she was aware of that restriction. Of course, we have very sketchy facts about the alleged “confinement,” but from the facts as presented, it would appear that the prevention by the “robbers” of the liberty of movement against her will, and the intent to confine, all occurring with Mary’s conscious awareness of the actions, would constitute valid grounds to support a cause of action for false imprisonment.

Intentional Infliction of Emotional Distress

It would appear that the facts support a claim for intentional infliction of emotional distress (“IIED”). The tort of IIED requires a showing that: 1) the defendant engaged in “extreme and outrageous” conduct, and 2) that the defendant intentionally caused the plaintiff severe emotional distress (or caused such distress with reckless disregard for the plaintiff’s emotional state). *Keohane v. Stewart*, 882 P.2d 1293, 1311 (Colo. 1994); cert. denied, 513 U.S. 1127 (1995); RESTATEMENT (SECOND) OF TORTS sect. 46 (1965).

Here, the “robbers,” by their outrageous and threatening actions, including the shouting of threats and the waving of weapons, intentionally caused severe emotional distress to Mary. The “robbers” specifically waved their guns around and shouted threats. This degree of outrageousness would seem to meet the standard for IIED as set forth in the Restatement. Further, the facts state that Mary is still having nightmares about the incident, and that she now hates her job. This was all caused by the actions of the “robbers” in the staged robbery at Copy-O’s. Thus, it would appear that Mary could make out a viable claim for IIED against her employer.

Negligent Infliction of Emotional Distress

A prima facie case of negligence is established when the plaintiff proves the following elements: 1) the existence of a legal duty owed by the defendant to the plaintiff, 2) a breach of

that duty, 3) injury to the plaintiff, and 4) a causal relationship between the breach and the injury. Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 929 (Colo. 1997); See also Connes v. Molalla Transp. Sys. Inc., 831 P.2d 1316, 1320 (Colo. 1992). The question of whether defendant in negligence action owes plaintiff a legal duty of care is essentially one of fairness under contemporary standards; that is, whether reasonable persons would recognize and agree that a duty of care exists. Swieckowski by Swieckowski v. City of Fort Collins, 923 P.2d 208 (Colo. App. 1995), aff'd 934 P.2d 1380 (Colo. 1997). "A court's conclusion as to the existence of a duty is an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is [or is not] entitled to protection." W. Page Keeton, et al. *Prosser and Keeton on the Law of Torts* § 53, at 358 (5th ed. 1984). Several factors, including the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the defendant's conduct, the magnitude of the burden of guarding against the harm, and the consequences of placing this burden on the defendant are all relevant to a court's consideration of whether to recognize a duty in a particular case." Greenberg v. Perkins, 845 P.2d 530, 536 (Colo. 1993).

Here, Mary could argue that her employer had a duty to avoid exposing its employees to events such as the staged robbery that might emotionally traumatize them, and that the employer breached this duty by its conduct. In other words, a reasonable person might find that the employer acted inappropriately by subjecting Mary to a "test" involving armed robbers wearing masks making threats against her personal safety. Mary will have to argue that her nightmares and disrupted sleep constitute injury to her person and that these injuries were directly caused by the employer's negligent actions.

DISCUSSION FOR QUESTION 6

Hearsay Issues

There are two major hearsay issues.

Admission of Party Opponent

Hearsay is an out of court statement offered for the truth of the matter asserted. Fed.R.Evid. 801(c). Certain statements are specifically not hearsay; an admission is one of those statements. An Admission by Party Opponent is not hearsay when the statement is offered against a party and is the party's own statement in his individual capacity. Fed.R.Evid. 801(d)(2). Vic Tem's testimony about what Dan said to him is not hearsay, it is an admissible admission. Therefore, Dan's objection should be overruled.

Absence of Public Record

Hearsay is an out of court statement offered for the truth of the matter asserted. Fed.R.Evid. 801(c). Hearsay is generally inadmissible. Fed.R.Evid. 802. However, if an exception applies, then the hearsay evidence is admissible. Fed.R.Evid. 802. Federal Rule of Evidence 803 provides a number of exceptions, one of which is applicable to Keeper's testimony.

Rule 803 provides hearsay exceptions where the availability of the declarant is immaterial; that is, it does not matter whether the declarant is available to testify. Fed.R.Evid. 803. One of these hearsay rule exceptions is the Absence of Public Record or Entry exception. Fed.R.Evid. 803(10). This exception provides that evidence to prove the absence of a record is admissible in the form of testimony that a diligent search failed to disclose the record where the record is one that was regularly made and preserved by a public office or agency.

The parties stipulated that Keeper worked in and was responsible for the state record office, and that she alone processed and granted state panhandling licenses. Therefore, Keeper had the proper foundation to testify about this issue, and that is not in dispute. Keeper's testimony that she searched all office records and found no evidence of a state panhandling license issued to Defendant as of January 15, 2001 was admissible under the Absence of Public Record or Entry hearsay exception. Fed.R.Evid. 803(10).

Judicial Notice Issues

A court may take judicial notice of adjudicative facts. Fed.R.Evid. 201(a). A judicially noticed fact must be one "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid 201(b). A court may take judicial notice of an adjudicative fact sua sponte. Fed.R.Evid. 201(c).

Judicial Notice of Application

The trial court took judicial notice that Dan had submitted an application on November 25, 2000. The fact that is the subject of this judicial notice question is an adjudicative fact. An "adjudicative fact"

DISCUSSION FOR QUESTION 6
Page Two

is one that is a fact to which the law of the case is applied in the process of adjudication. See, e.g., Davis, Judicial Notice, 55 Colum.L.Rev. 945, 952 (1955). These are the facts that normally go to the jury in a jury case. Id.

However, the fact is not one that is the proper subject of judicial notice. The fact is not one that is generally known within the territorial jurisdiction of the court. Fed.R.Evid. 201(b)(1). The fact is also not one that is capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed.R.Evid. 201(b)(2). Examples of these types of facts include dates, information in census reports, or scientific facts. The information which the trial court attempted to notice does not fall within this category of facts. Therefore, the City's motion should be granted.

Judicial Notice of Location of Barex Train Station

As discussed above, the trial court may take judicial notice sua sponte. At the close of the State's case, Dan moved for dismissal because the State failed to introduce evidence that Dan's conduct took place in Capital City. The trial court took judicial notice that Barex Train Station was in Capital City, and denied the Motion.

The trial court properly took judicial notice of the location of the Barex Train Station. A court may take judicial notice of a fact that is generally known within the territorial jurisdiction of the trial court. Fed.R.Evid. 201(b)(1). Common examples of this type of facts include geographic facts, such as the location of a road or building. The location of the Barex Train Station is a fact that is generally known with the jurisdiction of the court. Therefore, the trial court did not err by taking judicial notice of this fact, and the Motion should be denied.

Opinion on Ultimate Issue

An expert witness may testify at trial, in conformity with Fed.R.Evid. 702 et seq. An expert, in most circumstances, may express his opinion even if it embraces the ultimate issue of fact to be decided by the trier of fact. Fed.R.Evid. 704(a). However, an expert witness may not testify that a criminal defendant did or did not have the mental state constituting an element of the crime charged. Fed.R.Evid. 704(b).

Defendant called Peter Psych, his psychologist, to testify. Psych testified that, because Defendant submitted an application and thought he was properly licensed, Defendant did not act knowingly when he asked for money in the Barex Train Station. This testimony is inadmissible because an expert witness may not testify that a criminal defendant did not have the mental state required to commit the offense. Fed.R.Evid. 704(b). Therefore, the objection should be sustained.

DISCUSSION FOR QUESTION 7

One can acquire an easement by prescription through the adverse use of another's land under claim of right which is open, notorious, and continuous for the limitations period on actions in ejectment. CUNNINGHAM, STOEBUCK & WHITMAN, PROPERTY, 451-452 (3d ed. 2000); CRIBBET & JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY, 373-374 (3d ed. 1975). In Colorado, the statutory period is eighteen years. Colo. Rev. Stat. §38-41-202 (2000); *Gleason v. Phillips*, 172 Colo. 66, 70-71 (1970). When an owner of property permits another to use it, however, the use is not "adverse" or, as it is sometimes characterized, "hostile." Such a use generally cannot ripen into a prescriptive right. CUNNINGHAM, STOEBUCK & WHITMAN, PROPERTY, 453 (3d ed. 2000). Applying these principles to the problem, Able does not have a strong claim to an easement by prescription. She began using the road over the ranch with Baker's permission and presumably did so throughout the years Baker held title to the ranch. Her use of the road was never adverse to Baker's interest.

A person who holds a land locked tract of land may be entitled to claim an easement arising from necessity over the land of another. They may do so, however, only if the two parcels once formed a single tract and the necessity arose upon severance of the two parcels. CUNNINGHAM, STOEBUCK & WHITMAN, PROPERTY, 447-449 (3d. ed. 2000); *Martino v. Fleenor*, 148 Colo. 136, 139-40 (1961). No facts in the problem indicate that Able's land and Client's were once a single tract. Therefore, Able does not has a strong claim for an easement implied in law from necessity.

The statute of frauds requires any agreement to convey an interest in real property to be embodied in a writing signed by the grantor. CUNNINGHAM, STOEBUCK & WHITMAN, PROPERTY, 707-708 (3d. ed. 2000). An easement is an interest in real property and therefore any grant of an easement must comply with the statute. *Id.* at 442. A license, on the other hand, is a personal privilege to use another's land in a manner that would otherwise be trespass. *Id.* at 438. Under the law, a license is considered personal property. As such, the statute of frauds does not apply to the grant of a license but a license is considered to be revocable at the will of the grantor. *Id.* The grant from Baker to Able was not in writing. Able's reliance on the grant however may make it enforceable under an exception to the statute of frauds. Reliance can make a license irrevocable or an oral grant of an easement enforceable.

In nearly all states, a person may acquire the right to use the land of another through detrimental reliance on an oral agreement. In some states, the courts rely on the well recognized exception to the statute of frauds that permits enforcement of an oral agreement by estoppel. In other states, the courts hold that a license has been made irrevocable by estoppel. In either case, a person who was granted a right of way without a written grant may be permitted to enforce the grant. CUNNINGHAM, STOEBUCK & WHITMAN, PROPERTY, 457-458 (3d. ed. 2000). Here, Able detrimentally relied on Baker's agreement to let her use the road across the ranch. She built a house on her property in the belief she had the ability to use the road. A court could therefore hold she had acquired an easement by estoppel or an irrevocable license.

A title examiner undertakes a contractual duty to examine the public records for his or her employer. Ordinarily, the examiner is not liable failing to report title defects which do not appear in the public record. *See generally*, W. W. ALLEN, ABSTRACTER'S DUTY AND LIABILITY TO EMPLOYER RESPECTING MATTERS TO BE INCLUDED IN ABSTRACT, 29 A.L.R.2d 891 (1999). Easements by estoppel or prescription arise by operation of law and are not therefore included in the public record. Therefore, Client does not have a cause of action against her title examiner.

DISCUSSION FOR QUESTION 8

Miranda warnings need only be given if the suspect is subjected to custodial interrogation. Defendant was clearly in custody since he had been arrested and was being transported to the police station. He also was interrogated under the definition in Rhode Island v. Innis, 446 U.S. 291 (1980) because he was subjected to "either express questioning or its functional equivalent" which can be "any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." Smith's statement that they would not go anywhere until Defendant made a statement and his request to shed a little light on the murder clearly amount to interrogation.

The facts state that Smith did properly give Defendant the Miranda warnings. However, under Edwards v. Arizona, 451 U.S. 477 (1981) all interrogation must cease once a suspect exercises his Miranda right to counsel, which Defendant did. The only way a statement can be properly obtained from a suspect after he has invoked his right to counsel is if he initiates a conversation in which he expresses "a willingness and a desire for a generalized discussion about the investigation." Defendant only asked for a light for his cigarette and did not initiate a generalized discussion about the investigation. Smith's response was interrogation and thus, the statement was obtained in violation of Miranda and must be suppressed during the prosecution's case in chief. If Defendant testifies, however, he could be impeached by a statement taken in violation of Miranda. Harris v. New York, 401 U.S. 422 (1971).

The confession may also have been involuntary and thus excludable under the due process clause. The voluntariness test essentially requires that the police subject the suspect to some type of coercive conduct that is sufficient to overcome the free will of the suspect. Culombe v. Connecticut, 367 U.S. 568 (1961) and Colorado v. Connelly, 479 U.S. 157 (1986). Smith stopped the car in an alley, where presumably no one would see them, and laid his gun on the seat and told Defendant that they would not be going anywhere until he confessed. Defendant could clearly have felt that some harm would come to him if he did not confess and thus, his free will may have been overborne when he confessed. If his confession was involuntary, it not only cannot be used in the prosecution's case in chief, but it also cannot be used to impeach Defendant if he testifies. Mincey v. Arizona, 437 U.S. 385 (1978).

DISCUSSION FOR QUESTION 9

Danny has a constitutionally protected property interest in his taxi license. It was revoked by the commissioner without adequate due process. He may appeal the revocation in court because there is no administrative route open to him. The court will probably order a hearing on the revocation, but is unlikely to reinstate him pending its outcome, because of the public safety concerns.

While the Big City ordinance clearly authorizes the commissioner to revoke taxi licenses without any kind of hearing, and states that such revocation is final, the licensee will nonetheless have a basis for demanding judicial intercession in attaining a hearing. While the statute does not afford Danny a right to a hearing, a due process right under the U.S. Constitution may afford him such a right. Where no applicable statute requires a hearing, a party is entitled to a hearing as a matter of constitutional due process when the action may adversely affect an individual's "liberty" or "property interests." *Goldberg v. Kelly*, 397 U.S. 254 (1970) (case involving cancellation of AFDC benefits). The property interests protected by due process go well beyond the actual ownership of real estate, personal property or money to include any interest that a person has acquired in "specific government benefits." A property interest in a specific government benefit constitutes a sufficient interest to qualify for due process when the person has a "legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564 (1972).

There can be little question that Danny has a protected "property interest" in his taxi license. At one time, the constitutional right to a hearing depended on whether the affected interest was a legally protected right or merely a governmentally bestowed privilege. The Supreme Court in *Goldberg v. Kelly* abandoned the notion that rights were entitled to constitutional protection while privileges such as welfare benefits could be revoked freely. Professional or occupational licenses have been considered "rights" and protected even before the distinction was effectively eliminated. *See Ex parte Robinson*, 19 Wall. 505 (U.S. 1874) (attorney disbarment). *See also Bell v. Burson*, 402 U.S. 535 (1971) (holding a drivers license was a sufficient due process property interest). While a taxi license is not the same as attorney licensure, it does not fall into the suspect category of liquor licenses that some states and state courts still treat in the privilege category with little or no procedural safeguards. *See Smith v. Liquor Control Board*, 169 N.W.2d 803 (Iowa 1969).

While the argument could be made that because the state has created the property rights through granting the license, the state can limit or deny due process in revoking it. There is some support for this view in *Arnett v. Kennedy*, 416 U.S. 134 (1974) where Justice Rehnquist said that since the state law created the employment, the law could also define procedural limits on deprivation of employment. The court rejected that notion in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) by taking the position that state created property interests were entitled to constitutional due process protection.

Once it has been determined that due process applies, the question becomes what process is due. *Morrissey v. Brewer*, 408 U.S. 471 (1972). Some form of hearing is generally required before an individual is finally deprived of a protected property interest. Due process requires that the opportunity to be heard be "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Mathews* the court balanced three factors in judging the type of process required under the due process clause: (1) the private interest affected by the government action (i.e., the degree of loss to the individual), (2) the risk of error inherent in the procedures used (i.e., the likelihood of erroneous deprivation), and (3) the administrative burdens involved in requiring the

government to afford the party further process. Under this standard, Danny can be afforded significantly more procedural protection with relatively little burden on the government.

Because Danny was afforded no opportunity for a hearing before his taxi license was revoked, he has the basis for an appeal. The Big City ordinance provides that the commissioner "shall consider" relevant evidence, including evidence from the licensee, but there is no procedure for doing so. In this case the commissioner did not consider evidence from the licensee, so Danny had no opportunity to present his side of the case. There can be little dispute that Danny is entitled to some kind of hearing before the permanent revocation of his license, and that he did not receive anything close to it in this case. At a minimum, he should be afforded the opportunity to respond to the allegations that led to revocation of his license.

While Danny has been told he has the right to reapply for his license after 30 days, this does not constitute an appeal of his license revocation. Reapplication in competition and on the same footing with all other applicants does not afford Danny any protection of the license he previously possessed. The fact that he has been told as part of the notice of his license revocation that he may take this step does not force his efforts to secure relief into this channel. The city cannot define the procedures relating to these licenses in a constitutionally defective manner just because the city creates the property interest itself. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

There is a general rule in administrative law that an individual must pursue all relief available from the agency before seeking review in the courts. *McKart v. U.S.*, 395 U.S. 185 (1969). This notion of exhausting administrative remedies should have no effect on Danny's claim. Danny must appeal to the court because there is simply no avenue available within the agency for relief. The new application process is inadequate as discussed above. Further, even though the ordinance states that the commissioner "shall" consider evidence, there is no mechanism for the commissioner to hear Danny's evidence.

Danny no doubt wants his license back. He should be entitled to some kind of hearing on his revocation, but since his revocation involved a potential safety issue, it is unlikely that he will be entitled to reinstatement pending the outcome of his hearing. Courts use the balancing test in *Mathews v. Eldridge, supra.*, for determining when a hearing must be given and the type of hearing required. When immediate adverse effects may result from government action, the issue is whether the parties affected are entitled to a hearing before the government acts or whether a hearing after governmental action is sufficient. Generally courts have required some sort of hearing before the governmental action resulting in harm occurs. *Id.* However, in cases involving public health and safety, post deprivation hearings have been held to be constitutional even though the government has taken drastic governmental action. *Ewing v. Mytinger and Casselberry, Inc.*, 339 U.S. 594 (1950).

While Danny's right to earn a living at his chosen occupation has been impaired, the Supreme Court has lately not been inclined to require the full trial-type hearing they called for in *Goldberg v. Kelly* and have been satisfied with less formal procedures (see the balancing factors discussed above in *Mathews v. Eldridge*). Due process requires at a minimum, notice, an opportunity to comment and respond to the evidence, and the development of a record for review. Thus, Danny at a minimum should be entitled to be told the charges against him and respond to them before the commissioner.

DISCUSSION FOR QUESTION 9
Page Three

Perry v. Sinderman, 408 U.S. 593 (1972) (a fired professor with de facto tenure). A record of some kind is necessary to provide a basis for review later on.

It is unlikely that Danny can get reinstatement pending his hearing. While many cases talk about requiring due process prior to the termination of a property interest, public health and safety concerns can justify post-termination process. *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) established this principle when the confiscation of possibly tainted food was upheld when an opportunity for a hearing was provided immediately after the seizure. In a more recent case more directly on point, *Barry v. Barchi*, 443 U.S. 55 (1979), the court approved a post deprivation hearing when a jockey was suspended for alleged drug use. Thus, in conclusion Danny would most likely be entitled to a hearing, but not to reinstatement pending the hearing and its outcome.



21202

Essay 1 GradeSheet

Seat

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Score

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Please use blue or black pen and write numbers clearly

1. Only ground for dissolution of marriage in Colorado is if the marriage is "irretrievably broken." In other words, Colorado is a "no fault" jurisdiction. 1. _____
 - 1a. Husband's infidelity is, therefore, not relevant. 1a. _____
2. In every dissolution action, a temporary injunction (or restraining order) is issued automatically. 2. _____
 - 2a. The automatic temporary injunction prohibits harassment. 2a. _____
 - 2b. The automatic temporary injunction also enjoins parties from removing the child from the state without prior consent or court order. 2b. _____
 - 2c. Additionally, the Uniform Child Custody Jurisdiction and Enforcement Act protects the child from being taken out of the state. 2c. _____
3. Wife must wait at least ninety days before divorce can be granted. 3. _____
4. "Parenting time" refers to what was formerly called "visitation." 4. _____
5. The standard for parenting time is the "best interests" of the child. 5. _____
6. Factors for deciding the "best interests" of the child include:
 - 6a. Wishes of the parents. 6a. _____
 - 6b. Wishes of the child. 6b. _____
 - 6c. Child's adjustments to changes in the home, school, and community. 6c. _____
 - 6d. Ability of each parent to nurture and promote the child's needs and relationships. 6d. _____
 - 6e. Credible evidence of child or spousal abuse. 6e. _____
 - 6f. Physical proximity of the parties. 6f. _____
 - 6g. Physical and mental health of the parties. 6g. _____
7. Husband's infidelity is not relevant. 7. _____
8. There is no presumption in favor of Wife simply because the child is only two. 8. _____
9. "Parental responsibility" refers to what was formerly known as "custody." 9. _____
10. Standard for allocating parental responsibility also is child's "best interests." 10. _____
11. Additionally, when deciding parental responsibility, the court will look at the ability of Husband and Wife to cooperate and make decisions jointly. 11. _____



21321

Essay 2 GradeSheet

Seat

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Please use blue or black pen
and write numbers clearly

1. The 1998 handwritten will is a holographic will. 1. _____
2. A holographic will is valid whether or not witnessed if the signature and material portions of the document are in the Testator's handwriting. 2. _____
3. The holographic will validly revokes the 1995 will. 3. _____
4. Cancellation of the original also cancels the duplicate original in the possession of another. 4. _____
5. Omission of the children was intentional; therefore, they have no statutory right to participate in the estate so they get nothing. 5. _____
6. A specific devisee is entitled to tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised tangible personal property; thus, the BMW goes to Amy. 6. _____
7. A will does not control joint tenancy property, therefore the home passes by operation of law to Jane. 7. _____
8. A will does not control a payable on death account; therefore, the proceeds are paid equally to Mary and Mike. 8. _____
9. Under common law, an insurance policy creates a contractual right for the named beneficiary; therefore, Susan as the named beneficiary gets the \$25,000. 9. _____
10. The UPC, however, provides for the revocation of probate and non-probate transfers in the event of divorce unless the operative document provides otherwise. Here, there is no indication that the policy provides otherwise, thus the proceeds are payable to the estate and Jane would benefit. 10. _____
11. The remaining assets (Rolex and cash) pass to Jane as the beneficiary of the will. 11. _____



21382

Essay 3 GradeSheet

Seat

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Score

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Please use blue or black pen and write numbers clearly

Charges/Defenses Relating to Louise

1. Charge of burglary against Louise. 1. _____
2. Charge of larceny (theft) against Louise. 2. _____
3. Charge of conspiracy to commit burglary/larceny against Louise. 3. _____
4. Charge of attempted burglary/larceny against Louise. 4. _____
5. Charge of homicide (murder, voluntary manslaughter, involuntary manslaughter) against Louise through reckless indifference or criminal negligence by her act of putting Slim in dangerous situation. 5. _____
6. Defense that burglary requires an unauthorized entry (trespass) and as a rightful occupant Louise therefore cannot burglarize her own dwelling either herself or by authorizing another to enter. 6. _____
7. Defense that there was no actual taking and carrying away of the jewelry by Louise and therefore a fundamental element of the crime of larceny was not satisfied. 7. _____
8. Defense of legal impossibility (factual or legal) in either the attempt or conspiracy context. 8. _____

Charges/Defenses Relating to Slim

9. Charge of burglary against Slim. 9. _____
10. Charge of larceny (theft) against Slim. 10. _____
11. Charge of conspiracy to commit burglary/larceny against Slim. 11. _____
12. Charge of attempted burglary/larceny against Slim. 12. _____
13. Defense that burglary requires an unauthorized entry (trespass) whereas Slim received permission to enter the premises by a rightful occupant. 13. _____
14. Defense of lack of intent to commit a felony/larceny/steal by Slim. 14. _____
15. Defense of legal impossibility (factual or legal) in either the attempt or conspiracy context. 15. _____

Charges/Defenses Relating to Thelma

16. Charge of homicide (murder, voluntary manslaughter, involuntary manslaughter) against Thelma because Slim was retreating at the time Thelma shot him and therefore likely no longer posed a threat of personal attack against her that justified use of deadly force. 16. _____
17. Self-defense or defense of a dwelling by Thelma. 17. _____



21453

Essay 4 GradeSheet

Seat

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Score

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Please use blue or black pen
and write numbers clearly

- 1. This dispute is governed by Article 2 of the UCC. 1. _____
- 1a. This was a sale of goods between merchants. 1a. _____
- 2. Seller who questions buyer's ability to perform may seek assurances. 2. _____
- 3. If the seller discovers a buyer is insolvent, seller may refuse to deliver the goods except for cash. 3. _____
- 4. Seller may also stop delivery, prior to receipt by buyer, if that is possible. 4. _____
- 5. Where buyer has received goods on credit while insolvent, the goods may be reclaimed upon demand made by seller within ten days after the receipt of goods. 5. _____
- 6. If a written misrepresentation of solvency has been made within three months before delivery, the 10-day limitation does not apply. 6. _____
- 7. Except for the ten day demand (or elimination of the ten day requirement because of a written misrepresentation of solvency), a seller cannot base a right of reclamation on a buyer's fraudulent or innocent claim of solvency or intent to pay. 7. _____
- 8. Arcane may not reclaim goods delivered 30 days ago, or any goods delivered more than 10 days prior to demand for reclamation. 8. _____
- 9. Arcane may be able to argue that the misrepresentation was fraudulent in a claim for damages for the goods delivered more than 30 days ago. 9. _____
- 10. If Arcane successfully reclaims the last goods sold, he will have no other remedies with respect to those goods. 10. _____



21551

Essay 5 GradeSheet

Seat

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Score

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Please use blue or black pen
and write numbers clearly

1. Recognition that "robbers" were agents of the employer and that their actions would be imputed to the employer, thus allowing a suit against the employer to go forward. 1. _____

2. Identification of assault as potential claim. 2. _____
 - 2a. Elements of assault are: an act intending to cause offensive contact or imminent apprehension of such contact, thereby putting plaintiff in imminent apprehension of such contact. 2a. _____
 - 2b. Discussion of how facts support a claim of tort of assault. 2b. _____

3. Identification of battery as potential claim. 3. _____
 - 3a. Elements of battery are: act intending to cause offensive contact or imminent apprehension of such contact, which directly or indirectly causes a harmful or offensive contact. 3a. _____
 - 3b. Discussion of how facts support a claim of tort of battery. 3b. _____

4. Identification of false imprisonment as potential claim. 4. _____
 - 4a. Elements of false imprisonment are: defendant intended to restrict plaintiff's movement; plaintiff in fact was restricted; and, plaintiff was aware that her freedom of movement was restricted. 4a. _____
 - 4b. Discussion of how facts support a claim of tort of false imprisonment. 4b. _____

5. Identification of intentional infliction of emotional distress as potential claim. 5. _____
 - 5a. Elements of intentional infliction of emotional distress are: defendant engaged in "extreme and outrageous" conduct; and, defendant intentionally caused the plaintiff severe emotional distress. 5a. _____
 - 5b. Discussion of how facts support a claim of tort of intentional infliction of emotional distress. 5b. _____



21610

Essay 6 GradeSheet

Seat

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Please use blue or black pen
and write numbers clearly

1. Hearsay is an out of court statement offered for the truth of the matter asserted. 1. _____
2. An Admission by Party Opponent is not hearsay when the statement is offered against a party and is the party's own statement in his individual capacity. 2. _____
3. Vic Tem's testimony about what Dan said is admissible under the hearsay exception for admission by party opponent. 3. _____
4. Absence of Public Record or Entry exception provides that evidence to prove the absence of a record is admissible in the form of testimony that a diligent search failed to disclose the record where the record is one that was regularly made and preserved by a public office or agency. 4. _____
5. Keeper's testimony is admissible under the Absence of Public Record or Entry hearsay exception. 5. _____
6. A court may take judicial notice of adjudicative facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial unit or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. 6. _____
7. The trial court could not take judicial notice that Dan had submitted an application because this fact is not one that is generally known within the territorial jurisdiction of the court or capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned. The objection should be sustained. 7. _____
8. The trial court could take judicial notice of the location of the Barex Train Station because it is a fact that is generally known within the territorial jurisdiction of the trial court or capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned. The objection should be denied. 8. _____
9. An expert witness may not testify that a criminal defendant did or did not have the mental state constituting an element of the crime charged and the objection should be sustained. 9. _____



42345

Essay 7 GradeSheet

Seat

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Score

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Please use blue or black pen
and write numbers clearly

1. A Prescriptive Easement requires:
 - 1a. Adverse or hostile use. 1a. _____
 - 1b. Open, Notorious, Visible Use. 1b. _____
 - 1c. Continuous for the requisite period. 1c. _____

2. Baker's grant of permission defeats Able's claim of adverse use. 2. _____

3. An Easement by Necessity Requires:
 - 3a. Original ownership of whole estate by Grantor. 3a. _____
 - 3b. Necessity of easement at time of severance by original owner. 3b. _____
 - 3c. Great necessity for easement at the present time. 3c. _____

4. Easement by Implication/Implied Easement requires:
 - 4a. At the time of conveyance, one part of the land is being used for the benefit of the other part (quasi-easement). 4a. _____
 - 4b. The use is apparent and continuous. 4b. _____
 - 4c. That the use is reasonably necessary to the enjoyment of the quasi-dominant tract. 4c. _____

5. Irrevocable License or Easement by Estoppel exists if:
 - 5a. Justifiable reliance. 5a. _____

6. All interests in land must be in writing to comply with the Statute of Frauds. 6. _____

7. A title examiner does not generally have liability for failing to disclose unrecorded agreements. 7. _____



21686

Essay 8 GradeSheet

Seat

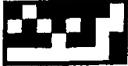
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Score

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Please use blue or black pen
and write numbers clearly

- 1. Custodial interrogation triggers Miranda. 1. _____
- 2. Defendant here was in custody. 2. _____
- 3. Interrogation equals actions or questions likely to elicit incriminating response. 3. _____
- 4. Defendant here interrogated. 4. _____
- 5. No interrogation after Miranda right to counsel asserted. 5. _____
- 6. Further interrogation permissible if Defendant initiates discussion about investigation. 6. _____
- 7. Defendant here did not initiate discussion about investigation. 7. _____
- 8. Miranda violation requires suppression of statement. 8. _____
- 9. Statement taken in violation of Miranda may be used to impeach. 9. _____
- 10. Issue spotting - whether Defendant's statement is constitutionally voluntary. 10. _____
- 11. Statement involuntary if coerced. 11. _____
- 12. Defendant here coerced. 12. _____
- 13. Involuntary statements are inadmissible. 13. _____
- 14. Involuntary statements may not be used to impeach. 14. _____



21741

Essay 9 GradeSheet

Seat

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Score

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Please use blue or black pen
and write numbers clearly

Arguments for appeal

1. Danny has no right under the statute to appeal his revocation. 1. _____
2. Danny may assert a claim under the due process clause of the U.S. Constitution for review despite the statutory preclusions for review. 2. _____
3. A party is entitled to a hearing under the due process clause when the governmental action adversely affects an individual's "protected property interests." 3. _____
4. Danny has a "protected property interest" in a vocational license (i.e., a driver's license). 4. _____
5. Courts consider the following three factors in determining the timing and nature of a hearing required under due process:
 - 5a. the private interest affected by the government action (i.e. the degree of loss to the individual). 5a. _____
 - 5b. the risk of errors inherent in the procedures used (i.e., the likelihood of erroneous deprivation). 5b. _____
 - 5c. the administrative burden on the government. 5c. _____
6. The commissioner's procedure for revocation is inadequate in failing to provide an opportunity for Danny to respond. 6. _____
7. Permitting some response by the licensee prior to final revocation is not overly burdensome. 7. _____

Commissioner or court arguments

8. Reapplication to the commissioner in 30 days is not adequate due process protection given the limited number of available licensees. 8. _____
9. Because there is no administrative procedure to exhaust, Danny may appeal directly to the appropriate court. 9. _____

Form of relief

10. Danny is entitled, at a minimum, to notice, an opportunity to comment and respond to the evidence, and the development of a record for review. 10. _____
11. Due process does not always require a full adjudicatory hearing. 11. _____
12. A post-deprivation hearing is sufficient protection when public health and safety is at stake (i.e., no reinstatement pending his hearing). 12. _____