

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

Question-One

You are an associate with an upstate New York law firm. A senior partner seeks your assistance concerning a matter presented by a new corporate client, Chips, Inc. ("Chips"). Chips manufactures two different computer chips, one designed for laptop computers and one designed for handheld computing devices.

The partner shares with you that on October 28, 1999, Devices Corp. ("Devices") faxed Chips an offer to buy 1,000 chips for handheld computing devices. The offer provided for payment in the sum of \$500,000 on delivery, which was to take place by December 15, 1999.

One day later, Chips faxed Devices written confirmation that Chips would provide the 1,000 computer chips as specified, but "would suggest shipment in the year 2000 on or before January 16, 2000 to avoid Y2K problems."

On January 9, 2000, Devices faxed Chips instructions for shipping the computer chips. That same day, Chips forwarded 1,000 computer chips to Devices. On January 10, immediately upon receiving the lot of 1,000 computer chips, Devices overnighted a check to Chips in the amount of \$500,000. The following day, on inspecting the shipment, Devices noticed that the chips received were for laptop computers, not handheld devices. That same day, Devices received word that the ultimate purchaser of the handheld devices for which the chips were to be utilized was canceling its order. Devices immediately stopped payment on its \$500,000 check, and notified Chips that, because the shipment was non-conforming, it was canceling the order. On that same day, but following receipt of the notice advising that the wrong chips had been delivered, Chips called Devices and said it would cure the problem immediately. Chips then forwarded the correct chips, which were received by Devices on January 15, 2000.

Devices inspected that shipment and found it to conform with the order. Nevertheless, Devices returned the entire shipment to Chips, accompanied by an acknowledgment of receipt form, which included an unequivocal general release of Devices for any and all claims Chips might have against Devices. The receipt form was signed by the supervising clerk in the shipping department of Chips and returned to Devices. When Chips presented the \$500,000 check for payment, Devices' bank refused to honor it due to the stop payment order. On January 31, 2000, Chips brought suit against Devices seeking full payment for the chips.

Upon proof of the foregoing facts, Devices moved for summary judgment. The court granted the motion dismissing Chips' claim. The court found that there was a valid contract, but that Chips had breached the contract by initially delivering non-conforming goods and, in any event, Chips' representative had signed a release of all claims. The attorneys previously representing Chips have advised that an appeal is not worth pursuing.

The partner would like you to prepare a memorandum discussing:

1. Whether a valid contract was formed.
2. Whether, assuming a valid contract, Chips' non-conforming delivery afforded Devices the right to cancel.
3. Whether the general release bars a successful claim by Chips.

ANSWER TO QUESTION ONE

Issue 1

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

A valid contract was formed between Chips, Inc. and Devices Corp. The issue is whether the two companies entered into a binding contract such that a breach by either party entitles the other to adequate remedies. A valid contract is formed where there is an offer, namely a manifestation to enter into a valid contract by one party, and an acceptance of that offer by the other party, which indicates a commitment to be bound. In addition to a valid offer and acceptance, there must be adequate consideration or a bargained-for legal detriment or, as in New York, a bargained-for legal benefit. Finally, there must be no defenses to formation that would invalidate an otherwise valid contract entered into by the parties, such as the Statute of Frauds. In this case, the transaction involves the sale of goods. For this reason, Article 2 of the UCC is controlling. The computer chips represent goods and Chips was selling them to Devices. Because Article 2 is controlling, the faxed offer must only set out the quantity term, which it did here of 1,000 units and the writing must be signed by the person to be charged. Devices' offer and Chips' acceptance (confirmation) by fax represent signed offers and acceptances under New York law. Chips is a merchant under the facts presented because it is in the business of selling the laptop and handheld computers (it is a manufacturer). The offer by Devices was thus sufficient because the quantity term was set out and Devices manifested an intent to be bound on its offer. The acceptance by Devices was similarly valid because it indicated an intention to be bound and because it was faxed on Devices' paper. The additional terms added by Chips' acceptance became part of the contract as well under the UCC rules relating to contracts between merchants. It is unclear whether Devices is also a merchant, a corporation in the business of buying and selling these types of goods. But whether Devices Corp. was a merchant, the additional term, whether it needed to be considered separately or not, became a part of the contract because no objection was made to its inclusion within ten days by Devices. Given a valid offer and acceptance, there was adequate consideration because there was a bilateral contract and both sides promised to perform, Chips in exchange for \$100,000 and Devices agreed to pay for the computer chips sent by Chips. Finally, since this is a sale of goods for over \$500, the contract is within the Statute of Frauds. The statute was satisfied because there was a written offer signed by Devices (the fax). Thus, there was a valid contract between Chips and Devices. The term added was acceptable because there was no mutual alteration, no objection and no acceptance conditional upon the additional term.

Issue 2

Chips' non-conforming delivery did not afford Devices the right to cancel. The issue is whether Chips was capable of curing the contract or whether its actions constituted a breach sufficient to allow Devices the right to cancel. Under Article 2, merchants are normally required to deliver a perfect tender to the other party. Few exceptions are made to this rule. Here, as a merchant, Chips was under an obligation under the UCC to deliver perfect goods (chips for handheld devices, not for laptop computers). Because the contract stated that performance was not due until January 16, 2000, (the additional term had become a part of the contract) Chips was entitled to an opportunity to cure the contract and it had until January 16, 2000 to do so. Chips should have been given the opportunity to send Devices the proper goods until that date and Devices was not entitled to cancel. This cure rule is specific to Article 2, where the party to be charged is a merchant. Thus, assuming a valid contract, Chips' non-conforming delivery on January 10, 2000 and its cure on January 15, 2000, prior to receiving notice of a valid reason for cancellation by Devices (for non-conformity is insufficient here) and prior to the date of performance contained in the contract of January 16, 2000, Chips had a right to cure and Devices could not cancel for the reason given.

Issue 3

The general release by Chips' employee does not bar a successful claim by Chips. The issue is whether Chips' employee had authority to return the acknowledgement form of his own volition on Chips' behalf. A principal is liable on all contracts entered with its authority. Here, it could be argued Chips' employee had implied authority to return the acknowledgment because he was

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

an employee in Chips' shipping department. However, the employee was only a supervising clerk in the shipping department who was probably not familiar with the terms or details of Devices' order, nor what was going on with it. Thus, he probably did not have sufficient authority to bind Chips without the consent of someone in a management position or position of authority. The employee may have had apparent authority because he was cloaked with authority given his position, but at this point it is unclear if Devices reasonably relied on the form's return with respect to the contract. Furthermore, the release may not represent a contract thus its ability to bind the principal in this situation is not adequate. Even though Chips was a merchant, such a release without more should be insufficient to bind Chips. Chips can still proceed with its claim.

ANSWER TO QUESTION ONE

1. A valid contract was formed between Devices and Chips. The issue is whether Devices' offer on October 28 and Chips' written confirmation met the requirements outlined in the UCC for a sale of goods contract. Between merchants (a merchant is one who regularly deals in the sale of specific goods or has specialized skill pertaining to goods) a contract may be formed by; a written confirmation, all the requirements for contract formation are met, there is consideration in that 1,000 chips are to be exchanged for \$500,000, there is an agreement or meeting of the minds, and there is bargained-for exchange or detriment.

The central question is whether Chips' change of date for delivery entered the contract. Under the UCC, a contract for the sale of goods between merchants does not have to comply with the common law mirror image rule. In other words, the acceptance may contain additional terms. These terms will become part of the contract if they do not materially alter the terms of the contract, if the contract does not limit acceptance expressly to its terms, or if the other party does not object to their addition in a timely manner (i.e. within ten days of receipt). In this case, the offer did not limit acceptance to its terms. As to whether a change in delivery date materially altered the contract, one can infer from the fact that time was not of the essence, that a one month delay was unlikely to be material. This is supported by the fact that Devices did not object to the new date. Devices impliedly accepted or acknowledged the new date when it faxed instructions for delivery on January 9 after the time of delivery proposed in the offer had passed. Because the delivery date was not objected to by Devices, it became part of the contract between the parties despite the fact that it conflicted with the original delivery date specified in the offer.

2. Chips' non-conforming delivery did not give Devices the right to cancel the contract because performance was not yet due and a seller has the right to cure a non-conforming shipment before performance is due. The general rule for buyer's rights on receipt of non-conforming goods is that a buyer may reject the goods entirely, retain units that conform to the contract, or accept the non-conforming goods. However, there is an exception to the general rule when a seller ships non-conforming goods before performance is due. In this case, a seller may notify the buyer upon learning of the non-conformity of its intent to cure. The buyer must accept conforming goods tendered when performance is due and may not cancel the contract before then. In this case, Chips breached its contract when it shipped the wrong chips. However, because it notified Devices of its intent to ship the correct chips and did so by January 16, 2000, Devices had no right to cancel the contract, even though Chips' first shipment was in breach of the contract. (It should be noted that the first shipment was not an accommodation so the seller was in breach.)

3. The general release signed by Chips will likely not bar Chips from asserting a successful claim. The issue is whether the release signed by a supervising clerk binds Chips from pursuing its claims. The first issue is whether the supervising clerk had the authority as an agent or employee of Chips to execute such a release. An agent can have express, implied, apparent or necessary authority to act on behalf of the principal. Here, it is highly unlikely that an agent in shipping would have the actual or express authority to sign such a release. Express authority is authority that has been explicitly given. In this case, the release was not a separate document but part of the

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

acknowledgment of receipt. A supervisor in shipping would have authority to sign a receipt acknowledgment but not a release. Signing the release appears to have been necessary to acknowledge receipt.

The next question is whether the supervisor's signature binds Chips. It is likely that it does not bind because it is doubtful that a supervisor would be thought to have the apparent authority to bind the corporation. Devices, as a merchant participating in the Chip market, would not have relied on the apparent authority of a person working in shipping to release any rights the company would have to make any subsequent legal claims. Industry custom and course of dealing should have informed Devices that the release obtained as part of the acknowledgement of receipt was not executed by an agent with the authority to bind Chips. Therefore, Chips is free to pursue its claims.

Question-Two

At about 2:00 p.m. on Sunday, May 20, 2001, Paul, a Suffolk County police officer, was patrolling in a commercial area. He suddenly heard the shattering of window glass from a closed store, Ann's Antiques, and the ringing of the store's alarm. When Paul looked across the street, he saw a woman running out of the antique store, carrying a lamp. Paul immediately chased the woman, but before he reached her, she accidentally ran into Mark, an elderly pedestrian, who fell and severely injured his head on the sidewalk. The woman ran away, but the lamp she had been carrying was lying on the street with a tag on it which read, "Ann's Antiques, \$150."

Shortly after Mark fell, an ambulance drove him to a local hospital. There, the doctor told Mark, who was conscious, that there was internal bleeding in his head, that his condition was serious, and that Mark would require prompt surgery. Before losing consciousness, Mark told Paul, who was questioning him at the hospital, that the woman who knocked him down was Denise, a waitress who worked at a nearby restaurant. Mark's final words to Paul were, "The doctor said my condition is serious, and surgery will be required to save my life. Don't let Denise get away with this." Despite surgery, Mark died later that night from the injuries he sustained when Denise ran into him.

Thereafter, Paul arrested Denise, and on May 24, a Suffolk County grand jury returned an indictment charging Denise with burglary and felony murder.

At Denise's trial, Ann, the owner of Ann's Antiques, testified that on May 20, her store was closed and that Denise had no right to be in the store. Paul then testified to the pertinent foregoing facts, and began to testify to Mark's statement to him at the hospital. Over the objection of Denise's attorney that Mark's statement to Paul at the hospital constituted inadmissible hearsay, the court (1) permitted Paul to testify to Mark's statement.

When the jury returned a guilty verdict against Denise on the charge of felony murder, her attorney moved to set aside the verdict on the ground that the facts proved at trial failed, as a matter of law, to constitute the crime of felony murder. The court (2) denied the motion.

After the verdict, Jan, a juror, advised Denise's attorney that one afternoon during the trial, she had walked past Ann's Antiques to see for herself whether Paul could really have seen Denise run from the store. Jan said that she thought Paul could have seen Denise, and that while she had discussed her visit to the area with two other jurors during deliberations, the discussion had not affected the jury's verdict. On the basis of Jan's statement, Denise's attorney timely moved for a mistrial. The court (3) denied the motion.

Were the numbered rulings correct?

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

ANSWER TO QUESTION TWO

Issue 1: The court ruled incorrectly in permitting Paul to testify to Mark's statement. The issue is whether Mark's statement was hearsay and whether it fit within any exception permitting its admission at trial.

A statement is hearsay if it was made out of court and is being offered to prove the truth of the matter asserted in the statement. Here, Mark's statement was made out of court while he was in the hospital before surgery. The matter asserted in his statement was that Denise was the person who injured him. The statement is being offered to prove that Mark identified Denise as his assailant. Because the out of court statement is being offered to prove the truth of the matter asserted, it is hearsay.

In order to admit hearsay in court, the statement must fit within one of the exceptions to the hearsay rule which have developed at common law. The only possible exception applicable to this statement is the exception for dying declarations. In order to be admissible under this exception, the declarant must be unavailable because he is dead, it must be offered in a homicide prosecution, and the declarant must have made the statement while under the belief that he was in imminent danger of dying (and the statement must be relevant to the cause of his death).

In this case, Mark has died and his statement is being offered in a homicide prosecution (felony murder is murder in the second degree, which constitutes a homicide prosecution). Mark's statement identifying his assailant also clearly pertained to the cause of his injuries. The issue is whether Mark made the statement while under the belief that his death was imminent.

Mark was not sufficiently convinced of the imminence of his own death for his statement to fit within this exception. First, the doctor told Mark his condition was "serious", not life-threatening or certain to cause death. Second, Mark's own description of his condition to Paul indicated that he held at hope for his own recovery since he said that surgery could save his life. Mark's statement reveals that he did not actually believe he would die when he identified Denise as his assailant. The purpose of the dying declaration exception to the hearsay rule is that statements made in contemplation of death bear sufficient indication or reliability to warrant their admission, despite the fact that the declarant is not on the witness stand for the jury to evaluate his credibility. Dying declarations are believed to be especially reliable because people generally don't want to die with a lie on their lips. That reliability stems from an actual belief on the declarant's part that he will die very soon. Mark simply did not have that belief, so his statement is not reliable enough to warrant its admission as an exception to the hearsay rule.

Issue 2: The court correctly denied Denise's motion to set aside the verdict for felony murder. The issue is whether the facts proved at trial constituted the crime of felony murder.

The elements of (second degree) felony murder are that the defendant caused the death of a non-participant victim while in the course, or in immediate flight from the commission of one of the enumerated felonies in the New York penal law. One of the enumerated felonies in the penal law is burglary. In order to constitute a felony under the felony murder statute, it can be any degree of burglary (for second degree felony murder). The elements of burglary are the breaking and entering of a dwelling or place of business with the intent to commit a crime therein. It is not required to occur at night.

In this case, the facts proved that Denise caused Mark's death by running into him and causing him to fall and hit his head. Denise caused Mark's injury while in immediate flight from Ann's antique store. She had not yet reached a place of safety, so the immediacy of her flight was sufficient to fit within that element of the statute. Clearly, Paul was a non-participant in Denise's crime. These facts were all established by Paul's testimony at trial.

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

The next question is whether Denise was in immediate flight from an enumerated crime. Since we don't know from these facts whether Denise was convicted of burglary at trial, we must determine whether the facts at trial were sufficient to prove the elements of that crime.

Denise broke into Ann's Antiques on May 20. This fact was proven by Ann's testimony that her store was closed and that Denise had no right to be in the store that day. Ann's Antiques was a place of business.

The facts at trial proved that Denise broke in and entered Ann's Antiques with the intent to commit a felony therein. Paul testified that he observed Denise running out of the store carrying a lamp. After running into Mark, Denise dropped and left the lamp bearing a tag, which read "Ann's Antiques". Since Denise actually committed and completed the crime of larceny, and absent facts to the contrary, her intent to commit that crime upon entering Ann's Antiques may be inferred.

Therefore, since all of the elements of burglary and felony murder were proved by the prosecution at trial beyond a reasonable doubt, the court correctly denied Denise's motion to set aside the verdict on felony murder.

Note: The standard for the court to determine whether to grant a motion to set aside the verdict would be whether the prosecution presented sufficient evidence for a jury to reasonably find that the defendant committed each element of a crime beyond a reasonable doubt.

Issue 3: The court incorrectly denied Denise's motion for a mistrial on the basis of improper juror deliberations. The issue is whether a juror visiting the crime scene, deliberating prior to the close of the evidence and/or discussing the case with fellow jurors constitute sufficient grounds for a mistrial.

A trial judge should grant a mistrial if a juror visits the crime scene on his own initiative, does not limit his deliberations to evidence presented at trial, deliberates prior to the close of the evidence and/or deliberates with fellow jurors prior to the closing arguments and instructions. In this case, Jan did all of the above acts. Because any one of her actions probably affected the verdict, the judge should have granted a mistrial. Because all of her actions combined certainly affected the verdict, the trial judge was definitely incorrect to deny the motion.

#### ANSWER TO QUESTION TWO

1. The court ruled improperly when it permitted Paul to testify as to Mark's statement. The issue is whether Mark's statement constitutes a dying declaration sufficient to except it from the general rule preventing the admission of hearsay.

Under the New York rules of evidence, hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay is inadmissible unless it falls within an exception or is excluded from the definition of hearsay. A "dying declaration" is an exception to the rule against hearsay and may be admitted for the purposes of establishing its truth. In order to be admissible, the statement must be made 1) under a sense of impending death, 2) it must concern the circumstances that put the declarant in the position of impending death, 3) the declarant must thereafter die, 4) the declarant must have been competent to testify at trial, and 5) in New York, the exception may only be used in a homicide case.

Under the facts, the statement by Mark meets requirement two because he explained that his position was caused by Denise. It meets requirement three because Mark dies after the surgery. It also meets requirement five because it is being offered in a homicide (felony murder) case.

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

However, the statement does not meet requirement one because the facts suggest that Mark had at least some hope that he would survive. The statement arguably fails to meet requirement four also because a person with internal bleeding in the head would probably not be considered competent to testify at trial. Thus, the court ruled improperly when it permitted Paul to testify as to Mark's statement.

2. The court improperly denied Denise's attorney's motion to dismiss the verdict of felony murder. The second issue is whether there were sufficient facts to support a felony murder verdict against Denise (enough so that a denial of Denise's attorney's motion was proper).

Under New York penal law, the crime of felony murder arises where the defendant causes the death of a non-participant during the commission of an enumerated felony or during the immediate flight there from. The prosecution must prove the crime beyond a reasonable doubt in order to sustain a guilty verdict.

Under the facts, the prosecution has proven that the enumerated felony burglary occurred and that a non-participant, Mark, died during the perpetrator's/felon's immediate flight from the felony. These elements can be proven without regard to the out of court statement made by Mark. Assuming that the declaration constitutes inadmissible hearsay, there would not be sufficient evidence to warrant a guilty verdict against Denise (i.e., without the statement, there would be no identification of Denise as the felon. Neither the police officer nor Ann, the owner of the antiques store, actually saw Denise herself commit the crime of burglary or the accidental contact with Mark). Assuming the admissibility of the statement, there would be sufficient evidence. It should be noted that third degree burglary in New York arises where the defendant knowingly enters or unlawfully remains behind in a building with the intent to commit a crime therein. It can be aggravated to second degree where there is injury to a non-participant. Again, under the facts, the requisite elements of burglary were met, except that there is no identification of Denise without the hearsay statement.

3. The court incorrectly denied Denise's motion for a mistrial. The issue is whether a juror's visit to the scene of a crime, unaccompanied by a judge, during the trial is grounds for a mistrial.

Under New York law, jurors may not visit the scene of a crime at their own accord during trial or deliberations. The fact that the verdict is not affected as a result of such a visit is not sufficient to prevent the granting of a motion for mistrial. Here, Jan made an unaccompanied, "unofficial" visit to the scene of the crime. It does not matter that the verdict was not ultimately affected. The court incorrectly denied Denise's attorney's motion for a mistrial.

#### Question-Three

Herb and Win were married in 1980. At the time of their marriage, Herb was a freelance writer who worked from home. In 1984, Win graduated from law school, passed the bar examination and obtained a salaried position as a New York State Assistant Attorney General. In 1985, Win gave birth to a son, Sam. After Sam's birth, Win returned to her job, and Herb cared for Sam and the household. That same year, Herb and Win purchased Blackacre, a one family house in Rockland County, and took title as tenants by the entirety. In 1990, Win inherited gold coins worth \$100,000 and a stock portfolio worth \$250,000. Win placed the gold coins into her personal safe deposit box and placed the stocks into a brokerage account in her name alone.

In January 1999, the parties separated pursuant to a separation agreement. The agreement was duly executed, acknowledged and filed on February 1, 1999, and on February 2, 2000, Win commenced an action for divorce. The court granted temporary custody of Sam to Herb and ordered Win to pay \$1,000 per month in child support during the pendency of the action. The stock portfolio, which Win actively managed over the years, is currently worth \$500,000. The

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

gold coins, which have remained in Win's safe deposit box since 1990, have been valued at \$200,000 as of February 2000.

Herb believes the value of Win's law license, the stock portfolio and the gold coins are subject to equitable distribution. Win believes that her professional license has merged into her employment as an Assistant Attorney General and has no measurable value which can be equitably distributed. She also believes that the full value of both the stock portfolio and the gold coins is her separate property.

Win timely made child support payments until March 2000, when Sam came to live with her. In March 2001, Sam returned to live with Herb, and Win again made child support payments. Herb has consulted his attorney regarding his right, if any, to seek a judgment against Win for the \$12,000 in child support arrears for the year during which Sam lived with Win.

Herb owes substantial legal fees, and his lawyer has proposed that the lawyer take a mortgage on Herb's interest in Blackacre as security for payment of the outstanding fees.

A settlement conference between the parties is scheduled for tomorrow.

(1) Discuss Herb's and Win's equitable distribution rights with respect to the professional license, stock portfolio and gold coins.

(2) Can Herb collect the child support arrears?

(3) What are the legal and ethical implications of Herb's proposal to his attorney regarding Blackacre?

### ANSWER TO QUESTION THREE

#### 1. Equitable Distribution Rights

##### A. Professional license

The value of Win's law license is subject to equitable distribution. The issue is whether a professional license, obtained during the marriage, constitutes marital property. Under equitable distribution law (EDL) in New York, a professional license obtained during marriage is subject to equitable distribution. Under these facts, Herb worked from home and likely supported Win as she went through law school and obtained her degree. He is thus entitled to an equitable share of the license (the court will value the license). However, Herb may not simultaneously sue for an equitable portion of the license's value and rely on Win's professional salary (based on her professional license) to calculate maintenance. He can only do one or the other.

##### B. Stock portfolio

As to the value of the stock portfolio, \$250,000 belongs to Win as separate property and \$250,000 is subject to equitable distribution. The issue is whether any part of the value of the stock portfolio is subject to equitable distribution. Under EDL, the spouses are entitled to keep their "separate" property, which includes, among other things, any gifts or legacies received by the spouse independently, even during marriage. Thus, Win is entitled to the \$250,000 value of the stock portfolio as she received it. Also under the general EDL rules, any appreciation is separate property, unless the other spouse contributes to the appreciation in some way. Here, Herb contributed to the appreciation in the stock portfolio because he stayed home and managed the household and took care of the child, thereby enabling Win the time to manage the portfolio actively. She may not have increased the value that much without Herb's help at home. Thus,



NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

the appreciation of \$250,000 is subject to equitable distribution, but Win is still entitled to the \$250,000 original value of the portfolio as separate property.

C. Gold coins

The value of the gold coins is not subject to equitable distribution. As discussed earlier, each spouse is entitled to retain his/her separate property under EDL. Separate property includes gifts and legacies given to one spouse independently, even during the marriage. Furthermore, the appreciation during marriage of such separate property may be included in the separate property unless the other spouse contributed to the appreciation. Unlike the portfolio, the coins appreciated in value without any action on the part of either Win nor Herb. As Herb did not contribute to the appreciation, the appreciation is not subject to equitable distribution. The full value of the coins, original value plus appreciation belongs to Win as separate and is not subject to equitable distribution.

2. Child Support Arrears

Herb may recover a judgment for the child support arrears. The issue is whether the court may modify or annul the arrears where the parent obligated to pay actually had custody of the child. Valid separation agreements, like the one here, are enforced according to their provisions under general contract law principles. The court has no jurisdiction to modify or annul the arrears or payment of the child support even though the separation agreement makes no provision for support payments if Win had custody. It would be unfair to make Win pay child support to Herb while she was already taking care of Sam and Herb was not. The provisions of the separation agreement govern and a court would have to enter a judgment for arrears. Furthermore, under the general rule of DRL, a court may never modify or annul a child support arrears, whether reduced to judgment or not. Thus, Herb may obtain a child support arrears judgment against Win pursuant to her breach of their validly executed separation agreement. (Win may be able to obtain relief under an unjust enrichment theory if Herb sues her on the agreement under ordinary contract law)

3. Attorney's proposal

Herb's attorney's proposal that he take a mortgage in Herb's interest in Blackacre is both illegal and immoral. Under the rules of professional responsibility, a lawyer may never take a case where he has a pecuniary interest in the outcome of the litigation. To take a case and then obtain an interest in the property at issue in the litigation is also prohibited. Thus, if Herb gave his attorney a mortgage in Blackacre, the attorney would be subject to discipline in New York. The mere proposal of such an arrangement is also a violation of the rules of ethics and the attorney can be disciplined.

Furthermore, taking an interest in Blackacre is similar to a contingent fee arrangement where the lawyer is entitled to a percentage of the judgment. Such contingent fees are not allowed in domestic relations matters. Under these facts, the attorney is representing Herb on a domestic relations issue – marital distribution of property – and thus cannot charge a contingent fee. Taking a mortgage interest in Blackacre has the same effect (because if the suit is successful, the attorney gets paid, if the suit is unsuccessful the attorney is left with nothing) as a contingent fee arrangement, the attorney may not take the mortgage interest and will be subject to discipline under the Rules of Professional Conduct.

ANSWER TO QUESTION THREE

1. A. Is the professional license subject to equitable distribution? The general rule is that property

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

acquired throughout the course of a marriage is rightfully considered marital property and is subject to equitable distribution.

In this case, Win's license to practice law was earned after the two parties were married. This license to practice law would generally be considered marital property because presumably Herb supported Win while she was going to school and studying for the bar.

However, there has been a recent trend to try to avoid double counting of assets. In this case, Win is paying support based on her job with the attorney general. In effect, to consider the license to practice law a marital asset you would be counting it twice, once in the equitable division and once in the determination of amount of support. It is likely that the license will not be counted as marital property to avoid a double counting of Win's assets.

B. Is the stock portfolio and gold coins subject to equitable distribution? Again the general rule is that property acquired during the marriage is marital property. There is, however, an exception to the general rule that individual inheritance remains part of the individual assets.

In this case, the stock portfolio and gold coins were both devised to Win individually. Thus, as an exception to the general rule, these gifts should not be considered marital property.

There is, however, a further exception. If a gift increases in value because of the work of one or both spouses, the increase in value is a marital asset.

In this case, the stock portfolio increased in value \$250,000 in the time Win actively managed it. However, if Herb can show that because of his time spent taking care of the house and child, Win was able to increase the value he may be entitled to share in the increase.

The gold coins should not be considered a marital asset, nor should the original value of the stock portfolio. However, the increase in value of the stock portfolio (\$250,000) should be included as a marital asset and subject to equitable distribution.

In summary, \$250,000 attributable to the increase in the stock portfolio should be considered a marital asset, and the \$100,000 value of gold coins and \$250,000 for the original value of stock portfolio is Win's individual property. Finally, the value of Win's license to practice law has already been counted in her obligation to pay support.

2. Herb is entitled to the back child support payments. A custodial parent can collect support for the time in which the child lived with the non-custodial parent.

The general rule is that the custodial parent is entitled to all child support payments. In this case, the parties entered into a valid separation agreement. One of the provisions was that Win would pay Herb \$1,000 a month in child support and that Herb would have custody. There is no indication that this support agreement was ever modified. The fact that Sam actually lived with Win for a year is irrelevant to the enforcement of the separation agreement. Herb should be able to collect the child support arrears of \$12,000.

3. Herb's attorney's proposal would effect only Herb's interest in the property and is unethical. May a lawyer take a security interest in a client's home during a pending divorce proceeding?

First, the general rule in New York is that one spouse may mortgage their interest in a tenancy by the entireties. A tenancy by the entireties is a protected marital interest that arises presumptively in a conveyance of real property to a husband and wife.

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

In this case, Herb and Win acquired Blackacre after they were married and because there are no facts to rebut the presumption they took as a tenancy by the entirety. New York follows the title theory for mortgages. This means that if one spouse exercises a mortgage on their portion of the property the tenancy by the entirety is not destroyed. In this case, the legal implication is that mortgage would only affect Herb's interest and the mortgage would be subject to Win's right of survivorship. However, the tenancy by the entireties and thereby the right of survivorship will be severed when the divorce is complete.

The Model Rules of Professional Conduct prevent an attorney from taking a stake in property that is the subject of litigation. This proposal would also seem to create a conflict of interest problem. In this case, the lawyer would have a significant personal interest in making sure that Herb would get title to the marital home. Because of this personal interest he may counsel Herb to take action that he would not otherwise recommend.

This proposed action is unethical because it violates the Model Rules of Professional Conduct and also creates a conflict of interest. At the very least, the lawyer should tell Herb to consult another attorney.

It should be noted that in section three, it is also impermissible for a lawyer to conduct business with a client during a family law case. Here, divorce obviously qualifies as a family law case.

#### Question-Four

Bob, a resident of State X, died and his will was duly probated in State X. Al, Bob's son, a resident of New York, is executor of Bob's estate. Bob had owned Greenacre, a summer home located on a large lake in Washington County, New York, which he had occupied each summer. Greenacre is now an asset of Bob's estate. On May 1, 2000, Carl, a house painter and resident of Washington County, met with Al at Greenacre. Carl and Al agreed that Carl would paint the exterior of the summer home, finishing by June 30; that Carl would furnish ladders, brushes and other necessary equipment; and that Al would furnish the paint and would pay Carl \$20 per hour for his work. Al also told Carl that he could use Bob's rowboat, which was pulled up on shore, to view the paint job from the water, but warned Carl that he should be careful. Carl began work on May 8, and Al did not return to Greenacre until after June 20.

On June 20, Carl decided to go out in the rowboat to view the paint job. When Carl was about one hundred feet from shore, the boat suddenly capsized, throwing Carl into the water. Carl, who was a poor swimmer, attempted to swim to shore but soon sank below the surface and drowned. An investigation revealed that the boat did not leak and was not otherwise defective, but that there were no life preservers or other flotation devices in the boat or in the vicinity of the boat when Carl placed it in the water.

Dot, Carl's widow and the personal representative of his estate, duly commenced an action in Supreme Court, Washington County, on behalf of herself, her children and Carl's estate against Al as executor of Bob's estate, for negligence and wrongful death. Dot's complaint sought damages of \$1,000,000. The complaint alleged that the defendant was negligent both as a matter of common law and because the defendant breached Navigation Law §40(1)(a), which requires that every rowboat shall have at least one wearable, personal flotation device (life preserver) for each person on board, "while underway or at anchor with any person aboard. . . ."

Al duly filed a notice of removal in federal district court to remove the action to that court, and Dot promptly moved in federal district court for remand of the action to the state supreme court. The court (1) granted Dot's motion.

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

After issue was joined, Al moved, upon proof of the pertinent foregoing facts, for summary judgment dismissing the complaint on the separate grounds that (a) Carl was an employee of Bob' s estate and the plaintiff' s exclusive remedy is pursuant to the Workers' Compensation Law, and that (b) Bob' s estate had breached no duty owed to Carl, and Carl's own negligence caused his death. The court (2) denied the motion as to (a) and (3) granted the motion as to (b).

Were the numbered rulings correct?

ANSWER TO QUESTION FOUR

1. The court was incorrect in granting Dot' s motion for remand to state court. The issue is whether Al can remove Dot' s claim to federal court based on diversity jurisdiction.

In order to remove a claim to federal court, the plaintiff' s claim must have been capable of initially being brought in federal court. Presuming Navigation Law is a matter of state law, Al would have to remove the case based on diversity. If Navigation Law is federal, federal jurisdiction might have given the district court subject matter jurisdiction arising out of a federal question. At that point the state law issue would be remanded to state court. Diversity jurisdiction exists when there is complete diversity of citizenship between all plaintiffs and all defendants. This means no plaintiff can be from the same state as any defendant. In addition, the amount in controversy must exceed \$75,000.

In this case, Al is being sued as an executor of Bob' s estate. As such, New York law requires that the domicile of the decedent be used to determine diversity. Because Bob was a domicile of state X and Carl and his widow of New York, there is complete diversity. In addition, the claim exceeds \$75,000. As such, Dot could have brought the action initially in federal court, so Al is entitled to remove it. Therefore, the court was incorrect in granting Dot' s motion because diversity jurisdiction allowed the federal district court to hear this case.

2. The court was correct in denying summary judgment to Carl. The issue is whether Carl was an employee of Bob' s estate and therefore limited to workers' compensation recovery.

Summary judgment is granted when there is no genuine issue of material fact. In this case, Carl might very well have been an employee of Bob' s estate, but he could also have been an independent contractor. In fact, the facts seem to suggest an independent contractor relationship existed because Al hired Carl for a specific job at an hourly rate. Likely, Carl was not on any employee payroll of Al' s. Assuming Carl was an independent contractor, his damages are not limited to workers' compensation. Workers' compensation is a damages remedy that limits an employer' s liability to a preset contractual amount. There are no pain and suffering damages and no punitive damages under the workers' compensation system. Workers' compensation excludes independent contractors, teachers, clergy and domestic part-time help from its coverage.

Because Carl' s status as an employee is not conclusive, and a jury could find genuine issue as to whether Carl was an independent contractor or an employee subject to workers' compensation, the court was correct in denying Al' s motion for summary judgment.

3. The court was incorrect in granting summary judgment to Al on the breach of duty issue. The issue is whether Al, as representative agent of Bob' s estate, owed a duty to Carl to protect him from his eventual death.

Under New York common law negligence, landowners (or representative agents of landowner, i. e. executors of estates) owe a duty of reasonable care. The majority of states apply different standards depending on the injured party' s status as an invitee, licensee or trespasser. However, New York simply relies on a reasonably prudent standard. Under the facts of this case, Al warned

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

Carl to be careful. This is a genuine issue of material fact as to whether this warning constitutes reasonable prudence under the circumstances depending on whether "be careful" was a general warning or whether it represented a knowledge of lack of life vests by Al. As such, there could have been a breach of duty for which Al is liable to Carl.

Additionally, Al owed Carl a statutory duty of care under the Navigation Law. Where the injury that results is in the class of risk the statute intended to protect and the injured party is in the class of persons intended to be protected, courts will find a breach of duty, or negligence per se. Here, the law was enacted to prevent users of boats from drowning. Carl is in both the class of persons and the class of risk. As such, the jury not only could, but should find a breach of duty by Al. Al might try to argue that he did not personally owe any duty, but as agent to Bob' s estate he takes on that duty.

The court was incorrect in granting summary judgment on the basis that Carl' s own negligence caused his death. The issue is whether contributory negligence bars a claim for negligence recovery in New York.

New York uses a pure, comparative negligence standard. This means a plaintiff may recover for a defendant' s negligence no matter how negligent the plaintiff was even if the plaintiff was more than 50% negligent (which is a bar in a modified comparative negligence jurisdiction). This means that even if Carl was negligent, if a jury could find that Al and Bob' s estate was even 1% negligent, Al cannot be granted summary judgment.

Therefore, the court was wrong in granting summary judgment to Al because Bob' s estate breached no duty and Carl' s own negligence caused his death.

#### ANSWER TO QUESTION FOUR

1. The court' s ruling was incorrect. The issue is whether there is jurisdiction of the federal district court. Under federal rules of civil procedure, in order for a case to be tried in federal court, the court must have subject matter jurisdiction. Subject matter jurisdiction is obtained when a federal question is at issue or there is diversity of citizenship and the amount in controversy is over \$75,000.

In this case, the causes of action are for negligence and wrongful death so there is no federal question. As for the second method for obtaining jurisdiction, the two prongs are met.

For purposes of diversity, an executor or personal representative is deemed to have the residence of the decedent. In this case, Al as executor is a resident of state X. Dot as Carl' s widow and as personal representative is from New York (assuming she lived with Carl in Washington County on the issue of her residence in suing on behalf of herself). Therefore, because the plaintiffs are residents of a different state than the defendant, diversity exists. Moreover, because damages are being sought for \$1 million, the amount in controversy requirement is met.

Thus, removal by Al was proper. The defendant can choose to remove when jurisdiction is proper. A plaintiff can only seek to remand if removal was improper. Here, it was proper removal so Dot' s motion to remand should have been denied.

2. The court' s ruling was correct. The issue is whether the workers' compensation laws apply.

In New York, workers' compensation law is the sole remedy for employees injured on the job. This law applies to all employees and employers with limited exceptions. Independent contractors are not covered by the laws. The issue then becomes whether or not Carl was an independent contractor.

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

The relevant inquiry centers on who had the control. Factors considered are the type of work, the pay rate (hourly or for the whole job), who supplied the equipment and how much supervision or discretion was given.

In this case, Al paid by the hour and furnished the paint which point in favor of an employee/ employer relationship. However, the nature of the job, specifically the painting of a house, is a job tending toward an independent contractor position. Moreover, Carl furnished all the equipment including brushes, ladders, etc. Seemingly also the right to use the boat "to view the paint job from the water" gives an indication of control and discretion on Carl' s part. It was up to Carl to make sure he did a good job. Thus, Carl was an independent contractor and outside the scope of the workers' compensation laws.

Thus, the summary judgment motion should be denied because there is a genuine issue of material fact to be tried.

3. The court' s ruling was correct as to (a) and incorrect as to (b). The issues are whether the Navigation Law should be used to replace the reasonably prudent person standard (as negligent per se) and also if Carl' s negligence should bar recovery under the pure comparative negligence statute.

A statute can be used to demonstrate a duty of care. In a negligence action, four elements must be shown: a duty, a breach of that duty, causation (in fact and proximate cause) and damages. When a statute' s standard is substituted for the reasonably prudent person standard, if a defendant breaches the statute' s standard, the two first elements are found and the plaintiff need only prove causation and damages. To use negligence per se, the statute' s purpose must be to prevent the type of injury that plaintiff has suffered and must fall into category of person sought to be protected.

In this case, the statute requiring life preservers to be on board is seemingly for the reason of preventing drowning. Since Carl drowned, the statute seems appropriate.

Thus, if the court applies the statute, Dot need only show causation and damages which she can probably do. Thus, the motion for summary judgment should not have been granted because there are issues of triable fact that need to be determined.

The issue as to whether Carl' s negligence caused his own death should go to a jury. In New York, the pure comparative negligence statute does not bar recovery if the plaintiff is partially at fault. Rather, the trier of fact determines the percentages and allocates the damages accordingly.

Thus, even if Carl was a bit at fault for using the boat, despite Al' s warnings to be careful, this does not bar recovery and the issue should be decided by the trier of fact, i.e. the issue should survive summary judgment.

#### Question-Five

In 1999, Bob, a widower, duly executed a will, which had been drafted by Linda, his attorney. The will provided as follows:

FIRST: I leave Blackacre, my home in Erie County, to my son, Jeff.

SECOND: I leave Greenacre, my hunting lodge in Warren County, to my friend, Mitch.

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

THIRD: I leave the balance of my estate to Trust Co., in trust, to pay the income to my sons, Jeff and Patrick, for their lives, and upon their deaths, to pay the principal to any children of Jeff and Patrick who shall reach age 30.

FOURTH: I name Linda, my attorney, executrix of my estate.

On January 2, 2001, Greenacre, which was insured by I Co. for \$100,000, was destroyed by fire. Bob filed a claim against I Co. for the loss.

Bob died on March 15, 2001, survived by his sons, Jeff and Patrick, neither of whom has any children, and by Mitch.

After his death, Bob's original will was found in his desk drawer. The "FIRST" provision of the will, leaving Blackacre to Jeff, was crossed out. In the margin was written, "I hereby leave Blackacre to my son, Patrick. [signed] Bob. January 20, 2001."

In April 2001, Linda presented a petition in Surrogate's Court, Erie County, for the probate of Bob's will. After a hearing, the Surrogate admitted Bob's will to probate.

The insurance proceeds for the loss of Greenacre have now been paid by I Co. to Linda, as executrix of Bob's estate.

1. To whom should the insurance proceeds be distributed?
2. Who will inherit Blackacre?
3. Was the residuary gift of the principal of the trust valid?

ANSWER TO QUESTION FIVE

1. The insurance proceeds from the destruction of Greenacre should be distributed to Mitch.

At issue is whether the EPTL makes an exception to the general ademption rules for casualty insurance paid after the testator's death.

The general rule of ademption is that a distributee is only entitled to the actual bequest if the bequest is a specific bequest. Thus, if the subject of the bequest is sold or destroyed prior to the testator's death, the beneficiary takes neither the bequest nor compensation equal in value.

Absent exceptions, the general rule would apply because the gift of Greenacre was a specific bequest (that is, it named a particular property).

However, the EPTL makes three exceptions to the general rule of ademption. Specifically, casualty insurance paid after the testator's death are paid to the beneficiary of the otherwise specific bequest.

The insurance proceeds were for casualty loss because they were paid after a fire destroyed the property. The proceeds were paid after the testator's death because the facts state that the proceeds were paid to Linda "as executrix". Had Bob been alive, the proceeds would have been paid to him. Thus, Mitch will take the insurance proceeds.

2. Jeff will take Blackacre. At issue first is whether partial revocation by physical act is valid.

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

The rule is that a testator may revoke his or her will in its entirety by physical act (i.e. burning, cutting, destroying). However, a testator may not partially revoke a will by physical act.

Here, the revocation was only partial because the cross-out merely crosses out one entry, rather than the entire document or signature. Thus, the revocation was only partial, and thus invalid.

At issue secondly is whether an attempted codicil, which is unattested, may serve as a revocation. Generally, partial revocation by codicil is permissible. However, codicils, like wills, are only valid if they meet the following requirements: 1) signed by testator, 2) at the end, 3) the codicil must be publicized to attesting witnesses, 4) there must be two attesting witnesses, 5) the attesting witnesses must sign after publication and 6) each witness must sign within 30 days of the other.

Here, the first requirement was met because the testator signed. The second requirement was met because he signed at the end of the codicil. However, the third, fourth, fifth and sixth requirements were not met because there were no attesting witnesses (or at least none who signed). Furthermore, New York does not recognize holographic wills, except for members of the armed forces and mariners at sea. Thus, the codicil was invalid. There was no revocation and Jeff will take Blackacre.

3. The residuary gift of the principal of the trust is valid. At issue is whether a gift to people not in being at the execution of the will is valid if those contingent remaindermen do not take until the age of 30.

The general rule is that a gift must vest, if at all, within 21 years of the death of any life in being at the execution of the instrument. Otherwise, the gift violates the Rule Against Perpetuities.

The residuary gift of the principal of the trust will not rest within the perpetuities period because it is possible that either Jeff or Patrick will have children and then die within less than nine years. The result would be that those children would turn 30 which is the vesting age – more than 21 years after the deaths of the relevant life in being.

However, New York has modified the common law rule against perpetuities such that the courts will reduce any age contingencies that violate the rule to 21. Here, the age 30 requirement will be reduced to 21 because it otherwise violates the rule against perpetuities. Thus, as modified, the residuary gift of the principal of the trust is valid.

#### ANSWER TO QUESTION FIVE

1. The insurance proceeds should be distributed to Mitch. The issue is who receives insurance proceeds for property left in a will.

Under the doctrine of ademption, if property left in a will to a survivor is destroyed or no longer with the testator at his death, the beneficiary gets nothing. An exception is casualty insurance proceeds paid out after the death of the testator. Proceeds paid out after death are given to the beneficiary.

In this case, Greenacre was destroyed before Bob died, but the insurance proceeds were not paid out until after his death (as evidenced by payment to Linda, the executrix). Therefore, Mitch will receive the insurance proceeds.

2. Jeff will receive Blackacre. The issue is whether a testator can make valid handwritten changes to a will without any witnesses present. A testator can revoke a will by physical act, such as tearing or burning. He can cross out a will but only if he makes it evident that he is destroying the whole will such as by complete cross-outs. There is no partial physical revocation. In addition, a



## NEW YORK STATE BAR EXAMINATION JULY 2001 QUESTIONS AND ANSWERS

cross-out with new words added is not valid because New York does not recognize holographic wills (except in the case of mariners at sea or soldiers during war – neither of which apply here). A modification must be made by a codicil or new will and signed by the testator with publication in front of two witnesses who both sign within 30 days of each other. A holographic will (or written alteration) is handwritten, signed by the testator but not witnessed so it is therefore invalid in New York.

In this case, Bob' s crossed-out writing is akin to a holographic will and therefore not valid. The will will be honored as though no changes had been made. His partial cross-outs do not qualify as full physical revocation. Therefore, the original beneficiary, Mitch, will inherit Blackacre.

3. The residuary gift of the principal of the trust was valid. The issue is does a clause leaving the residuary to children "who shall reach age 30" violate the Rule Against Perpetuities in New York.

No estate interest shall be valid if it does not vest or fail within a life in being plus 21 years from the date of creation of the interest. The income to Jeff and Patrick is valid and they will be considered "lives in being" or measuring lives because their existence effects the trust outcome.

The clause that states that the principal will go to any children of Jeff and Patrick who shall reach age 30 would normally be invalid. Under the common law Rule Against Perpetuities, the clause would be struck because Jeff and Patrick could both die and leave young children (under the age of nine) that would not allow the interest to vest within 21 years.

In New York, however, the court applies an Age Contingency Doctrine which would reduce the age to 21 years old if it would save the gift. Here, the clause in New York would thus be valid and if Jeff or Patrick had children they would get the gift at age 21. Since there are no children, there is a reversion back to Bob' s estate.

Note that Linda was made executrix of the estate. An attorney must not write herself into a will as an executrix unless she explains that she will be paid for both attorney' s fees plus executor commissions, that anyone can be an executor and she gets a signed separate consent from the testator. If she fails to do so, her commission will be cut in half.

### Synopsis of the July 2001

#### Multistate Performance Test (MPT) Question

State v. White (July 2001, MPT-1) Applicants are attorneys in the Public Defender' s Office, which represents James White, who is being prosecuted for homicide for killing his brother with a knife. Less than a year before the homicide, White had attacked the same brother with a knife and was charged with aggravated assault. The Public Defender' s Office also represents White on the assault charge, which is pending. A Public Defender staff social worker interviewed White after his arrest for the assault. During that interview, White made admissions, denials, and related statements about the assault and his feelings toward his brother. He also told the staff social worker about his mental health problems and treatment history. The social worker wrote a report based on her interview and gave it to White' s public defender, who relied on the information in the report to get White released to a treatment facility. The prosecutor has now subpoenaed the social worker' s report in the hope of using White' s statements about the assault to support an indictment for homicide. Applicants are instructed to write an in camera brief in support of a motion to quash the subpoena arguing that the communications between White and the social worker are privileged under the social worker-client and/or attorney-client provisions of the Franklin Evidence Code. The File includes a memorandum on how to write persuasive briefs, the subpoena, the motion to quash, the attorney' s notes, and the social worker' s report. The Library contains two cases and portions of the Franklin Evidence Code.

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

ANSWER TO THE MPT

1. Statement of the Facts

The defendant, James White, was arrested for the murder of his brother, with whom he resided. Mr. White is an army veteran who has been diagnosed as having a nervous condition and receives disability compensation from the Veteran's Administration.

Mr. White was arrested once before and was charged with assaulting his brother. However, the matter never was resolved, as it did not go to trial. While the assault matter was pending, Mr. White met with Ms. Grace Peterson, a social worker employed by the public defender's office. She was asked by Mr. Carlos Espinoza, Mr. White's attorney, to meet with his client and evaluate him for purposes of preparing a bail reduction motion and possibly for disposition. She met with Mr. White and made observations based on their meetings and submitted them in a report to Mr. Espinoza. The report contained several communications made by Mr. White to Ms. Peterson that the prosecutor now seeks to obtain. Mr. White has made a motion to quash the prosecutor's subpoena.

2. Ms. Peterson is an intermediate agent of Mr. Espinoza, and any communications made between Mr. White and Ms. Peterson are protected by the lawyer-client privilege.

Ms. Peterson was an employee of the office of Mr. Espinoza. He asked her to interview the client in order to interpret the client's mental state and communicate it back to him in the course of his representation of Mr. White. An issue arises then, whether these communications are protected by the lawyer-client privilege.

Under §953 of the Franklin Evidence Code, the client has a privilege to refuse to disclose and prevent another from disclosing a confidential communication between the client and lawyer. A lawyer cannot be examined as to any communication or the lawyer's advice given in the course of professional employment; nor can a lawyer's secretary, stenographer or clerk be examined, without the consent of the lawyer, concerning any fact the knowledge of which has been acquired in such capacity.

In *Shea Cargo v. Wilson*, the Franklin Court of Appeal determined that a physician who examined a patient at the direction of an attorney to aid the attorney in the preparation of a lawsuit was an intermediate agent for communication between the client and his attorneys and that the client may therefore invoke the lawyer-client privilege under §953. Like that case, here, Ms. Peterson was acting as an intermediate agent of Mr. Espinoza and the sole purpose of the examination of Mr. White was to aid Mr. Espinoza in his preparation of Mr. White's defense.

The privilege is grounded on the policy that adequate legal representation in the defense of litigation compels full disclosure of the facts by the client to his lawyer. A client should not fear that his lawyer would be forced to disclose any unfavorable facts revealed to the attorney. Forcing the attorney to do this would convert the lawyer into a "mere informer for the benefit of the opponent". This is what the prosecution is intending to do in this matter. By attempting to disclose the statements made by Mr. White in Ms. Peterson's report, they are seeking to compel Mr. Espinoza to reveal confidential client communications protected by the privilege. For, as the court stated, "it is no less the client's communication to the lawyer when it is given by the client to an agent for transmission to the lawyer... a communication, by any form of agency employed or set in motion either by the client or the lawyer is within the privilege". The communication by the client to the lawyer regarding his mental condition required his attorney to seek the assistance of Ms. Peterson to interpret that condition to the lawyer. Thus, they are privileged, as Ms. Peterson was an intermediate agent.

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

3. Mr. White's statements made to Ms. Peterson about his brother, during their meetings, is privileged under §835 of the Evidence Code, a duly licensed social worker is prohibited from disclosing information acquired from persons consulting the social worker in a professional capacity. Mr. White consulted with Ms. Peterson in this way. However, there is an exception which the prosecution stating that a social worker is not required to treat as confidential a communication that reveals the contemplation or commission of a crime or harmful act in §835 (b).

In *State v. Guthrie*, the Franklin Supreme Court determined that under exception (b), a social worker is only required to reveal admissions of criminal activity. She is not required to reveal a defendant's alleged denials of wrongdoing and false statements, as they do not reveal the commission of a crime. The contents of Ms. Peterson's report are nothing but a conglomerate of Mr. White's statements denying wrongdoing (i.e. "he was sure he didn't do what his brother said he did") and false statements (i.e. Mr. White changed his story several times). The only admission was to an attempt he allegedly made once to poison his brother, which is not on trial here.

The court recognized the important policy consideration of encouraging individuals who need help from a social worker to seek that help by ensuring the confidentiality of their communications. Thus, they said that any exception should be narrowly construed.

#### ANSWER TO THE MPT

##### Brief in Support of Motion to Quash

#### 1. Facts

On September 27, 2000, James White was arraigned on charges of aggravated assault arising from an incident between Mr. White and his brother, Stephen White, at the home shared by the two men. Mr. White cut his brother with a knife, but the court and the prosecution agreed to several continuances on the case based on Mr. White's mental condition. Mr. White, an army veteran, who served in the Gulf War, receives compensation for his nervous condition, was evaluated by a social worker at the direction of his appointed attorney, in order to evaluate his mental condition and in the course of the representation of the client on the aggravated assault charge.

In the course of the evaluation, Mr. White revealed to the social worker confidences concerning his wrongdoing. Mr. White discussed the facts and circumstances of his relationship with his brother to the social worker and made statements about the incident on which he was charged. The social worker was not able to make a full diagnosis. However, the social worker suggested that Mr. White could be suffering from Post Traumatic Stress Disorder or schizophrenia. In the process of her evaluation, the social worker created a report on September 29, 2000 detailing the communications with the client, which precipitated from the lawyer's request that she meet with the client.

In July 2001, Mr. White was arrested for the murder of his brother, Stephen White. The indictment is pending before the grand jury and the prosecution seeks to have the social worker's report of September 29, 2000 produced. The report contains confidential communications regarding the aggravated assault, Mr. White's mental condition, his feelings toward his brother, and several statements about specific actions that he took toward his brother including denial of wrongdoing, inability to remember the incident, and admissions of certain emotions to "teach his brother a lesson". Specifically, Mr. White revealed in confidence that he feels anger toward his brother and that "he was not sure he didn't do what his brother said he

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

did". Further, he revealed in confidence that he once attempted to poison his brother with rat poison, but the social worker specifically noted that his statement was of questionable veracity.

2. Argument

A. The attorney-client privilege extends to the evaluation of Mr. White by the social worker and need not be revealed in whole or in part. Section 953 of Franklin's Evidence Code protects confidential communications between a lawyer and a client. The protection precludes a lawyer from disclosing such a communication without the client's permission. The statute specifically extends the privilege to others working under the lawyer, such as the lawyer's clerk or secretary. In *Shea Cargo*, this privilege was also extended to "any form of agency employed or set in motion by the client or the lawyer".

In the instant case, the social worker, Ms. Peterson, was employed by the office of the public defender and was assisting Mr. White's lawyer in his case. Therefore, she was acting as an agent of Mr. Espinoza when she interviewed Mr. White.

The court in *Shea* made clear that communications by a client to a lawyer

regarding the client's physical or mental condition that requires... assistance... to interpret... (should be made by client) without fear that the communication will be compelled. Therefore, it would be detrimental to the foundation of attorney-client privilege to compel the report of Ms. Peterson and the subpoena should be quashed as to the entire report because it was prepared fully by Ms. Peterson as an agent of Mr. White's lawyer. It does not matter that she is a social worker rather than a physician because she was acting as an agent for the lawyer as the basis for the *Shea* decision rests squarely on the grounds of agency.

B. Mr. White believed all communications privileged and it would undermine the strength and purpose of the attorney-client privilege to reveal them.

The court in *Shea* pointed out that a client should be able to disclose unfavorable facts without fear that the lawyer will reveal the information. The fact that the lawyer explained the privilege to Mr. White on September 27, 2000 and then arranged a meeting with the social worker on the two days following indicates that Mr. White relied on that privilege. Section 952 of the Franklin Code defines a confidential communication as one which arises in a confidential relationship and... which is not disclosed to third persons. Here, Mr. White likely believed the information he revealed to Ms. Peterson would be covered by that privilege.

C. The entirety of the communications between Mr. White and Ms. Peterson need not be disclosed because the exception to confidential communications with social workers does not apply.

Section 835 of the Franklin Code protects communications with a licensed social worker during professional consultation. Ms. Peterson is a licensed social worker. The Code, in §835(b) however makes an exception for "communication that reveals contemplation or commission of a crime or harmful act". Mr. White's statements arguably do not fall within this exception. In *State v. Guthrie*, the Supreme Court ruled that subsection (b) does not extend all information that might be relevant to a crime, but only to subpoenaed communications that directly relate to the facts or circumstances of the crime. In addition, the court noted that denials of wrongdoing and false statements to the social worker do not reveal the commission of a crime.

In the instant case, all of the communications by Mr. White to Ms. Peterson can be categorized as denials of wrongdoing, rather than facts that reveals commissions of a crime. Mr. White only said that he "wasn't sure he didn't (do it)" and that his brother was "lucky he didn't do it". These

NEW YORK STATE BAR EXAMINATION  
JULY 2001 QUESTIONS AND ANSWERS

statements are distinguishable from admissions. They are mere denials of wrongdoing or showing of a "consciousness of guilt". Guthrie is not enough to constitute an exception to the statute. Moreover, the rat poison statement, which is clearly unreliable, cannot be revealed. The entirety of the statements should be excluded under §835 of the Code. However, even if any of the statements must be included they should be extremely limited so as to prevent a fishing expedition on the part of the prosecution.

D. The defendant at no time waived his privilege because he did not put the communication with Ms. Peterson or his attorney at issue.

Section 835(d) states that a defendant will waive his privilege by bringing charges against a social worker. Under §955, no privilege exists if a lawyer's services were obtained to commit fraud. Mr. White has not raised any charges against Ms. Peterson, nor did he hire his attorney, who was in fact appointed for the purpose of committing fraud. Therefore, he has not waived.

### 3. Conclusion

The subpoena should be quashed because it fits squarely within the attorney-client privilege as a confidential communication. Moreover, it should be quashed under §835 for social worker confidentiality as well. Even if it is not quashed as a whole, the court should select few of the communications in order to prevent a fishing expedition and further the important public policy protected by these confidence privileges.