NEW YORK STATE BAR EXAMINATION
FEBRUARY 2002 QUESTIONS AND ANSWERS

Question-One
In 2001, Punch, the owner of a metal stamping plant, purchased a used conveyor system from Usedparts, Inc., a distributor of refurbished industrial equipment. The conveyor system, consisting of a hydraulic lift and several moving platforms, was sold "as is". Punch contracted with Gen Installation Co. ("Gen") for Gen to install the conveyor system in the plant for $350, 000. Installation drawings showing the layout of the system and the structural modifications which were required to be made to the plant by Gen in order to install the system were made a part of the contract.

Prior to the installation of the conveyor system, Punch determined that the system would move products more efficiently if it were reconfigured. Gen drew new installation drawings, incorporating Punch's revisions. A revised contract which provided for the change in the work was prepared and signed by Punch and Gen. The revised contract did not provide for any change in the contract price, although the revisions would require more labor to install the system than would have been required under the original plans.

Gen subcontracted with Sub for Sub to do the installation work in accordance with the revised plans. Punch closed the plant for one month so that the conveyor system could be installed. When Sub's work crew installed the conveyor system, they did not follow the revised plans, but mistakenly installed the conveyor system in accordance with the original drawings. The error was not discovered until after the work was completed. Both Gen and Sub refused Punch's request that they reinstall the conveyor system in accordance with the revised plans. Punch then hired another contractor to reinstall the conveyor system in accordance with the revised plans at a cost of $150,000.

Once the plant reopened, Punch put the newly installed conveyor system into operation. Shortly thereafter, in January 2002, the hydraulic lift on the conveyor system failed due to a defective cylinder, causing a raised conveyor platform to fall to the floor. The accident caused significant damage to the conveyor system.

Usedparts, Inc. is now out of business. The conveyor system, including the hydraulic lift, was originally manufactured by Move-It Inc. in 1990. Punch commenced an action against Move-It Inc. for the cost of repairing the conveyor system, asserting a cause of action in tort for strict product liability. Punch's complaint alleged that the damage caused to the conveyor system was the result of the defective cylinder. Move-It Inc. moved to dismiss the action on the grounds that (a) as a matter of law, it could not be held liable in strict product liability for the cost of repairing the conveyor system, and (b) in any event, the action was barred by the statute of limitations.

1. How should the court rule on Move-It Inc.'s motion?

2. Is the contract revision enforceable against Gen, despite the lack of consideration for the revision?

3. Can Punch recover against Sub for breach of contract?

ANSWER TO QUESTION 1
1. The court should grant Move-It's motion to dismiss.

2. The contract revision against Gen is enforceable despite the lack of consideration for the revision.

3. Punch can recover against Sub for breach of contract.

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1. The court should grant Move-It's motion to dismiss the action on the grounds that Punch fails to state a cause of action under strict products liability. A manufacturer of a product is strictly liable in tort when his product is defectively designed, has inadequate warnings concerning its use, or leaves the manufacturer's plant with a defect. However, strict products liability is available for personal injuries and not purely economic injuries. In the present case, Punch's injuries are purely monetary because his damages are limited to his lost business due to the conveyor system and not due to any personal injuries suffered by him.

Because Punch's damages are purely economic and strict products liability is not available for purely economic damages, the court should dismiss this claim.

Because the court should dismiss this claim based on the above, it would not have to address the Statute of Limitations issue. However, assuming the court did not dismiss the claim based on the above, the claim is not barred by the Statute of Limitations. In New York, a strict products liability claim has a three-year statute of limitations, which accrues from the date of injury. Despite its original manufacture (Move-It's conveyor system) in 1990, Punch's strict products liability claim accrued in January 2002 when he suffered injury due to the manufacturing defect. Therefore, Punch's claim is not barred by the Statute of Limitations. He has until January 2005 to start such an action.

2. The contract revision is enforceable against Gen despite the lack of consideration for the revision.

In New York, generally a modification without new consideration is enforceable as long as the modification is contained in a writing signed by the party to be charged with the breach. In the present case, because Punch and Gen signed a revised contract, which did not call for a change in the contract price (consideration), the revised contract is enforceable against Gen.

3. Punch can recover against Sub for breach of contract. Generally, a party who is not in privity of contract with another party cannot assert a claim of breach of contract. However, when the party asserting the claim is an intended third-party beneficiary, he has the same rights as the party in privity with the breaching party. An intended third-party is one whom while not in privity with two or more other contracting parties, the two contracting parties are aware that their respective performances are intended to benefit an identified third-party.

In the present case, the contract between Gen and Sub, to have Sub perform the installation work for Punch in Punch's plant, indicates that the performance was intended to benefit third-party Punch. Sub's failure to install pursuant to the revised plans constituted a breach on its part. Because Punch, as third-party beneficiary, could assert a breach of contract claim just as Gen, the non-breaching party of the Gen/Sub contract could, Punch could recover against Sub.

ANSWER TO QUESTION 1
1. A. Move-It Inc.'s motion to dismiss should be granted because it is not liable for the cost of repairing the conveyor system.

In New York, a manufacturer who puts goods into the stream of commerce in an unreasonably dangerous condition or produces goods that could have, for a reasonable cost, been manufactured or designed in a safer condition is liable to a person who is injured as a result of the product's defectiveness.

In the instant case, Move-It did not sell the goods (system) to Punch. Under

Article 2 of the UCC, Move-It could be liable as a merchant selling defective goods. Instead Move-It put the system into commerce and it eventually landed in the hands of Usedparts, Inc., the now out-of-business refurbisher. Punch did not purchase the system directly from Move-It and the facts do not indicate that the system was defective when it was placed in the stream of commerce over 10 years ago. Therefore, Punch cannot prove that the defect was a result of Move-It's actions.

Moreover, there is no personal injury in this case, as no person was injured as a result of the conveyor failing. A strict products liability action does not lie.

B. The statute of limitations bars the action, so the motion should be granted.

The statute of limitations for a strict product liability action is three years from the date of the injury of the foreseeable user. As stated earlier, there is no indication that a person was injured but rather only the machinery. Additionally, the seller of a defective product may be liable for up to four years under the UCC.

As whether Punch, personally nor his employees suffered no injury and did not purchase the cylinder from Move-It in a defective condition, Move-It's motion to dismiss should be granted as to the statute of limitations.

Punch purchased the system "as is" from a refurbisher knowing the system to be used. There is no indication of personal injury or manufacturer design defect on the part of Move-It. Punch will have to pay to have the system repaired out of his own pocket.

2. The contract revision against Gen is enforceable despite the lack of consideration.

In New York, a contract that is revised is enforceable without new consideration if it is put in writing and signed. A contract requires an offer, acceptance and consideration.

Gen and Punch signed a subsequent contract where Gen agreed to install the new system and make new revisions for the price of the original contract. There is no indication of fraud or mistake on the part of Gen or Punch. Because the plans were drawn by Gen, he is presumed to know the cost of the labor and necessary modifications. Therefore, Gen will be liable for the subsequent contract despite no new considerations.

3. Punch cannot recover against Sub for breach of contract.

A contract requires an offer, acceptance and consideration. In the instant case, Punch and Sub have signed no agreement for Sub to complete the work. Gen and Sub were parties to a subcontracting agreement and Punch was the intended third-party beneficiary. However, Punch's proper cause of action is against Gen who may then recover against Sub for instituting the wrong plans.

Lacking a valid contract between Punch and Sub, Punch cannot sue for the breach of the contract between itself and Gen.

Question-Two
Dan, a deliveryman for a pizza shop, was operating a van while making a delivery. When a pizza started to slide off the front seat, Dan reached over to grab it. When Dan grabbed the shifting pizza, the van weaved back and forth on the road, at one point crossing a solid double yellow line.

Peter, a police officer, observing this, pulled Dan over and asked him to exit the van. Suspecting that Dan was intoxicated, Peter conducted field sobriety tests, all of which Dan passed. Dan explained his erratic driving to Peter. Peter said he would not give Dan a ticket, but warned him to be more careful in the future.

Peter then advised Dan that he fit the description given by an eyewitness of a man who robbed a nearby convenience store earlier that evening. Peter observed that Dan, like the robber, was over 6'3" tall and was also wearing a green suede jacket with a colorful patch on the left arm. Peter told Dan that he would have to accompany him to the police station and participate in a line-up. Although Dan protested, Peter took Dan to the station for a line-up.

The line-up was properly conducted, but Dan was nevertheless identified by the eyewitness because of his resemblance to the robber. He was then charged with the robbery. Shortly thereafter Dan was arraigned and, for the first time, was advised of his rights, including his right to counsel. Dan told the judge that he could not afford an attorney, and Ann, an assistant public defender, was appointed to represent him.

Unable to post bail, Dan remained in custody. Later that evening, Peter asked Dan to give a statement concerning his activities that night. Dan signed a form acknowledging that he had been advised of his rights and was waiving his right to have an attorney present. Peter then interrogated Dan. Dan denied any involvement in the robbery, but admitted he had stopped near the convenience store earlier in the evening. Although Dan claimed he never entered the convenience store, the police found his fingerprints on the counter inside the store.

The following day, Dan spoke to Ann and related all of the foregoing facts. He also admitted to her that he had gone in the convenience store earlier in the evening to buy cigarettes. He told her that he had given a statement in which he lied to Peter because he was afraid.

Ann is now preparing pre-trial motions. Discuss her prospects for success on each of the following motions:

1. A motion to dismiss based on the unlawfulness of the stop of the van and of Dan's subsequent arrest.

2. A motion to suppress the line-up identification as having been conducted in violation of Dan's right to counsel.

3. A motion to suppress the statement as having been taken in violation of Dan's right to counsel.

ANSWER TO QUESTION 2

1. The motion to dismiss based on the unlawfulness of the stop and arrest should be denied. The issue is whether the stop of the van or the arrest violated Dan’s 4th Amendment rights.

Under the 4th Amendment, a person has the right to be free from unlawful search and seizures by the government. Seizure under the 4th Amendment includes arrests. For an arrest to be proper under the 4th Amendment it must be made pursuant to a warrant unless it is conducted in a public place and the police officer has probable cause (information sufficient that a reasonably prudent person would believe that the suspect committed the crime). A stop of a vehicle may be conducted properly so long as the police have some reasonable and articulable reason for the stop. The reasonable suspicion required for a valid stop does not have to rise to the level of probable cause. In this case, Peter, the police officer, had the required reasonable suspicion to stop Dan’s van because Peter observed the van weaving back and forth on the road and he

observed the van cross a solid double yellow line. Peter thus formed reasonable suspicion that the driver of the van was intoxicated and therefore, the stop of the van was constitutional and valid under New York penal law's sliding scale of authority for seizures.

The arrest of Dan was also proper. To arrest a person in a public place, the police need probable cause. Thus the issue is whether Peter had probable cause to arrest.

In this case, Peter did not require a warrant to arrest because the arrest was conducted in a public place – on a public roadway. Furthermore, after stopping Dan lawfully and while conducting lawful sobriety tests, Peter noticed that Dan fit the description of an eyewitness report of a robber. Peter's knowledge of the description of the robber and his personal observation of Dan gave him probable cause to believe that Dan may be the robber because the particular description of the robber included the fact that he was wearing a green suede jacket with a colorful patch on the left arm. It was reasonable for Peter to assume that it was unlikely that two people would have the exact same particular jacket. The fact that Dan was 6' 3" tall like the robber was of no consequence on its own, but along with the description of the jacket, gave Peter the probable cause to arrest. Therefore, the arrest of Dan was proper and the motion to dismiss will fail.

2. The motion to suppress the line-up identification should be denied.

Under the 5th Amendment, a person in custody is entitled to Miranda warnings (right to remain silent and right to counsel) before being interrogated. This right arises from the 5th Amendment protection against self-incrimination. The 5th Amendment right to counsel dictates that a defendant should be able to have counsel present during pre-charge interrogation if he wishes. The right to counsel under the 5th Amendment does not apply to pre-charge lineups because lineups are not considered interrogatory in nature as they are not likely to elicit a verbal response from the defendant.

Under the 6th Amendment, a person has a right to counsel after being charged with a crime. Therefore, the 6th Amendment mandates that a person has a right to counsel at a post-charge lineup. However, a person does not have a 6th Amendment right to counsel at a pre-charge lineup because the 6th Amendment right has not yet attached.

Under the New York penal law, New York provides for an indelible right to counsel under the 6th Amendment which attaches 1) if the defendant requests counsel and is subject to interrogation overwhelming to a layperson or 2) at arraignment or 3) after any significant judicial activity.

In this case, Dan was in custody because he was taken to the station for a lineup. However, Dan was not entitled to Miranda warnings before the lineup as the lineup was not interrogatory in nature and Dan was not subject to any interrogation during the lineup or before the lineup.

Therefore, Dan had no 5th Amendment right to counsel prior to the lineup and his 6th Amendment right had not yet attached because he was not charged prior to the lineup. Moreover, his right to counsel under New York's indelible right had not yet attached because he was not yet arraigned nor had their been any significant judicial activity and Dan did not request an attorney at the pre-charge lineup. Therefore, Dan did not have a right to counsel at the pre-charge lineup.

Furthermore, the lineup was conducted in accordance with Dan's due process rights so long as it was not unduly suggestive or prejudicial. The facts state that the lineup was properly conducted. Therefore, Dan's due process rights were not violated and his right to counsel was not violated and the motion should be denied.

3. The motion to suppress the statement should be granted.

The issue is whether Dan's right to counsel was violated by the taking of the statement. As above, after Dan's arraignment, his 6th Amendment right to counsel had attached under New York law because he had been arraigned. Furthermore, under the common law, his 6th Amendment right to counsel had attached because he was charged with the robbery. Dan was properly advised of his rights before interrogation began and an attorney was appointed for him.

In New York, the Arthur Hobson rule dictates that once the police know or have reason to know that the defendant is represented in the current case by an attorney, waiver of his right to counsel is only effective if made in the presence of the attorney. Ordinarily, waiver must be knowing, intelligent and voluntary and can be made without counsel present, but in this case, the police had reason to know that Dan was represented by counsel because counsel was appointed by the judge at the arraignment and the police were likely present or could have found out easily that counsel had been appointed. Therefore, Dan's waiver of his rights was ineffective because it should have been in Ann's presence and any statement obtained in violation will be excluded under the exclusionary rule. Therefore, the motion to suppress the statement should be granted.

ANSWER TO QUESTION 2

1. Ann's motion to dismiss evidence based on the unlawfulness of the stop will be denied. The issue is whether the police had a reasonable suspicion that Dan was driving under the influence. Based on the facts (the swerving) it appears that the police did have a reasonable suspicion to believe that Dan was driving under the influence.

The police also had probable cause to arrest Dan. After stopping the van, the officers noticed that Dan fit an earlier description of the robbery suspect. Probable cause arises when the circumstance gives an officer reasonable suspicion to believe that a crime has occurred. Here, Dan fit the description, so the police arrest was lawful, since they had probable cause to arrest.

2. Ann's motion to suppress the line-up identification will also be denied. The issue is when does a defendant's right to counsel attach. A defendant's right to counsel attaches when judicial proceedings have started, or when the defendant is either represented by counsel or requests to be represented by counsel.

Under these facts, Dan's right to counsel did not attach at the lineup because it was a pre-arraignment lineup. Dan was also not represented by counsel and did not request to be represented by counsel, therefore, his right to counsel was not violated by his participation in a pre-arraignment lineup.

3. The court should grant Ann's motion to suppress the statement. The issue is whether a defendant can waive his right to counsel without the presence of his attorney.

In New York, a defendant can waive his right to counsel only in the presence of his attorney. Here, Dan's right to counsel attached when the court appointed Ann as his attorney. Also, being that the statement occurred post-arraignment and while he was in police custody his right to counsel had attached. In New York, Dan cannot waive his right to have his attorney in a criminal proceeding, if the attorney is not present. Therefore, the statement violated his right to counsel and must be suppressed.

Question-Three

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Shortly after Sly met Amy in 1995, he asked her to marry him. When Amy agreed, Sly bought and gave Amy an engagement ring worth $20,000. Six months later, Sly and Amy were married.

The following year, after Amy gave birth to twins, Sly and Amy purchased a home in Suffolk County for $100,000, taking title as tenants by the entirety. Sly and Amy each contributed $50,000 of their own premarital money to purchase the home. Soon thereafter, Sly, who earned his living as a traveling salesman, and was frequently away from home, used $30,000 of his premarital money to open a joint savings account with Amy.

In 1998, Sly found himself short of money. Without Amy's knowledge or the knowledge of the mortgagee, Sly forged Amy's signature to a mortgage on their home in order to borrow $60,000. The mortgage, which also had Sly's signature, was duly recorded, and Sly thereafter made monthly payments on the loan.

In 2000, Amy discovered that Sly was engaged in an adulterous relationship, and she sued him for a divorce and the equitable distribution of marital assets. At the trial, the proof of Sly's adultery was sufficient and uncontested. Sly testified to giving Amy the engagement ring, and presented expert testimony to establish its value at $20,000. Sly also testified that he had opened the $30,000 joint account with Amy as a matter of convenience only, so that Amy would have money if an emergency arose when Sly was away from home. Amy, however, testified that prior to marrying Sly, they had orally agreed that their assets would be combined once they were married. Sly did not mention the mortgage on their home, and Amy did not testify to the mortgage because she remained unaware of its existence.

At the conclusion of the trial, the Court granted Amy a judgment of divorce and awarded her sole title to the marital residence. In addition, the Court accepted Sly's explanation for placing his $30,000 into a joint account with Amy and (a) awarded the $30,000 account, together with its accrued interest, to Sly alone, and (b) directed that the engagement ring be sold and the proceeds divided equally.

Three months after their divorce, Amy learned of the mortgage on the marital residence when Sly stopped making the monthly payments.

1. Was ruling (a) correct?

2. Was ruling (b) correct?

3. To what extent, if at all, is the marital residence subject to the mortgage?

ANSWER TO QUESTION 3
1. The ruling regarding the joint account was correct.

2. The ruling regarding the engagement ring was incorrect.

3. The marital residence is partially subject to the mortgage.

The issue here is the journey of separate property to marital property and out again. The $30,000.00 was definitely Sly's separate property at the time of the marriage. Generally speaking the creation of a joint account with the spouse equals the gift of one half the balance to the spouse. Under that rule, the account and the interest earned thereon is marital property subject to equitable distribution. However, New York does recognize the concept of convenience bank accounts and will allow proof that another party was made a joint account holder solely for the convenience of the true owner of the funds on deposit. Sly testified to this effect and Amy

testified to the contrary. However, Amy testified that the agreement she and Sly had was that their assets would be combined once they were married.

However, the facts are different. It appears each kept their pre-marital money until the home in Suffolk County was purchased and the twins were born. Soon after these two significant events, Sly put the $30,000.00 into the joint account. At this point, Amy's potential need for emergency care when Sly was traveling becomes very acute. Because the objective facts are consistent with Sly's testimony and inconsistent with Amy's testimony, the court was correct in finding that the joint account was for convenience only, and the funds plus interest were Sly's separate property.

There is no claim by Amy to have contributed to the increase in value of the account. It simply earned interest at prevailing rates. She did not manage it nor did Sly. Therefore, she cannot claim to have aided Sly in managing it by providing the important and valuable service of wife and homemaker.

The ring was a gift to Amy, which she received six months before the marriage. It was hers at the marriage and nothing has happened to change that. Her mere assertion that they agreed to combine assets does not change the ownership of the item. This would require some express conveyance of ownership or other overt act out to change the ownership of the ring into a marital asset.

The tenants by the entirety are free to mortgage their interests in the property. Therefore, Sly can mortgage his interest in the home. However, the mortgagee hold this subject to Amy's survivorship rights. So if Sly had died before the divorce, Amy would own the house free and clear of the mortgagee's interest.

As to the forgery of Amy's signature, this is a nullity. Upon proper proof of the forgery, Amy's interest will be free of any claim by the mortgagee.

When Amy and Sly are divorced, the tenancy by the entirety terminates and they become tenants in common. Now the mortgagee has a better position because the mortgagee can foreclose Sly's half and then seek a partition sale of the whole.

However, the divorce decree also awards sole title to Amy. This cannot be accomplished because of the mortgage unless Sly pays the mortgage off. This is exactly what the court should require Sly to do. Amy should seek to change the terms of the property judgment to require Sly to pay off or otherwise hold her harmless as to the mortgage. Normally, these judgments cannot be modified except for material change in circumstances. First, Amy can show a change because of the existence of a large mortgage which was unknown and not considered at the original trial. Further, Sly's failure to disclose the mortgage is a material non-disclosure, which was calculated to work to his advantage in the divorce proceeding. The court should allow Amy to modify the judgment to deal with the mortgage in an equitable and lawful way.

ANSWER TO QUESTION 3

1. The court should not have awarded the joint account solely to Sly, but instead should have divided the amount in half. The issue is whether a joint bank account can be divided as equitable property. New York, per the Domestic Relations Law, follows the tenets of equitable distribution upon divorce between spouses. In accordance with the rules of equitable distribution, spouses take half of all material property and separate property remains separate. Generally, all property acquired during marriage becomes marital property with the exception of personal injury winnings, inheritance and gifts.

Here, the joint bank account was funded by monies Sly had before the marriage. In theory, therefore, they (and the bank account) should be considered his separate property. Upon closer examination, however, we find the opposite is true. A joint banking account between husband and wife is a gift of one-half. It also grants rights of survivorship to the other spouse. That is, Sly's gift to Amy was $15,000. If he happened to die before they divorced, Amy would have received the full amount, so Amy should have received $15,000.

It should also be noted that Amy's testimony that she and Sly had orally agreed before their marriage is of no particular help to her. In New York, agreements in consideration of marriage must be in writing to be enforceable. It will be subject to a Statute of Frauds defense. In essence, for it to have been valid, the agreement should have been signed by Sly, identified each of them, stated the consideration and the terms and conditions of the agreement. Absent such a showing, Amy's testimony won't help her, but she shouldn't need it. Amy has a $15,000 right in the account and the court should have ruled accordingly.

2. The engagement ring should not have been sold and the proceeds divided equally. The issue is whether the $20,000 engagement ring is subject to equitable distribution under the marital property concept. As stated in the previous question, New York courts apply equitable distribution principles to the division of assets upon divorce. Here, the ring was given to Amy before they married. The gift is one where the donor gives to the donee with the intent that the donee keeps it. After a valid delivery, its acceptance is irrevocable. Dan gave the ring to Amy. Thus, it belongs to her because it is a gift. Even if Sly had given the ring to Amy after marriage, the ring would fall under one of the exceptions to marital property. Therefore, because the ring was a gift to Amy, it belongs to her and should not have been divided up between Sly and Amy.

3. The mortgagee cannot look to the property unless Amy dies first. The issue is whether the mortgagee can look to the marital residence in the event of default if Amy's signature was forged. In a mortgage, the mortgaging party (the mortgager) acquires money from a mortgagee and, in most situations, places a security interest on his home as promise to repay the debt. That is, the mortgager promises the mortgagee that if he does not fulfill his debt, the mortgagee can look to his home in satisfaction of the debt. While the rule appears simple, it becomes more complicated in a tenancy by the entirety. Per Real Property Law, a tenancy by the entirely is a freehold estate created in a husband and wife.

Here, Sly and Amy took title to their home as tenants by the entirety regardless of whether they each contributed their own money to the home. In New York, all freehold estates owned by spouses are tenancies by the entirety. Such tenancies have a right of survivorship. That is, whenever one spouse dies, the other automatically receives his spouse's share. Furthermore, one spouse cannot convey his share without the knowledge of the other spouse. New York follows the lien theory of mortgages, which is that one joint tenants conveyance won't void the joint tenancy. However, in tenancies by the entirety in New York, one spouse can convey his own interest. However, the party to whom he has conveyed cannot enforce that interest unless the non-conveying spouse dies first.

Here, Sly attempted to convey the entire interest by forging Amy's name. Amy had no knowledge of the forgery and no facts indicate that she was negligent. Therefore, the property is subject to the mortgage, but only to the extent of Sly's conveyance. The only way for the bank to acquire the debt in court for default is if Amy dies first.

Question-Four
Wild World, Inc. ("WW") owns and operates Wild World, a wildlife preserve in northern New York State. Fred, a New York resident, was a regular visitor to Wild World.

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On May 5, 2001, while hiking on a well-marked trail, Fred decided to leave the trail to see a beaver dam. While attempting to climb down the steeply sloped and muddy riverbank, Fred suffered severe injuries when he lost his footing and fell. As Fred was being taken to the hospital, Don, the ambulance driver, gave Fred the business card of Anne, a lawyer, and told him that Anne could help him get money for his injuries.

After his release from the hospital, Fred discovered that his car had been stolen from the garage at his home, and he immediately made a claim under his Acme Insurance Co. automobile insurance policy. Acme, a State X corporation, denied coverage and retroactively cancelled Fred's insurance policy based upon misrepresentations in his insurance application. In order to pay lower premiums, Fred had stated in his application that he resided in State X and that the car would be principally garaged in State X. However, Acme's investigation revealed that from the time Fred applied for the policy, which had been issued and delivered in State X, Fred has resided and garaged the car in New York.

Fred consulted Anne and Anne told him that for a flat fee of $1,000 she would get the cancellation of his insurance policy rescinded. Fred paid Anne $1,000 and gave her the cancellation notice that he had received from Acme. Anne also said she would file a negligence action against WW. She told Fred not to worry about the cost of the lawsuit and that her fee would be "a fair percentage" of any recovery. Fred did not sign a written retainer agreement. Anne sent Don a check for $500 for referring Fred to her.

Anne commenced an action against WW to recover damages for Fred's injuries, alleging that WW's negligent operation of the wildlife preserve and its failure to warn of a dangerous condition had caused Fred's accident. Fred testified at his deposition that he knew that the riverbank was steep and saw that it was muddy before he began to climb down. After the completion of discovery, WW moved for summary judgment dismissing the complaint. The parties stipulated that WW had neither fenced off the area where Fred was hurt nor posted any warning signs in the area.

Anne also commenced an action against Acme Insurance Co. to rescind the cancellation of the automobile insurance policy based on New York law, which prohibits such retroactive cancellation. In its answer, Acme asserted as an affirmative defense that the court should apply State X law, which permits retroactive cancellation of such an insurance policy.

(1) What are the ethical considerations, if any, raised by (a) Anne's payment to Don and (b) her fee arrangements with Fred?

(2) On WW's motion for summary judgment, what arguments should the parties make and how should the court rule?

(3) In the action against Acme Insurance Co., what law should the court apply?

ANSWER TO QUESTION 4
1. a. Anne violated ethical considerations in her payment to Don by paying a referral fee and possibly for giving him cards for distribution. The first issue is whether it is a violation of ethical consideration for payment of a referral fee in New York.

In New York, under professional responsibility statutes/codes, an attorney shall not pay any fees for referral of clients. Anne did not act ethically and is in violation for paying referral because she gave Don a check specifically for that purpose.

Moreover, in New York, an attorney shall not solicit business in person unless a relative, friend, or current or former client and shall not solicit by writings in many situations including a person who might be sensitive. Here, Anne has not directly solicited but she may have through an agent.

In New York, it is misconduct to circumvent ethical considerations by having another person violate on ones behalf. Here, it is likely Ann asked Don to pass out her cards because he, as an ambulance driver, sees many potential victims like Fred.

In conclusion, Anne violated ethical considerations in payment to Don for the reasons above.

b. Anne also violated ethical considerations in her fee arrangement with Fred.

The issue regarding the flat fee of $1,000 for cancellation is whether such is acceptable and whether the purpose is proper.

In New York, attorneys may not charge excessive fees and flat fees are acceptable in certain instances. A flat fee of $1,000 to rescind the contract does not seem excessive because is could involve several hours of work. However, to say that she will get cancellation rescinded may reflect adversely and have negative effects on views of her fitness as a lawyer. She may not be able to have it rescinded. Further, it is advisable to have fee agreements in writing for enforceability.

The issue regarding the contingent fee is whether it is proper when not in writing and for a fair amount. In New York, contingent fees are permitted in negligence actions but the agreement must be in writing and signed by the client. It must state the amount of the contingent fee (perhaps by percentage), indicate how litigation costs/expenses are to be paid, and whether deducted before or after the contingent fee.

It is a negligence action as stated. Here, Anne violated because there is no writing signed by Don, she did not address costs and whether before or after, and she did not specify amount. "A fair percentage" is not sufficient.

In conclusion, Anne violated ethical considerations in both the flat fee and contingent fees.

2. The court shall grant the summary judgment motion in favor of WW, Inc. The issue that will be argued in the summary judgment motion is the meaning of reasonable prudence under the circumstances for a landowner in a negligence action for an invitee (customer) or licensee (social guest), and which category Fred is.

In New York, a landowner is liable in negligence for breach of its duty to exercise reasonable prudence under the circumstances concerning safety of guests on the land with respect to activities and conditions on the land. There must also be causation (factual and legal cause) and damages.

The standard for a summary judgment motion is that it shall be granted if there is no genuine issue as to a material fact and the parties are entitled to a judgment as a matter of law. WW will argue that there is no genuine issue as to material fact and is entitled to judgment as matter of law as Fred is merely a social guest and WW acted reasonably under the circumstances. Perhaps WW will argue assumption of a defense risk of Fred – he saw that it was muddy. The trail was well marked.

Fred will argue there is a genuine issue of fact and WW is not entitled to judgment as a matter of law or alternatively, that he is entitled to judgment as a matter of law on the facts at hand. The court shall grant the summary judgment motion in favor of WW because no genuine issue and

judgment as a matter of law is in WW's favor. They acted with reasonable prudence. It also should be noted that liability and damages could be divided.

3. The court should apply the law of State X. The issue is whether New York law or State X's law should be applied to determine the validity of the rescission of the contract.

In New York, a conflict of law issue is analyzed in a most significant interest/relationship test where the court looks to place of execution, place of performance, and place of breach where there is no express choosing of a law to apply.

Here, there was no express choice of law in the policy. The contract would be performed in State X where the Acme Co. is located. Further, Fred lied in the contract that breaches would likely be in State X because he lived there and the car would be stored there. Clearly, State X has the most significant relationship and interest to the contract and the claim. Fred would not get the advantage of his misrepresentations. In conclusion, the law of State X should be applied.

ANSWER TO QUESTION 4

1. Both the payment by Acme to Don and Anne's fee arrangement with Fred violates the Disciplinary Rules. The issues are (a) whether there can be payments for referrals and (b) whether a contingent fee retainer agreement can be vague and oral.

Anne's payment to Don for referring Fred to her constitutes a violation of the Disciplinary Rules. A referral fee is forbidden in New York. In addition, a lawyer or someone under her order, whether a friend or a secretary, cannot solicit a potential client face-to-face. Only in certain situations like to friends, former clients, or current clients can a lawyer or her subordinate solicit face-to-face.

Therefore, Anne is not permitted to hire Don, the ambulance driver, to give potential victims/ clients her business card and she is not permitted to pay for referrals regardless of whether Don did it on his own initiative. The fact that Don did it when Fred was still getting over the shock of falling, while still in the ambulance on the way to the hospital, makes this situation even worse.

Anne's fee arrangement with Fred also violates the Disciplinary Rules. Flat fees are acceptable in certain situations like writing a will, so Anne's $1,000 fee for the insurance suit is fine. However, her negligence action fee arrangement is not permitted.

Contingent fee-based payments are acceptable in many situations. There are a couple of exceptions like criminal suits and domestic relations issues like divorce. However, a contingent fee retainer agreement should be in writing and the terms reasonable and clear.

Therefore, Anne's fee arrangement regarding the WW negligence suit is unacceptable. First, it is not signed and it is not in writing. Second, that her fee would be "a fair percentage" of any recovery is vague and unreasonable because it is unclear what fair means.

In conclusion, there are several ethical problems in Anne's referral fee and fee arrangement retainer that the client never signed.

2. WW's motion for summary judgment should be granted for the failure to warn of a dangerous condition but not for the negligent operation issue. The issues are whether a failure to warn liability is distinguished when the plaintiff has notice and whether negligence claim where the facts are uncertain can be thrown out.

Regarding the failure to warn claim, a defendant is liable for injuries when it fails to warn of any dangerous conditions. When a plaintiff is unaware of danger because of a lack of warning, the defendant will be held responsible. However, if the plaintiff is aware of it, then the defendant cannot be held responsible.

Therefore, Fred cannot claim that the WW failed to warn. Fred knew of the danger of the steep riverbank and its muddy condition. It was foreseeable that an injury may occur. In addition, Fred was off the well-marked trail and in a place where he was not permitted. Because Fred acknowledged the above, a summary judgment in favor of WW should be granted. Even if everything is favored for the plaintiff, the facts show that there is no legal cause of action against WW.

However, regarding the negligence claim, there are too many unanswered jury questions that a summary judgment cannot be granted. Negligence is when a duty owed to a foreseeable plaintiff is breached and causes an injury to that plaintiff. If any of the four issues are in dispute, a summary judgment should not be granted.

Therefore, because there are unresolved issues in pretty much all the negligence factors, WW's motion for summary judgment should not be granted. If we assume everything that Fred asserts is true, then there seems to be negligence on WW's part because it is reasonable to say that a wildlife preserve operator should fence off restricted areas and post warning signs. Especially with the attractive nuisance doctrine, it can easily be claimed that WW was negligent.

In conclusion, there are material issues that need to be litigated about whether WW's operation was negligent and the summary judgment cannot be granted.

3. In the action against Acme Insurance Co., the court should use State X's law. The issue is whether a party can assert his state law because the car was driven there when the other party transacts no business in that state.

Just because a party is a domiciliary of a state, i.e., New York, does not mean that that state's law should be applied. When the other state has more of a substantial impact, the other state's law is generally used. In this case, Acme Insurance Co. issues policies in State X and is a State X corporation. State X permits retroactive cancellations and just because New York doesn't, and that favors Fred in getting his insurance rescinded, should not allow the court to apply New York law. Fred lied in his application to Acme and Acme should be able to assert State X law.

Question-Five
In 1997, Luke, a lawyer, prepared wills for Herb and Wendy, husband and wife, which they duly executed. In those wills Herb and Wendy each named the other as primary beneficiary and executor.

In 2000, Herb and Wendy, by mutual agreement, began living separate and apart, but they did not sign a written separation agreement.

In 2001, Herb duly executed a new will, prepared by Luke at Herb's request. The new will gave Herb's entire estate to his son, Seth, and named Luke as executor and Seth as alternate or successor executor.

Herb and Wendy continued to live separate and apart until Herb died on January 25, 2002, survived by Seth and Wendy. Luke plans to present a petition to the Surrogate's Court asking that Herb's 2001 will be admitted to probate and that Luke be appointed executor. Wendy,

having learned of the existence and provisions of the 2001 will, has asked Luke what rights she might have in Herb's estate.

Herb's estate, after payment of all debts, administration expenses and funeral expenses, consists of (a) investments in Herb's name alone valued at $300,000; (b) investments purchased by Herb in the names of Herb and Wendy as joint tenants with right of survivorship valued at $120,000; (c) money deposited in a savings account in the name of Herb in trust for Seth with a balance of $90,000; and (d) a life insurance policy payable to Seth as the named beneficiary having proceeds of $120,000.

1. May Luke advise Wendy regarding her rights in Herb's estate?

2. Assuming Herb's 2001 will is admitted to probate, what rights, if any, will Wendy have in Herb's estate?

3. If Luke serves as executor of Herb's estate, may he receive a full executor's commission in addition to receiving attorney's fees?

ANSWER TO QUESTION 5

1. Luke should not and cannot advise Wendy regarding her rights in Herb's estate, since there would be a potential conflict of interest. Arguably, he should not have represented both of them in drafting their wills, although there are some exceptions for that situation. Since their separation (whether or not formal if Luke was apprised) and Luke's subsequent revision of Herb's will in a manner not favorable to Wendy, and Luke's appointment as executor of Herb's estate keep him from being the advocate she would need in this advisement.

Generally, a lawyer may represent two clients simultaneously if a disinterested lawyer believes the representation as to both can be effective and full disclosure is made to both clients who consent. Here, under these facts, a disinterested lawyer would not likely OK the simultaneous representation, and regardless, one of the two clients (Herb) is not able to consent.

In another situation, Luke may have obtained the consent of Herb's estate, if that would satisfy the requirement, but here, Luke represents the estate. As executor, he has a duty to do so fairly and impartially as a fiduciary, meaning that he may not advise Wendy.

2. Wendy has a right to the $120,000 investments held by her with Herb as joint tenants. In a joint tenancy, when one tenant dies, the other automatically succeeds to that interest. That gives Wendy $120,000.

Wendy may have a right to a spousal elective share. Under New York law, a spouse has a right to elect to receive under the New York statute as opposed to taking her devises or distributions. The reasoning for the New York law is to protect spouses from being completely disinherited by the other. In keeping with that reasoning, however, there are limitations on the ability of a spouse to take an elective share. If the spouses are divorced or separated, for instance, a spouse is not entitled to the elective share.

While Herb and Wendy are not divorced, they are separated, although not by decree or formal agreement. Therefore, Wendy is not barred from her elective share under that rule. However, she may be barred for abandonment and lack of support of Herb. As they lived apart for over one year, they may be found to have abandoned each other, but without more facts, we cannot know for sure. Did they live apart for job or health reasons? Was it planned to be temporary? The facts, based on Herb's execution and provisions of a new will indicate the separation may have been a

bit more hostile and permanent, leading to a conclusion of abandonment. The court would have to decide.

Assuming the court does not find abandonment and lack of support and allows Wendy her elective share, she' s entitled to the greater of $50,000 or 1/3 of Herb' s estate. This is after the exempt personal property set aside (car, furniture, computer, $15,000 cash) totaling up to $56, 000 that Wendy is entitled to off the top.

After that, we need to determine which of Herb' s estate properties are subject to the elective share. Generally speaking, it covers totten trusts, survivorship vehicles, lifetime transfers with interests retained, one-half of the employee benefits plans, gifts (after $10,000) made within a year of death or causa mortis gifts (all), payable on death accounts, U.S. bonds and general presently exercisable powers of attorney.

Of Herb' s four categories, his $300,000 investments held alone qualify for elective share, as do the $120,000 joint tenancy investments. The life insurance does not count and the trust for Seth may or may not. If Herb had any lifetime interest in it or if it is a Totten Trust, it counts. If it was an irrevocable disposition made up to a year before his death, it does not.

Assuming the trust is a Totten Trust, since it is a savings account, that gives us the following included in the elective share: Herb' s investments ($300,000) + joint tenancy investments ($120, 000) + trust ($90,000) = total subject to the elective share ($510,000) divided by 3 to find out Wendy' s right = $170,000 – joint tenancy survivorship investment she gets anyway ($120,000) = $50,000. She is entitled to an additional $50,000 from Herb' s estate (exempt marital property) that will be taken pro rata from the rest of his estate.

3. If Luke serves as executor, he may only receive 50% of a full executor' s commission in addition to his attorneys' fees. He is only entitled to that if he was validly made an executor meaning he would have had to disclose to Herb in writing that 1) anyone can act as an executor, not just lawyers and 2) if he is appointed, he is entitled to executor' s commission fees in addition to attorneys' fees. Then Herb would have had to sign and two witnesses would have had to attest Herb and sign.

ANSWER TO QUESTION 5

1. Luke may not advise Wendy regarding her rights in Herb' s estate.

2. Wendy may exercise her right of election against Herb' s will.

3. Luke, as attorney executor, may only receive ½ of his statutory commissions.

1. The issue is whether Luke may advise Wendy regarding her rights in Herb' s estate. Luke may not advise Wendy regarding her rights in Herb' s estate.

An attorney, in executing wills, may serve as the same attorney for spouses in the same transaction. There is no rule disallowing this, however once a conflict of interest arises, the attorney must withdraw from representation.

Here, Luke is the attorney for both Wendy and Herb regarding the 1997 will. However, he was then the attorney for Herb' s 2001 will without the presence of Wendy. Furthermore, in this will, Luke is the executor of Fred' s estate. His job is to administer all of the estate debts and assets.

Since he is both an attorney/executor in the 2001 will, he may not advise Wendy as to her rights. This is in conflict of interest to his client Herb. Although Herb has died, his confidences will be

protected by the attorney/client relationship. In light of such an apparent conflict of interest, Luke may not advise Wendy on her rights against Herb's will.

2. The issue is whether Wendy has any rights to Herb's 2001 will. Wendy may exercise her right of election against Herb's will ($50,000).

A surviving spouse of a will is entitled to a right of election under the EPTL. This states that such a spouse may elect under the will either $50,000 or 1/3 of the testator's net estate. In New York, it is against public policy to disinherit a spouse, thus the right of election protects such spouses who are not left anything under a will.

Here, the 2001 will, executed by Herb, effectively revoked the 1997 will and left nothing for Wendy. Since this occurred, Wendy, as surviving spouse, may elect under his will. In order to compile a surviving spouse right of election, the decedents net estate is totaled. To this figure, it must be increased by any testamentary substitutes such as: 1) U.S. bonds, 2) retirement plans, 3) shareholder agreements, 4) gifts causa mortis, 5) intervivos trusts exceeding $10,000 given within one year of testator's death, 6) totten trusts, 7) jointly held property, 8) powers of appointments the testators has (general). From this total, the 1/3 is applied. From the 1/3 anything passing to the surviving spouse under the will must be deducted.

Note however that insurance policies are not testamentary substitutes and do not get included in determining the right of election. The insurance policies pass outside of the will. Once the right of election is determined, all beneficiaries of the will must contribute ratably to the right of election.

Here, Herb's net estate consists of the investments of $300,000, the $90,000 totten trust established for Seth, as well as the jointly held investments in the names of Herb and Wendy totaling $120,000. The $120,000 insurance policy passes outside of the will and is not included.

Here, the total amount of Herb's estate including the testamentary substitutes is $510,000. From this amount the 1/3 is applied leaving $170,000. From this amount, anything Wendy received is deducted. Here, Wendy received the $120,000 investment since it included a survivorship interest. As such, Wendy's right of election is $50,000, which must be ratably contributed by all the beneficiaries under the will.

Note: The mere separation between Herb and Wendy did not destroy her survivorship rights. A divorce, dissolution or annulment does so by operation of law, however here the parties merely separated without even a separation agreement. As such, Wendy is entitled to her $50,000 right of election.

3. The issue is whether Luke can receive his full executor's commission. Luke may only receive ½ of his executor's commissions.

An attorney who prepares the will may act as an executor. There is no per se rule against this, however when an attorney does act as an executor, he/she must comply with certain disclosure requirements. There must be an acknowledgement stating that: 1) the attorney informed the client that anyone may act as an executor and 2) inform the client that if the attorney acts as both, he will receive two commissions under the EPTL. Failure to do so will result in the attorney receiving only ½ of his statutory commissions. The policy behind this is that a client that is not fully informed may think he is actually saving money by having the attorney act as executor. To discourage such indirect deception, the disclosure requirement was enacted.

Here, in the 2001 will execution, the facts indicate that no disclosure was signed nor did Luke even inform Herb of the requirements. In the absence of the disclosure documents, Luke, the attorney/executor, will only receive ½ of his statutory commission.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2002 QUESTIONS AND ANSWERS

SYNOPSIS OF FEBRUARY 2002 MPT QUESTION

In re Franklin Construction (February 2002—MPT 1) Applicants work in a law firm that has been retained by Ralph Dirksen, the CEO of Franklin Construction Company (FCC) to advise if FCC has any financial obligations as a result of a failed joint venture with MDI to build a $35 million hotel. Initially, FCC obtained an exclusive right to negotiate with a Redevelopment Agency (Agency) to build the hotel, but FCC was unable to secure financing before its exclusive right was about to expire. FCC then sought MDI's expertise in securing financing. The Agency granted FCC an extension of its exclusive negotiation right provided that FCC deposit $350,000 with the Agency. MDI advanced FCC the $350,000 deposit in consideration of an Assignment Agreement in which FCC assigned its exclusive negotiation right to MDI. MDI and FCC then signed a Joint Venture Agreement that detailed how profits would be distributed, but was silent on how losses would be shared. The joint venture was unable to secure loans, thus prompting the Agency to terminate FCC's exclusive negotiation right and keep the $350,000 deposit, which it deemed non-refundable. MDI terminated the joint venture agreement and demanded that FCC recover the $350,000 from the Agency and pay it back to MDI. Applicants are asked to draft an opinion letter advising Dirksen, a non-lawyer, what FCC's obligations are under the Joint Venture Agreement and the Assignment Agreement. The File consists of an instructive memo, an excerpt from the supervising partner's interview with Dirksen, the Assignment Agreement, documents regarding the exclusive negotiation right, the Joint Venture Agreement and MDI's notice of termination of the Joint Venture. The Library contains portions of the Franklin Business Associations Code and two cases.

ANSWER TO MPT
Ralph Dirksen

Chief Executive Officer

Franklin Construction Company

12543 Wrangel Rd.

Boyceville, FR 33324

Re: New Millennium Hotel Venture ("Venture")

Dear Mr. Dirksen:

Regarding our meeting earlier this week, I have done extensive research into the issues presented by your involvement in the Venture and have the following answers for you.

Factual Statement

Franklin Construction Company ("FCC") obtained the exclusive right to negotiate for the acquisition and development of the Third and Market Street property with the Boyceville Redevelopment Agency (the "Agency"). Due to difficulties in obtaining funding for the project, FCC agreed to assign its right to negotiation to Millman Developers, Inc. ("MDI") in exchange for MDI's transfer of $350,000 to the Agency as a deposit, and $60,000 to FCC as

consideration. MDI and FCC then formed a joint venture into which MDI contributed the exclusive right to negotiate and the $350,000, and FCC contributed its expertise and services. MDI and FCC agreed to share profits 90/10 and agreed that MDI would have exclusive management and control of the Venture.

Subsequently, the Agency terminated the exclusive right to negotiate on the basis of an unlikelihood that MDI and FCC would obtain the necessary loan commitments. MDI has demanded that FCC pursue with the Agency recovery of the $350,000 and return the money, whether or not FCC is able to recover it from the Agency.

1. FCC is not obligated to either MDI or the Venture for any part of the money demanded by MDI under the Assignment Agreement or the Joint Venture Agreement.

The Assignment Agreement is essentially a contract between MDI and the FCC under which the FCC assigns its exclusive right to negotiate with the Agency for the payment of $60,000, and the transfer of $350,000 to the Agency as a deposit. The Agreement does set forth several conditions precedent which must be met. First, the parties must execute a definitive agreement regarding formation of the Venture within 30 days from the date of the Assignment Agreement. This condition precedent was met when the Joint Venture Agreement was signed on December 26, 2001. Second, the Agency had to accept MDI as an authorized party, which it did in Resolution No. 43-99 on November 30, 2001. While the Resolution only makes mention of MDI's involvement in the financing, this will be construed to include the acquisition and development as well. Therefore, nothing in the Assignment Agreement requires FCC to return the $350,000 to MDI.

The Joint Venture Agreement does not require FCC to return the $350,000 either. This agreement sets forth the $350,000 as MDI's capital contribution to the Venture. It is in no way a loan to FCC that must be repaid. In addition, the agreement sets forth profits that are to be shared, but not losses. The Agreement states that if the exclusive right to negotiate is terminated by the Agency, MDI has the right to terminate and withdraw from the Joint Venture. It does not mention return of the $350,000.

2. FCC is not obligated by statute or case law to pay either MDI or Venture any part of the $350, 000 deposit.

The first issue is whether the Venture will be considered a joint venture or some other sort of agreement. In Stilwell v. Trutanich, the Franklin Court of Appeals held that the elements of a joint venture are: a) a community of interest in the venture, b) a sharing in profits and losses, c) an equal right or a right in some measure to control the conduct of the other and d) a fiduciary relationship. Here, there is a shared interest in the hotel venture by MDI and FCC. They both have an interest in ensuring that the venture is successful. In addition, they have agreed to share profits 90/10. While there is no right on the part of FCC to control MDI's conduct, the court also held that if the parties have delegated their authority, there is no need for any control. Here, FCC has delegated its authority to MDI. Therefore, the Venture meets all of the elements of a joint venture.

Joint ventures are governed by partnership laws of the State of Franklin. Section 401 of the Franklin Business Associations Code states that in the absence of a contrary agreement, partnership losses are shared in proportion to partnership profits. Therefore, under partnership law, FCC would be liable to 10% of the losses, which includes the $350,000.

However, in Kovacik v. Reed, the Franklin Supreme Court held that where one partner contributes money and the other contributes services, neither party is liable to the other for

contribution for losses. Here, MDI has contributed money and FCC has contributed its services. Therefore, FCC will not be liable to MDI for its losses.

If the joint venture continued and the parties completed the acquisition and development, this may not be as strong an argument for FCC because MDI would have contributed more than just money, but at this stage, that is where it stands between the parties.

3. FCC does not have any obligation to recover the money from the Agency. Under the venture agreement, FCC only agreed to contribute its services and assistance during the construction phase of the contract. Since that phase has not been reached, FCC is under no obligation under the venture agreement to recover the money.

Under partnership law, partners (and joint venturers) owe the partnership a duty of care, which consists of refraining from engaging in any conduct that is grossly negligent, reckless, intentional misconduct or a knowing violation of the law. In Kovacik, the court also held that it is the duty of the managing venturer to take action to recover debts of the joint venture. MDI was the managing venturer because the joint venture agreement gave them sole control over the project. Therefore, if anybody has a duty to recover the $350,000, it is MDI. Certainly, FCC's failure to pursue recovery of the money from the Agency would not be considered grossly negligent or reckless. FCC's involvement was to be limited to construction services and expertise, not debt collection. Therefore, FCC has no obligation to recover the money from the Agency, nor does it have any obligation to return the money out of its own pocket.

ANSWER TO MPT
Mr. Ralph Dirksen

Chief Executive Officer

Franklin Construction Co. ("FCC")

12543 Wrangel Rd.

Boyceville, FR 33324

Dear Mr. Dirksen:

This letter is in response to your request for an opinion regarding your joint venture with Millman Developers, Inc. ("MDI") and their subsequent demand letter.

FCC entered into a joint venture with MDI in an effort to secure a project with the Boyceville Redevelopment Agency ("Agency") to construct a Class A hotel on property located at Third and Market. FCC obtained an exclusive right to negotiate the project for six months with the Agency. The deal required that a Class A hotel be built for at least $35,000,000. FCC was unable to secure financing. As such, FCC approached MDI to enter into a partnership. With MDI's backing the exclusive negotiating rights were extended for 90 days. FCC and MDI agreed to set up a joint venture. FCC assigned all its rights to MDI and in exchange, MDI would put up $350,000 "front money". This money was 1% of the project price and was required by the Agency. The Agency would apply this "deposit" to the overall cost of the project upon approval. The Agency had the right to terminate the deal if it was likely FCC would not obtain the necessary loan commitments. The Agency did not state this amount was nonrefundable. FCC and MDI executed an Assignment Agreement. FCC assigned its rights to the exclusive negotiating to MDI and paid $60,000. MDI in turn transferred $350,000 for FCC. In the Joint Venture agreement, MDI assigned as its capital

contribution to the Venture, its negotiation rights and the $350,000 paid to FCC. On February 13, the Agency terminated the negotiations and kept the $350,000, as it was nonrefundable. Also, in the Venture agreement, MDI was given exclusive management control of the Venture. The profits would be shared as 90% to MDI and 10% to FCC. Nothing is mentioned regarding losses. MDI had demanded that FCC recover the $350,000 from the Agency or repay the sum itself to MDI and MDI terminated the Venture.

You asked for our opinion on these issues:

1) FCC is not obligated to pay MDI under the Assignment agreement because the return of the money was contingent only on the failure of two occurrences. Since both occurrences materialized, FCC does not owe MDI the money. Furthermore, FCC does not owe the money to the Venture because the Venture agreement does not require this result.

2) Under statutes and relevant case law, FCC is not obligated to pay the full $350,000 to MDI or the Venture because FCC did not contribute the capital. Furthermore, any losses must be shared in the same proportion as profits.

3) FCC does not have any obligation to undertake efforts to recover the money from the Agency because that is the duty of MDI as the managing venturer.

Under the Assignment Agreement, MDI agreed to transfer the $350,000 to be used as the required option. This money was to be refunded to MDI only if the parties failed to enter into a joint venture in 30 days and upon the Agency's acceptance of MDI. The Agency approved MDI's involvement in Resolution 43-99. Furthermore, on December 26, 2001, MDI and FCC executed their Joint Venture Agreement. As such, since both events occurred, FCC is not required to refund MDI the $350,000. Furthermore, MDI assigned its rights to the $350,000 to the Joint Venture as MDI's capital contribution. The agreement stated that profits would be allocated 90% to MDI and 10% to FCC. Nothing was stated as to losses, nor does the agreement state any obligations on FCC to refund the $350,000 to the Venture. MDI did reserve the right to terminate under Section M in the event the Agency terminated the exclusive negotiation rights. However, no mention is made as to the $350,000 contribution. Thus, under neither contractual undertaking, is FCC obligated to pay either MDI or the Venture.

MDI and FCC did form a valid joint venture, which is treated as a partnership under the law. Parties to joint ventures may have an unequal distribution of profits and unequal control of operation (See Stillwell v. Trutanich). Furthermore, the Franklin Court of Appeals held that an omission for sharing losses in a joint venture is immaterial since, in absence of an agreement, the laws implies that losses are shared in the same proportion as profits. Thus, if the $350,000 is treated as a loss by the Venture, it should be allocated according to the 90% - 10% split agreed to. FCC would only be obligated for 10% or $35,000. However, in the Venture, only MDI contributed capital to the partnership. Where one party contributes capital and the other joint venturer only contributes skill and labor, the case law unanimously holds that neither party is liable to the other for contribution for any losses sustained. Thus, since FCC only contributed labor and services, the law does not require FCC to contribute to this loss. MDI contributed the money and must bear this loss.

MDI treated the $350,000 as its contribution to the Venture and assigned all its rights to it to the Venture. Thus it is incorrect that MDI is attempting to treat this money as a loan. Under the Uniform Partnership Act, a partnership is only obligated to reimburse a partner an amount in excess of its capital contribution (Section 401 UPA). A partner shall also reimburse a partner any payments that the partner incurs in the ordinary course of business. Neither situation is relevant to your case. The entire $350,000 was treated as a contribution by MDI. Furthermore, this money was not incurred in the ordinary course of business, but rather was the partner's initial capital

contribution to the Venture. Under case law and states law, FCC is not obligated to reimburse either MDI or FCC.

Finally, FCC is not obligated to undertake efforts to recover the $350,000 from the Agency. The Franklin Supreme Court has held that it is the duty of the managing venturer to take action against debtors of the Venture to preserve and recover joint venture assets (See Kovacik v. Reed) . Furthermore, in absence of an agreement, one joint venturer is not obligated to protect the other from loss of an investment or to take steps to assist him in any recovery. Additionally, losses recovered as venture property, not the venturers.

Here, MDI was the sole managing venturer. MDI is obligated to seek recovery from the Agency, not FCC. If the money is recovered, it will be Venture property. If the Venture is terminated, the money must first be used to pay the debts and obligations of the Venture. Any remainder will be returned to MDI as a return of their contribution. Any profits or losses will be allocated between MDI and FCC 90/10 respectively.