QUESTION 1

Snow White and Prince Charming have been married for ten years. They both have resided in Colorado their entire lives. A month ago, Snow moved in with Doc Dwarf and now wishes to divorce Prince.

Prince's assets include a pension which will be worth fifty percent of his salary at the time he retires. Prince also has an investment account created by his secretly taking $100 a month out of his pay check and depositing it in the account. Snow recently learned about the account, but Prince has refused to tell her what the account is worth.

Snow has a wedding planner business. She has consistently kept the business' finances separate from the couple's and refuses to tell Prince how much money the business makes. Through her business, Snow has a health insurance policy that covers both her and Prince.

Snow is worried that as soon as she files for divorce, Prince will cash out both the investment account and his retirement account, then hide the proceeds. She is also worried he will become so angry that he will try to hurt her. Snow says, however, that Prince has never actually threatened her.

QUESTIONS:

1. Discuss the grounds upon which Snow may seek to divorce Prince.

2. Discuss what must be filed with the court to commence divorce proceedings.

3. Assuming divorce proceedings have been commenced, discuss:

    a. what protection is afforded Snow regarding her personal safety;

    b. how the parties must conduct themselves with regard to their assets; and

    c. whether Snow may drop Prince's health care coverage.

QUESTION 2

Daryl Diego is a sole proprietor of a video rental store located in Bliss. He owns the store, its assets, and the land and building where the store is located. On March 1, 2006, Daryl properly executed a mortgage on the video rental store, the land, and all appurtenances, present and future, in favor of Bank. On March 4, 2006, Bank properly recorded its mortgage in the county where Bliss is located.

On April 1, 2006, Daryl purchased and installed a security system. The system included video cameras throughout the store, a large electronic scanner at the store's entrance, and security monitors in his private office. It also included all the wiring, cabling, switches, and connectors located in the ceilings and walls. Once the system was installed, it would be impossible to remove much of it without damaging the building. The monitors and the cameras, however, could be removed and replaced quite easily with any similar equipment.

On May 1, 2006, Daryl borrowed money from Lender to use as operating capital. On the same day, Daryl executed a security agreement with Lender in which Daryl gave Lender a security interest in the security system. Lender filed a financing statement with the Secretary of State on that date. Both the security agreement and the financing statement contained the names of the parties and were signed by Daryl. Although the security agreement described the security system in some detail, the financing statement listed simply "equipment and fixtures."

QUESTION:

Discuss the order of priority between Bank and Lender to the security system. Assume that Revised Article 9 of the Uniform Commercial Code is applicable in the state where Bliss is located.

QUESTION 3

In June 2005, Pat and Dan were involved in an automobile accident at an intersection in Colorado. As a result of the accident, Pat incurred $5,000 in property damages to her car and $4,000 in medical expenses from an emergency room visit. Pat had to miss several days of work due to continuing headaches, and she claims that disturbing memories of the accident have reduced the quality of her life and disrupted her sleep.

At the time of the accident both Pat and Dan were United States citizens domiciled in Colorado. In January 2006, Dan moved to Montana where he immediately bought a house, registered to vote, and accepted permanent employment.

In March 2006, Pat commenced a civil action against Dan in federal district court for the district of Colorado seeking recovery for ongoing personal injuries and property damage. Her complaint alleged that the court had subject matter jurisdiction over the action and sought damages in the amount of $76,000.

Prior to trial, Dan timely filed the following motions:

1. A motion to dismiss for lack of subject matter jurisdiction.

2. A motion to transfer venue to the federal district court in Montana pursuant to 28 U.S.C. § 1404(a).

3. A motion for summary judgment. This motion included affidavits from five eyewitnesses to the accident each of whom stated that the light was green in Dan's direction when he entered the intersection. Pat filed a response to the summary judgment motion that included an affidavit from her mother, who was in the car with her when the accident occurred, who stated that Pat entered the intersection while the light was "still green."

QUESTION:

Discuss how the district court should rule on Dan's motions.

QUESTION 4

Homeowner called the fire department to request aid in getting her cat out of a tree. The department sent a volunteer fireman (Fireman) who with the aid of an aerial ladder was able to reach the cat. Grabbing the cat by the scruff of its neck, Fireman began to descend the ladder.

As Fireman was descending, Homeowner's 10-year-old child intentionally pushed over a beehive in Homeowner's backyard. The angry bees attacked and stung Fireman. Fireman was very allergic to bee stings and went into anaphylactic shock. Fireman dropped the cat, which fell to its death. As Fireman sought to prevent himself from falling, he grabbed a limb of the tree. The limb, which was rotten, broke and Fireman fell to the ground breaking a leg.

QUESTION:

Discuss the potential tort claims of Fireman against Homeowner, Fireman against Homeowner's child, and Homeowner against Fireman. Also, discuss any defenses the parties may have.

QUESTION 5

David suffered from hallucinations that caused him to believe that insects were crawling on him and had been committed to a state mental hospital for five years. Because medication was able to manage his condition, David was released to live with his mother, Marta. Marta, however, believed that David was still mentally ill and told David he was not allowed to go outside without her.

Two months after his release, David again began having hallucinations. One evening while Marta was working, David left the house and ran to their neighbor's home. David believed the neighbor would have some sort of chemicals in his house that he could use to kill the imaginary bugs. David smashed a window in the neighbor's house and went inside. He saw a can of bug spray and immediately grabbed it. Unbeknownst to David, the neighbor was at home. When the neighbor heard the sound of the breaking glass, he rushed into the room where David had entered. David sprayed the neighbor in the face with the bug spray, dropped the can, and ran out. The neighbor suffered temporary blindness from the bug spray.

When Marta returned from work, David told her what he had done. Marta hid David in the basement, and when police came looking for him, she told them she hadn't seen him for a week.

QUESTION:

Discuss what crimes under common law, and the Model Penal Code, that David and Marta can be charged with. Also discuss any defenses under the Model Penal Code that David could raise and which party has the burden of proof with respect to those defense(s).

QUESTION 6

An armed robber held up Vince Victim's jewelry store. The robber wore no mask or any other disguise. Victim, despite being very frightened during the robbery and not very composed, provided the police with a general description of the robber. Based on Victim's description, the police were able to produce a composite sketch of the robber.

Police officer Jim Detective was assigned to the case. Detective examined the sketch, but was unable to match it with a picture of any known criminal. Nevertheless, Detective focused his suspicion on Donald Suspect, a petty shoplifter. Detective followed Suspect for the next few days, but did not observe Suspect engaging in any criminal activity. One day, while tailing Suspect in his car, Detective noticed that Suspect had a rear tail light out. Detective turned on his lights and siren and forced Suspect to pull over. Detective immediately asked to see Suspect's license and registration, which were in order. Detective then questioned Suspect about the armed robbery; Suspect denied knowledge and participation. At that point, Detective decided to take Suspect to the police station for further questioning on "suspicion of robbery."

At the station, Detective arranged a photographic array which included pictures of Suspect and a number of other persons, all of whom had characteristics similar to the composite sketch. Victim was brought in to view the array. The only thing that Detective said to Victim was: "Do you see the robber?" Victim immediately pointed to Suspect's picture and identified Suspect as the perpetrator of the crime.

After the identification, Detective arranged a live lineup (a/k/a "in-station lineup") involving Suspect. The participants in the lineup were all similar in appearance to the composite sketch, and all were similarly dressed. Detective again simply asked Victim: "Do you see the robber?" Victim again identified Suspect as the robber. No attorney was present for Suspect.

Suspect was charged with armed robbery. At trial, the prosecution sought to have Victim identify Suspect as the perpetrator of the robbery.

QUESTION:

Discuss any objections defense counsel should have raised.

QUESTION 7

Irene engaged Sal to promote and sell her new invention, the Instant Potato, a cooking device for restaurants that peels, cooks, and mashes potatoes automatically. Irene has worked with Sal in the past, and knows that Sal promotes and sells inventions nationwide and has used assistants to help him do so in the past.

Irene promised to pay Sal part of the sales price for each Instant Potato he sells. Unbeknownst to Irene, Sal asked Henry to help him and agreed to pay Henry for any Instant Potato Henry sells.

Sal sold an Instant Potato to Dave's Diner. The contract with Dave's Diner was signed by Sal and made no mention of Irene.

Henry sold an Instant Potato to Betty's Bistro. The contract with Betty's Bistro was signed by Henry and indicated that Henry was acting on Irene's behalf.

The Instant Potato had a design defect that caused the units sold to Dave's Diner and Betty's Bistro to explode.

QUESTION:

Discuss the legal relationships among Irene, Sal, and Henry and who, if anyone, may be liable to Dave's Diner and Betty's Bistro for any damages due to the explosions.

QUESTION 8

The Brotherhood of God is a small religious organization that spreads its message by reading from the Bible in public places. The Brotherhood wants permission for its members to perform Bible readings in a large public park in the center of Capital City. Capital officials denied the Brotherhood permission to perform the planned Bible readings "because the content of the Brotherhood's speech may distract or disturb people in the park." There is evidence to suggest that Capital's decision was motivated by a bias against the Brotherhood's religious message.

QUESTION:

Discuss any grounds the Brotherhood of God may raise to compel Capital City to allow the planned Bible readings.

QUESTION 9

Wally works for Massive Machines, a heavy equipment company. One day at work Wally's leg got caught and was injured by the gears of a large crane. Wally sued Massive for negligently causing his injuries.

In his complaint, Wally's attorney alleged that the gears in which Wally's leg was caught had been left exposed due to the failure of Massive's maintenance technician to properly replace the crane's gear guard after he had worked on the crane. Massive denied the allegation.

The following evidence was offered at trial:

1. Wally testified that just after helping free Wally's leg from the engine gears, the plant manager said to Wally, "Just a little while ago I reminded the maintenance technician to make sure the gear guards were replaced after he worked on the crane."

2. Massive offered into evidence a copy of a form entitled "Engine Maintenance Record," a document used by Massive to record all service work done on its cranes. The form contained an entry by the maintenance technician indicating that the crane that injured Wally had been serviced, and the gear guard replaced, just hours before Wally's accident. The technician who made the entry on the form was not in court. The plant manager, however, was familiar with the document and she testified to its creation.

3. Wally testified that Massive offered him $100,000 to settle the suit.

4. During discovery, the parties deposed a non-employee, Sally Witness. Witness had seen the entire accident, and testified that the gear guard over the crane's gears was in place. At the time of the trial, Witness was living in a different state and was unwilling to attend the trial. Massive offered Witness' deposition testimony into evidence.

QUESTION:

Discuss the admissibility of the evidence described above under the Federal Rules of Evidence.

DISCUSSION FOR QUESTION 1

The only grounds for dissolution of marriage in Colorado are irretrievable breakdown of the marriage. Colo. Rev. Stat. § 14-10-102. Pursuant to § 14-10-110, an irretrievable breakdown is presumed if both parties agree or if Snow says there is an irretrievable breakdown and Prince does not deny it. Otherwise, the court is required to hear the evidence and enter a finding of fact; before doing so though, the court must continue the hearing for 30 to 60 days and order the parties to undergo counseling in the interim.

A divorce proceeding in Colorado is commenced by filing a Verified Petition for Dissolution. Colo. Rev. Stat. § 14-10-107. Upon filing of a Verified Petition for Dissolution, an automatic temporary injunction takes effect pursuant to Colo. Rev. Stat. § 14-10-107(4)(b). Under the injunction, both Prince and Snow are prohibited from transferring, concealing, or in any way disposing any marital property (except in the usual course of business or for the necessities of life). They are also prohibited from disturbing each other's peace, and Snow is prohibited from canceling or modifying the health insurance policy. While Snow has the right to seek other protection, such as a restraining order, this injunction is automatic and issues even though Prince has not actually threatened any misconduct.

Rule 16.2 of the Colorado Rules of Civil Procedure controls pretrial procedures in divorces, including discovery. (Prior to January 1, 2005, both rules 16.2 and 26.2 contained language controlling such procedures.) Rule 16.2 requires both parties to automatically disclose certain information within 20 days after Prince responds to the Verified Petition for Dissolution. Those disclosures must be made without waiting for the other side to issue a discovery request or make the same disclosures. The disclosures include the following:

1. A complete Financial Affidavit that substantially complies with a form approved by the Colorado Supreme Court.

2. A complete Business Financial Statement that complies with Colorado law.

3. Complete copies of personal and business federal and state income tax returns for the three years prior to the filing of the petition.

4. Pay stubs or statements of earnings for the three months prior to the filing of the petition and a year-end pay stub for the preceding year.

5. The most recent information relating to all pension, profit sharing, deferred compensation, and retirement plans, as well as investments.

6. The health insurance policy and current documents, including a statement of beneficiaries.

Therefore, Prince and Snow will each be required to provide personal and business financial information. Prince will be required provide information about both his pension plan and investment account. Snow will be required to provide information about her business and the health insurance.

DISCUSSION FOR QUESTION 2

1. Is the security system a fixture under state law?

Under Revised Article 9 of the Uniform Commercial Code, "[f]ixtures means goods that have become so related to particular real property that an interest in them arises under real property law." Rev. § 9-102(a)(41). In other words, the Code defers to non-Code state law definitions of fixtures. The bar examinee should note that parts of the security system are quite firmly annexed to the video store, that removal of the basic structure of the system would take considerable effort and result in damage to the store building, and that Daryl owns the building to which the system was annexed. On the other hand, certain parts of the system, the video cameras and the monitors, can be easily removed. Unless these parts are considered to be an integral part of that particular security system, then they might be classified as chattels. In other words, if Daryl could use any cameras or monitors, not necessarily those particular ones, in the system, then they would not be viewed as uniquely adapted to that system. If the cameras and monitors are not fixtures, they would be considered "equipment" under Article 9. Rev. § 9-102(a)(33).

2. What does it take for a security interest to attach and perfect a security interest?

There are three requirements for attachment of a security interest: (i) the parties must have an **agreement** authenticated by the debtor that the security interest attach; (ii) **value** must be given by the secured party; and (iii) the debtor must have **rights** in the collateral. [U.C.C. §9-203(b)]. The security agreement must be signed by the debtor and must describe the collateral.

A security agreement alone is sufficient to give a lender priority over the borrower to the collateral. However, to give priority over third parties to the collateral, the security interest must be perfected. Here, perfection is through filing a financing statement. The financing statement must contain the names of the debtor and creditor, a description of the collateral and for fixtures must describe the real property where the fixtures are located. Filing for chattels is with the Secretary of State and for fixtures is with the clerk and recorder of the county where the collateral is located. Priority is determined by who is the first to properly file.

3. Did Bank file a proper mortgage covering equipment and fixtures?

Bank recorded a valid mortgage covering the video store, the surrounding land, and all appurtenances, present and future. The mortgage was filed in the proper county. The UCC considers a mortgage that describes fixtures as a security agreement. The security system, as a fixture, would be considered an appurtenance to the real estate and thus subject to Bank's mortgage interest.

4. Did Lender's financing statement and security agreement satisfy the requirements of Article 9?

Lender's security agreement with Daryl seems to satisfy the Article 9 requirements for attachment

that the debtor "has authenticated a security agreement that provides a description of the collateral." Lender and Daryl seem to have a conventional security agreement that Daryl has signed and that describes the security system in some detail.

A financing statement is sufficient only if it provides the parties' names and "indicates the collateral covered by the financing statement." Rev. § 9-502(a). Lender's financing statement provides the parties' names and an indication of the collateral. Under Rev. § 9-504, an indication of collateral is sufficient if it provides a description that complies with Rev. § 9-108. Rev. § 9-108 (b) provides that a description of collateral is sufficient if it identifies the collateral by a U.C.C. category. Thus, Lender's description of the collateral as "equipment and fixtures" would be sufficient since those terms are Code categories of collateral. Rev. § 9-102(a)(33), (41).

5. Assuming the security system is a fixture, did Lender file its financing statement in the appropriate office?

Article 9 gives fixture financiers the option of making an ordinary Article 9 filing or making a fixture filing. Rev. § 9-501(a)(1). Both types of filings serve to perfect the secured party's security interest. but as against different groups of competing claimants. An ordinary chattel filing will perfect the interest of the fixture financier against the interests of other chattel claimants -- i.e., other Article 9 secured parties and lien creditors. In re Lucero, 203 B.R. 322 (B.A.P. 10th Cir. 1996). A fixture filing will give protection against the interests of both chattel claimants and real estate claimants, such as real estate mortgagees. Rev. § 9-334 (d), (e)(1). Lender did not make a fixture filing here, but instead made a chattel filing in the Secretary of State's office. This filing is sufficient to perfect Lender's security interest in the security system as a fixture as against the claims of other chattel claimants.

6. As between Bank and Lender, who has priority in the security system?

Article 9 generally ranks secured creditors first in time, first in right. Rev. § 9-322 (a)(1). Although Bank filed its mortgage before Lender, it filed only in the county and not with the Secretary of State. This perfects the security interest in the fixtures, but the cameras and monitors may are not considered fixtures, but are chattels. Filing only in the county did not perfect the security interest in the chattels. Lender properly filed with the Secretary of State and. accordingly, perfected its security interest in the cameras and monitors. Bank will have priority in the fixtures while Lender will have priority in the chattels.

DISCUSSION FOR QUESTION 3

1. Motion based on lack of subject matter jurisdiction

The district court should deny this motion because it has subject matter jurisdiction over the action based upon diversity of citizenship.

Diversity of citizenship jurisdiction requires that there be (a) complete diversity of citizenship among the parties and (b) an amount in controversy that exceeds $75.000 (exclusive of setoffs, interest, or costs). See 28 U.S.C. § 1332(a)(1)(district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between (1) citizens of different States). Both requirements are met here.

a. Diversity of parties. For purposes of diversity jurisdiction, an individual is a citizen of the state in which he or she is domiciled. See Crowley v. Glaze, 710 F.2d 676 (10th Cir. 1983). Domicile, in turn, is the combination of (i) physical presence in a location and (ii) an intent to remain there indefinitely. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). In this case, the facts reveal that Pat is domiciled in Colorado. Dan has bought a house, registered to vote, and accepted permanent employment in Montana. This conduct is sufficient to establish that he is domiciled in Montana. Thus, the parties are of diverse citizenship.

The examinee should also note that diversity is determined at the time the action is filed or commenced, not when it arose or accrued. See Model Imperial Supply Co. v. Westwind Cosmetics, Inc., 808 F. Supp. 943 (E.D.N.Y. 1992); see also Louisville, N.A. & C.R. Co. v. Louisville Trust Co., 174 U.S. 552, 19 S.Ct. 817, 43 L.Ed. 1081 (1899). Thus, the fact that the accident occurred and/or the claims arose while Dan was still domiciled in Colorado does not destroy diversity.

b. Amount in controversy. In determining whether the amount in controversy requirement is satisfied, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify a dismissal. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568. 50 L.Ed.2d 471 (1977).

Here, the complaint seeks damages exceeding the $75,000 threshold and appears to be made in good faith. And, while the facts indicate initial property damage and medical expenses totaling only $9000, it is not a legal certainty that Pat cannot recover additional damages for her "ongoing" injuries. Thus, the amount in controversy requirement is satisfied.

2. Motion to transfer venue

The district court should also deny Dan's motion to transfer venue. 28 U.S.C. § 1404(a) provides that for "the convenience of parties and witnesses, in the interest of justice, a district

court may transfer any civil action to any other district or division where it might have been brought." To obtain a transfer of venue under this provision, the movant must establish two things. First, that the action could have been brought in the district to which the movant seeks transfer. This means the proposed forum must have proper subject matter jurisdiction and personal jurisdiction over defendant, and proper venue. Second, the movant must establish that the transfer is appropriate based on the convenience of the parties, the convenience of witnesses, and the interests of justice. The district court has broad discretion in determining such a motion. See Posven, C.A. v. Liberty Mut. Ins. Co., 303 F. Supp.2d 391 (S.D.N.Y. 2004).

Here, Dan can establish that this action could have been brought in Montana. Subject matter jurisdiction and personal jurisdiction are not problematic and venue is proper in the district court in Montana because actions based solely on diversity of citizenship may be brought in a judicial district where any defendant resides, if all defendants reside in the same state. See 28 U.S.C. § 1391(a)(1).

However, in balancing the convenience of the parties (one of whom is domiciled in Colorado) and the witnesses (most or all of whom probably reside in Colorado) and the interests of justice, it appears that Colorado is the far more convenient forum. Thus, the district court should deny Dan's motion to transfer venue.

3. Motion for summary judgment

Finally, the district court should also deny Dan's motion for summary judgment. Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Palladium Music, Inc. v. EatSleepMusic, Inc., 398 F.3d 1193 (10th Cir. 2005). Thus, if a material factual issue is in dispute, summary judgment is improper.

Here, there is a genuine issue of material fact as to which party had the right of way through the intersection when the accident occurred. Although Dan has a greater number of affidavits than Pat, the court should still conclude that a factual controversy exists which precludes entry of summary judgment. See Hall v. Bellmon, 935 F.2d 1106 (10th Cir. 1991)(material factual disputes based on conflicting affidavits generally cannot be resolved at summary judgment stage).

DISCUSSION FOR QUESTION 4

Fireman Against Homeowner

A. Potential claims

Fireman may claim that Homeowner was negligent. Many courts, however, hold that a landowner owes no duty of care to a fireman, who is deemed as a matter of law to assume the risks incidental to his role as a fireman. *Day v. Caslowitz*, 713 A.2d 758 (R. I. 1998). This rule has been applied to voluntary firemen. *Flowers v. Rock Creek Terrace Ltd.*, 520 A.2d 361 (Md. 1987). Under such a rule Homeowner would not be liable for her negligence, if any, in allowing the cat to climb the tree.

The rotten limb, however, is another matter. This appears to be a latent defect, not fairly associated with the fireman's mission, to which the fireman's rule would not apply. *Flowers v. Rock Creek Terrace, Ltd., supra*. In order to recover in negligence, Fireman would have to show that Homeowner knew or should have known about the rotten limb and did not take reasonable precautions to prevent Fireman's injury therefrom. Dobbs, THE LAW OF TORTS § 231 (2000).

Other jurisdictions, however, have abolished the fireman's rule, and have imposed a general duty of care on the landowner to protect the fireman. *Day v. Caslowitz, supra.*

Parents are generally not held vicariously liable for the torts of their children. Phillips *et al.*, TORT LAW 46 (2d edition 1997). A parent may be negligent in failing to supervise his/her child, or in failing to protect others against known dangerous propensities of the child. Restatement (Second) of Torts § 316 (1965). In addition, some states, by statute, hold parents to limited amounts of liability for the intentional torts of their children. *See, e.g.*, Tenn. Code Annot. § 37-10-101. Thus, Homeowner could be liable to Fireman for damages from the broken leg, and also for damages from the anaphylactic shock if she is responsible for the act of her child.

B. Homeowner's Defenses

Homeowner may allege that Fireman was contributorily negligent, or comparatively at fault. There is no evidence, however, that Fireman was negligent in not discovering the rotten limb, and his falling may be excused under the sudden emergency doctrine owing to the bee stings. *Raimondo v. Harding*, 341 N.Y.S. 2d 679 (App. Div. 1973).

Fireman Against Child

A. Potential Claims

Fireman would claim that child is guilty of the intentional tort of battery in knocking over the beehive. A prima facie case of battery is proven when an intentional act by a defendant causes harmful or offensive contact to a plaintiff. Additionally, there must be causation, either

direct or indirect contact will suffice. Here, the contact is indirect, as the child set the bees in motion and they caused the harmful contact.

B. Child's defenses

The child will likely plead the fireman's rule, but this defense will be ineffective both because of the latent danger rule, discussed above, and because the fireman's rule is generally held not to apply to the commission of intentional torts. *Flowers v. Rock Creek Terrace, Ltd., supra.*

Child may also plead his minority. This is not a bar to recovery for the commission of an intentional tort, if a child of like age, intelligence and experience is capable of forming the requisite intent to commit the tort. *Goss v. Allen*, 360 A.2d 388 (N.J. 1976). A jury could find a child ten years of age capable of forming such an intent. *Id.*

Knocking over a beehive might be considered an adult activity, since it is one not normally engaged in by children and one involving a great risk of danger. *Robinson v. Lindsay*, 598 P.2d 392 (Wash. 1979). If the activity were considered an adult activity, Homeowner's child would be held to the standard of a reasonable adult. *Id.*

Homeowner's child may contend the danger to Fireman was not foreseeable. The validity of such a defense would depend on whether the child would reasonably foresee that the bees might escape and sting someone in the vicinity.

The bee sting could be seen as an injury resulting from transferred intent, in which event the issue of foreseeability would be immaterial. *Corn v. Sheppard*, 229 N.W. 869 (Minn. 1930). Homeowner's child committed a trespass to personalty or realty (depending on how the beehive is characterized), and the intent to commit this tort could be transferred to the battery of Fireman by the bees, which the child set in motion.

If Child is liable for the bee stings, he should also be liable for Fireman's injuries from the fall. The general risk of a fall under these circumstances is foreseeable, and the contributing factor of the rotten limb is merely a substantial contributing cause. *Landers v. East Texas Salt Water Disposal Co.*, 248 S.W.2d 731 (Tex. 1952). If Fireman is liable for the death of the cat, the child may be required to provide contribution or indemnity.

For the reasons already discussed, Fireman's comparative fault should not be a defense. Moreover, comparative fault, if any, is generally not considered to mitigate liability for an intentional tort. *Graves v. Graves*, 531 So. 2d 817 (Miss. 1988).

Homeowner Against Fireman

Homeowner could claim Fireman was negligent in grabbing the cat insecurely, i.e., by the scruff of the neck. It is not clear that this way of grabbing the cat was negligent, since cats are frequently carried securely and safely by the scruff of their necks. In any event, even if this method of transportation were negligent, this negligence was superseded by the unexpected, superseding bee stings and the breaking rotten limb.

DISCUSSION FOR QUESTION 5

Crimes David can be charged with

Burglary

At common law. the elements of burglary are an unlawful breaking and entry into a dwelling of another person at night with the intent to commit a felony therein. United States v. Brandenburg, 144 F.2d 656 (3rd Cir. 1944); Sanchez v. People, 142 Colo. 58, 349 P.2d 561 (1960); see also 3 Wharton's Criminal Law §§ 316-19, 328;. The unlawful breaking and entry at night elements are obviously satisfied here. The facts also indicate that David went to the neighbor's home with the intent to steal items that he believed would kill the bugs.

Some states require that the intended crime be a felony, but The Model Penal Code does not. Some examinees might discuss whether intent to steal bug spray constitutes a felony sufficient to satisfy the "commission of a felony" element of burglary. Those examinees might argue that David should be charged with and convicted only of the lesser-included offense of criminal trespass, which is the knowing and unlawful (or unconsented to) entry into a building or occupied structure. Model Penal Code and Comment, § 221.1 (2001).

Battery

Battery is an unlawful application of force to another person resulting in either bodily injury or an offensive touching. People v. O'Rear, 220 Cal. App. 2d Supp. 927, 34 Cal. Rptr. 61 (1963); Bentley v. Commonwealth, 354 S.W.2d 495 (Ky. 1962); Banovitch v. Commonwealth, 42 U.S.C. 83 S.E.2d 369 (Va. 1954). The common law offense of battery is called assault in the Model Penal Code. Model Penal Code and Comment, § 211.1(1) (2001) (a person who "purposely, knowingly, or recklessly causes bodily injury to another" is guilty of simple assault). If the examinees correctly set forth the elements of the offense, they should probably get credit regardless of what they call it.

At common law, a battery that results in serious bodily injury is aggravated battery. People v. Satterfield, 552 N.E.2d 1382 (Ill. App. 1990); State v. Blackstein, 387 P.2d 467 (Idaho 1963). People v. Satterfield, 552 N.E.2d 1382 (Ill. App. 1990); State v. Blackstein, 387 P.2d 467 (Idaho 1963). The terminology under the Model Penal Code for the same substantive offense is aggravated assault. Model Penal Code and Comment, § 211.1(2) (2001).

Here. David sprayed bug spray in the neighbor's face. causing him temporary blindness. Even thought he didn't actually touch the neighbor, the contact suffices for battery. Temporary blindness may constitute serious bodily injury and therefore David likely committed aggravated battery.

Crimes Marta can be charged with

Accessory After the Fact

A person commits the offense of accessory after the fact if she knowingly "harbors or conceals" a felon for the purpose of helping him avoid apprehension. The accessory after the fact is not liable for the underlying felony, as an accomplice would be. Instead, she has committed a distinct crime based upon obstruction of justice. The elements of the offense are: 1) a completed felony must have been committed; 2) the defendant must known that the felony was committed; 3) the assistance must have been given to the felon personally; 4) the defendant must have taken affirmative acts to hinder the felon's arrest. Model Penal Code and Comment, § 242.1and 242.3 (2001); United States v. Barlow, 470 F.2d 1245, 1252-1253 (D.C. App. 1972) (the gist of being an accessory after the fact lies essentially in obstructing justice by rendering assistance to hinder or prevent another's apprehension and prosecution for a crime); Noblit v. State, 808 P.2d 280 (Alaska App. 1991); People v. Sandoval, 791 P.2d 1211 (Colo. App. 1990).

Here, David's offenses had been completed. Marta knew what he had done, and she hid him in her basement to prevent police from finding and arresting him. Based on these facts, the elements of the offense are satisfied.

David's defenses

Insanity

The question directs the examinees to discuss the defenses available under the Model Penal Code only. Accordingly, they should not discuss other tests for insanity, including the M'Naghten, irresistible impulse, and Durham (or New Hampshire) tests. Under the Model Penal Code, "a person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity either appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

A criminal defendant is presumed sane, but under the Model Penal Code, once the insanity defense is raised, the prosecution has the burden of proving beyond a reasonable doubt that the defendant was sane at the time of the offense. Model Penal Code and Comment, § 4.01 (2001). Other jurisdictions require the defendant to prove his insanity, but the question asked only about the Model Penal Code. Therefore, once David raises the issue of his sanity, the basis of which could be his prior confinement in a mental institution, the prosecution has the burden of proof to establish that David was sane at the time he committed the crimes.

DISCUSSION FOR QUESTION 6

This case presents important questions regarding police investigatory power, particularly the power of police to "stop" and search citizens as well as their authority to conduct lineups.

OBJECTIONS

I. Suspect's Sixth Amendment Right to Counsel was violated.

The initial issue is whether Detective violated Suspect's Sixth Amendment right to counsel by either the photographic lineup or the actual lineup. In *United States v. Wade*, 388 U.S. 218 (1967), the Court held that the Sixth Amendment right to counsel applies to lineups because they involve a "critical stage" at which the absence of counsel can lead to a "suggestive lineup." *Id.* Because of the suggestiveness, a witness' identification may be tainted and may result in "irreparable mistaken identification." *Id.* In other words, the witness' perception may be unalterably affected by the suggestiveness and the in-court identification may reflect nothing more than the suggestiveness of the lineup. *Id; see also* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF & CATHERINE HANCOCK, PRINCIPLES OF CRIMINAL PROCEDURE 228-232 (Thomson/West 2004).

The difficulty for Suspect, in this case, is that the Sixth Amendment does not attach until adversary proceedings commence. In *Moore v. Illinois*, 434 U.S. 220 (1977), the Court held that the right to counsel applies only to post-charging lineups. In other words, until a defendant has been formally charged with a crime, there is no right to counsel. In this case, at neither the photographic lineup nor the regular lineup, had Suspect been charged. Therefore, under *Moore*. Suspect did not have a right to counsel. Further, under *United States v. Ash*, 413 U.S. 300 (1973). there is no right to counsel at photographic lineups.

II. Due Process violation.

Even if an in-court identification does not violate the defendant's right to counsel, it can be excluded if admission would violate due process. *See Stovall v. Denno*, 388 U.S. 293 (1967); *see also* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF & CATHERINE HANCOCK, PRINCIPLES OF CRIMINAL PROCEDURE 232-235 (Thomson/West 2004). Unlike the Sixth Amendment right to counsel, due process considerations apply to both pre-indictment and post-indictment lineups. The question is whether the pre-trial identification was unduly "suggestive" and created the potential for "irreparable mistaken identification" at trial. *See Stovall v. Denno*, 388 U.S. 293 (1967); *see also* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF & CATHERINE HANCOCK, PRINCIPLES OF CRIMINAL PROCEDURE 232-235 (Thomson/West 2004).

In evaluating due process claims, courts consider a variety of factors. In *Neil v. Biggers*, 409 U.S. 188 (1972). the Court indicated that a variety of factors were relevant in determining whether an identification is "reliable." Although *Neil* dealt with a confrontation rather than a

lineup, the factors it identifies are relevant to lineups a well: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

In this case, it is difficult to argue that an in-court identification would violate due process. There are factors suggesting that the jewelry store owner did not get a good view of the robber. The owner was very frightened and not very composed during the robbery. On the other hand, at the photographic lineup, which was not conducted in a suggestive manner, the owner readily picked Suspect out as the perpetrator. He repeated the identification at the in-station lineup. Under the circumstances, especially given that there were no suggestive factors at work in the in-station lineup; it is difficult to argue that an in-court identification would be unduly affected by suggestivity that would produce irreparable mistaken identification. On the contrary, it can be considered "reliable."

III. Fruit of the Poisonous Tree

This problem also involves so-called "Fruit of the Poisonous Tree" issues. Under the Fourth Amendment, when evidence is "derived" from unconstitutional police conduct, the exclusionary evidence rule requires exclusion of the derivative evidence. *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963); *see also* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF & CATHERINE HANCOCK, PRINCIPLES OF CRIMINAL PROCEDURE 228-232 (Thomson/West 2004).

In this case, the lineup may have been "derived" (a "poisonous fruit") from illegal action (the "tree"). As a general rule, police are not allowed to stop an individual without a "reasonable suspicion" that the individual is involved in criminal activity without violating the Fourth Amendment's prohibition against unreasonable searches and seizures. *Delaware v. Prouse*, 440 U.S. 648 (1979). In other words, the police cannot pull citizens over to engage in a "fishing expedition," and cannot pull them over simply to check their driver's licenses and registration forms. In this case, however, Suspect had a defective tail light. Thus, Detective had adequate grounds to stop him. However, the facts indicate that Detective decided to take Suspect to the station on "suspicion" of armed robbery. Under the Fourth Amendment, a mere "suspicion" of criminal activity is not sufficient to force a defendant to go to the police station or to participate in a lineup. *See Dunaway v. New York*, 442 U.S. 200 (1979). In general, "probable cause" is required for these actions. *Id.; see also* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF & CATHERINE HANCOCK, PRINCIPLES OF CRIMINAL PROCEDURE 131-134 (Thomson/West 2004). Even if it could be argued that Detective had a "reasonable suspicion" that Suspect was involved in criminal activity, it does not rise to the level of probable cause. Accordingly, it can be argued that the in-station lineup was the "fruit" of the illegal seizure.

The difficulty is that, absent evidence that the in-station lineup was unduly "suggestive" and therefore produced the possibility of irreparable mistaken identification, it is unlikely that the "fruit of the poisonous tree" doctrine would preclude the in-court identification. In *Nix v. Williams*, 467 U.S. 431 (1984), the Court refused to apply the "fruit of the poisonous tree" doctrine to exclude witness testimony when there was an "independent source" for the witness. The Court stated that "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." In this case, the police knew about the jewelry store owner's existence, and could have asked him to make the in-court identification whether or not it conducted a pre-trial identification.

CONCLUSION

None of Suspect's objections to the in-court identification are likely to succeed. As a result, the evidence should be admitted into evidence against Suspect.

DISCUSSION FOR QUESTION 7

Irene and Sal have entered into a principal-agent relationship. Agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Stortroen v. Beneficial Fin. Co. of Colo., 736 P.2d 391, 395 (Colo. 1987) (citing Restatement (Second) of Agency § 1(1) (1957)). Creation of the agency relationship requires the consent of both parties to have the agent, Sal, act for the benefit of the principal, Irene. City of Aurora ex rel. Utility Enterprise v. Colorado State Engineer, 105 P.3d 595 (Colo. 2005). A principal is bound by acts of its agent that are within the agent's actual or apparent scope of authority. Commercial Standard Ins. Co. v. Rinn, 65 P.2d 705, 707 (Colo.1937)

Henry is an agent of Sal, and is a subagent to Irene. A subagent is "a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible." Restatement (Second) of Agency § 5 (1957); Stortroen v. Beneficial Fin. Co. of Colo., supra at 395.

Here, although Irene did not give Sal express authority to hire a subagent, the authority to appoint subagents is inferred where the principal knows or has reason to know the agent employs subagents. Bloom v. Wolfe, 37 Colo. App. 407, 547 P.2d 934 (1976). Here, since Irene has worked with Sal before, knows Sal has used subagents in the past, and knows Sal is trying to promote the product nationally, Sal has implied authority to hire a subagent.

A principal is undisclosed if, when an agent and a third party interact, the third party has no notice that the agent is acting for a principal. The duty to disclose the identity as well as the existence of the principal lies with the agent. Water, Waste & Land, Inc. v. Lanham, 955 P.2d 997, 1001 (Colo. 1998). A principal is liable to third-parties for contracts entered into by its agent. Beneficial Finance Co. of Colorado v. Bach, 665 P.2d 1034, 1036 (Colo. App. 1983). An undisclosed principal is liable upon a contract, even if it purports to be the contract of the agent, unless the terms of the contract exclude the liability of the principal. Restatement (Second) of Agency § 190 (1958).

An agent or a subagent acting within his or her actual authority is not personally liable to third-parties unless acting on behalf of an *undisclosed* principal. Leonard v. McMorris, 63 P.3d 323, 330 (Colo. 2003). "[U]nless otherwise agreed, a person making or purporting to make a contract with another as agent for a *disclosed* [emphasis added] principal does not become a party to the contract." Restatement (Second) of Agency § 320 (1958).

Here, Sal did not disclose to Dave's Diner that he was acting on behalf of Irene, and there is nothing in the facts to suggest that Dave's Diner was on notice that Sal was acting on behalf of Irene. Therefore, Irene is liable to Dave's Diner since the contract was entered into on her behalf and in the scope of Sal's agency, and Sal is also liable because he had a duty to disclose he was acting on behalf of a principal and did not.

Irene is also liable to Betty's Bistro since Henry was a subagent. Henry and Sal are relieved of liability because the contract disclosed that Henry was acting on behalf of his principal, Irene.

DISCUSSION FOR QUESTION 8

The city's denial of the Brotherhood's request for permission to perform Bible readings in the public park may violate two provisions of the First Amendment, as incorporated against states and municipalities through the Fourteenth Amendment: the freedom of speech and the freedom of religion. See U.S. Const. Amend. I, XIV.

The initial question a court must confront when a speaker wishes to speak on public property is whether the property is a public forum. A public forum is government property that traditionally has been open to expressive activity, Hague v. CIO, 307 U.S. 496 (1939), or that the government has opened to such activity by designation. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). In a public forum, the government must satisfy strict scrutiny, an extremely difficult standard, before it may regulate speech based on content. To satisfy strict scrutiny, the government must show that the regulation is (1) necessary to accomplish (2) a compelling governmental interest and is (3) narrowly tailored to serve that interest. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). In contrast, in a nonpublic forum, the government merely must show a rational basis to justify content-based regulation of speech, an extremely easy showing to make. Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985). In this case, the government has stated clearly that its denial of the Brotherhood's request is based on the content of the Brotherhood's speech. Thus, the determination whether or not the public park is a public forum will dictate which test will apply and probably will be dispositive.

The public park is the quintessential public forum. Courts generally hold that speakers are free to speak on public streets and sidewalks and in public parks, subject only to content-neutral "time, place, and manner" regulations. United States v. Grace, 461 U.S. 171 (1983). Because the city's denial of the Brotherhood's request is content based, the city will have to satisfy strict scrutiny to keep the Brotherhood out of the park. Protecting citizens from distraction and disturbance does not rise to the level of a compelling governmental interest. Erznoznik v. Jacksonville, 422 U.S. 205 (1975). Thus, the Brotherhood almost certainly will prevail as to the park.

The Brotherhood also can raise a claim that the city's denial of permission violates the First Amendment right to the free exercise of religion. Two different types of arguments are possible under the Free Exercise Clause.

First, to the extent the city's denial of permission was neutral — that is, any group making the same request would have been denied for the same reasons — the Brotherhood might try to obtain an exemption from operation of the law, also known as a religious "accommodation." Such an argument probably would fail, because the Supreme Court in Employment Division v. Smith, 494 U.S. 872 (1990), held that religious accommodation claims were entitled to nothing more than "rational basis" review, and the city's interest in maintaining order and decorum provides a rational basis for the denial.

Second, to the extent the Brotherhood can show the city denied permission for the Bible readings because of bias against the Brotherhood, it can argue that the city has violated the Free Exercise Clause by impermissibly targeting religion for a special burden. The Court in Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), held unanimously that such deliberate targeting of religion violated the Free Exercise Clause. Thus, if the Brotherhood can prove bias, it should be able to win on a free exercise claim.

DISCUSSION FOR QUESTION 9

As a threshold matter, to be admissible, all evidence must be relevant. FRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FRE 401.

1. The plant manager's statement is relevant. The statement creates the inference that the technician disobeyed or neglected explicit instructions. It also might create other inferences, including that the technician did, in fact, follow orders. Either inference is relevant to Wally's contention that the gear guard was not properly replaced, thus causing his leg injury. Thus, pursuant to FRE 401, the statement is admissible unless some other rule of evidence precludes admission.

The plant manager's statement is also subject to a hearsay objection. Even if it is relevant, hearsay is not admissible. FRE 802. Hearsay is an out-of-court statement offered for the truth of the matter asserted therein. FRE 801(c). She obviously made a statement and it was not made in this courtroom. In addition, the relevance of the statement results from the truth of the matter it asserts. The finder of fact must conclude that the plant manager did instruct the technician to replace the gear guard in order to conclude from this statement that the technician was either negligent or dutiful.

Although hearsay, a statement can nevertheless be admissible if it meets one of the "exceptions" to the hearsay prohibition. One exception, which is actually an exemption to the hearsay rule, is for admissions by party-opponents. FRE 801(d)(2). This exception requires that the statement be made by a party and offered into evidence by the party's opponent. Here, the plant manager's statement is deemed to have been made by Massive Machines. A statement by an agent is deemed to have been made by the principal if the statement is within the scope of the agency or employment and made during the existence of the employment relationship. FRE 801(d)(2)(D). The plant manager was Massive's employee at the time she made the statement, and the statement, involving quality control on the assembly line, concerned a matter within the scope of her employment as the plant manager. Finally, the statement was offered into evidence by Wally, Massive's party opponent. The plant manager's statement constituted a party admission, and is admissible on that ground.

2. The maintenance form offered by Massive is relevant. If accurate, it tends to prove Massive's contention that the gear guard was in place at the time of the accident. It also shows that Massive's quality control measures were not negligent.

Wally may object to the document as hearsay. The document is an out-of-court statement offered for the truth of the matter it asserts. The finder of fact must believe in the truth of the entry on the form, indicating recent maintenance, to use the document to conclude that the gear guard was properly in place. An exception to the hearsay prohibition exists for business records. FRE 803(6) permits the admission of records in any form of "regularly conducted activity" if the records were made at or near the time of the event recorded by a person with knowledge, if kept

in regular course of a business activity and if it was a regular practice of the business to make that record.

The maintenance form meets the requirements of the business records exception. It is a document that is used to record maintenance service on the crane. The plant manager will testify that the relevant entry on the form is customarily made by a person with knowledge, the maintenance technician, and is made in a timely fashion, just after completing service on the crane. She can also testify that Massive customarily uses these forms as part of its ongoing business operations.

The fact that the technician is not in court does not matter. Hearsay exceptions found in FRE 803 are admissible without regard to the availability of the declarant. The plant manager can testify to all the pertinent aspects of the record-keeping at her assembly plant. The document is admissible.

With regard to the copy of the maintenance form being offered rather than the original document, the best evidence rule (FRE 1002) requires that where the terms of a writing are material, the original document must be produced unless it has been shown that the original is unavailable for some reason other than the serious misconduct of the proponent.

3. Massive's offer of $100,000 to settle the case may be relevant. One plausible inference from the offer is that Massive believes it was in fact negligent in injuring Wally. Massive's knowledge on this point is relevant to establish that it was negligent.

FRE 408 specifically provides that evidence of offering valuable consideration to attempt to compromise a claim is not admissible to prove liability or validity of the claim. Because the only inference that makes Massive's settlement offer relevant goes to its liability, the offer is inadmissible.

4. Sally's recollections as to events at the accident scene are obviously relevant to the issue of whether or not the gears were properly guarded at the time of the accident. The relevance of Sally's statements stems from the truth of the matter they assert. They are being offered to prove the gear guard was fastened at the time of Wally's accident. As a result, the deposition testimony is admissible only if an exception to the hearsay prohibition applies.

FRE 804(b)(1) allows the admission of former testimony given in a deposition as long as the party against whom the deposition is offered had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination. The declarant must also be "unavailable." The facts indicate that both parties deposed Sally. Although a deposition examination is not a perfect substitute for trial examination, the rule permits its substitution in cases where the declarant is unavailable. FRE 804(a)(5) includes within the definition of

"unavailable" a witness who is absent from the hearing and whose presence the proponent of the evidence cannot obtain by process or other reasonable means. Because Sally is now living in another state, she is outside the subpoena power of the court and cannot be compelled to attend through process. She is also unwilling to attend the trial. Therefore, she is "unavailable" within the meaning of FRE 804(a).

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ESSAY Q1

SEAT | | | | |

ISSUE		POINTS AWARDED
1.	The only ground for divorce in Colorado is the irretrievable breakdown of a marriage ("no fault").	1. o
1a.	An irretrievable breakdown is presumed if the parties agree, or,	1a. o
1b.	If Snow says so and Prince does not deny it.	1b. o
1c.	Otherwise, whether there has been an irretrievable breakdown is a question of fact for the judge to decide after hearing all the evidence.	1c. o
1d.	First, the court must continue the hearing for 30-60 days and order the parties to undergo counseling in the interim.	1d. o
2.	A divorce action is initiated by filing a Verified Petition for Dissolution.	2. o
3.	A temporary injunction will automatically issue upon filing of the Verified Petition for Dissolution that prohibits Snow and Prince, each, from disturbing the other's peace.	3. o
3a.	The automatic injunction issues even though Prince has not actually threatened to hurt Snow.	3a. o
4.	A temporary injunction will automatically issue upon filing of the Verified Petition for Dissolution that prohibits each other from transferring, concealing, or in any way disposing of any marital property.	4. o
4a.	Prince may not cash out his high yield account.	4a. o
5.	A temporary injunction will *automatically* issue upon filing of the Verified Petition for Dissolution that prohibits them from cancelling or modifying health insurance.	5. o
5a.	Snow may not take Prince off of the health insurance.	5a. o
6.	Both parties will be required to automatically disclose their personal and business financial information.	6. o
6a.	Prince will be required to disclose the details of his pension plan.	6a. o
6b.	Prince will be required to disclose the details of his high yield account.	6b. o
6c.	Snow will be required to produce detailed financial information for her business.	6c. o
6d.	Snow will be required to produce detailed financial information for the health insurance.	6d. o
7.	Those disclosures will need to be made *within 20 days after Prince files a response* to the Verified Petition for Dissolution.	7. o
7a.	Whether or not the other party makes their disclosures.	7a. o
7b.	Snow should be told to start compiling the required information now.	7b. o

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ESSAY Q2

SEAT

ISSUE		POINTS AWARDED
1.	To have a perfected security interest, a party must have a security agreement that attaches and is filed with the proper office.	1. o
2.	Security Agreement must be signed by debtor and describe collateral.	2. o
3.	Attachment defined	
	3a. Security Agreement;	3a. o
	3b. Value given by the secured party:	3b. o
	3c. Debtor has rights in the collateral.	3c. o
4.	Perfection requires filing in the proper office	
	4a. Secretary of State for chattels;	4a. o
	4b. County clerk for real estate and fixtures.	4b. o
5.	Fixtures are goods that have become so related to particular real property that an interest in them arises under real property law.	5. o
6.	Chattels defined as equipment and other property easily removed.	6. o
7.	Monitors and camera are chattels/equipment.	7. o
8.	Balance of the security system attached to the building are fixtures.	8. o
9.	First to perfect has priority.	9. o
10.	Financing statement requires names of parties and description of collateral.	10. o
11.	Describing "equipment and fixtures" is adequate.	11. o
12.	After acquired property clauses are generally enforceable.	12. o
13.	Bank has priority in fixtures.	13. o
14.	Lender has priority in equipment.	14. o

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ESSAY Q3

SEAT

ISSUE		POINTS AWARDED
Subject Matter Jurisdiction		
1.	Identification of two basic requirements for diversity of citizenship jurisdiction (diverse citizenship and 75,000 amount in controversy).	1. ○
2.	Citizenship/residency equates to "domicile."	2. ○
3.	Test: Physical presence plus intent to remain indefinitely.	3. ○
4.	Dan meets requirement (move/vote/employment in Montana).	4. ○
5.	Diversity is determined when action is commenced.	5. ○
6.	Standard for whether amount in controversy is satisfied (amount claimed in complaint sufficient if made in good faith).	6. ○
7.	Amount in controversy requirement is satisfied here.	7. ○
Venue		
8.	Proposed forum must be one in which action "might have been brought."	8. ○
9.	Venue proper where defendant (any defendant) resides.	9. ○
10.	Venue proper in Montana based on Dan's residency/domicile.	10. ○
11.	Transfer must be appropriate based on the convenience of parties, witnesses, interests of justice.	11. ○
12.	Convenience weighs against transfer.	12. ○
Summary Judgment		
13.	Legal standard for summary judgment (no genuine issue of material fact/no genuine factual controversy).	13. ○
14.	Recognition that factual controversy still exists so summary judgment improper.	14. ○

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ESSAY Q4

SEAT

ISSUE		POINTS AWARDED
1.	Elements of Negligence are:	
1a.	Existence of duty of care,	1a. ○
1b.	Breach of duty of care; and,	1b. ○
1c.	Damages.	1c. ○
2.	H may be liable to F for negligent supervision of her child, C.	2. ○
3.	Claims against child include negligence, battery or other intentional torts.	3. ○
4.	H could be liable to F for damages arising from the sting and/or fall.	4. ○
5.	For H to recover from F for loss of her cat, H must prove that F was negligent in not meeting the duty of care in handling the cat.	5. ○
6.	Fireman's defenses could include comparative negligence and/or contributory negligence (H's failing to maintain the tree and C's destruction of the beehive).	6. ○
7.	H has affirmative defenses, including:	
7a.	There is no vicarious liability for intentional torts of children	7a. ○
7b.	That because of Fireman's Rule H had no duty of care.	7b. ○
8.	Child's defenses include that while purposefully knocking over the beehive, C did not intend to cause harm to F.	8. ○

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ESSAY Q5

SEAT

ISSUE		POINTS AWARDED
1.	Elements of burglary	
1a.	Common law: Unlawful breaking and entry into the dwelling of another person at night with the intent to commit a felony therein. (must get all)	1a. ○
1b.	MPC – enters building with intent to commit a crime therein.	1b. ○
2.	Question on elements: may not be a felony and/or issue of night time.	2. ○
3.	MPC doesn't require felony.	3. ○
4.	Under MPC, may be trespass – knowing and unlawful or unconsented entry into a building or occupied structure/property.	4. ○
5.	Battery/Assault – unlawful application of force to another person resulting in either bodily injury or an offensive touching. (must get all)	5. ○
6.	Aggravated Battery/Assault – battery that results in serious bodily injury.	6. ○
7.	Accessory after the fact	
7a.	a completed felony (crime) must have been committed/the defendant must have known that the felony was committed.	7a. ○
7b.	the assistance must have been given to the felon personally, the defendant must have taken affirmative acts to hinder the felon's arrest.	7b. ○
8.	Insanity	
8a.	A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect.	8a. ○
8b.	He lacks substantial capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law.	8b. ○
9.	Burden of proof	
9a.	Defendant is presumed sane until he brings forward evidence of insanity.	9a. ○
9b.	Prosecution then has burden of proving beyond reasonable doubt that defendant was sane at time of crime.	9b. ○
10.	David can raise issue and use prior confinement in mental institution as proof of insanity.	10. ○

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ESSAY Q6

SEAT | | | | |

ISSUE		POINTS AWARDED
1.	Recognition that Sixth Amendment or right to counsel may apply to identification procedures.	1. o
2.	Awareness that Sixth Amendment applies only after adversary proceedings are commenced.	2. o
3.	Awareness that no Sixth Amendment protection applies to photo arrays.	3. o
4.	Recognition that identification procedures are subject to Due Process standards.	4. o
5.	Awareness that in court identification may be tainted by suggestive prior identification procedure.	5. o
6.	Linchpin of DP analysis is reliability.	6. o
7.	Recognition of Fourth Amendment issue - adequacy of grounds for arrest.	7. o
8.	Taking D to police station likely amounted to arrest.	8. o
9.	Arrest requires probable cause.	9. o
10.	Detective's characterization of grounds as "suspicion of robbery" is insignificant; test is objective, not subjective.	10. o
11.	Recognition that identification here may be "fruit of poisonous tree" i.e., an illegal arrest.	11. o
12.	Even if grounds for arrest were inadequate, identification may be attenuated, or result of independent source.	12. o

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ESSAY Q7

SEAT

ISSUE		POINTS AWARDED
1.	An agency relationship is created when the parties mutually consent to have the agent act on behalf of the principal.	1. ○
2.	A principal is bound by acts of its agent/subagent that are within the scope of the agent's authority.	2. ○
Dave's Diner		
3.	Sal is agent of Irene.	3. ○
4.	Irene is undisclosed principal of Sal.	4. ○
5.	Agents are liable for contracts entered into on behalf of their principals if they fail to disclose they are acting on behalf of a principal.	5. ○
6.	Sal is therefore liable to Dave's Diner.	6. ○
7.	Irene is also liable to Dave's Diner because Sal was her agent.	7. ○
Betty's Bistro		
8.	Sal had implied authority to hire Henry because Irene knew that Sal employed subagents in the past.	8. ○
9.	Henry is agent of Sal.	9. ○
10.	Henry is a subagent of Irene.	10. ○
11.	Agents are not liable for contracts entered into on behalf of their principals if they disclose they are acting on behalf of a principal.	11. ○
12.	Henry is not liable to Betty's Bistro because he disclosed he was acting on behalf of Irene.	12. ○
13.	Sal is not liable to Betty's Bistro because Henry disclosed he was acting on behalf of Irene.	13. ○
14.	Irene is liable to Betty's Bistro because Henry is a subagent.	14. ○

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ESSAY Q8

SEAT | | | | |

ISSUE		POINTS AWARDED
1.	The City's denial may violate the First Amendment of the U.S. Constitution in two provisions:	
	1a. the freedom of speech;	1a. o
	1b. the freedom of religion. association or assembly.	1b. o
2.	The First Amendment is applied to municipalities through the 14th Amendment.	2. o
3.	A court must determine whether the City park is a public forum.	3. o
4.	A public forum is government property that traditionally has been open to expressive activity.	4. o
5.	If the park is a public forum, then the strict scrutiny test applies to regulate speech.	5. o
6.	Strict scrutiny tests requires government to show that the regulation is:	
	6a. necessary to accomplish;	6a. o
	6b. a compelling government interest;	6b. o
	6c. is narrowly tailored to serve that interest.	6c. o
7.	In a non-public forum, the government only needs to show that the regulation is rationally related (rational basis test) to serve the interest.	7. o
8.	City's goal of no disruption will probably not pass the strict scrutiny test.	8. o
9.	Brotherhood may claim special accommodation as a religious accommodation under the freedom of religion clause.	9. o
10.	Brotherhood may claim that City impermissibly targeted religious speech.	10. o

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ESSAY Q9

SEAT

ISSUE		POINTS AWARDED
1.	General rule that evidence must be relevant in order to be admissible.	1. ○
2.	Under FRE 401, relevant evidence has the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.	2. ○
3.	General rule that hearsay is inadmissible unless an exception applies.	3. ○
4.	Under FRE 801, hearsay is an out of court statement offered for the truth of the matter asserted.	4. ○
Plant Manager's Statement		
5.	Plant Manager's statement may be admissible as an "admission by a party-opponent" under the hearsay prohibition.	5. ○
Maintenance records		
6.	The maintenance records may be admissible under the "business records" exception to the hearsay prohibition.	6. ○
7.	FRE 803(6) permits the admission of business records if (1) the records were made at or near the time of the event, (2) by a person with knowledge, (3) were kept in the regular course of a business activity.	7. ○
8.	The unavailability of the technician is immaterial as to whether the records are admissible.	8. ○
9.	The best evidence rule requires that an original document be used unless it is shown that the original is unavailable for some reason other than misconduct of the proponent.	9. ○
Settlement Offer		
10.	Compromises or offers to compromise are not admissible.	10. ○
Sally's Deposition		
11.	The deposition may be admissible under the "former testimony" exception to the hearsay prohibition.	11. ○
12.	FRE 804(b)(1) allows the admission of former testimony given in a deposition as long as the party against whom the deposition is offered had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.	12. ○
13.	In order for this exception to apply, Sally also must be unavailable to testify.	13. ○