NEW YORK STATE BAR EXAMINATION
FEBRUARY 2001 QUESTIONS AND ANSWERS

Question-One
In August 2000, Mindy entered into a written contract with Ben, a builder, to construct an addition to the family's residence. One of Mindy's reasons for building the addition was to provide a practice gym for her son, Mike, a 21 year old college student, who wanted to become a professional basketball player. Thus, the contract between Mindy and Ben provided, in part, that the gym would have a hardwood floor and a basketball hoop while the remainder of the addition would be carpeted. The contract price was $100,000, one-half of which was paid upon execution of the contract, with the balance to be paid upon completion of the job.

In September 2000, while Mike was playing basketball at a local sports center, Alice, a well known sports agent, approached Mike and invited him to have dinner with her to discuss his career. At dinner, Alice told Mike that he could be a professional basketball player. Alice offered to be Mike's agent, and she handed him a proposed 20 page typewritten contract. When Mike asked Alice if he could review the contract with his mother, Alice said that this was Mike's "golden opportunity" and that if he didn't sign the contract then, it would be withdrawn. Mike signed the contract immediately.

The next day, when Mike was reviewing the contract with his mother, they realized that it gave Alice the exclusive right to represent Mike for the next ten years, as well as 60% of all of Mike's gross income from employment in the field of basketball during that period. Shortly thereafter, Mike learned that the standard percentage for a basketball agent is 20% and that the usual term of such a contract is three years. Mike then promptly advised Alice that he would not comply with the terms of their contract.

On December 18, 2000, Ben notified Mindy that the addition to her residence was completed. When Mindy inspected the work, she realized that Ben had installed carpeting in the gym, as well as all of the other rooms, and had failed to install a practice hoop. Ben said that his failure to install the hardwood floor and hoop in the gym was inadvertent, but the value of the addition was unchanged by the error. The cost to remove the carpet and install a hardwood floor and hoop has not yet been determined. On December 20, 2000, when Ben asked Mindy for the $50,000 balance of the contract price, she refused to pay.

In January 2001, in response to New School District's advertisement for bids for the construction of a high school gym, Ben prepared a preliminary bid proposal in accordance with the plans and specifications of the School District. Before submitting the bid, Ben decided that he would be able to reduce his bid by $25,000. In transposing this reduction from his worksheet to the actual proposal however, $250,000 was inadvertently deducted instead of $25,000, and the bid submitted was therefore $225,000 lower than Ben had intended. When the bids were opened by the School District, Ben discovered his error. Ben promptly advised the District of his error and asked it to withdraw his bid. Ben provided his worksheet, which confirmed his error, but the District nonetheless awarded the contract to Ben based upon his submitted bid. Ben refused to perform the contract.

1. Can Alice enforce her contract with Mike?

2. What are the rights and liabilities of Ben and Mindy with respect to payment of the balance of the contract price?

3. Is Ben bound by the bid he submitted to the New School District?

ANSWER TO QUESTION ONE
Alice is not entitled to enforce her contract with Mike.

Ben is liable to Mindy for the cost of installing a new floor consistent with the terms of the contract.

Ben is not bound by the bid to the New School District.

Alice's contract with Mike

Alice cannot enforce her contract with Mike. The first issue is whether Alice and Mike had an enforceable contract. In order for a contract to be enforceable it must contain (1) definite terms, (2) a valid acceptance to the terms, (3) consideration, and (4) an offer. However, even if a contract does contain all of the essential terms and is signed by both parties, a contract will not be enforced by the court if its terms are unconscionable. An unconscionable contract is one that is both substantively and procedurally unconscionable.

Procedurally unconscionable occurs when one party to the contract, usually the party who wrote the contract, is at a superior bargaining position than the other party and uses that power to their advantage by engaging in unfair pressuring or bargaining practices to force the other party to sign.

Substantive unconscionability is where the contract contains terms that are obviously unfair and one-sided in favor of the party with the superior bargaining power.

In this case, although Mike is 21 years old and is legally able to enter into a valid enforceable contract, the tactics used by Alice were unfair. She pressured Mike into signing the contract on the spot without giving him time to read the 20 page document, and refusing to allow him to review it with his mother or a lawyer. In addition, the terms of the contract itself were unconscionable. The length of the contract and the percentage of Mike's salary that Alice would be entitled to were not the standard terms in an agency contract. While Alice was not bound to those industry norms, the fact that her terms varied so much from the industry lends further evidence of the unconscionability of this contract.

Therefore, Alice should not be allowed to enforce this contract as its terms were unconscionable and because of the fact she took advantage of Mike in persuading him to sign it.

Ben's rights and liabilities and Mindy's

Ben and Mindy entered into an enforceable contract that was breached upon full performance. The first issue is Ben's rights.

Although Ben did completely perform the contract, his performance was defective. Therefore Ben is in breach.

Ben is entitled to the $50,000 minus any costs to Mindy to rip up the existing floor as installed by Ben and to install a new floor. Ben completed the performance to a substantial degree so Mindy cannot refuse to pay the $50,00 remaining on the contract. However, Mindy is entitled to have the floor that she contracted for. It would be waste to knock down the entire addition, but Mindy can collect from Ben the value of what she contracted for. Therefore, Mindy is entitled to have someone else complete the gym the way she wanted it and then sue Ben for the difference between what she wanted under the terms of the contract and what she received.

Ben and the New School District

Ben is not bound by the bid he submitted because of his unilateral mistake and can ask the court for a rescission of the contract.

Ben made a unilateral mistake in his bid to the School District. A unilateral mistake is a mistake made by one party that is unknown to the other party. When the mistake is made in calculating figures on a construction bid, the mistaken party can move to rescind the contract.

To ask for rescission, the mistaken party must show that (1) the error was communicated to the other party, (2) the error was a result of ordinary negligence, (3) prompt notice of the mistake was given and the notice of withdrawal was made, and (4) the party would suffer substantial hardship if the contract was enforced.

In this case, the School District was promptly notified of the mistake in the bid before the School District detrimentally relied on the bid and entered into another contract based on Ben's bid. The School District knew of the mistake when the gave Ben the bid and it would pose substantial hardship to Ben to force him to perform the contract at a $225,000 loss.

Therefore, Ben should not be bound by the bid to the School District.

ANSWER TO QUESTION ONE
(1) Alice cannot enforce her contract with Mike. The issue is to what extent the parties were in comparable bargaining positions to render the contract unconscionable. Unconscionability of a contract is determined at the time the parties entered into the agreement. A court will consider disparities in bargaining power and significant deviation from what otherwise would be considered a reasonable contract in these types of circumstances. Here, Mike is a 21-year old college student whose life dream is to play professional basketball. He is then approached by a "famous" sports agent to have dinner to discuss his career. She then hands him a 20-page written contract for representation, but does not allow Mike a reasonable opportunity to inspect the terms or consult his mother (or for that matter, a competent attorney). Essentially, this is a contract of adhesion, where one party's meaningful ability to bargain is compromised by the other party's superior position. Here, Alice gave Mike a "take it or leave it" proposition, and under the circumstances it left Mike in no position to bargain in good faith.

Furthermore, considering the terms of the contract, it is clear that Alice exploited this putative "golden opportunity" to secure for herself terms that were grossly disproportionate and excessive to industry standard. The contract called for Mike to maintain Alice as his agent exclusively and for six years (as compared to the usual contract of three years). Moreover, the contract entitles Alice to collect 60% of Mike's total basketball income, 40% more than the average percentage secured by agents. Considering this grossly disparate bargaining position and the unfair terms secured by one party exploiting this unfair advantage, Mike's performance and obligations under the contract will be discharged because of unconscionability.

Alice may try to assert that it was not unfair– he is a 21 year old kid with no guarantee of either a career or representation, and perhaps by securing a well-known agent it will help his career. The facts do not, however, indicate that Alice will do more than the average agent to justify her preventing Mike from reviewing the terms that are, in fact, unreasonable. NOTE – age and the statute of frauds will be of no help to Alice or Mike. Mike is 21 and is capable, as a matter of law, of entering into valid contracts. Furthermore, neither party is disputing the existence of the contract, rather whether it is enforceable. For these reasons, Alice may not profit from her exploitive plan and the contract will not be enforced.

(2) Ben breached the contract and Mindy can recover her expectancy damages. The issue here is whether Ben's failure to install the hardwood floor or a practice hoop and alternative decision to carpet the gym was a material breach that substantially compromised Mindy's bargained for expectation of the outcome. Here, Ben knew that the contract specifically called for the installation of a gym for Mindy's son. A gym with carpeting and no practice hoop arguably is a

far cry from what the parties bargained for – essentially in its finished condition the gym has no value whatsoever to Mindy or Mike (no place to shoot and no possibility of dribbling the ball). This was a material breach and it discharged Mindy's duty to pay.

There is a related issue of implied warranty of fitness for a particular purpose. Although this is not a contract for the sale of goods and hence the UCC does not govern, the principle is relevant. The builder knew the particular purpose for which the addition was being built. His claim that the carpeting and lack of hardwood floor does not change the "value" of the addition is off the mark. When a party contracts with the knowledge of the other party's interest, he cannot avoid liability simply by saying the value is the same. The subjective value to Mindy is relevant because Ben knew the purposes for which she entered the contract. A gym without a hardwood floor or baskets, when the parties expressly and knowingly bargained for a working gym, does not meet Ben's duties and substantially impairs the value of the contract.

The question is how to measure damages. Mindy is entitled to her expectancy interest, the value of the contract had it been completed . Accordingly, this will be determined by the difference in cost of the amount it will take to change the gym as Ben built it into the gym specified in the contract. Presumably it will not be too great because the addition was completed and all that would be required is the installation of hardwood floors. Ben is not left without recourse. He is entitled to the value of his services because his breach was inadvertent and certainly, from the facts, does not appear willful or intentional. This will be measured by his full contract price less the difference to install the gym as expected. In other words, though Ben breached, he did fulfill a substantial portion of his contractual obligations and thus is entitled to his costs and profits in the contract, less the amount it will cost to cure (i.e., to install the hoop and hardwood floor).

(3) Ben is not bound to the bid he submitted. The issue is whether a unilateral mistake will or may discharge a party's contractual obligation. Here, there is no dispute that the error in submitting the bid was entirely on Ben. He inadvertently added a zero in his bid and thus offered a bid $225,000 lower than he had anticipated. Normally a unilateral mistake will not discharge a party. Parties are expected to responsibly negotiate and bargain from this position. However, where the non-erring party knows or has reason to know that the error was made, it may not profit on the error by "snatching up" the erroneous offer. Here, the School District should have known that Ben's bid was in error because, presumably, if Ben thought $25,000 was the type of reduction that might secure him the contract, a reduction of $225,000 would surely open up some eyes. In comparison to the other bids, the School District would be on notice that an error had been made. However, in this scenario it is even easier to resolve because the School District had actual notice of the error when Ben promptly notified them of the worksheet error. Because the other party had notice of the error, it could not take advantage of the error. Hence, Ben's duties are discharged and the contract is rescinded because of his unilateral error.

Note that there is an alternative way of approaching the scenarios that Ben may invoke. His bid to the School District was an offer. By revoking his offer prior to their acceptance, Ben defeated the power of the School District to accept the offer and create a binding contract. There is no issue of reliance to make the offer irrevocable on a theory of promissory estoppel. The School District did not rely, in any way, to their detriment on the bid. With nothing here, the offer was effectively revoked, and the School District cannot enforce the contract.

Question-Two
Clare was the leader of "SUFFER", Students Undertaking Full Fledged Educational Reform, an organization dedicated to the elimination of all standardized testing of students. On January 3, 2001, without having obtained a permit, Clare led approximately 100 SUFFER members in a march through the streets of Albany to the State Capitol. When the police became aware of the marchers' destination, several dozen uniformed officers were stationed in front of the Capitol

building and barricades were erected to ensure that the demonstrators would not block pedestrian or vehicular traffic around the building.

When they reached the barricades, Clare and the other marchers began chanting, "No tests or no peace". Officer Paul told Clare and the marchers to disperse because they did not have a permit and were causing a public disturbance. Clare then climbed on top of one of the barricades and screamed to the crowd, "Don't let the cops stop you. We have the right to march and we will fight if they try to stop us." Clare then pushed over one of the barricades and yelled to the crowd, "Let's go. We have the right to march on the State Capitol. Fight the cops if you have to." While Clare continued to loudly urge them on, about 20 demonstrators started to climb over the barricades while others threw rocks and bottles at the police.

Officer Paul then approached Clare and told her that she was under arrest for inciting to riot. When he placed one handcuff on her, Clare screamed, "No way, cop" and pulled away, causing the other handcuff to fly up and cut Officer Paul in the head. Officer Paul then placed Clare under arrest, removed the backpack she was wearing, transported her to the police station and placed her in a holding cell. While Clare was in the cell, Officer Paul searched her backpack and discovered marijuana.

Upon presentation of the foregoing pertinent facts to the grand jury, Clare was indicted on charges of assault in the second degree, inciting to riot, resisting arrest and possession of marijuana. Penal Law Section 240.08 provides that: A person is guilty of inciting to riot when he urges ten or more persons to engage in tumultuous and violent conduct of a kind likely to create public harm. Penal Law Section 120.05(3) provides that: A person is guilty of assault in the second degree when . . . with intent to prevent a police officer . . . from performing a lawful duty, he causes physical injury to such . . . police officer. Clare's attorney timely filed an omnibus motion:

(a) to dismiss the inciting to riot charge, on the ground that her words were protected by the First Amendment to the Constitution;

(b) to dismiss the assault charge, on the ground that she did not intend to cause injury to Officer Paul; and

(c) to suppress the marijuana found in her backpack.

The court denied the motion in its entirety.

At trial, the prosecution proved the foregoing pertinent facts. Clare testified in her defense that she pulled away from Officer Paul in an attempt to protect herself from what she believed to be an unlawful arrest. After both sides rested, over the prosecution's objection, Clare's attorney requested that the court charge the jury on the defense of justification with respect to the charge of resisting arrest.

(1) Did the court decide each branch of Clare's omnibus motion correctly?

(2) Should the court instruct the jury on the defense of justification?

ANSWER TO QUESTION TWO
(1) Motion to Dismiss the Inciting to Riot Charge

The court correctly denied the motion to dismiss the charge of inciting to riot on the grounds that her words were protected by the First Amendment. The issue is whether Clare’ s speech is protected by the First Amendment. The freedom of speech is protected by the First Amendment

to the Constitution, however, speech can be lawfully curtailed if it falls under the following categories: (1) obscene, (2) defamation, (c) commercial speech, (4) "fighting words", and (5) words which provoke imminent lawless action. "Fighting words" are not protected if they are spoken with the intent to incite violence, they actually incite violence, and they objectively are viewed as inciting violence by a reasonable person. Words which provoke imminent lawless action are words which create an immediate threat of unlawful action. Here, Clare's words and actions are not protected by the First Amendment because they are both fighting words and words intended to provoke imminent lawless action. Clare explicitly and purposefully prevailed upon the demonstrators to "fight the cops" and not to "let the cops stop you." She specifically advocated fighting the cops by both those words and her leadership in pushing over one of the barricades. This action, along with her words, incited others to climb over the barricades and throw rocks and bottles. Clare clearly intended to incite violence and she also advocated fighting the police unlawfully. Thus, Clare's actions and words are not protected by the First Amendment as they fall under the exceptions of "fighting words" and words which incite imminent lawless action. The court correctly denied the motion to dismiss the inciting to riot charge.

(2) Motion to Dismiss the Assault Charge

The court incorrectly denied the motion to dismiss the assault charge on the ground that Clare did not intend to cause injury to Officer Paul. The issue is whether one must have the intent to perform a certain objective in order to be guilty of assault. Assault is a specific intent crime which means that one must have the intent to perform a certain objective in order to be guilty, rather than just the intent to commit the act required under the general intent crimes. In addition, in order to be found guilty of assault under this statute, Clare needs to have had the intent to prevent a police officer from performing a lawful duty.

Here, Clare clearly had the intent required by the statute of preventing Officer Paul from arresting her – a duty he is lawfully able to do. However, Clare did not have the specific intent to commit an assault. Assault is the apprehension of immediate bodily contact, or an attempted battery, under New York Penal Law. Here, Clare did not intend to create apprehension on the part of Officer Paul, nor did she intend to commit a battery. Instead, Clare's hand inadvertently flew up and caused the handcuff to hit Officer Paul. Clare did not have the objective of hitting or creating an apprehension of battery. Thus, Clare cannot be guilty of assault, and the court incorrectly denied the motion dismissing the assault charge against her.

(3) Motion to Suppress the Marijuana

The court incorrectly denied the motion to suppress the marijuana found in Clare's backpack. The issue is whether the police officer conducted an illegal search of Clare's backpack. Searches and seizures are governed by the Fourth Amendment which protects against unlawful searches and seizures. Search warrants are normally required in order to lawfully search an individual and seize evidence or weapons. However, a police officer may search an individual without a warrant and seize evidence, weapons and contraband if the search falls under one of the warrantless search exceptions. These exceptions are: (1) search incident to a lawful arrest, (2) automobile exception, (3) plain view and plain feel, (4) hot pursuit, (5) stop and frisk, (6) extraordinary circumstance plus probable cause. Here, the search incident to a lawful arrest applies. A police officer may search a person whom he has lawfully arrested by doing a protective pat down for anything which might be a weapon. In New York, a police officer may not seize something unless it feels like a weapon without probable cause under the warrantless exception of a search incident to a lawful arrest.

Here, Officer Paul lawfully arrested Clare because she was inciting violence and causing a major disturbance with her demonstration. Moreover, Officer Paul first requested of Clare that the

marchers disperse, and only arrested her after she did not comply and continued to incite violence. However, once he had arrested Clare, Officer Paul was only permitted to do a pat down search for weapons, to protect himself. Here, Officer Paul proceeded to search her backpack after she had already been placed in jail and posed no threat to him or anyone else.

Any evidence that is discovered through an illegal search is not permitted to be used as evidence and is also excluded under the exclusionary rule. Here, the marijuana was discovered pursuant to an illegal search, and therefore it must be excluded as well. Thus, the court incorrectly denied Clare's motion to suppress the marijuana.

(4) Defense of Justification

The court should not charge the jury with the defense of justification. The issue is whether in New York a citizen has the privilege to resist arrest. A citizen does not have a privilege to resist arrest in New York. Since a citizen does not have this privilege it cannot be used as a defense to an arrest which was lawful. Here, the arrest was lawful, as previously discussed, and Clare did not have a privilege to resist. Therefore, the court would be in error if it instructed the jury on the defense of justification in this case, because that defense does not apply here. Thus, the court should not instruct the jury to consider a defense of justification.

ANSWER TO QUESTION TWO
(1) OMNIBUS MOTION

The court correctly denied the motion to dismiss the inciting riot charge.

The issue is whether Clare's words were protected speech under the First Amendment of the Constitution. The First Amendment right to free speech does not protect certain categories of speech. Included within the exceptions to protected forms of speech are words of incitement or fighting words. In this case Clare chanted to her fellow marchers, "Let's go. We have the right to march on the State capitol. Fight the cops if you have to." The latter statement concerning fighting the cops if necessary are words of incitement that are unprotected speech. Fighting words that lead to a breach of the peace, in this case riot, in the form of throwing rocks and bottles at the police, will not be protected by the First Amendment's free speech clause.

The court correctly denied the omnibus motion to dismiss the inciting riot charge as the words by Clare urged the marchers to breach of the peace and riot.

(b) The court correctly ruled to deny the omnibus request for dismissal of the assault charge.

The issue is whether Clare is guilty of the assault charge. Under the provided penal statute, assault in the second degree occurs when, with intent to prevent a police officer from performing a lawful duty, the defendant causes injury to such officer. Here, Clare did intend to prevent the police officer from handcuffing her which was his lawful duty to perform. In doing so, she caused the police officer to be injured in the head and is liable for assault in the second degree. The fact that the injury was unintentional is irrelevant under the circumstances. It is the intent to prevent the execution of the lawful duty of the police officer, and not intent to cause injury, which is relevant and pertinent to criminal liability for assault in the second degree. Clare is correctly indicted on this charge; thus the court correctly denied her attorney's motion to dismiss the assault charge on the ground that she did not intend to cause injury to Officer Paul.

(c) The court incorrectly denied the omnibus motion to suppress the marijuana found in Clare's backpack.

The issue is whether the marijuana is the product of unlawful search and seizure under the Fourth Amendment to the Constitution.

The Fourth Amendment to the Constitution protects individuals against unlawful search and seizure by law enforcement officers. Products that are the subject of unlawful search and seizure will be excluded from evidence that is admissible at trial against the defendant. The police officer in this case was correct in performing a lawful arrest of Clare, but was acting beyond his powers in the search of her backpack. The officer is allowed to search the arrested individual's person for any concealed weapon and if in so doing finds illegal subject matter they are admissible. Likewise, in addition to the "wingspan rule" in regards to checking for such items as weapons or contraband, the police may search an individual's personal belongings during permitted lock-up procedures. Here, Clare is not shown to have been undergoing any such legal lock-up procedure or itemization of her belongings, rather the officer, on his own accord, searched her backpack. This search is inherently unlawful and thus, under the "fruits of the poisonous tree" doctrine, any illegal substance found during such search will not be admissible against the defendant at trial. The marijuana cannot be admitted into evidence against Clare at trial because it is the product of an unlawful search and seizure. The court therefore was incorrect in its denying the omnibus motion to suppress the marijuana found in her backpack. The court should have granted the motion to dismiss only on this one branch of the omnibus motion.

(2) The court should not instruct the jury on the defense of justification.

The issue is whether the request to instruct the jury on the defense of justification is valid under the procedural law.

The court does not have to instruct the jury regarding the defense that is in and of itself an invalid legal argument. Here, the judge has the discretion to decide whether the jury need be informed of the defense. In this case, because the defense is baseless and without legal substance, the jury need not be given any such instruction. Clare was not able to exercise resisting lawful arrest by the police officer, due to her inciting the marchers to breach the peace. It is no defense that she was attempting to protect herself from what she believed to be an unlawful arrest. Reasonable persons would not believe they were being subjected to unlawful arrest under similar circumstances. Clare's ignorance of the criminal law is no justification for her resisting arrest, thus the court need not instruct the jury on the defense. The defense should have been raised during trial, if at all, not at termination of the proceedings. Thus the court does not have to charge the jury on the defense of justification with respect to the charge of resisting arrest.

Question-Three
In 1984 Ann and Bill were married in State X, where they both resided and where they were employed by Crash.com, a computer consulting company. There were no children of the marriage.

In 1985 Bill became an officer of Crash.com, with a very large increase in income. That same year, Ann and Bill purchased Blackacre, a substantial residence in Washington County, New York, with 200 feet of frontage on the easterly shore of a large lake. The deed conveying Blackacre was to Ann and Bill, grantees, as tenants by the entirety. Ann and Bill then moved to Blackacre and Bill continued to be employed by Crash.com in State X, commuting each weekday from Blackacre. Ann did not work again after moving to Blackacre.

Greenacre, the property adjoining Blackacre on the south, was owned by Carl. Carl became concerned about the privacy of his property after Ann and Bill moved into Blackacre, and in 1987, Carl erected a six-foot high wood fence along what he believed to be the boundary line between Blackacre and Greenacre. In fact, the fence erected was five feet southerly of the

northerly boundary of Greenacre as it was described in the deed to Carl. Ann and Bill then proceeded to use the five-foot strip northerly of the fence for their own purposes by constructing a tool shed, planting a garden and mowing that portion of the strip that was lawn. This use continues to date. Ann and Bill never discussed the fence or the five-foot strip with Carl, the owner of Greenacre.

In 1999 Ann discovered that Bill was having an affair with Dawn, a co-worker at Crash.com, and Ann and Bill agreed to separate. Bill and Dawn moved into a one-bedroom apartment in State X. Ann and Bill, each represented by counsel, entered into a separation agreement which was duly executed, acknowledged and filed on December 30, 1999. The agreement provided, inter alia, for the division of marital property, with Ann receiving sole ownership of Blackacre and provided for maintenance for Ann of $1,000 per month for her life or until she remarries. In the quitclaim deed conveying Blackacre from Ann and Bill to Ann, the southerly boundary of Blackacre is described as " along the wood fence erected in 1987" . The deed was duly executed and recorded on December 30, 1999.

In April 2000, Carl conveyed Greenacre to Ed. Ed had an engineer survey Greenacre which revealed that the fence erected by Carl was five feet south of the north line of Greenacre as described in the deed from Carl to Ed.

Ed went to Ann and told her she was trespassing on his property. Ed offered to " rent the five-foot strip to Ann for $1,000 per year. Ann, without consulting an attorney, agreed and paid Ed $1, 000 for the year 2000. Now Ann has consulted Fred, a lawyer in Washington County, by whom you are employed as an associate. Fred has relayed the above facts to you and asked you to prepare a memorandum addressing the following issues:

(1) Does Ann have a valid cause of action against Bill for divorce in New York and, if so, on what grounds?

(2) What jurisdiction is necessary, and how may it be obtained for a New York court:

(a) to grant Ann a judgment of divorce; and

(b) to incorporate the separation agreement into the judgment?

(3)

(a) What interest, if any, does Ann have in the five-foot strip?

b) What effect, if any did Ann's agreeing to pay rent to Ed have?

ANSWER TO QUESTION THREE
Ann has valid grounds for divorce based on adultery and conversion of the separation agreement.

The issue is what grounds Ann has for a divorce from Bill. The facts are governed by the DRL and CPLR. There are five grounds for divorce, including adultery and a conversion of a separation agreement or decree. For adultery, the spouse needs to have cohabitated with another, not his own spouse. There can be no available defenses such as condonation (continuing to live or cohabitate with the adulterous spouse after learning of the affair) or recrimination (committing adultery yourself).

In this case, Bill was having an affair with Dawn. After learning of the affair, Ann and Bill agreed

to separate and Bill moved with Dawn to State X. There was therefore no condonation and from the facts, no recrimination on the part of Ann.

Ann can also convert the separation agreement into a divorce. There needs to be a valid separation agreement between the parties (writing, signed, acknowledged, voluntary, not against public policy such as refusing to support, and filed with the County Clerk). The parties must live separate and apart with no intent to reconcile or cohabitation with intent to reconcile. The only defense to obtaining a conversion divorce is the terms of the agreement were not substantially complied with.

In this case, the separation agreement was duly executed before counsel and filed on December 30, 1999. There is no indication in the facts that the parties did not substantially comply with the terms. In addition, Ann and Bill lived separate and apart for over a year.

Ann therefore has grounds for divorce based on adultery and/or conversion. (It should be noted that the statute of limitations for divorce in New York is five years, so Ann is still within the SOL.)

II(a) To grant Ann a divorce in New York, there must be subject matter jurisdiction and the residency requirement, which is part of the substantive element that needs to be proved in Ann's grounds for divorce.

The issue is whether there is subject matter jurisdiction and the requisite residency requirement.

DRL and New York CPLR controls. New York CPLR provides that New York Supreme Court has exclusive jurisdiction to dissolve a marriage and concurrent jurisdiction with Family Court and Surrogate Court in all other family matters. The status of a marriage is considered res, "property", and it therefore travels with the spouse. Once the spouse is in New York, the res is in New York and is sufficient to give New York Supreme Court subject matter jurisdiction to dissolve the marriage.

In this case, Ann, since the time she moved to Blackacre with Bill, has remained in New York and therefore the res (status) is sufficiently in the State to give New York Supreme Court jurisdiction to hear the case.

In addition, in an action for divorce, DRL 230 provides a minimum residency requirement that must be pleaded as part of the substantive case. Failure to include it in the complaint is a failure to state a cause of action, which is grounds for dismissal. DRL 230 requires: (1) two years residency by either party in New York; (2) both parties are residents at the time the cause of action arose in New York; (3) one party a resident for one year plus: (a) the marriage occurred in New York, (b) New York was the matrimonial domicile, or (c) the cause of action arose in New York.

In this case, Ann has been living in New York since 1985, and New York was the matrimonial domicile for 12 years. Ann therefore satisfies the residency requirement to sustain an action for divorce in New York.

II(b) To incorporate the separation agreement into the judgment requires full in personam jurisdiction and a bilateral divorce.

The issue is what jurisdiction is necessary for the separation agreement to be incorporated into the judgment.

As discussed above, New York has subject matter jurisdiction to dissolve just the status of the marriage. All other matters involving maintenance and equitable distribution require personal jurisdiction, which can be either general (domiciliary, doing business in New York or being personally served in New York) or minimal contact/long arm jurisdiction, either by the plaintiff being a resident/present in New York and: (1) New York was the matrimonial domicile in the recent past (up to 10 years); (2) the spouse was abandoned in New York; (3) the claim for support, alimony, etc. were accrued in New York or the agreement was executed in New York; or (4) Art. 10, a claim for child abuse.

It should be noted that where the judgment is silent, the agreement survives the divorce decree. It is most beneficial for Ann to have the agreement incorporated or merged into the divorce decree so that she may have not just contract remedies, but court enforcement of the agreement's provisions. In order for a court to hear all other matters involving support and maintenance, it needs personal jurisdiction over the defendant.

In this case, Ann is a domiciliary of New York and New York was the matrimonial domicile of the parties in the recent past (just two years ago). This is sufficient for the court to acquire personal jurisdiction over Bill and to serve him anywhere in the State or State X. (It should be noted here that only in hand service is permitted without a court order, all others require a court order.)

Ann can now have a New York court enforce, modify and incorporate the separation agreement into the divorce judgment.

III(a) Ann does not have ownership of the 5-foot strip by adverse possession.

The issue is whether Ann has acquired ownership through adverse possession.

In New York, the statute of limitations for adverse possession is 10 years. The person must possess the property in a hostile manner, open and notorious to the world, continuous for the statutory period (10 years). "Hostile" must be through a claim of right of ownership, without acknowledging anyone's superior interest to it.

In this case, Ann and Bill possessed the property in 1987. At that time, Carl erected the 6-foot fence. By Carl's mistake, he set it back 5 feet from where his natural boundary line actually was. Ann and Bill proceeded to use that space by building a construction tool shed, planting a garden and mowing the lawn. They did all this under a claim of ownership – it is irrelevant how erroneous. All that is required is that it be open and notorious for the world to see and believe that the property was Ann and Bill's, and continuous for 10 years. Here, it was for 14 years. Ann would have acquired the strip through adverse possession, if it weren't for Ed.

However, Ed, the next grantee after Carl, has asserted his right to the land. Since Ann was conveyed a quitclaim deed, which only releases the grantor from any claim to the land he had, if any, and makes none of the general warranties of a general warranty title (seisen, conveyance, no encumbrances). Ann takes subject to Ed's claim under the original deed which states the property actually belongs to Ed/Carl. Even though Ann could probably win in court through evidence of adverse possession for 14 years, the deed she possesses is a quitclaim deed and does not adequately record her interest to it. Especially now since Ed has asserted his claim to it and it is no longer continuous. See discussion next.

III(b) The effect of Ann's agreeing to pay rent to Ed is to create a license to use the land, and to extinguish her adverse possession claim over the property.

A license is permission to use one's property. It may be oral or written, and can be terminated any time by the grantor.

In this case, Ed is permitting Ann to use the strip for a "fee" which she orally agreed to. This created a license for Ann to use the strip which may be terminated at any time. In the alternative, it can be viewed as a landlord-tenant relationship, specifically a year-to-year periodic tenancy. However, since Ann doesn't seem to have any additional rights to the land (Ed keeping it in good repair) this may not be validly asserted by Ed.

Ann should not have consented to paying the fee to Ed because her possession was no longer "hostile" and she can try to still assert ownership by adverse possession since she held the strip for 14 years, but probably will not be successful.

ANSWER TO QUESTION THREE
(1) TO: Fred

FROM: Associate

RE: Ann's legal questions

Ann has a valid cause of action for divorce The issue is whether adultery constitutes a valid legal ground for divorce and whether Ann has met the necessary residency requirements.

Adultery constitutes a valid ground for divorce in New York. Adultery is an act of voluntary sexual intercourse with another person not your spouse. Here, Bill was having an affair with Dawn. Assuming this "affair" included sexual intercourse, adultery has occurred and Ann may validly pursue a divorce. That the affair may have been going on long before Ann's discovery in 1999 is of no importance as the statute of limitations for divorce based on adultery is five years running from the date of discovery.

There are no valid defenses to Ann's procurement of a divorce based upon adultery. Ann herself does not appear to have committed "recrimination", that is committing adultery herself. She has not condoned the adultery by learning of it, accepting it, and continuing to cohabit with Bill. In fact, Bill moved out promptly. Nor did she set up Bill by persuading Dawn to commit adultery with him. Thus, no valid defense exists against Ann.

Depending upon where Ann and Bill filed their separation agreement, Ann may also seek a conversion divorce. A conversion divorce requires that a separation agreement be in writing, signed, acknowledged before a notary, and filed in the county of the court where a conversion divorce will be sought. Then, if the parties have not resumed cohabiting with an intent to be back together, the separation agreement may be converted into a divorce if they have been separated for a year or more. The facts do not indicate which county – or even which state – the separation agreement was filed in, so more facts would be needed here.

Ann may also seek a divorce on the ground of abandonment. If one party has voluntarily left the other without the intent to return and is without justification or consent of the other party, and has been gone for over one year, this constitutes a ground for divorce. Here, these grounds will be prevented from forming the basis of Ann's divorce action because they entered into a separation agreement. Thus, despite the present of all other elements, Ann's consent to Bill's leaving eliminates this ground for divorce.

Ann has satisfied the substantive residency requirement because she has been residing in New York at Blackacre in Washington County since 1985, over the two years residency required for a

divorce without any added factors. It should be noted, however, that Ann would have grounds for an ever shorter period of residency – one year, at least – because New York was the marital domicile at one point.

Ann may seek a divorce based upon adultery and also likely a conversion divorce.

(2)(a) Ann needs subject matter jurisdiction to obtain a divorce. The issue is what jurisdiction is required to get a simple divorce in New York.

Because a marriage is considered property in New York, the New York Supreme Court will have subject matter jurisdiction over a divorce action any time one party to the marriage is a domiciliary of New York. The marriage is the res – the property – giving the New York Supreme Court in rem jurisdiction.

To grant a lawful divorce only subject matter jurisdiction is required, not personal jurisdiction. Ann is a domiciliary of New York because she has lived in New York for over 15 years with an apparent intent to remain indefinitely. Thus, the marriage – the res – is within New York, and the New York Supreme Court has proper subject matter jurisdiction. The residency requirements, discussed previously, are parts of the substantive law and not a jurisdictional issue.

(2)(b) Ann must have personal jurisdiction over Bill to incorporate the separation agreement into any judgment. The issue is what type of jurisdiction is needed to issue collateral relief in a divorce action.

To issue collateral relief in a divorce action, the New York Supreme Court must have personal jurisdiction over both parties. Collateral relief consists of maintenance awards and property distribution. Here, the separation agreement contains maintenance awards and a property distribution. Thus, by incorporating the agreement the court would be granting Ann relief collateral to the divorce, necessitating personal jurisdiction.

The Court has personal jurisdiction over Ann because she is a domiciliary of New York. To achieve personal jurisdiction over Bill, the court must use the marital long-arm statute because Bill is no longer a domiciliary of New York. He moved in with Dawn in a State X apartment and he does not "do business" in New York – he works for Crash.com in State X.

The marital long-arm statute requires either that the marriage was performed in New York, the grounds for the divorce action occurred in New York, or the obligation supporting the collateral relief arose under the laws of New York, or an agreement entered into under New York law. Here, the marriage occurred in State X. From the facts it is not clear whether Bill's affair with Dawn occurred in State X or in New York. Furthermore, it is unclear whether the separation agreement was entered into pursuant to New York law or whether the obligation to comply with the separation agreement lies under New York law, because the facts do not reveal where Ann and Bill entered into the agreement, or where they filed the agreement. Thus, more facts are needed to determine whether Ann has the required personal jurisdiction over Bill to enter the collateral relief contained in the separation agreement sought to be incorporated into any divorce judgment.

(3)(a) Ann has a fee simple in the five foot strip. The issue is whether Ann has acquired the five foot strip of property through prescription or "adverse possession".

To acquire property through adverse possession in New York, one must continuously occupy land for the 10-year statutory period, occupy it openly and notoriously, actually, and hostilely with a claim of right. Here, Ann has occupied the property for over 13 years. That, at times, she and Bill occupied it jointly is immaterial because tacking periods of occupancy is allowed.

Ann has used the land actually, openly and notoriously by building the shed, planting the flower garden and mowing it. She has occupied the property hostilely, even though she was without knowledge she was doing so, because Carl did not outright give her (or her and Bill) permission to occupy the land. Thus, Ann has acquired a fee simple in the strip of land, not subject to Bill's interest because it was conveyed by quitclaim deed to her solely.

(3)(b) Ann's payment of rent is of no effect on her fee simple. The issue is whether agreement to pay rent to Ed under an assumption of title vesting in Ed destroys Ann's fee simple.

Ed may not rent to Ann what he does not own. As explained above, Ann owns the strip in fee simple; thus, Ed's procurement of rent from Ann has no effect on her fee simple ownership. Furthermore, if the rental agreement was not in writing it is unenforceable because it attempted to be a tenancy in land for more than a year ($1,000 per year). Thus, to comply with the statute of frauds it must have been in writing. However, because Ed had no interest in the land to begin with, his attempted rental is void as to Ann.

Question-Four
To: Associate

From: Senior Partner

Our client Chuck came to the office today and related the following events. He has asked our advice regarding his rights and liabilities arising out of a party held at his house last July.

Chuck invited several of his friends to the party, which was held on July 4, 2000 to celebrate the holiday and to show off his recently completed pool and surrounding deck. Among the guests were Tom, Nick, Duke and Molly, all of whom are adults.

During the party, Nick dove into Chuck's pool, which was four feet deep, striking the bottom of the pool and breaking his nose. Nick is an experienced swimmer and diver, and he was aware of the risks of diving into shallow water. However, he had never been in Chuck's pool before and was not aware of its depth, which may have been obscured by the deck.

Tom tripped over a loose board in Chuck's deck, and fell breaking his leg. Duke offered to drive Tom to the hospital, and Molly went along for the ride. Chuck had been serving beer to Duke all afternoon, and Duke was intoxicated. On the way to the hospital, Duke drove erratically, lost control of the car and hit a tree. Molly was seriously injured in the accident.

Molly has threatened to start an action against Chuck to recover damages for the injuries she sustained in the accident.

Tom has commenced an action against Chuck to recover damages for his injuries. Chuck does not believe that he should be held responsible for the injuries Tom sustained because the deck was built by Brad and had only been completed three weeks before the party. If he can do so reasonably, however, Chuck would like to settle with Tom and bring an action against Brad, to recover the amount he pays to settle Tom's action.

Nick has commenced an action against Chuck to recover damages for his broken nose. Chuck believes that Nick's reckless act of diving into a shallow pool was the cause of his injury.

Chuck would like our advice on the following issues:

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2001 QUESTIONS AND ANSWERS

1. Can he be held liable to Molly for the injuries she sustained in the accident due to Duke's intoxication?

2. Can he be held liable to Tom for the injuries Tom sustained in tripping on the loose board on the deck?

3. Can he settle with Tom and bring an action against Brad for all or part of the settlement?

4. What impact will Nick's conduct in causing his injury have on the outcome of his action, and how should Chuck raise the contention that the accident was Nick's fault?

Prepare a memorandum addressing Chuck's questions.

ANSWER TO QUESTION FOUR
(1) Chuck will not be held liable to Molly for the injuries sustained in the accident due to Duke's intoxication.

The issue is whether Chuck owes a duty to Molly and whether he is liable for negligence.

Under New York's torts law, negligence is defined as when the defendant owes a duty, breaches that duty to a foreseeable plaintiff, that breach was the proximate or factual cause of the plaintiff's injuries and there were damages and harm caused as a result of that breach.

Chuck's position or status in this case is one of an owner/occupier of land. At common law, Molly, Tom, Nick and Duke are classified as licensees. New York has since abandoned these classifications and owners'/occupiers' liability is governed by the reasonable man's test to foreseeable plaintiffs. Even if these statuses have been abandoned in New York, the presence of the plaintiff as a trespasser, licensee, invitee, will determine the degree of care accorded to each and will determine if they were foreseeable. In this case Molly is a social guest and Chuck owes her a reasonable duty of care because he was also aware of her presence.

On the issue of the injuries caused by the accident, the issue is whether Chuck is liable for any supervening acts caused by his negligence.

New York torts law defines negligence as a duty of care, breach of that duty, proximate (legal) or factual cause and damages incurred because of the breach.

Chuck could not have foreseen that Tom's injury will also result in Molly's injuries. There was a break in the causal link between the harm caused to Tom by a condition in Chuck's home to the accident causing Molly's injury. The "but for" (or legal) cause requirement that Molly will depend on has not been established according to these facts.

Molly has a cause of action against Duke for driving his car when intoxicated. Duke owed a duty of care to all passengers in his car and should be liable for Molly's injuries, not Chuck.

Based on the above arguments, Chuck will not be liable for Molly's injuries she sustained in the accident due to Duke's intoxication.

Another issue is whether Chuck can be liable under New York Dram Shop Laws.

Under New York law, commercial drinking establishments who serve alcohol to minors and visibly intoxicated patrons will be held liable for their conduct created by that intoxication. But

this law cannot be applied to Chuck because the law does not apply to the social host, just commercial establishments.

In conclusion again, Chuck cannot be held liable by Molly.

(2) Chuck can be held liable for all of Tom's injuries but he can seek indemnification on any aggravating incidental injuries caused to Tom by Duke's negligence. (There are, however, none in these facts.)

The issue is whether Tom can successfully maintain an action in negligence against Chuck.

In New York Torts law, negligence is defined as where the defendant owes the plaintiff a duty of care, a breach of that duty occurs, there was proximate or factual cause and the plaintiff suffered damages or harm because of that breach. Also in New York torts law, all owners and occupiers of property owe a duty of care to all users of the property and guests to keep common areas safe and repair areas that are in disrepair.

Since Chuck invited his friends (including Tom) for a party to show off his recently completed pool and surrounding deck, that constitutes a common area of his house because it is open to guests. It is immaterial that the loose deck board had just been built as in this case. Since Chuck owes Tom a duty of care to keep common areas in his home safe, and since he owes a duty of care to his house guests, Chuck is liable to Tom for his injuries because that duty was breached and because a breach of that duty caused Tom's injuries and because Tom was a foreseeable user of the common areas in Chuck's home and because he suffered injury which were his damages.

For the above reasons Chuck is liable for Tom's injuries.

(3) Chuck can settle with Tom and bring an action against Brad for all of Tom's settlement.

Brad owed a duty of care to Chuck under New York's torts law. His duty was to perform his job in such a way that foreseeable users of the properties he built will not suffer any injury. Since he breached that duty, it was the proximate (but for) and factual cause of Tom's injuries which Brad has to pay for. Brad is responsible for all of the settlement to Tom. The issue is whether Chuck can sue Brad for indemnification.

Under New York's law, where a party is sued for harms caused solely by a third party, he can be indemnified for whatever moneys he has expended on that law suit. A cause of action on indemnification requires a total shifting of the loss. It should also be noted that a settlement will not bar indemnification but will bar an action in contribution. Chuck can sue Tom for indemnification which has a six year statute of limitations and accrues from the date of judgment.

Based on these facts, Brad should pay all of Chuck's settlement to Tom because he caused the injury to Tom by his negligent construction of the boards.

(4) Nick's conduct was one of assumption of risk which is a recognizable defense in New York to negligence actions.

The issue is what impact Nick's conduct will have on the outcome of his actions.

Under New York torts law, there is a derivative from common law theory of assumption of risk. While it is an absolute bar to recovery at common law, it is not in New York. In New York, the defendant's conduct (where he assumes the risk and causes injury to himself) will limit his claim

to the extent that he too contributed to his injuries. Nick will be judged by a reasonable person's standard and compared to people with his same experience and skill.

On these facts, Nick was described as an experienced swimmer and diver and that he was aware of the risk of diving into shallow water. Since Nick has all these special skills, he should have known the consequences of diving into shallow water and since he assumed this risk his claim for injuries will be reduced by his percentage of fault because he assumed the risk of jumping into shallow water and was injured.

The issue is how Chuck should raise the contention that the accident was Nick's fault.

Chuck can counterclaim against Nick, serving a general denial to Nick's claim in his answer. Under New York law, Chuck can state a failure to state a cause of action. This means that taking all the facts therein as true, there are no grounds for the relief requested as a matter of law. When the court finds that there are no grounds for the relief requested, he can dismiss the case to a moving party.

Chuck may also plead an affirmative defense in a 3211 motion (CPLR) in his answer. An affirmative defense states that where the court finds that there are grounds on which this relief will be granted, it dismisses the case.

ANSWER TO QUESTION FOUR

(1) Chuck cannot be held liable to Molly for her injuries. The issue is whether Molly has any cause of action against Chuck.

Molly could only recover for her injuries against Chuck if Chuck breached a duty to Molly thereby actually and proximately causing her damages. Here, Molly was not injured on Chuck's property, but while riding in Duke's car. Therefore, she cannot base any duty owed to her by Chuck on her status as a licensee on his property. And, in any event, Chuck would only be held to a reasonable standard of care – see below.

The issue then is whether Chuck has a duty to Molly to refrain from serving Duke beer when he was visibly intoxicated. This turns on whether Molly was a reasonably foreseeable victim that could be injured by Chuck's conduct. Here, it was not reasonably foreseeable that Duke would decide to drive drunk and injure someone when Chuck served him. Therefore, Chuck did not breach a duty to Molly by serving Duke beer.

Molly may argue that Chuck violated the Dram Shop Act, briefly giving rise to a presumption of negligence – i.e., negligence per se. This argument is wrong, however, because the Dram Shop Act does not apply to a private person like Chuck, only to tavern keepers.

Finally, Chuck may argue that Molly assumed the risk of riding with Duke, since she rode with him although he was visibly intoxicated. Molly must have been aware of the risk, but went with him anyway. This is a complete defense to any action by her against Chuck.

(2) Chuck probably cannot be held liable to Tom for his injuries. The issue is whether Chuck breached a duty to Tom.

New York does not judge the duty owed to a person on land based on that person's status as either a trespasser, licensee, or invitee. Rather, the liability of the landowner will be judged under a reasonable person standard in all cases, with the facts of each case informing reasonableness.

In this case, Chuck likely acted completely reasonably toward Tom. The facts state that the deck was only recently built (3 weeks ago), and nowhere does it state that Chuck was aware of the loose board. Chuck was not under a duty to inspect every board to make sure that it was not loose. It was reasonable for Chuck to assume that Brad built it correctly. Therefore, Chuck is not liable for Tom's injuries.

(3) Chuck can settle with Tom and bring an action against Brad. The issue is whether Chuck is entitled to contribution or indemnity.

Tortfeasors are jointly and severally liable when each commits a negligent act that contributes to the injury. Here, both Chuck and Brad likely contributed to Tom's injury – Chuck by not discovering the loose board, and Brad by negligently building the deck.

When one joint tortfeasor settles with the plaintiff (or loses to the plaintiff) he may seek contribution from the other joint tortfeasors. Of course, Chuck would have to prove Brad's liability and percentage of fault, but that does not bar him from seeking contribution.

(4) Nick's conduct will reduce his recovery based on his percentage of fault. The issue is what effect a plaintiff's own negligence has on his right of recovery.

New York is a comparative negligence state – meaning that a plaintiff who is himself partly negligent is not barred from recovering, but his recovery is reduced based on his percentage of fault. Here, Nick was also negligent in diving into the shallow pool. Nick was aware of the damages of diving into shallow water. And, although he had never been in Chuck's pool before, he failed to check its depth. This was negligence by Nick. Literally, he should have looked before he leaped. Therefore, his recovery against Chuck will be reduced based on his own percentage of fault. (Even if the jury finds that Nick was more than 50% at fault, he may still recover.)

Chuck should plead Nick's own negligence as an affirmative defense in his answer. He cannot seek to dismiss the complaint because Nick will only lose if he was 100% at fault, and Chuck was 0% at fault. It is up to the jury to determine relative fault allocations.

Question-Five

Cole, a wealthy widow, called one of her closest friends, Attorney Walker, an experienced probate attorney, to have him prepare a will on her behalf. When Walker went to Cole's home to discuss the terms of her will, he learned that Cole wanted him to receive a specific bequest of $100,000 from her $10,000,000 estate because of their longtime friendship. Walker told Cole that he could not ethically accept a bequest from her under any circumstances because he was her attorney. Cole acceded to Walker's wishes, and the will which Walker drafted for her review and signature made no bequest to Walker. The will provided that after certain specific bequests were made, the residue of Cole's estate was bequeathed to CO, a properly qualified charitable organization. Cole executed the will immediately after stating to Walker and two of his secretaries that the instrument she was about to sign was her will. Walker signed the attestation clause while Cole and the two secretaries were still in his office. Two days later, both secretaries signed attestation clauses.

Two years later, Cole had occasion to speak with her cousin, Nelson, who was also a lawyer. Cole shared with Nelson her disappointment that her friend Walker believed that he could not be a beneficiary of any portion of her estate. Nelson advised Cole that he did not agree with Walker's conclusion. Nelson said that he would be happy to prepare a codicil to her will which included a bequest to Walker. Cole requested that Nelson do so, and shortly thereafter she went to Nelson's office, where he presented a codicil to Cole for her review. The codicil provided for a specific bequest of $100,000 " to Walker, or his issue in equal shares per stirpes and $10,000 to Nelson

himself. The codicil specifically affirmed every other provision of the first will drafted by Walker. When Cole reviewed the codicil, she questioned Nelson about the bequest to himself, and he indicated that he included the bequest in lieu of submitting a bill to her for his services in drafting the codicil. After hearing Nelson's explanation, Cole agreed to sign the codicil. Cole declared to Nelson and two of his paralegals that she intended the document to be a codicil to her will. The two paralegals, one of whom was a notary public, duly executed the attestation clauses in the presence of Cole. Nelson did not sign an attestation clause.

Following the death of Cole in New York, her will and codicil were offered for probate by her nominated executor in the county where she had been domiciled. A true copy of the will and codicil were provided to all of the beneficiaries and to all of Cole's distributees. Walker died before Cole. Walker was survived by two sons, Dick and Bryan, and a daughter, Diane. His other son, Ira, predeceased him. Ira left three daughters surviving him.

An officer of CO, the residuary legatee, knowing that both Walker and Nelson were attorneys, contacted the office of the Attorney General to see if the Attorney General could look into the probate application which had been submitted. The Attorney General's office objected to the bequests to both attorneys in the codicil. Dave, a distributee who was not a beneficiary, objected to the probate of the will because of the absence of contemporaneous signature of the attestation clause and to the codicil because the codicil was witnessed by only two persons.

Attorney Nelson, appearing pro se at the return of the probate petition, objected to the standing of the Attorney General to raise objections to the bequests to Walker and Nelson.

You are the law clerk to the Surrogate and she has asked you to comment on the following questions:

(1) Should Dave's objections to the probate of the will or the codicil be sustained?

(2) Is there any issue concerning the propriety of the bequest to:

(a) Walker?

(b) Nelson?

(3) Does the Attorney General have standing to raise objections in this Surrogate's Court proceeding?

(4) What share, if any, will Ira's children receive from Cole's estate?

ANSWER TO QUESTION FIVE

(1) Dave’s objections to the will and the codicil should both be overruled. The issue is whether these instruments were validly executed. The rule is that in New York, a will is valid when it is: in writing; signed by the testator; published as last will and testament; duly executed; in front of two disinterested witnesses.

The will fulfills those requirements and Dave’s objections center around the date of the witness signatures. The rule for witnesses is that they have to sign within 30 days of each other. Here, the facts reveal that they signed within two days of each other. This is a validly executed will.

A codicil is required to be executed with the same formalities of the will. Here, the facts reveal that indeed this codicil was executed with those formalities. Dave’s objections over the codicil is

that only two persons witnessed it. Two persons are all that are required. This is valid and despite Dave's objections, the codicil will govern the probate proceedings.

(2)(a) The bequest to Walker is valid and proper. The issue is whether a lawyer can be a beneficiary in the same will he helps prepare. While such a relationship is not per se illegal, it raises an inference of undue influence in will preparation and is probably an ethical violation. Walker was correct in refusing to insert himself in Cole's first will. There is nothing wrong in his being named a beneficiary in the codicil which he did not prepare, however, Nelson has incurred an ethical violation with this conduct.

(2)(b) The bequest to Nelson in the codicil is improper. As mentioned in the above passage, this is inferred to be an ethical violation evincing self-dealing. A lawyer is charged with a fiduciary duty (i.e., a confidential relationship of the utmost good faith which requires one to subvert their own interest for the interest of the client), and this manner of reliance upon the lawyer that the testator places cannot be compromised. It is irrelevant that Nelson is Cole's cousin. He should not have written himself a bequest.

(3) The Attorney General has standing to raise objections in Surrogate's Court. The issue is how does the Attorney General derive standing in this manner. The doctrine of cy pres requires that bequests to the state or charities cannot be attacked by will contests. Here, the inclusion of Walker into a codicil falling in dispute raises the possibility of CO's bequest being reduced. As such, CO can rely on state aid. Thus, the Attorney General, as chief law enforcement officer of New York State has standing. He would also be curious to see why Nelson is a beneficiary.

(4) Ira's children will each take 8.3% of the bequest. The issue is how much per stirpes is due to each of Walker's grandchildren. As Walker's specifically designated "issue" in Cole's codicil, Walker's four children would have taken 25% each (or $25,000 of $100,000 divided four ways) . Ira's 25% will be split between his three surviving children -- each child will get $8,333.

ANSWER TO QUESTION FIVE

(1) Dave's Objections

(a) Initial Will – Dave's objection to the probate of the initial will should not be sustained. The issue is whether witnesses to a will must sign an attestation clause at the same time the testator publishes her will to them.

Under the EPTL, witnesses may affix their signatures as witnesses to a will as long as they do so within 30 days of the other witnesses' signature and after they have both witnessed the testator sign or acknowledge her signature in their presence.

In this case, Walker signed and then the two other witnesses signed just two days later, which is fine. An attestation clause merely recites the six elements to a valid will, and is very useful to probate a will if the witnesses' memories have failed or if they have turned hostile. However, there is no special rule under the EPTL that an attestation clause must be signed concurrently with the testator signing, as long as all other formalities are met.

(b) Codicil – Dave's objection to the probate of the codicil should not be sustained. The issue is whether the testator needs to have the same number of witnesses sign a codicil that she had to sign the original will. Under the EPTL, the answer is that you must have two witnesses for any testamentary instrument, and there is no requirement that you have the same number for a codicil as you do the underlying will.

In this case, it is a perfectly valid act that only two witnesses were present for the codicil after three were present for the initial will.

(2) Bequest to Walker and Nelson

(a) Walker – There is no issue concerning the propriety of the bequest to Walker. The issue is whether a witness to a will may also be a beneficiary under the will. Under the EPTL, the general rule is that such a bequest is void unless the beneficiary would also take if the testator were intestate.

In this case, Walker was not a witness to the codicil that contains the bequest to him or his issue. As a result, the concerns implicated by the general rule do not materialize, and the bequest to Walker – only a friend and not family of the testator – is valid.

(b) Nelson – There is an issue with the bequest to Nelson under so-called "Putnam scrutiny." The issue is whether a gift may be valid to the drafter of a will. Nelson, a cousin of the testator, is not an interested witness as he did not actually sign as a witness of the will. Under the EPTL, if a gift is made to the drafter of the will, the court will review the voluntariness of that gift under "Putnam scrutiny," either upon motion of a party or sua sponte.

In this case, Nelson inserted the bequest into the will on his own, and later explained why he did so to Cole. Thus, at first, this was not a voluntary gift made by Cole but rather seemed to be the product of undue influence. However, one fact in Nelson's favor is his familial relation with Cole in that they are cousins. This somewhat reduces the issue of undue influence and the voluntariness of the bequest, but should be looked into in any event.

Thus, the court should conduct "Putnam scrutiny" to make sure this was made freely by the testator, in exchange for services approximating that amount.

(3) The Attorney General does have standing to raise objections in the Surrogate Court proceeding. The issue is whether it is ripe for the Attorney General to represent the interests of CO, the charitable organization, before the will is even probated.

Under the EPTL, all potential beneficiaries under a will, and heirs who would take if the testator died intestate, have standing to either challenge or champion a will. Under the EPTL, the Attorney General is deemed the representative of the beneficiaries of all charitable trusts.

In this case, the Attorney General has standing to represent the interests of CO, a beneficiary under Cole's will. Therefore, we should entertain the Attorney General's objection.

(4) Ira's children will each receive 1/12 of the $100,000 bequest. The issue is what, if anything, will Walker's granddaughters receive, given they're a generational level below Walker's three surviving children. Under the EPTL, distributions to "issue" are made per capita by representation, unless the will provides otherwise.

In this case, the will does provide otherwise – for a per stirpes distribution – but the end result is the same.

Under the EPTL, bequests to a beneficiary generally lapse if the named beneficiary does not survive the testator, and the beneficiary is neither issue or a sibling of the testator. However, if the will indicates that the gift shouldn't lapse due to the beneficiary predeceasing the testator, then it won't.

In this case, Cole provided that $100,000 should go to "Walker, or his issue in equal shares per stirpes", evincing an intent that the gift should not lapse if Walker were to predecease Cole. Therefore, it is a valid bequest that needs to be distributed among Walker's issue as directed.

Per stirpes means that each line of issue is entitled to an overall equal share. Therefore, Dick, Bryan, Diane and Ira are entitled to ¼, or $25,000 of the bequest. Because Ira is dead, his $25, 000 flows down to his daughters to be split three ways.

Question-Six

In 1995, Builder, Inc. (Builder) was incorporated by Al and Bob, two carpenters experienced in the construction business. Builder was authorized to issue 200 shares of common stock, of which 50 were issued to Al, and 50 were issued to Bob. In accordance with the by-laws of Builder, Al, Bob, and Bob's wife, Sue, were duly elected as the directors and officers of Builder.

In 1999, Builder decided to hire another carpenter. When Builder approached Cal, an experienced carpenter, Cal agreed to join Builder for an annual salary of $75,000, provided he could acquire shares in Builder and participate in its management. After Builder agreed to Cal's salary demand, it voted to issue 45 shares of its stock to Cal for $20,000, which Cal paid. At a duly held meeting of the shareholders of Builder, Sue tendered her resignation as a director and officer, and Cal was duly elected as a director of Builder. At the same time, Builder and Cal entered into an agreement which provided, in relevant part:

"If, at any time, Cal voluntarily terminates his employment with Builder, Builder shall have the option, for a period of thirty days after such employment ceases, to repurchase Cal's shares in Builder for the purchase price of $20,000 originally paid by Cal."

Although Builder's business continued to be profitable, Al and Bob soon found that they were unable to get along with Cal and that they were dissatisfied with the quality of his carpentry work. Accordingly, just a year after Cal joined Builder, Al and Bob decided to hold a special meeting of the directors for the purpose of terminating Cal as an employee and director of Builder. Without giving any formal notice of the meeting or its purpose, Al and Bob met at Builder's offices. As the meeting was about to begin, Cal, who by coincidence was at Builder's offices, learned of the meeting. Cal walked into the meeting room, and Al called the meeting to order. Al and Bob then resolved and voted to terminate Cal as an employee and director of Builder, and to reelect Sue as Builder's third director. Cal voted against the Board's actions, reminding Al and Bob that the only reasons that he had agreed to join Builder were for the salary and the right to participate in its management.

A week after the meeting, Cal consulted his attorney and asked the following questions:

1. Was the special meeting of the board of directors validly held?

2. Was Cal's employment by Builder validly terminated?

3. What action or proceeding can Cal maintain as a shareholder against Builder?

4. In such action or proceeding:

(a) Can Cal be compelled to sell his shares in the corporation back to Builder?

(b) Can Cal be required to accept $20,000 for his shares?

Prepare a memorandum answering Cal's questions.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2001 QUESTIONS AND ANSWERS

ANSWER TO QUESTION SIX

(1) The special meeting of directors was validly held. The issue is whether a directors' meeting is valid where it is a special meeting, and there is no formal notice of the meeting or its purpose.

Under the New York BCL, special meetings of directors may be held in any location, need prior notice to directors, but need not provide notice of the purpose of the meeting. Notice defects are curable through prior or later waiver by directors, or through waiver by attendance and participation by directors.

Here, the meeting in Builder's offices was a proper place, but the failure to give notice was present because Al and Bob gave Cal no notice of the special meeting. Cal waived the notice requirement, however, by attending the meeting and voting against the Board's actions. Thus, the meeting was valid.

It is important to note that a director may be removed for cause by a majority vote of shareholders, without cause by a majority vote of shareholders if authorized by the bylaws or certificate of incorporation, and with cause by a majority of the board if authorized by the bylaws or certificate of incorporation. Here, the facts do not indicate whether the bylaws or certificate authorized Cal's removal for cause.

(2) Cal's employment by Builder was validly terminated. The issue is whether an employee whose employment contract was conditioned upon acquiring shares in the corporation and participating in its management can be terminated by the board.

Employment contracts are terminable at will, generally. Where employment is coupled with an ownership or managerial relationship with the corporation, it may only be terminated for cause.

In this case, Cal agreed to work for $75,000 after the board allowed him to acquire 45 shares for $20,000 and participate in Builder's management. However, Al and Bob found themselves unable to work with Cal and found his work to be unsatisfactory, although Builder's business continued to be profitable.

The unsatisfactory nature of Cal's work was sufficient good cause for the termination of his employment. In fact, Cal himself was able to voluntarily terminate his employment at any time. Thus, Builder was entitled to cancel his employment upon good cause.

(3) Cal can maintain a proceeding for judicial dissolution against Builder based on Builder's oppressive conduct of him as a minority shareholder.

Under New York BCL, a minority shareholder can petition the court for judicial dissolution if the corporation is closely held and thus the shareholder cannot escape any oppressive fraudulent behavior of the majority shareholders. The court will examine whether, instead of dissolution, the majority shareholders should buy the shares of the minority shareholders.

However, here this would not be available to Cal because he does not hold less than 20% of the shares and thus is not considered a minority shareholder, because he holds 45 of 145 shares.

Instead, Cal should maintain an action against Builder for the breach of fiduciary duty by the majority shareholders, Al and Bob. Majority shareholders owe a fiduciary duty not to oppress minority shareholders. Although Cal holds 45 of 145 shares, he does not have the controlling shareholder power that Al and Bob do. Al and Bob voted Cal out of directorship and terminated his employment. This was a breach of their fiduciary duty of good faith to Cal.

(4)(a) Cal cannot be compelled to sell his shares back to Builder. The issue is whether the agreement between Builder and Cal created a right of first refusal in Builder.

Because rights of first refusal are restraints on alienation, courts will only enforce them when they are reasonable, and courts will strictly construe any provision that may create a right of first refusal.

Here, Cal's contract with Builder provides that "If at any time, Cal voluntarily terminates his employment. . .Builder shall have the option. . .to repurchase Cal's shares . . . for. . . $20,000." Strictly construed, this right of first refusal only applies if Cal voluntarily terminates his employment. Here, Cal did not voluntarily terminate his employment, in fact, he cast a vote against the termination of his employment. (Furthermore, the reasonableness of this right of refusal is questionable since it is linked to Cal's original purchase price, not a fair price upon termination. However, since either Cal or Builder could be benefited this is probably reasonable.)

Thus, Cal cannot be compelled to sell his shares to Builder.

Note that if Cal brought a dissolution proceeding, the court could force him to sell his shares at a fair and reasonable price to the corporation instead of dissolving it.

(4)(b) Cal cannot be required to accept $20,000 for his shares. The issue is whether he is bound by the price in the employment contract.

As discussed previously, this provision will be strictly construed by the court because it relates to a right of first refusal. Here, Cal did not voluntarily terminate his employment, and thus will not be bound by the amount in the contract. Cal does not have to sell his shares, either.

ANSWER TO QUESTION SIX
(1) The special meeting of the directors of the company was not validly held.

The issue is whether directors are entitled to notice of a proposed special meeting of directors.

Under New York statutory law, formal notice of a special meeting of directors must timely be given to all of the directors, along with a description of the purpose of the meeting. If such notice is not given any decisions/actions at that meeting may be declared void. If a director wishes to assert that the actions are void due to not receiving formal notice, he should refrain from voting at such a meeting, as it will constitute a waiver by him to the notice requirement.

In application, Cal did not receive notice of the meeting called by Al and Bob, to which he was entitled in his position as director to the company. However, instead of promptly launching an objection and having it duly recorded in the minutes, Cal proceeded to vote, thereby waiving any right of objection he may have had to the notice requirements.

In conclusion, therefore, the meeting was validly held.

(2) Cal's employment by Builder was validly terminated as a director and as an employee.

Under New York statutory law, a director can be removed from the board by the other directors, either with or without cause, on a majority vote. Directors may also remove employees of the company, but cause must be shown.

In application, Al and Bob validly removed Cal as a director of the company and replaced him with Sue. Although Cal voted against the action, a 2 to 1 vote suffices to carry the proposal. In addition, Cal was removed as an employee. We are told how Al and Bob were dissatisfied with his carpentry work and how they were unable to get along. In such a closely held corporation, such factors could indeed be sufficient ' cause' for removal.

In conclusion, therefore, Cal' s employment has validly terminated.

(3) Cal could maintain an action for dissolution of the company. The issue is as to whether the court will agree with Cal that he has been oppressed or treated unfairly by the board/majority shareholders.

A shareholder with 20% or more of the issued stock in a company not publicly listed may petition for the dissolution and winding up of the company if he can show he was unfairly treated or oppressed by the majority shareholders.

In application, Cal, holding 45 issued shares (just short of 30% of issued shares), has sufficient power to petition the court for this measure. He would have to show that he was either oppressed or unfairly treated. However, from the facts Cal was simply dismissed for two good reasons, i.e., his workmanship and his personality. Therefore, such an action is likely to fail.

(4)(a) Cal can be compelled by the courts to sell his shares back to Builder in a proceeding as outlined above in (3). The court, in deciding a winding up is unnecessary, can direct that the petitioning shareholder be bought out. In application, it would appear that this would be a sensible solution here as Builder is still a viable and continuing business. Winding it up is unnecessary.

(4)(b) Cal cannot be required to accept $20,000 for his shares.

The issue is as to the enforceability of the agreement between Cal and Builder.

Under New York law, such agreements of first refusal are enforceable, on their terms. In application, however, the terms specifically state that $20,000 will suffice in a case of Cal' s voluntary ceasing employment, which is not the instance in the present case, as he was removed.

In conclusion, he cannot be required to accept $20,000 for his shares.