

NEW YORK STATE BAR EXAMINATION
JULY 2002 QUESTIONS AND ANSWERS

Question-One

Mal and Sal formed Mal and Sal, P.C., (the "P.C.") for the purpose of conducting a law practice. The P.C. hired Bonnie as an associate in 1995. In 2000, Mal was indicted for his role in an insurance fraud scheme and entered into a misdemeanor plea agreement with the district attorney. Mal anticipated that a disciplinary proceeding resulting from his criminal conduct would likely result in a suspension from the practice of law for at least one year. On May 1, 2001, Mal asked Bonnie to continue working for the firm at an annual salary of \$60,000 until the conclusion of any disciplinary proceeding against Mal and then during the period of any suspension. Bonnie orally agreed to do so.

Mal was suspended for two years beginning January 1, 2002. After commencement of the suspension, Mal continued to be involved in the law practice by coming into the office and meeting with clients. On February 1, 2002, Bonnie told Mal that such conduct by Mal was unlawful and that she would not participate in it. Mal then told Bonnie that her employment was terminated.

Bonnie commenced an action against Mal and the P.C. for breach of contract by filing and serving a summons and complaint alleging the foregoing pertinent facts. In her complaint, Bonnie specifically alleged that the contract was breached (i) because her employment was terminated before the expiration of its term and, in the alternative, (ii) because the basis for the termination of her employment constituted a breach of an implied term that both parties would comply with the prevailing ethical standards of the legal profession. Mal and the P.C. both timely moved to dismiss the action on the grounds that (a) the complaint failed to state a cause of action on either alleged theory of breach of contract, and (b) the statute of frauds was a defense. The court (1) denied the motion.

After timely serving the answer, Mal moved for summary judgment dismissing the action as to him on the ground that he was not personally liable on the contract. When the motion was heard, the parties provided the court with proof of the foregoing pertinent facts. The court (2) denied Mal's motion.

Were the numbered rulings correct?

ANSWER TO QUESTION 1

1. Breach of Contract

a) i) They correctly denied the motion. The issue is whether a breach of contract claim will lie where an employer terminated employment before the agreed upon term had expired.

At the outset it should be noted that a motion to dismiss for failure to state a cause of action requires the court to take all of the plaintiff's allegations as true and determine whether there is any basis upon which relief can be granted. If there is any basis for relief, the court should deny the motion.

The employment contract is valid. A valid contract requires 1) offer, 2) acceptance and 3) consideration (i.e. bargained for detriment or benefit). Here, Mal offered Bonnie an annual salary of \$60,000 in exchange for Bonnie's commitment to continue working for the firm until Mal returned. Bonnie accepted. There was also good consideration. At common law a preexisting legal duty cannot serve as consideration to a modified contract. In New York, this is true if the modification is not in writing. However, the preexisting legal duty rule is full of exceptions. Courts will try and find consideration where either 1) the parties change their duties and/or rights under the contract or 2) where there are unforeseen circumstances. Both of those exist here. Both

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parties are committing to Bonnie continuing in her employment until Mal returns. In addition, Mal's discipline and suspension are sufficient unforeseen circumstances to support a finding of consideration. Thus the contract is valid.

Bonnie has stated a claim for breach of contract based on her termination. A breach of contract occurs when one party has an absolute duty to perform and fails to tender performance. Here, there were no conditions to Mal's obligation to perform. Mal had a duty to retain Bonnie until the completion of his suspension. Because Mal terminated Bonnie with one year remaining on his suspension, he breached his implied commitment to her that if she continued to work for the firm during his suspension, he would continue to employ her. Thus, Bonnie has made out a claim for breach of contract and the court correctly denied the motion.

a) ii) The court correctly denied the motion. The issue is whether compliance with prevailing ethical standards is an implied term in legal employment contracts. Second, the issue is whether Mal breached that implied term.

First, compliance with ethical standards should be read as an implied term into the contract. In New York, courts will imply missing terms into contracts where necessary to make the contract complete. In New York, lawyers are bound by disciplinary rules of professional responsibility to which they must adhere. Any employment contract for legal employment should imply the term that lawyers will comply with the disciplinary rules because failure to do so subjects the lawyer to judicial consequences. Just as legality is implied in a contract, so should compliance with ethical standards be implied. Thus Bonnie's claim is sufficient.

The next issue is whether Mal's conduct violated those ethical standards. In New York, a subordinate lawyer must refuse to follow the order of a supervising lawyer which will result in her violation of a disciplinary rule. It is clearly a violation of a disciplinary rule to practice as a lawyer while under a suspension. Here, Mal fired Bonnie after she refused to participate in Mal's violative conduct. Bonnie's actions were proper under New York professional responsibility law. Firing her therefore, breached an implied term of the contract. Thus the court correctly denied the motion.

b) The court correctly denied the motion. The issue is whether the employment contract is covered by the statute of frauds. The statute of frauds requires certain contracts be in writing to be enforceable. These include services contracts for a term longer than one year. The proper analysis is whether the contract by its terms could be performed within one year, not whether it was in fact performed in that time. Here, the contract could have been performed in less than a year and thus is not subject to the statute of frauds. Mal anticipated that his suspension would last for at least one year. In reality it was for two years. Both of these facts are irrelevant because it was possible at the time of contracting that the term would have been for less than one year. Since Mal could have not been suspended at all or suspended for less than one year, the contract does not come within the statute of frauds. The statute of frauds is no defense and the court correctly denied the motion.

2. Summary Judgment Motion

The court correctly denied the motion. The issue is whether the P.C. should be treated as a partnership or corporation for purposes of constituent liability.

A summary judgment motion should be granted if upon examination of all the evidence presented in the record the court determines as a matter of law that there is no issue of fact requiring a trial.

Here, there is an issue of fact requiring a trial. Upon the facts presented it is unclear whether the P.C. should be treated as a corporation or a partnership. If the P.C. is akin to a partnership, then

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Mal would be personally liable if he were a general partner. This is because general partners are personally liable for debts of the partnership. On the other hand, if the P.C. were treated as a corporation, then Mal would not be personally liable because shareholders enjoy limited liability and are not personally liable for debts of the corporation. On these facts, it is unclear how the P.C. should be treated because we are not told what type of organization it is. Thus, there is an issue of fact for trial and summary judgment is improper.

ANSWER TO QUESTION 1

1. The court was correct in denying for failure to state a cause of action. Bonnie has stated a claim under either ground.

a) i) Can an employee state a valid cause of action for breach of contract when the employee was discharged before the expiration of an indefinite term? Under the CPLR, a plaintiff states a valid cause of action if, on its face, plaintiff's complaint states any valid grounds for relief under the substantive law; the standard is liberal. The general rule in New York is that employment is at will unless otherwise stated. At will, employment allows either party to terminate employment at any time chosen. At will employment may be abrogated by contrary agreement. To state a cause of action for breach of contract, an employee must show that the employer materially breached the contract. An employee may terminate the contract without fault if the employer engages in activity making it impossible or illegal for the employee to continue, and employer's action constitutes breach.

Here, the agreement between Mal, Sal and Bonnie was not for a specifically stated term, such as two years for example, but it did state an express amount of time; until conclusion of Mal's proceedings and suspension. Because of this term, Bonnie had an expectation of her work continuing for a foreseeable amount of time until the end of proceedings. Here, Mal and Sal materially breached by ending Bonnie's employment, and they materially breached by engaging in illegal activity. Because behavior of one member of a firm can be imputed to other members of a firm in New York, under the binding disciplinary rules, Mal and Sal materially breached and Bonnie had a right to sue for breach even though she refused to participate in the conduct. Therefore, Bonnie stated a cause of action.

a) ii) Will New York courts imply a contract term that professional parties must comply with prevailing ethical standards in employment contracts? A contract with an illegal purpose is voidable by a party who did know of the illegal purpose. Such a rule extends to employment contracts between professionals.

Here, Mal and Sal represented to Bonnie that she would work for the firm during Mal's suspension, implying that she should continue when he could not. The contract, as it was formed on May 1, 2001, did not necessarily have an illegal purpose. However, once Mal continued to see clients even during his suspension, when such conduct is prohibited, the contract then had an illegal purpose and Bonnie learned of it. Therefore, Bonnie stated a cause of action.

b) The court correctly denied the motion for dismissal on the grounds of the statute of frauds. Does the statute of frauds apply to an employment contract with an indefinite time term? Under New York's General Obligations Law, contracts for services that cannot be performed within one year must be in writing. If not in writing, such a contract is not enforceable.

Here, Mal anticipated that the contract would last for more than one year. However, it may have been completed within one year. The disciplinary proceedings could have been completed within one year. It should be noted that if the court does not find the contract to be performable within

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one year, Bonnie can argue that she fully performed the contract and therefore the statute of frauds does not apply. Therefore, the court was correct.

2. The court incorrectly denied Mal' s motion. Does partnership status in a professional corporation (P.C.) prevent a partner from being personally liable for contract-based debts? In New York, the P.C. designation, a business corporation law designation exclusively for professional associations provides some limited liability for partners. While partners, for public policy reasons, remain liable on tort claims, they are not liable on contract claims. The P.C. itself is liable for both. A party will be granted summary judgment under the CPLR if no reasonable trier of fact could find for the non-moving party and the moving party is entitled to judgment as a matter of law.

Here, Mal would only be personally liable for a tort claim, such as malpractice. He is not liable for a contract claim, like Bonnie' s. Therefore, he cannot be held personally liable.

Question-Two

In the early morning of May 20, 2002, a fire destroyed a restaurant owned by Chef. Detective Drake of the arson squad investigated the fire, and determined that the fire had been deliberately set using gasoline. An empty gasoline can was found on the premises, and the fingerprints of Arnie, a known arsonist, were found on the can.

Detective Drake picked Arnie up for questioning. Arnie admitted to Detective Drake that he set the fire. He told Detective Drake that Chef had hired him to burn down the restaurant and had paid him \$5,000 after he did so.

Arnie agreed to testify against Chef in exchange for a plea to a reduced charge. Arnie then appeared and testified before the grand jury. Thereafter, Chef was indicted for the crime of arson in the third degree.

At trial, the prosecution presented Arnie, who testified that he set the fire; that he was hired and paid \$5,000 to do so by Chef; and that he was testifying in exchange for a reduced plea. The prosecution also presented proof that Chef sold some of his restaurant equipment for \$5,000 a few days before the fire and that he had recently increased the insurance on the restaurant. Out of the presence of the jury, the prosecution offered the testimony of Owl, an undercover officer, who testified that Chef had recently approached him and attempted to hire him to burn down Chef's home. Chef has not been charged with any crime with respect to those allegations. On Chef's objection, the trial judge ruled that the proposed testimony of Owl was inadmissible.

At the close of the prosecution's case, Chef moved to dismiss the indictment on the grounds that (a) even if the facts testified to at trial were accepted as true, he could not properly be convicted of the crime of arson because no proof was offered that he set the fire; and (b) in any event, he could not be convicted on the evidence presented by the prosecution.

(1) Was the court's ruling excluding the testimony of Owl correct?

(2) How should the court rule as to grounds (a) and (b) of Chef's

motion to dismiss the indictment against him?

ANSWER TO QUESTION 2

1) Exclusion of Owl' s Testimony

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The court's ruling to exclude Owl's testimony was incorrect. The issue is whether the prosecution can introduce evidence of specific acts of the defendant as substantive evidence at trial. In general, evidence of specific acts of a defendant that show bad character may not be introduced by the prosecution at trial. Character evidence is only admissible by the prosecution when the defendant has opened the door by bringing in evidence of his good character. However, specific acts may be introduced by the prosecution as evidence of something other than the defendant's propensity to commit the crime, or of the defendant's guilt. The prosecution may use prior specific bad acts to show motive, intent, identity, absence of mistake of accident, modus operandi, or common plan or scheme. Here, Owl's testimony may be introduced as evidence of modus operandi – which is evidence of a signature crime that the defendant has done or has committed crimes in a manner that is particular or sufficiently unique so as to indicate the defendant's identity in this current crime. Because this testimony by Owl indicates a pattern and an act being done in a unique manner so as to indicate identity, Owl's testimony should be admissible. In the present case, Chef is accused of hiring a person to burn down a building that he owns. Owl's testimony indicates a crime that is unique in that he also was approached, and Chef attempted to hire him to burn down a building Chef owns. This could constitute a signature crime and implicates Owl's identity by a specific act. However, the similarity of the crimes is highly prejudicial. The court is within its discretion to keep out evidence that's prejudicial effect outweighs its probative value. The court thus was in its discretion to keep out the evidence. However, the prosecution could introduce it and the court should have admitted Owl's testimony.

2) a) The Proof of Actually Setting Fire

The court should deny Chef's motion to dismiss the indictment on the grounds that the prosecution offered no proof that he set the fire. The issue is whether the prosecution must show that the defendant personally committed the act of arson in order to establish his culpability. In New York, an accomplice is liable for all the acts of his accomplices that were foreseeable. An accomplice is one who aids, abets, or encourages another to commit a crime with the intent to so encourage the crime to be committed. An accomplice may be held liable for the substantive offenses of the person actually committing the crime. Third degree arson requires, under the NYPL, the intentional burning of a building by intentionally setting a fire or using an explosive device.

Here, Chef is an accomplice to Arnie's arson and therefore could be found guilty of the crime of arson. Chef solicited Arnie's aid in the commission of the crime. He not only encouraged Arnie, he paid Arnie \$5,000. Arnie did in fact burn down Chef's restaurant, as evidenced by both his confession and the evidence of his fingerprints on the gasoline can. Chef, at no point, attempted to withdraw from the crime or to take substantial steps to prevent its commission, voluntarily renouncing his intent. It was not required that he actually burn down the building himself. His actions as an accomplice are enough to find him liable of the arson. Therefore, the court should deny the motion by Chef to dismiss the indictment on the grounds that Chef could not be convicted of arson without actually setting the fire.

b) The court should not grant Chef's motion to dismiss the indictment that he could not be convicted on the evidence presented by the prosecution. The issue is whether Chef may be convicted by the testimony of an accomplice and whether liability insurance is admissible as evidence.

Under the NYPL, a person cannot be convicted solely on the testimony of an accomplice. Here, the prosecution did present evidence of Arnie's testimony that Chef hired him to set the fire in the restaurant for payment of \$85,000. This alone is not enough to convict Arnie of arson. The prosecution's other evidence is circumstantial, but it is enough to corroborate Arnie's testimony. The evidence that Chef sold some of his equipment for \$5,000 only a few days before

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is enough to support Arnie' s testimony that Chef hired him to burn down the restaurant. Arnie testified that Chef paid him after he set the fire. Thus, Arnie' s testimony was corroborated and the prosecution is not resting its case solely on Arnie' s testimony.

In addition, as a policy matter, liability insurance is not admissible as evidence at

trial unless there is a dispute as to ownership or it is used to impeach a witness. Here, the evidence of Arnie' s increased liability insurance should not even have been admissible. However, it was admitted and it may go to indicate that Chef was planning on burning his restaurant in order to collect the insurance money. Because the prosecution is not attempting to convict Chef solely on the uncorroborated testimony of an accomplice, the evidence presented was enough to convict Chef if the jury finds him guilty beyond a reasonable doubt.

ANSWER TO QUESTION 2

1) Ruling one on Owl' s testimony was correct. The issue is whether Owl' s testimony violates any of the evidentiary rules.

Evidence admitted at trial must be logically relevant (tends to prove or disprove a material fact of the case) and must be discretionally relevant (must not be unduly prejudicial; confuse the jury; unduly time consuming or misleading). Evidence showing a propensity to do the criminal activity will not be permitted to be shown by prosecution unless the defendant opens the door of the character issue. However, character evidence may be admitted if it goes to show motive, intent, mistake, identity or a common plan or scheme by the defendant. Furthermore, evidence of hearsay (out of court statements offered for the truth of the matter asserted) will not be admitted unless the statement falls into one of the exclusions or exceptions to hearsay.

Owl' s testimony is logically relevant because it tends to show Chef' s common plan or scheme to set fire to the buildings he owns. Owl' s testimony is in regard to Chef' s home and the arson charge relates to the burning of his restaurant, but a motive or a common plan may be inferred as to why Chef is burning his properties.

Owl' s testimony is discretionary relevant because once again it goes to motive or common plan or scheme. Although a jury may get confused about the house and the charged crime, the probative value outweighs the prejudicial effect because evidence goes to common plan or scheme.

Owl' s testimony is character evidence, but it does not show propensity to commit arson. Once again, it is offered to show motive or common plan or scheme and this reason allows prosecution to present such evidence. The evidence goes to common plan or scheme because of past attempts to destroy his other properties.

Finally, Owl' s testimony is not hearsay because it is not offered for the truth of the matter asserted. Here, Chef' s statements are made in the furtherance of a conspiracy or at least a solicitation to commit arson. New York follows the unilateral theory of conspiracy and allows a plaintiff to conspire with a police officer even though no actual agreement or intent to commit the crime exists between the two. As statements made in furtherance of a conspiracy or solicitation, the truth of statements is irrelevant. Just the mere acts of saying the words leaves the declarant open to prosecution and are legally operative. This is not hearsay. Owl' s testimony is admissible.

2) a) Chef can be convicted of arson without actually setting the fire. The issue is

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whether Chef was an accomplice.

An accomplice is someone who aids, abets, or encourages another in performing an illegal act and who possesses the required intent to commit the crime. Accomplice liability extends to any crimes foreseeable from the intended crime and the initial crime itself.

Here, Chef paid Arnie to set fire to Chef's restaurant. This act is aiding and encouraging the crime of arson. Chef has the required malicious intent for arson because that is directly what the payment to Arnie was for. Chef can be convicted for arson.

b) Chef can be convicted for arson under the evidence admitted. The issue is whether Arnie's testimony is uncorroborated.

Arson is the malicious burning of a building. One may not be convicted by the uncorroborated testimony of an accomplice. In this case, malicious intent is shown because of the payment to Arnie for burning the restaurant. The burning occurred and is testified to by Arnie. Furthermore, Arnie's testimony is corroborated by the circumstantial evidence that Chef sold restaurant equipment for \$5,000 (the amount to be paid to Arnie) only a few days before the fire. Further corroboration exists because the prosecution showed Arnie took out insurance on the restaurant. This evidence is admissible to show a motive for destroying the property. Chef may be convicted for arson.

Question-Three

Ann and John had been married for 25 years at the time of their separation in 1994. They had two children, both of whom were over 21 years of age at the time Ann and John separated.

In September 1996, Ann and John entered into a valid separation agreement which required John to make maintenance payments of \$1,500 per month "until the death or remarriage of the wife." The agreement provided that it was to be "binding upon the heirs, legal representatives and assigns of both parties." Both parties expressly waived "any right of election" with respect to the estate of the other. The separation agreement, by its express terms, was to survive, and not merge with, any subsequent divorce decree.

The agreement also provided that Ann receive a \$100,000 mortgage from John on Greenacre, a parcel of real property owned by John individually, as security for John's maintenance obligation. The agreement provided that the mortgage was to "survive the death of John." In November 1996, in accordance with the agreement, John signed a duly drawn mortgage which contained no acknowledgment. A year later, John borrowed \$50,000 from Lender, and as security for the loan gave a duly executed mortgage on Greenacre to Lender, which was recorded in November 1997.

John and Ann were duly divorced in 1998. John died in June 2002. His last will, executed in 1982, named Ann as his executrix and as the residuary beneficiary of his estate.

Ann has come to your office inquiring about her rights and has posed the following questions to you:

1. Does she have a right to maintenance payments after John's death?
2. Assuming she has a right to maintenance payments after John's death, what rights does she have with respect to Greenacre as related to:

(a) John's estate; and

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(b) Lender?

3. Can she serve as John's executrix and/or inherit from his estate?

ANSWER TO QUESTION 3

1) Ann does have rights to continued maintenance payments. The issue is whether maintenance payments terminate upon the death of the paying spouse. Absent an alternative agreement, Domestic Relation Law (DRL) indicates that spousal support agreements terminate upon 1) death of either party, 2) marriage of receiving spouse or 3) the receiving spouse lives with another and holds herself out as married to that person. However, this rule applies absent an alternative agreement. Here, John and Ann agreed that Ann would continue to receive payments until her death. Thus, because both parties negotiated this agreement, and agreed to it, the contents of the contract will be binding. John's estate will have to create a constructive trust after probating his will to adhere to the contract. Thus, unless the court finds the contract unconscionable (and the facts do not support this) Ann will be entitled to continued spousal maintenance payments.

2) a) Ann can enforce the mortgage against the estate. The issue is whether Ann's mortgage can be enforced. Although a mortgage will survive the death of a party and thus will remain attached to the land when the successor inherits it, it must be acknowledged to be valid. A mortgage must be signed by the party to be charged and acknowledged like a deed (it must also state the land with accuracy).

Because the mortgage was never acknowledged, it was never activated. However, the parties signed the contract with the mortgage clause. This contract was acknowledged (facts indicate it was "valid"), thus Ann has rights to the mortgage because of the agreement. Therefore, the mortgage will stay attached to the land. If the maintenance payments are not paid, Ann can foreclose on the mortgage. The mortgage will survive John's death and Ann may enforce it against the estate if it becomes due. However, Ann's rights will be subject to Lender's.

b) Ann's mortgage will be subordinated to Lender's. The issue is what priority does Ann's mortgage take. New York has a Race Notice Statute, which is used to determine priority (this applies to deeds and mortgages). The Race Notice Statute requires a mortgagee to be the first to record to take priority (the mortgagee must not have notice of the earlier mortgage to be successful). Here, although Ann received the mortgage first, the facts do not indicate that it was recorded. Because Lender duly recorded his mortgage, he was the first to record, and as a result will have priority over Ann. Thus, if Lender were to foreclose on Greenacre, Lender would collect his debt in full before Ann received any money on her mortgage. As a senior mortgage, it would have to include Ann as a necessary party in any suit. Failure to do so would preserve her mortgage on Greenacre. If Ann were to foreclose prior to Lender, Lender would not have to be joined, but his mortgage would remain on the land. Thus, Ann's mortgage would be subordinated to Lender's mortgage because Lender was the first to record.

3) Ann cannot serve as executor of John's estate, nor can she inherit from the will. The issue is whether a divorce terminates benefits to an ex-spouse in a will. EPTL indicates that a divorce will terminate all benefits going to a spouse under a will. Here, Ann and John divorced after John executed his will. Thus, the court will treat the will as if Ann pre-deceased John. Additionally, Ann is not entitled to her right of election.

First, the court will appoint a new executor to run John's estate. Next, the court will divide his assets in intestacy (since Ann was named the beneficiary of the residuary clause). Because John has two children, the court will treat Ann as predeceasing John and divide his estate equally between his children.

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Divorce also terminates the right of election, as does a final decree of separation, an invalid divorce rendered against the surviving spouse, an invalid marriage (incest or bigamy) and abandonment by the surviving spouse or lack of support by the surviving spouse. Because Ann and John are divorced, she has no right of election. Therefore, Ann will take nothing under the will. The court will appoint a new executor and John's children will equally inherit John's estate through intestate distribution.

ANSWER TO QUESTION 3

1) Yes, Ann does have a right to maintenance payments after John's death. The issue here is whether the separation agreement, as a binding contract, be validly enforced upon the estate of one of the parties.

The rule under New York law allows for the enforcement of a contract against one's estate when the contract expressly allows for such enforcement. Here, the intent of the parties is very clear in that the maintenance was to continue until the death or remarriage of the wife. Moreover, the parties also indicated their intent for the obligation to be binding on the successors.

While the general rule is that maintenance payments will cease at the death of either spouse, here the parties have contracted otherwise. Furthermore, the separation agreement was not merged with the divorce decree. Its express terms were to survive the divorce decree. Thus, the parties showed a clear intent to vacate the general rule of New York Domestic Relation Law, and provide for a different contractual arrangement. Accordingly, Ann does have a right to receive maintenance payments from John's estate.

2) Ann's rights in Greenacre are valid, but subordinate to that of the Lender. The issue here is twofold. Is the mortgage, signed but not acknowledged by John, valid? If so, is it superior to that of the Lender's?

a) The rule is that the mortgage signed, but not acknowledged by John, is invalid on its face for not being acknowledged. However, as per the terms of the separation agreement, Ann is entitled to receive a valid mortgage from the estate. While the executed mortgage may not be valid, Ann is entitled to receive a valid mortgage from the estate. Thus, the executor can issue a valid mortgage, or the predecessor in title may execute the mortgage. As discussed earlier, the terms of the separation agreement will be enforceable upon the estate of John.

b) As such, any interest Ann may receive in Greenacre will be subordinate to that of the Lender. Here, the general rule is that the first in time is the first in right. Here, it is clear that the Lender's interest was not only first in time, but it was also recorded first. Thus, the Lender's rights will be superior.

3) No, Ann will not serve as John's executrix or inherit from his estate. The issue is the right of an ex-spouse under a will drafted while the parties were still married. The rule is that upon a valid divorce (as we have here) all fiduciary relationships (except the guardianship of marital children) and inheritances from the will are void and given no effect.

Here, the will was executed in 1982, while the parties were still married. They were duly divorced in 1998. At that point, both aspects of John's will involving Ann became void. As such, Ann cannot serve as executrix or inherit under the will.

It should be noted that Ann's interest in the mortgage on Greenacre might have additional limitations not discussed earlier. Partial performance by John may affect the amount of any

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mortgage Ann could receive from the estate. If John had paid down the mortgage by \$20,000, then Ann would only be entitled to an \$80,000 mortgage.

Question-Four

On June 6, 2000, Paul and his wife, Mary, checked into the new Lazy Day Motel, in the Town of Erie, New York. In the afternoon, Mary left the motel to visit a nearby shopping center. Paul remained in their room at the motel to take a nap.

When Mary returned from the shopping center, the motel was in flames, and the Erie Fire Department was trying to put out the fire. Mary told the fire captain that her husband was asleep in their room, whereupon two firemen broke into Paul's room and rescued Paul, who sustained serious and disfiguring injuries from the fire.

An investigation by the Erie Fire Department established that the fire started because the motel's electrical wiring had been defectively installed in the Lazy Day Motel in violation of the Town of Erie Building Code. The Town of Erie building inspector, who was charged by statute with the duty of inspecting the motel's electrical wiring, had failed to discover the defective installation and had issued a certificate of occupancy which permitted the motel to operate. In addition, the alarm system, which would have warned motel occupants of the fire in time to escape injury, did not function because it had been defectively manufactured.

The alarm system had been purchased from Fire Corp., a Nevada corporation, which had its only place of business in Nevada. Dave, the owner of the Lazy Day Motel, on a trip through Nevada, saw the system at Fire Corp.'s showroom and told representatives of Fire Corp. that he would consider using it in a motel then under construction in Erie, New York. Shortly thereafter, a representative of Fire Corp. called Dave to inquire whether he was still interested in using Fire Corp.'s alarm system, and upon receiving an affirmative answer, Fire Corp. sent a purchase order to Dave. The purchase order, which provided for a cash price of \$15,000, was executed by Dave and sent back to Nevada, where it was countersigned by a representative of Fire Corp. A month later, Fire Corp. shipped its alarm system to Dave, F.O.B. Nevada, and upon receipt it was installed in the Lazy Day Motel.

After duly serving a notice of claim on the Town of Erie, Paul commenced an action in Erie County Supreme Court against Dave, the Town of Erie, and Fire Corp., to recover damages for his injuries. Dave and the Town of Erie were served with the summons and complaint in New York. Fire Corp. was served with the summons and complaint by an authorized process server at Fire Corp.'s office in Nevada.

Prior to answering Paul's complaint, Fire Corp. timely moved to dismiss the complaint against it based upon lack of jurisdiction. The court (1) denied the motion. The Town of Erie moved to dismiss the complaint against it for failure to state a cause of action. The court (2) denied the motion.

At the start of the jury trial, Paul's attorney moved for an order precluding the defendants from offering any proof before the jury that Paul's medical expenses had been fully paid by Paul's insurance company. The court (3) granted the motion.

Were the numbered rulings correct?

ANSWER TO QUESTION 4

1) The trial court properly denied Fire Corp.'s motion to dismiss based on lack of jurisdiction.

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The New York Supreme Court, County of Erie has jurisdiction over Fire Corp. In order for a court to have jurisdiction over a foreign corporation, not licensed to do business in the state, procedural due process must be satisfied. There must be minimum contacts of that corporation with the state, an opportunity to be heard and proper service of process (notice).

In order to obtain jurisdiction over a defendant, the defendant must either: 1) be domiciled in the state, 2) served in New York state, 3) service of a designated agent in the state, 4) service via long arm jurisdiction, 5) doing business in the state, or 6) consent to personal jurisdiction.

Here, the New York court had long arm jurisdiction under CPLR § 302. Under

that section, the plaintiff may obtain jurisdiction on several grounds. Pertinent here are first, the defendant contracted to sell a good in the state. Thus, Fire Corp. could reasonably expect to defend in an action as a result of defective equipment sold (i.e. the alarm system). Although Dave went to Nevada and sought out defendant's services, Fire Corp. purposely and deliberately contracted to sell their product in New York. They called Dave in New York, shipped the product to New York and solicited Dave, a New York resident. These acts alone are sufficient for jurisdiction and have been upheld as sufficient minimum contact to pass the constitutional due process test.

The CPLR permits service of a non-domiciliary by looking to the laws of the defendant's jurisdiction or by an attorney in that jurisdiction or by an adult non-party. Here, the facts indicate that the defendant was served by an "authorized process server". The CPLR permits corporations to be served by several methods: via secretary of service as agent of a business licensed to do business in the state (not applicable here), or by personal service of a director, officer, cashier (treasurer), assistant cashier, manager, general agent or any authorized agent. There is no indication who exactly was served here so it will be assumed that a proper person was served.

2) The court properly denied the town's motion to dismiss for failure to state a cause of action under CPLR § 3211(a)(7) unless the town was not permitted to do a 50-H hearing and examination of the plaintiff.

Generally, a municipality cannot be sued for its misfeasance or non-feasance under the Municipal Tort Doctrine because "since (they) are responsible for all (they) can be responsible to all".

There are several exceptions to this rule. First, when the municipality performs a proprietary function. Second, where there is a special relationship such as when one relies on the municipality because of an affirmative act or when the municipality assumes a duty or promise of an undertaking to a specific person. A special relationship is also created when the municipality knows that their inaction will lead to injury and where there is a specific duty undertaken that the municipality knows a person will rely on or if the municipality created the defective condition.

Dismissal should be granted only when there is no set of facts when looking at the plaintiff's complaint as a whole, there would be no viable cause of action. Here, there is evidence that the town's building inspector failed to discover the defective installation and issued a certificate of occupancy. Arguably, this is enough of an affirmative act to at least go through the discovery phase of litigation. The issuance of the certificate of occupancy permitted the motel to operate and thus was at least a factual cause of the accident.

The facts also indicate that the notice of claim was duly served. Under the General Municipal Law, a municipality must be permitted to examine the plaintiff via a 50-H hearing prior to the commencement of litigation. This permits a municipality to settle the matter and investigate before litigation. If the plaintiff commences the litigation before the town had a chance to hold the 50-H hearing, the plaintiff's complaint should be dismissed.

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3) The court properly granted the plaintiff's motion.

Under CPLR § 4545, New York has modified the collateral source rule. Plaintiffs are not permitted to recover money received from insurance companies for reimbursement for the cost of medical care and lost wages. There is a four-step procedure with regard to personal injury judgments. First is itemization by the jury for amounts awarded for economic and non-economic (pain and suffering) losses. Second, the judge, not the jury, makes the collateral source adjustment by subtracting the amount the plaintiff was reimbursed from the jury award for economic loss. After making the collateral source adjustments, entry is made of two judgments (past loss and first \$250,000 of future loss and a second for future loss in an annuity not to exceed ten years). Lastly, interest is entered. The judge also adds the cost of medical insurance for the past two years and the future cost of maintenance of medical insurance. Since these calculations are made by the judge and not the jury, the court's preclusion of the insurance payments was proper.

ANSWER TO QUESTION 4

1) The court correctly denied Fire Corp.'s motion to dismiss. The issue is whether New York has long-arm personal jurisdiction over Fire Corp. Under New York CPLR, New York courts can assert long-arm jurisdiction over non-domiciliaries in specific situations (A general basis for jurisdiction cannot apply here because Fire Corp. is a Nevada corporation and does not regularly do business in New York). One such situation is when the defendant makes an economically significant contract to provide goods or services in New York. A plaintiff is then able to bring suit on the specific transaction that serves as the basis for long-arm jurisdiction.

In this case, Fire Corp. made a contract with Lazy Day Motel, a New York company, to provide an alarm system. The Fire Corp. representative called Dave in New York and sent Dave a purchase order. While it is true that their agreement ended Fire Corp.'s delivery obligation when it delivered the alarm system to a common carrier in Nevada (signified by the "F.O.B. Nevada"), Dave had specifically informed Fire Corp. that the alarm system would be used in a hotel in New York.

Furthermore, exercising personal jurisdiction over Fire Corp. in this case would not violate due process. The due process test is whether the defendant has purposefully availed itself of the state and could reasonably be expected to be sued based on its activities in that state. Fire Corp. has reached out to New York and satisfies the minimum contacts requirement by soliciting Dave's business in New York.

Thus the court correctly concluded it could exercise personal jurisdiction over Fire Corp.

2) The court incorrectly denied Erie's motion to dismiss for failure to state a cause of action. The issue is whether a municipality can be sued for negligently failing to comply with its duty under statute. The general rule is that a defendant is negligent per se when it violates a statute that is intended to protect the class of people and against the class of harms at issue in the case. The statute was clearly intended to protect against electrical fires in motels by requiring Erie to inspect. Thus, if Erie had been a typical non-governmental defendant, Paul would have proven negligence per se by showing violation of the statute.

However, Erie is a municipality and benefits from municipal immunity. It is not engaged in a proprietary function here, which would subject it to liability. The inspection duty is a governmental responsibility that is not tied to any business or non-governmental activity. Thus, Paul cannot sustain a claim against Erie.

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3) The court correctly granted Paul's motion to exclude the evidence. The issue is whether proof of full payment of medical expenses should be admitted when such expenses will affect any judgment awarded. The general rule is that evidence should only be admitted when relevant – when it tends to prove or disprove a material fact at issue. The payment of Paul's medical expenses is irrelevant to any issue of liability. It is also irrelevant as to damages because the mere fact that the insurance company paid all the expenses does not establish what Paul's damages should be. Thus, the jury should come to a conclusion about the amount of the judgment, and the amount of insurance proceeds will be deducted from the proceeds as required under New York law.

Question-Five

Pat, Iz, and Pete, New York residents, were equal partners in PIP Manor, a catering business. PIP Manor had no written partnership agreement. It owned a building and three cars, one of which was used exclusively by Iz. Iz also worked individually as a party planner, operating "Izquisite Affairs", a sole proprietorship.

In January 2002, Iz died intestate, survived by his wife, Win, and his adult son, Sam, an attorney. Neither Win nor Sam had ever worked with Iz in either of his two businesses. At the time of his death, Iz's assets consisted of \$10,000 in the "Izquisite Affairs" checking account, \$150,000 in a personal savings account, and his interest in PIP Manor.

In February 2002, Sam and Win both filed petitions for letters of administration of Iz's estate. Sam claimed that he was best qualified to administer the estate. Win claimed that she, rather than Sam, should be appointed administrator of the estate. The surrogate granted letters to Win.

In her capacity as administrator, Win continued to operate "Izquisite Affairs". Due to her lack of business experience, Win used all the money in the Izquisite Affairs checking account and an additional \$50,000 of the personal savings account in an unsuccessful attempt to operate "Izquisite Affairs".

Pat and Pete continued to operate PIP Manor after Iz's death and demanded that Win return Iz's car to them. Win refused to return the car and demanded that they allow her, as administrator of Iz's estate, to be substituted for Iz as a partner in PIP Manor or immediately turn over one-third of the partnership assets to the estate.

- (1) Was the Surrogate's ruling granting letters of administration to Win correct?
- (2) What are the respective rights and liabilities, if any, of Sam and Win with respect to Iz's estate?
- (3) What are the respective rights of Pat, Pete, Win, as administrator, and Iz's estate in the partnership and its assets?

ANSWER TO QUESTION 5

1. The surrogate's ruling was incorrect. The issue is whether the court erred in ruling that an inexperienced wife was more entitled or better suited to perform the tasks of an administrator than was the decedent's lawyer son. Letters of administration are those court documents that appoint an administrator for a decedent who dies intestate. Here, both Sam and Win filed petitions for letters of administration of Iz's estate, but the court granted letters to Win, the decedent's spouse. Ordinarily, granting letters to the spouse is in the best interests of the estate because the spouse is probably the most involved in the now-decedent spouse's affairs and is the most likely to protect the interests of the estate. In this case, however, Sam was probably in the

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best position to serve as administrator because he was related to the decedent and was also an attorney who should have known what to do with the estate and how to do it. Here, Win ran the estate right into the ground because she was inexperienced. Sam here could have properly served as administrator of the estate and to fulfill all the duties of the administrator. He was in a much better position to work in the estate's best interests than was Win.

2. Rights and liabilities of Win with respect to Iz's estate

Win is liable for the losses sustained by Iz's estate because of her breach of her duties as administrator. The issue is what actions of Win could subject her to liabilities for the losses sustained by an estate because of a breach of the administrator's duties. An administrator (especially one with no previous business experience) may not continue a business that she otherwise had no interest in before she was appointed administrator.

When Win was appointed administrator, she had a duty to conserve and protect the assets of the estate, which she was overseeing. She had no right to continue the business in which she had never worked with her husband. Because Win breached her duty as administrator, she may be held liable for losses sustained as a result of her breach, including the \$10,000 from the Izquisite account and especially the \$50,000 from Iz's personal account.

In order to determine Win's rights to Iz's estate, it is first necessary to examine Sam's liabilities and rights to the estate.

Sam's Rights & Liabilities

Sam is not liable for any decrease in the estate's assets and has a right to whatever his intestate share would have been had his mother not breached her administrator duties.

The issue is what Sam is entitled to. Sam has no liabilities to Iz's estate because he was not given the letters of administration. He therefore had no duties. Sam never worked with his father and thus had no obligations to the business. Sam is entitled to his intestate share, which shall be calculated from the time of Iz's death (prior to any diminution caused by his mother's acts).

When a person who dies intestate is survived by a spouse and issue, the spouse gets \$50,000 off the top of the estate and one half of the remainder. Therefore, not including any interest in PIP, Win is entitled to \$50,000 plus half of \$110,000 (\$160,000 equals total estate without PIP) (\$160,000 - \$50,000). Win gets \$105,000 and Sam gets \$55,000. However, the original \$160,000 is no longer available because of Win's breach so she, and she alone, must be held accountable for the \$60,000 expended by her. Sam's rights remain the same. Not including the PIP interest, Sam is entitled to \$55,000.

3. PIP Partnership

A. Iz's estate is entitled to surplus, if any, from dissolution of the partnership. There are no formalities to create a general partnership. A partnership ends with any material change, including the death of one of its members. A partnership exists when two or more persons operate a business as co-owners for profit.

Here, although there was no written partnership agreement, a valid partnership still existed because Pat, Iz and Pete all operated the business as co-owners for profit. No formal formation requirements are necessary. Despite its valid formation, the partnership automatically terminated upon the death of Iz (i.e. death of a partner constitutes a material change and the partnership terminates).

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Although the car was exclusively used by Iz, the partnership owned the car and presumptively was bought with partnership funds. It is therefore partnership property and needs to be returned to the partnership for eventual distribution equally among the partners. Once the partnership is terminated, each partner receives an equal share of profits, if there are any. Outside creditors are paid first out of the partnership's assets, than inside creditors, and all collateral contributions. Any assets left must then be distributed equally among the partners. Here, Pat would receive one third of total partnership assets, as would Pete. Iz's estate is also entitled to his share of repayment of collateral contributions and one third of the partnership's assets. Win, as administrator, has no rights in the partnership or its assets other than making sure that Iz's estate receives its share of surplus and profits.

ANSWER TO QUESTION 5

1. Letters of Administration

The surrogate's ruling granting letters of administration to Win was correct. The issue is who should be the administrator/trix of Iz's estate. An administrator has significant responsibilities in handling a decedent's estate. As such, the surrogate's court seeks to appoint someone who, ideally, is not only familiar with the decedent and the decedent's estate, but who can adequately and competently perform the requisite responsibilities.

Here, the court properly granted letters to Win because, as Iz's wife, she is closely familiar with decedent's estate and there is no evidence that she is incapable of performing the required duties. The fact that Sam is a lawyer does not automatically make him more qualified for the job than the decedent's wife. Thus, the court's ruling was correct.

2. Rights and Liabilities of Sam and Win

Sam is entitled to \$55,000 and Win is entitled to \$105,000, but she is also personally liable for \$60,000. The issue is what are the respective rights and liabilities of Sam and Win with respect to Iz's estate. Under intestacy laws, when a decedent dies leaving a spouse and children, the spouse gets \$50,000 and half the balance of the estate and the children get the rest.

Thus, as an initial matter, Win is entitled to \$105,000 ($\$50,000 + \frac{1}{2}$ of $\$160,000 - \$50,000$) and Sam is entitled to \$55,000. However, although an administrator's powers are broad, they do not include the right to continue operating a business. If an administrator does so operate, they are personally liable for any losses. Therefore, Win is personally liable for the \$60,000 she lost in her attempt to run "Izquisite Affairs" because she attempted to carry on the decedent's business and thus acted outside the scope of her authority as an administratrix. Win thus ends up with \$45,000 from the estate of her initial \$105,000 because she is personally liable for the loss of \$60,000. Therefore, Win has a right to \$105,000 but is liable for \$60,000, and Sam has a right to \$55,000.

3. Pat and Pete

Pat and Pete have the right to get the car back. The issue is what are Pat and Pete's rights. Any property owned by a partnership is partnership property, regardless of how it is used. Thus, although Iz used the car exclusively, the car was not Iz's personal property since it was owned by the partnership. Pete and Pat thus have the right to have the car returned.

Win

Win has no right to be substituted as a partner for Iz. The issue is what rights Win has as administrator. A partnership is dissolved upon the death of a partner, and the partnership can

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choose to continue to operate as a partnership without that partner if it wants. However, the administrator of a deceased partner has no right to be substituted for that partner in the partnership.

Win thus cannot demand that Pete and Pat allow her as administrator of Iz' s estate to be substituted for Iz as a partner in PIP Manor because she has no right to do so. Win has no right to be substituted as a partner.

Iz' s Estate

Iz' s estate does not have the right to one third of the partnership assets. The issue is what rights Iz' s estate has in the partnership assets. Partnership assets are partnership property, not personal property. The only personal property a partner has in a partnership is his/her share of partnership profits.

Here, Iz' s estate doe not have the right to one third of partnership assets because it is partnership property and not Iz' s personal property. Thus, Iz' s estate does not have the right to one third of the partnership assets.

SYNOPSIS OF JULY 2002 MPT QUESTION

State v. Tweedy (July 2002—MPT) Applicants, assistant district attorneys, are asked to draft a persuasive memorandum to the district attorney convincing him that there is sufficient evidence to seek a felony indictment against James Tweedy on two counts of endangering the welfare of a child. Applicants are also asked to identify additional facts that would assist in prosecuting Tweedy for the death of his two young children in an apartment fire. On the night in question, Tweedy, a single parent, put the children to bed, secured the bedroom door, locked the apartment door, and went out with friends, leaving the children alone. While Tweedy was out, a fire started in a defective TV set that he had left on. An unidentified visitor tried to rescue the children, but couldn' t enter the bedroom because of the way Tweedy had secured it. Tweedy claims that a neighbor had agreed to watch the children. The neighbor is reported at one place in the record to have said she declined Tweedy' s request, and in another place that Tweedy never asked her to watch the children on the night in question. As part of their investigation, the police learned that there was a small electrical fire in Tweedy' s same apartment four years earlier, which started when Tweedy' s late wife left a curling iron on. No one was home at the time of that fire. The File contains police and fire marshal reports, a memorandum from the County Medical Examiner assigning the cause of death, and a transcript of a police interview with Tweedy. The Library consists of excerpts of the Franklin "endangering" statute as well as excerpts from the Franklin Rules of Evidence and two cases.

ANSWER TO MPT

To: Shirley Clay Scott, Assistant District Attorney

From: Applicant

Re: James A. Tweedy – Child Endangerment Charges

Date: July 30, 2002

The following is a two-part memorandum for your signature for submission to the District Attorney. The first part addresses the sufficient admissible evidence to prove the elements in

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order to obtain a conviction. The latter part discusses any conflicting or incomplete facts in our file and proposes relevant investigative steps the District Attorney's office should take to develop these additional facts.

1. Evidence to obtain a conviction

Under Penal Code § 4304, a parent, guardian or other person supervising the

welfare of a child under 18 years of age commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, support or protection. Section 4304 contemplates endangerment either by act or by omission to act. Thus, in order to prove this element of the crime, we need to show that Mr. Tweedy "knowingly" put his children in danger or failed to act which thus put his children in danger. State v. Miller sets forth the three-part Cardwell Standard to test the sufficiency of evidence of the intent element under § 4304. All three of the prongs must be met to satisfy the intent standard and if proof fails on any one of these prongs, the evidence will be found insufficient. Evidence is sufficient to prove the intent element of the offense of endangering the welfare of the child when the accused 1) is aware of his or her duty to protect the child, 2) is aware that the child is in circumstances that are reasonably likely to result in harm to the child, and 3) has either failed to act or has taken actions so lame or meager that such actions cannot reasonably be expected to protect the child from physical or psychological harm.

As to element one (awareness of duty to protect the child), we have sufficient admissible evidence to satisfy this prong. Mr. Tweedy is obviously aware of his duty to protect his children. If he was not aware of such a duty, he would not have asked Mrs. England to watch the children while he was out. In the transcript of Tweedy's interview with Officer Higgerson, Tweedy states that he asked Mrs. England to watch the children. Furthermore, asking Mrs. England to watch the children is a regular practice of Tweedy. In the statement given by Harry Wirthin, owner and superintendent of the building occupied by Tweedy, he states that Mrs. England occasionally watched the children for Tweedy. Thus, this evidence satisfies the first part of the three-part Cardwell test. Furthermore, as to the evidence stated above, it satisfies the general relevancy standard promulgated by the Franklin Rules of Evidence (i.e. it has a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence). Furthermore, the probative value of such evidence is not outweighed by the danger of unfair prejudice, confusion of the issues, etc., enunciated in Rule 403 of the Franklin Rules of Evidence. Lastly, evidence of Tweedy leaving his children in the care of Mrs. England often is closer to habit evidence, than character evidence, and as such, would not be excluded under Franklin Rule of Evidence 404.

We are also able to satisfy the second prong of the Cardwell test to show that Tweedy was aware that his children were in circumstances likely to result in their harm. In his interview with Officer Higgerson, Tweedy stated that he jammed the bedroom door closed because "this is not a safe neighborhood". If Tweedy did not feel safe enough to leave his children alone even for a few minutes until Mrs. England made it to their apartment, he was certainly aware that they were in circumstances likely to cause them harm. Furthermore, in the same interview, Tweedy stated that he even left the TV on so that people would think he was home. One can only surmise that these "people" Tweedy is referring to are robbers or thieves, which may have infiltrated his "unsafe neighborhood". Lastly, Tweedy knows the results of leaving any type of electrical equipment on when no one (or helpless young children) are home. According to Officer Higgerson's interview with Mr. Wirthin, a small electrical fire occurred in Tweedy's apartment approximately four years ago, when his wife (now deceased) left a curling iron on in the apartment when no one was home. All of the above evidence is also relevant and, as such, is admissible.

The final prong of the Cardwell test involves proving that Tweedy either failed to act or has taken actions so lame or meager that such actions cannot reasonably be expected to be effective to

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protect the child from physical or psychological harm. In this case Tweedy did not fail to act, but instead took actions so lame and meager which, in the end, did not protect either of his children from physical harm. Here, Tweedy jammed two table knives between the bedroom door and jam. If Tweedy was so concerned about his safety and that of his children, he should have changed the locks on the apartment door and bedroom door. Tweedy's defense that the landlord does not keep the place in the best shape is not a valid defense.

Employing the Cardwell test, we have sufficient admissible evidence to satisfy a felony indictment against Mr. Tweedy for endangering the welfare of his children.

2. Conflicting or Incomplete Facts

The most obvious conflicting fact, and one essential to this case, involves the statement of Tweedy where he alleges that he asked Mrs. England to watch out for his children. On the other hand, Officer Higginson, in her report of Harry Wirthin, states that she spoke with Mrs. England who indicated that she had been asked to watch the children on the night in question, but had declined. The District Attorney's Office should make a further inquiry into Mrs. England's statement and perhaps have her sign an affidavit.

In addition, we also have incomplete information regarding the code violations of the building Tweedy and his family lived in. Although, the Fire Marshall Report states that the fire was caused by a defective television set, it would be useful to know if the fire was aggravated by any faulty wiring in Tweedy's apartment. A further check on the DeSoto Licensing and Inspection Records would also let us know if Tweedy had ever complained (regarding faulty wiring) to this city agency. However, it should be noted here that if the fire was furthered by such faulty wiring, Mr. Wirthin may also be held liable for the children's deaths. According to *State v. Shoup*, criminal responsibility is properly addressed against one whose conduct was a direct and substantial factor in producing the results even though other factors combined with that conduct to achieve that result.

Finally, the medical examiner's report found that both children died of smoke inhalation. The report also indicates, however, that the younger female child had a congenital heart malformation, which if remained untreated, would be life threatening. The District Attorney's office should contact Tweedy's family physician in order to determine what, if any, action was taken or would have been taken in the future to fix this heart defect.

Should you need any additional information or require any additional clarification, please do not hesitate to contact me.

Thank You.

ANSWER TO MPT
To: District Attorney

From: Applicant

Re: Tweedy, James A.

Date: July 30, 2002

1. There is sufficient admissible evidence to indict James Tweedy for two counts of endangering the welfare of a child under Penal Code § 4304.

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A. Facts

On the evening of July 16, 2002, the two children of James Tweedy, Fred and Alma, were killed from a fire in Mr. Tweedy's apartment. Mr. Tweedy went out for the evening and left the children in their bedroom. He locked the main door of the apartment and inserted two knives into the bedroom door between the door and the jam. Mr. Tweedy claims that he asked his neighbor, Mrs. England, to watch the children, which she denies. The fire, which was probably caused by a defective television in Mr. Tweedy's apartment, ended up killing Mr. Tweedy's children who were home alone and locked in their bedroom, unable to be rescued. When Mr. Tweedy returned from his night of fun with friends he discovered that his children had been killed.

B. Elements of § 4304 - Endangering Welfare of a Child

Section 4304 Endangering Welfare of a Child (4304) is defined as "a parent, guardian or other person supervising the welfare of a child under 18 years of age commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support. This must be proven with admissible evidence in accordance with the Franklin Rules of Evidence.

John Tweedy was in fact a parent because he was the father of Alma and Fred. The children lived with him and he was responsible for supervising their welfare solely, as his wife had died. Additionally, his children were under 18 as Fred was three and Alma was 20 month old.

As stated in § 4304, this offense must be committed "knowingly". Section 302(b) of the Penal Code defines knowingly and *State v. Miller* (Miller) states from this definition that § 4304 contemplates endangerment either by act or omission to act.

State v. Cardwell established a three-part test for this intent element: 1) the accused is aware of his/her duty to protect the child; 2) aware that the child is in circumstances that are likely to result in harm to the child; 3) either failed to act or taken steps so lame that they cannot reasonably be expected to protect the child.

First, Mr. Tweedy was aware of his duty to protect Fred and Alma because he was the sole parent and made or claimed to make some efforts for their care. Second, Mr. Tweedy was aware that Fred and Alma were in circumstances that could harm them. In *Miller*, the court found that Mrs. Miller was not aware she had placed her child in dangerous circumstances because she believed Green when he told her Orr was watching her child. However, in this case it is not clear that Mr. Tweedy asked Mrs. England to babysit or believed that she would. Mrs. Miller left the door to the hallway open whereas Mr. Tweedy put knives in the door jam evidencing his knowledge. Third, Mr. Tweedy's actions were unreasonable to protect his child. The *Miller* court found that Mrs. Miller was reasonable in believing Green (that Orr was babysitting) because she had a relationship with him and there was no evidence he was a dishonest person. Here, Mr. Tweedy did not have such a relationship with Mrs. England.

Just like the *Cardwell* defendant, where the court found she had taken ineffective remedial measures, so too did Tweedy by recognizing the danger, that Mrs. England had not left her apartment and putting knives in the door. This case is different from *Louie* in which the parents were not culpable because they did not allow their child to remain in a potentially dangerous situation, whereas here, Tweedy allowed his children to remain in the apartment. Evidence that Tweedy knew of the dangerous conditions in his apartment and previous fire and citations are relevant under Rule 401 by making the fact of Tweedy's knowledge more probable than without the evidence. Knowledge of the dangers of leaving his children alone could also be inferred from Tweedy leaving his children alone before. Rule 404 prohibits the use of this evidence to prove conduct in conformity therewith but other acts are admissible under 404(b) to prove knowledge

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or mistake or accident. In addition, the "unreasonableness" element caused by Mr. Tweedy's drinking might be relevant but excluded under Rule 403 because it is more prejudicial than probative.

Causation must also be proven. *State v. Shoup* held that the state must prove that a person's conduct was a "direct and substantial factor in producing the result". In *Shoup*, the court found that even though the parking of the dump truck contributed to the accident, Mr. Shoup's conduct started the "unbroken chain of causation". Similarly, even though the fire caused the accident, Mr. Tweedy leaving his children alone with the door jammed with knives was the substantial factor producing the result. The faulty electrical wiring was foreseeable and Tweedy, like Shoup, cannot escape the consequences of his act.

2. Facts for Further Investigation

A. We should investigate if Mrs. England really did decline to babysit and how many times she had babysat before by interviewing her, Tweedy and neighbors further to establish the "reasonableness" of Tweedy's conduct.

B. We should look into Alma's heart malformation through interviews with doctors and Tweedy to establish his knowledge of such. We may have a possible § 4304 claim for failing to treat.

C. We should investigate how often Tweedy left his children unattended by talking to neighbors and friends. This evidence could establish a pattern but might be excluded under Rule 404.

D. Investigate whether Tweedy knew of Mr. Wirthin's citations to establish knowledge of the condition. This can be done through interviews.

All the foregoing can be obtained through discovery, depositions and interrogatories.