NEW YORK STATE BAR EXAMINATION
JULY 2003 QUESTIONS AND ANSWERS

Question-One
On June 3, 2003, Sarah, a shoe manufacturer located in Farmingdale, Suffolk County, entered into the following written agreement with Linda, a wholesale supplier of leather heels:

June 3, 2003

Linda agrees to sell to Sarah, and Sarah agrees to buy from Linda, 10,000 leather heels, delivery to be made on June 5, 2003, at Sarah's shoe factory, located in Farmingdale. The price shall be agreed upon by Linda and Sarah after delivery of the heels to Sarah.

(Signed) Linda

(Signed) Sarah

On June 5, Linda delivered 10,000 heels to Sarah at Sarah's shoe factory, along with a $5,000 invoice. Later that day, Sarah telephoned Linda and stated that she was accepting the heels, but she believed that the $5,000 price was excessive, and offered to pay Linda $4,000. Linda refused to accept less than $5,000.

On June 16, 2003, Sarah entered into a written contract with Anne, who owned a retail shoe store located in Albany, for the sale by Sarah to Anne of 1,000 pairs of shoes for $20,000, F.O.B. Farmingdale. On June 16, Sarah delivered the shoes to a licensed carrier in Farmingdale, notified Anne of the shipment of shoes, and sent Anne all of the necessary documents to enable Anne to obtain possession of the shoes from the carrier.

While in route to Albany, the carrier's truck was involved in an accident that totally destroyed the shoes. Upon learning of the accident, Anne immediately purchased 1,000 pairs of the identical shoes from another shoe manufacturer for $25,000, the market value of such shoes at the time, and asserted a claim against Sarah for $5,000 damages. Sarah rejected Anne's claim and demanded that Anne pay her the $20,000 contract price of the shoes. Anne refused Sarah's demand.

On May 1, 2003, Sarah entered into a duly executed written contract to sell a warehouse to Beth for $500,000. The contract provided for a down payment of $50,000, which Beth paid to Sarah upon signing the contract. The contract set a closing date of June 9, 2003, and provided that "time is of the essence." The contract contained the following provision:

Buyer shall have the absolute right to cancel this contract at any time prior to closing, and, in such event, the down payment of $50,000 shall be returned to Buyer. The contract did not grant the seller a similar right to cancel the contract, and was silent concerning remedies or damages in the event of breach.

On May 3, Beth learned that another warehouse was available for sale for $400,000 from a different seller, and, therefore, she decided not to buy the warehouse from Sarah. On May 9, Beth notified Sarah in writing that she was canceling the contract and demanded that Sarah promptly return the $50,000 down payment. Sarah replied that she did not consider the contract to be cancelled. On June 9, Beth did not appear at the closing, and Sarah notified Beth that she was retaining the $50,000 down payment as liquidated damages. On June 20, Sarah sold the warehouse to another buyer for $500,000.

(1) Is there a contract between Linda and Sarah for the sale of 10,000 heels and, if so, what is the price?

(2) What are the rights and obligations of Sarah and Anne with respect to the June 16, 2003 contract for the sale of the shoes?

(3) (a) In the May 1, 2003 contract for the sale of the warehouse, does the provision granting Beth the exclusive right to cancel make the contract illusory?

(b) If the May 1, 2003 contract did not contain the cancellation provision, would Sarah be entitled to retain the entire $50,000 down payment?

ANSWER TO QUESTION 1

1. The issue is whether a valid contract exists where the price term is missing from the writing evidencing the transaction.

The UCC (Uniform Commercial Code) governs this issue because a sale of goods (i.e., shoes which are tangible, movable property) is involved. Pursuant to the UCC, a contract is not void merely because the price term is missing. The rule is that quantity must be capable of being ascertained. Here, quantity is certain with 10,000 heels, but the price term is missing, so the UCC will insert a reasonable term for price. It should be noted that where parties agree to supply a missing term at common law, the contract is unenforceable because the parties are deemed to be still in negotiations. Here though, the UCC governs and a reasonable price term will be supplied. Thus, it is a valid contract. The price set will be the price as determined by the UCC.

2. The issue is which party, Anne or Sarah, bears the risk of loss.

Again, UCC, if applicable, will govern because of sale of goods. The rule is that in shipment contracts, the risk of loss shifts to the buyer as soon as the seller completes their delivery obligation (i.e., gets the goods to a common carrier).

A shipment contract is a contract in which F.O.B. is designated as the place where the seller is. Here, we are dealing with a shipment contract because Sarah, the seller, is located in Farmingdale, the designated place for F.O.B. Thus applying the rule, Sarah's risk of loss shifts to the buyer as soon as her delivery obligations were complete. A seller's delivery obligations, (Sarah's) are complete when; 1) the goods are delivered to a common carrier, 2) the buyer (Anne) is notified of the shipment and 3) the buyer is given all the necessary information to obtain the goods. All three requirements were met here. Accordingly, the risk of loss shifted to Anne, the buyer, when Sarah placed the goods with the common carrier. Anne bore the risk of loss. Because Anne bore the risk of loss, Anne is liable to Sarah for the contract price and Sarah has no obligations owed to Anne. The rule is that, where the buyer bears the risk of loss and goods are destroyed in transit, the buyer is liable to the seller for the contract price. Anne is not entitled to any re-imbursement for cover (price of the replacements she bought). Sarah has no obligations to Anne. Anne may have a cause of action against the common carrier if the common carrier was negligent.

3. a. The issue is whether a contract which grants one party the exclusive right to cancel is illusory due to lack of consideration.

The rule is that consideration consists of a legal detriment to the promisee. However, in New York, the applicable rule is that consideration exists where there is either detriment to the promisee or benefit to the promisor. A promisee, which neither benefits the promisor or is detrimental to the promisee, is considered illusory. Here, the buyer (promisee) clearly did not sustain a detriment as she could back out at any time for any reason and receive her down payment back. The seller (promisor) also gained no benefit as the deposit needs to be returned at

the buyer's cancellation. Thus, the promise was illusory and there was no consideration. The consideration element was missing from the contract and thus the contract is unenforceable.

b. The issue is whether a failure to close on a specified date in a contract where "time is of the essence" constitutes a material breach entitling the seller to keep the down payment.

The rule is that where "time is of the essence", failure to close on time is a material breach because the partners have so agreed. The $50,000 down payment would be Sarah's to keep. It represents the liquidated damages the parties thought appropriate in the event of a material breach. The failure to close here constitutes a material breach. The entire amount may be kept because it is a reasonable 10%.

ANSWER TO QUESTION 1
1. Contract between Linda and Sarah

The issue is whether, in an agreement between merchants for the sale of goods, a binding contract can be created that states that price shall be agreed upon in the future. The general rule is that a contract is formed if there is a "meeting of the minds", consideration (benefit a legal detriment to both parties) and no defenses to the existence of a contract. A merchant is one who deals in goods of the kind at issue or who holds himself as having special knowledge about the goods. Where the contract is for the sale of goods, UCC Article II applies and states that where both parties are merchants, the only term essential in the contract is that of quantity (i.e., the merchants can agree to later agree on price). Should they not come to an agreement later, the court will supply a reasonable price.

Here, we can tell from the contract that there is a meeting of the minds and consideration because the consideration is Sarah's promise to sell and Linda's promise to buy. There are no defenses. Any defenses based on the Statute of Frauds is invalid because the Statute of Frauds is satisfied (i.e., should a redeemable price be $500 or more, a writing would be required, which we have here, signed by both parties). Both parties are merchants because Linda deals in heels (goods) and Sarah deals in shoes (goods; i.e., tangible movable property). The contract is for the sale of goods so the UCC applies and the contract is binding (i.e., the agreement to agree in the future is binding). Since the parties cannot agree on a price, the court will supply a reasonable price.

2. Sarah and Anne

The issue is who bore the risk of loss at the time the goods were destroyed. The general rule is that where there is a contract for the sale of goods between merchants, and the contract says F.O. B. (seller's place of business), the contract is a shipment contract, and the risk of loss passes to the merchant buyer once the goods have been delivered by the seller to a common carrier. The seller arranges for their shipment and seller notifies the buyer.

Here, we have a contract for the sale of goods for $500 or more ($20,000) that satisfies the Statute of Frauds because it is in writing. The contract is a shipment contract because it states F. O.B. Farmingdale, which is seller Sarah's location. As such, Sarah satisfied her duty when she delivered the goods (shoes) to a licensed carrier, notified the buyer (Anne) and gave Anne the documents to get the shoes upon delivery. The risk of loss at that point passed to Anne. As a result, Sarah is entitled to receive $20,000 from Anne (the contract price) even though the goods were destroyed in transit because Anne had the risk of loss at that point. Anne does not have the right to get $5,000 from Sarah (the "cover" price) because the risk of loss was on Anne.

3. a. Illusory

The issue is whether a contract for the sale of land that contains a clause that enables the buyer to not perform at the buyer' s whim is an illusory contract. The general rule is that in order to have a valid contract, there must be consideration, as defined above, on both sides of the contract. Where one party can perform or not perform as it chooses, there is no mutuality of obligation (i. e., that party has not given consideration, and the contract will be invalid as an illusory contract). Here, the contract enables the buyer to cancel at any time and receive her down payment back (i. e., it allows her to choose not to perform at her own whim). As a result, the clause makes the contract illusory and not binding.

b. The issue is whether the seller of real estate can forfeit the down payment of the buyer if the buyer breaches the contract by refusing to perform at closing. The general rule is that where a real estate contract contains a clause that "time is of the essence", the buyer must perform on the closing date (if no such clause, within a reasonable time of closing). Should the buyer fail to perform, the seller can forfeit the down payment.

Here, Beth did not perform on the closing date. As a result, Sarah can forfeit and retain the down payment even though she resold the land for the same price as the breaching buyer would have paid.

Question-Two

Cal was the building superintendent of an apartment building. On January 2, 2003, Cal telephoned the T Town police to report a "strange odor" coming from one of the apartments. Officer Opie responded to the call and met Cal outside the apartment building. Cal told Opie that for the past several days he had smelled a foul rotting odor coming from apartment 2A.

Cal escorted Opie into the building where Opie immediately confirmed the rotting smell which intensified as they approached apartment 2A. Opie knocked on the door, but got no response. Cal could not provide Opie with a key to the apartment but told Opie that the apartment was rented to Max and Veda Anabel. Unable to find another way in, Opie forced the apartment door open and discovered the partially decomposed body of a woman in the bedroom and a bloody knife on the floor.

The police investigation determined that the woman was Veda and that the fingerprints found on the knife belonged to Max. Shortly thereafter Max was arrested and indicted for murder. Max hired Al Attorney to represent him. Al and Max entered into a written retainer agreement that provided in pertinent part that Al's fee was $10,000, and that an additional $25,000 would be payable to Al if "Max was acquitted or found not guilty by reason of insanity."

At his arraignment, Max pled not guilty by reason of insanity. After Max's arraignment, Al timely served a motion to suppress both the knife and any testimony from Opie regarding his observations while in apartment 2A.

At the suppression hearing, Opie testified to the aforesaid pertinent facts. At the end of the hearing, Al argued that Opie's entry into the apartment without first obtaining a search warrant violated Max's Fourth Amendment rights, requiring the suppression of the knife and Opie's observations. The court (a) denied the motion.

During jury selection, Al requested that the court ask the prosecutor why she used her first seven peremptory challenges to excuse panel members who were of the same race as Max. The court refused, advising Al that the prosecutor is not required to provide reasons for exercising her peremptory challenges.

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At trial, the prosecution offered testimony from Cal and Officer Opie. Over Al's objection, the court admitted the knife into evidence.

The prosecution also presented expert testimony that only Max's fingerprints were on the knife, that Veda's blood was on the knife, and that the cause of death was multiple stab wounds.

After the prosecution rested, Al moved for a trial order of dismissal based upon the prosecution's failure to offer any psychiatric evidence that Max was sane at the time of the commission of the crime. The court (b) denied the motion on the ground that Max had the burden of proof with respect to his mental condition. The defense rested without presenting any evidence.

Max was convicted of murder and timely filed a notice of appeal. Max hired a new attorney who has asserted on appeal that Max's conviction should be reversed because:

(1) The court incorrectly denied:

(a) The motion to suppress; and

(b) The motion to dismiss.

(2) The court failed to question the prosecutor about the use of her peremptory challenges; and

(3) Max was denied effective assistance of counsel because of the contingent retainer agreement.

How should the appellate court rule on each assertion?

ANSWER TO QUESTION 2
1. a. The issue is whether a search warrant was needed for May' s apartment, and if the items and observations were illegally obtained and should be excluded under the Exclusionary Rule.

Under the Fourth Amendment to the U.S. Constitution and Article 8 of the New York Constitution, there is a right to be free from unreasonable search and seizure. Generally, this requires that a search warrant be obtained to search a private home, unless there is a valid exception, such as pursuit of a fleeing felon, evanescent evidence or consent. Consent can only be given by a person with equal access to the premises to be searched.

In this case, Cal called the police to report a smell. Opie identified that smell was coming from apartment 2A. Although Opie obtained a key and consent from Cal, the consent was not valid because Cal was the superintendent of the building and did not have equal rights in apartment 2A. Opie knew that the apartment was rented to others because Cal told him. Although a warrant is generally needed to search a private home, and Opie searched apartment 2A without a warrant, there were exigent circumstances justifying the warrantless search. The smell was identified as that of a rotting, decomposing body. This provided a need for urgency because decomposure would hinder identification and the cause of death. This qualifies as evanescent evidence because it will disappear quickly. Additionally, there could have been someone injured in the apartment.

The court properly denied the motion suppressing the evidence of the knife found and Opie' s observations because Max' s Fourth Amendment rights were not violated by this search. The appellate court should affirm on this ground.

b. The issue is whether the court placed the burden of proof properly on Max with regard to his affirmative defense of insanity.

Under New York Penal Law, insanity is an affirmative defense. All affirmative defenses must be raised by the defendant and proved by a preponderance of the evidence. However, the prosecution always bears the burden of proving the defendant guilty beyond a reasonable doubt. This burden on the prosecution includes proving each element of the crime beyond a reasonable doubt, including the mens rea (level of intent). If the burden of proof is wrongly placed on the defendant, it is a violation of due process.

In this case, Max was prosecuted for murder. This means that the prosecutor must prove that Max is guilty of murder beyond a reasonable doubt. This burden includes that Max intentionally killed Veda, but not that he was sane when he did it. As an affirmative defense, Max must plead and prove that he lacked the required intent to know the nature, quality, or consequences of his actions by the preponderance of the evidence. The motion to dismiss should only have been granted if the prosecution failed to meet its burden of production on the elements of the charge. The prosecution need not produce any evidence of an affirmative defense.

The court properly denied the motion to dismiss and the appellate court should affirm that ruling.

2. The issue is whether the court's failure to question the prosecutor about a possible violation of equal protection regarding peremptory challenges is a ground for appeal.

The Fourteenth Amendment to the U.S. Constitution guarantees that the States give equal protection to all. Additionally, the Fifth Amendment to the U.S. Constitution guarantees due process and a jury for criminal trials.

In this case, the prosecutor used her first seven peremptory challenges to remove members of Max's race from the jury. Although the prosecutor is given wide discretion in exercising peremptory challenges, to exclude on the basis of race alone is discriminatory and unconstitutional absent a compelling state interest and the means are necessary to achieve that interest. Max is entitled to a jury that fairly represents his community. However, once the attorney requested that the judge inquire of the prosecutor's motives, the judge should have done so. The prosecutor can be made to explain peremptory challenges so long as there is a reasonable inference that they are being used in a discriminatory manner.

The judge should have inquired as to the prosecutor's motives behind her peremptory challenges and this ruling should be overturned by the appellate court.

3. The issue is whether Max was denied effective assistance of counsel when his attorney violated a disciplinary rule and engaged in an unethical fee arrangement.

In order to prove ineffective assistance of counsel in violation of the Sixth Amendment to the U. S. Constitution, the defendant must show that his attorney deviated significantly from professional norms and that there is a colorable claim that without the deviation, there is a reasonable probability that the result of the trial would be different.

Under the New York Code of Professional Responsibility, an attorney may not charge an excessive fee, which is determined by location, amount of time devoted to the cause, complexity of the issues and reputation and experience of the attorney. However, contingency fees (dependent upon the outcome) are flatly prohibited in criminal cases.

In this case, the attorney violated a disciplinary rule by entering into a contingency fee arrangement in a criminal case. Therefore, the attorney did deviate from professional norms and standards because violation of a disciplinary rule is proof of such a deviation. However, Max has failed to show how this deviation affected the outcome of his case. There is no colorable claim,

that but for the contingency fee arrangement. There is a reasonable probability that Max would have been acquitted.

Therefore, the appellate court should rule that this ground did not give rise to ineffective assistance of counsel and that a reversal should not be granted under this claim.

ANSWER TO QUESTION 2

1. a. The issue is whether a police officer may enter an apartment building without consent when he smells a rotting odor in an apartment. The Fourth Amendment protects individuals against unreasonable government searches of their homes, in which they have a reasonable expectation of privacy. Here, Max and Veda lived in their apartment, and whether or not they owned it is irrelevant. They have a reasonable expectation or privacy. In such cases, the police may not enter without probable cause and a warrant, unless one of the warrant exceptions applies. The relevant possible exceptions in this case include consent and emergency/hot pursuit.

A police officer may enter an apartment without a warrant upon the consent of an authorized party. In this case, the building superintendent was not authorized to consent to a search of the building because he did not share the premises. In fact, he did not even have regular access to the apartment, as he was unable to find Opie a key. Therefore, he was incapable of consenting to the search.

The second relevant exception is more promising, though ultimately it will probably fail. A police officer may enter an apartment without a warrant in a course of an emergency. In New York, the evanescent evidence exception is limited. The police' s principal motive must be unrelated to securing evidence. Thus, even if Opie feared that the body would disappear, he was not entitled to enter without a warrant. However, he might successfully argue that he validly entered in order to prevent contamination of other tenants of the building. Before seeing the body, he could not have known the origin of the smell, which might have represented a danger to the public. If the court found that Opie had acted reasonably on this basis, the evidence would be admissible.

In conclusion, the court most likely acted correctly in denying the motion to suppress.

b. The issue is whether the prosecution or defense bears the burden of proof with respect to an insanity plea. A motion to dismiss is properly granted in favor of a criminal defendant if, in light of the evidence, no reasonable jury could find the defendant guilty. In this case, Max has pled not guilty by reason of insanity. In New York, a defendant is considered insane if as a result of his mental illness, he is unable to appreciate the nature and consequences of his conduct, or that his conduct is wrong. Insanity is an affirmative defense. While the state must prove each element of its affirmative case beyond reasonable doubt, that rule does not apply to an affirmative defense. For an affirmative defense, such as insanity, the burden is on the defendant to raise the defense and prove it by the preponderance of the evidence. In this case, Max has not presented any evidence to substantiate his plea of insanity. Therefore, the court acted properly in denying the motion to dismiss.

2. The issue is whether a judge, on the request of the parties, must inquire into the

prosecutor' s motivation for making racially discriminatory peremptory strikes. Under federal constitutional law, the racial motivation of a prosecutor in making a peremptory challenge is deemed to be state action for the purposes of the Fourteenth Amendment' s Equal Protection Clause. Therefore, racially motivated use of peremptory strikes is subject to strict scrutiny, and the government must prove that it has acted in a racially motivated fashion for reasons narrowly tailored to a compelling governmental interest. The government bears the burden of proof once a facial case of discrimination has been made. In this case, the prosecutor has used all seven of her

peremptory challenges to excuse panel members who were of the same race as the defendant. While she may have had valid reasons for doing so, she may have acted for impermissible reasons. The court should therefore have questioned the prosecutor about her motivations.

3. The issue is whether violation by a lawyer of a rule of professional responsibility rises to the level of ineffective assistance of counsel. Under the federal Strickland test, the standard for ineffective assistance of counsel is quite high. The defendant must prove either total deprivation of counsel, or such egregious faults as clear bias or protracted absence at trial. A lawyer may make any decision that can be described as conscious and strategic. Moreover, a defendant must prove that but for the ineffective assistance of counsel, the case might have come out differently. While the rules might be more defendant-friendly under the New York Constitution, the recent ruling with respect to the Rosario disclosures suggests that New York courts have become less tolerant of procedural grounds for reversal when the result of the case would not have changed. While Max might make a colorable case of "but for" causation with respect to Al's failure to present evidence, this question inquires only into Al's retainer agreement.

The New York rules of professional responsibility prohibit a lawyer from accepting contingency fees or bonuses for the successful defense of a criminal defendant. Al has clearly breached that rule in this case because he has contracted for a bonus, if Max is acquitted or found not guilty by reason of insanity. He will therefore be subject to disciplinary proceedings and appropriate penalties. However, Max will be unable to use this violation as the basis for a claim of ineffective assistance of counsel. Arguably, the bonus would make Al more effective than a straight hourly fee, since it provided an incentive for successful and competent representation.

Question-Three

Win and Hal were married in 1990. In January 2002, Win and Hal discovered that they each had fallen in love with another person and mutually agreed to separate. Since then they have lived separate and apart from one another. Win has been living with her boyfriend in his house, and Hal has been living with his girlfriend in her apartment. Their only child, Carl, resides with Win, who allows frequent visitation by Hal. On February 1, 2002, each signed and gave to the other a letter stating only: "To whom it may concern: My spouse and I have separated. From this day forward my spouse will not be liable for my expenses or debts, and I will not hassle my spouse about living arrangements." The parties signed no other document relating to their separation.

Prior to their marriage, Hal had acquired title to Parcel A, a vacant tract of land which he continues to own.

Also prior to their marriage, Hal had acquired title to Parcel B, which is improved by an apartment building. During their marriage, Hal and Win occupied one of the apartments as their marital residence. While they were living together, Win handled telephone calls from tenants and collected and deposited rent payments. Title to Parcel B remains in Hal.

Last week Hal was personally served with a summons and complaint in a divorce action commenced by Win. The complaint alleges adultery and living separate and apart for more than one year as grounds for divorce and seeks equitable distribution of marital property and child support.

Hal has visited Lou, a lawyer, and explained the foregoing facts. In their discussion, Hal has asked Lou the following questions:

1. Are the grounds for divorce alleged by Win valid, and if so, does Hal have any defenses to them?

2. If Hal is agreeable to a divorce and defaults in answering the complaint, how might that affect him in any determination regarding (i) distribution of marital property, and (ii) child support?

3. To what extent, if at all, will Parcels A and B be considered marital property?

How should Lou advise Hal?

ANSWER TO QUESTION 3

1. Neither of the grounds for divorce alleged by Win are valid. The question presented is whether adultery on behalf of the accusing spouse is a defense to adultery.

Adultery is a valid ground for divorce in New York. Adultery is engaging in sex or deviant sex with someone other than your spouse. The spouse who is accused of adultery has three defenses: 1) unclean hands, which means the accusing party is also guilty of adultery; 2) entrapment, the accusing spouse set the other up, or 3) the accusing spouse either condoned or forgave the adultery.

In this case, Hal has committed adultery by cohabitating with someone other than his spouse. However, he has a defense to the action because Win too is guilty of adultery because she is cohabitating with her new boyfriend. Because Win is also committing adultery, Hal has a defense to her accusation of adultery. Thus, the grounds for divorce cannot be adultery.

Do Hal and Win have grounds for divorce under the conversion doctrine? Under the conversion doctrine, a couple can obtain a divorce when they have lived separate and apart for one year pursuant to a court order or a valid separation agreement. The court can then convert the separation agreement into a divorce decree. To be valid, a separation agreement must be in writing, signed and acknowledged. It must be entered into freely and voluntarily. Separation agreement may also provide for support and property division.

Hal and Win will not be able to obtain a divorce under the conversion doctrine because they never had a valid separation agreement. Their agreement was in writing but was never acknowledged or filed with a clerk. They accordingly have not lived separate and apart for one year pursuant to a valid separation agreement.

Hal and Win do not have grounds for divorce under the conversion doctrine. Their agreement was in writing, but it was never acknowledged or filed, and was therefore invalid.

2. The question presented is whether fault is a factor in the distribution of marital property and child support. Marital fault is not considered in property division and in the order of child support. Child support is determined by statute according to income and number of children. In New York, marital property is subject to equitable distribution and fault will not be considered. Any property obtained in the marriage will be divided fairly among both parties.

Child support for Carl will be based according to the relevant statute on Win and Hal’ s income and the fact that they have one child. Fault will not be an issue at all. The court makes this award according to the standard of the best interests of the child and it can take into account the lifestyle the child would have enjoyed had the parents stayed together, as well as the educational, physical, and mental needs of the child.

Because fault will not be a consideration in property division and child support, Hal could just answer Win’ s complaint and admit to the allegations.

3. Marital property is anything acquired by the couple during the marriage. Only marital property is subject to equitable division on divorce. Husband and wife will keep their separate property. Separate property is anything they entered into the marriage with; personal injury judgments, gifts and inheritances taken in their own name or anything they decide to treat as marital property. However, if there is an increase in value in any of the above, and that increase was due in any part to the efforts of the other spouse, the increase will be considered marital property subject to equitable division on divorce. Parcel A is Hal's separate property because he owned it prior to marrying Win. It will therefore not be subject to equitable distribution in their divorce. Parcel B itself is Hal's separate property because he owned it prior to marrying Win. The property will not be subject to equitable distribution because it is Hal's separate property. However, any increase in the value of Parcel B that was the result of Win's efforts will be subject to equitable distribution. Win worked as the office manager of the apartment building of Parcel B and is therefore entitled to any increase in value her efforts caused. This increase will be treated as marital property and will be subject to equitable division on divorce.

ANSWER TO QUESTION 3
1. The issue is whether Win may claim adultery as grounds for divorce and whether Hal can raise any defenses.

The rule in New York, under the DRL, is that an action for divorce can only be maintained upon one of five grounds, adultery being among them. Adultery is sex or deviant sex with a person other than your spouse, which occurs during the marriage. However, there are three defenses to adultery; condonation, recrimination, and "setting up" the other spouse. Recrimination occurs where the spouse is herself guilty of adultery and the defense is an absolute defense to an action for divorce.

In this case, Win is claiming divorce on the grounds of adultery. However, she has been cohabiting with her boyfriend for nearly as long as Hal. Presumably, each has been having sex. Therefore, Hal can successfully raise the defense because Win is guilty of recrimination. Therefore, the grounds for divorce alleged by Win are valid, but Hal can successfully assert the defense of recrimination.

The issue is whether Win may maintain this action as a conversion divorce.

The rule is a spouse in New York can maintain an action for divorce by showing that the couple has lived separate and apart for at least one year pursuant to a valid separation agreement (signed and acknowledged) and filed with the clerk of the court in the county within which the marital home is located. This is called a conversion divorce under the DRL.

In this case, the couple signed and exchanged an agreement, but the agreement is not a validly executed separation agreement. It is not valid because the letters are not one document, signed by both parties or acknowledged. This action also cannot be maintained because the letters were not filed with any court. Therefore, the ground for divorce alleged by Win as a conversion divorce is valid. Hal can successfully assert the defense that the agreement is not a valid separation agreement pursuant to which a conversion divorce action may be maintained.

2. i) The issue is how will the marital property be distributed in the event of a default judgment in Win's favor.

The rule is a default judgment dissolves the marriage, but it will unlikely affect distribution of the marital property. The DRL provides a statutory framework which courts must follow in performing an equitable distribution. Courts may consider the relative health, education and

financial standing of each spouse among various other factors. However, fault in the divorce action generally will not be considered during equitable distribution of the property unless that fault is egregious.

In this case, Hal's failure to appear will have the equivalent of an admission and Win may obtain a default judgment. However, this will not affect the equitable distribution because Hal's conduct was not egregious. Therefore, if Hal is agreeable to divorce, he should not be concerned that his failure to appear will adversely affect his share of the marital property.

ii) The issue is how will a failure to appear affect his child support obligations.

The rule is that courts in New York take a "best interest of the child" approach in setting support. In addition, the DRL provides a very specific framework for setting child support. The relative share of each spouse is based on their relative incomes and the number of children for whom support shall be provided.

In this case, because child support is set based on the statutory scheme set for in the DRL, Hal's failure to appear, which will result in a default judgment, will unlikely affect his child support obligations. Therefore, if Hal is agreeable to divorce, he should not be concerned that his default in answering the complaint will adversely affect his child support obligations.

3. The issue is whether Win is entitled to any portion of Parcel A or B as marital property.

The rule in New York is that property acquired before the marriage is separate property and therefore not subject to equitable distribution. However, where separate property has increased in value due to the labor and efforts of one or both spouses, the increased value will be considered marital property.

In this case, Parcel A is a vacant tract of land, which Hal owned prior to the marriage. Since the tract has not increased in value due to any part of Win's efforts, it remains separate property and not subject to equitable distribution. Parcel B however, has increased in value due to Win's effort, because during the marriage Win handled calls from tenants and collected rent payments.

Question-Four

Apple, the owner and operator of a cider mill in upstate New York, hired Renee to renovate a section of the mill to create a store to sell apple products. Renee hired Carp to lay the carpet required for the renovations. Renee supplied the carpet, but Carp selected and supplied the adhesives to be used on the job and utilized his own tools. In order to coordinate laying the carpet with other parts of the job, Renee determined what hours and where in the store Carp would work. Carp determined the methods to be utilized in preparing the premises and laying the carpet.

In May 2003, while renovations were ongoing, an explosion occurred in the mill. Evan, who was employed by Apple as a maintenance mechanic working in the mill, was knocked against a cider press by the force of the explosion, striking his head. Evan died instantly from his injuries.

An investigation revealed that Carp had carelessly knocked over a can of explosive and highly flammable carpet adhesive which he had left open in the area where he was laying the carpeting. The explosion occurred when fumes from the spilled adhesive were ignited by a space heater in the store. The fire investigator determined that the pilot light on the space heater should have been extinguished by Carp while preparing the premises before the adhesive was used. Apple told the investigator that Carp had asked him to extinguish the pilot light, but that he forgot to do so.

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Evan was survived by his wife, Willie, two adult children, and a sister, Sara. Sara is disabled, and she was dependent on Evan for her support. Although Evan's children were financially independent, he often assisted them with household maintenance and car repairs.

Evan's duly executed will left his estate one-half to Willie and one-half to Sara. Willie was appointed executrix of Evan's estate.

Willie, as executrix of Evan's estate, has commenced an action against Apple, Renee and Carp seeking to recover damages for Evan's wrongful death. In her complaint, Willie asserts the foregoing facts and alleges that Apple and Carp were negligent in causing Evan's death and that Renee is liable for Carp's negligence.

Renee and Carp each answered Willie's complaint and asserted cross-claims for contribution against Apple. Apple moved to dismiss Willie's complaint and the cross-claim of Renee and Carp, alleging that, as Evan's employer, no claim could be stated against him. The court granted the motion.

(1) Were the court's rulings dismissing (a) the complaint and (b) the cross-claims for contribution against Apple correct?

(2) Is Renee liable for Carp's negligence?

(3) If Willie succeeds in recovering damages for Evan's wrongful death, what elements of damages may be recovered and to whom would such damages be paid?

ANSWER TO QUESTION 4
1. a. The dismissal of the complaint

The issue presented is whether a claim against Apple by Evan’ s estate is barred by New York’ s worker’ s compensation laws. As a general rule, worker’ s compensation is the exclusive remedy for an employee who is injured or killed on the job against his employer. In this case, Willie’ s claim against Apple will be barred because Evan was killed while he was on the job at his place of business. Willie, as executrix of the estate, may recover, under the worker’ s compensation laws, a death benefit and medical bills. For this reason, worker’ s compensation is the exclusive remedy and the judge properly dismissed the complaint.

b. Cross-claim for contribution

The issue presented is whether a third party may seek contribution from an employer when an employee is injured and covered by worker’ s compensation. The general rule, under the CPLR, is that a third party may not seek contribution from an employer in these circumstances. There is an exception to this general rule. A third party may seek contribution from an employer when the employee has suffered a "grave injury". Grave injury is defined to include the death of the employee. Applying the law and its exception to these facts, Evan did suffer a "grave injury" as defined by the CPLR because he died. This type of injury fits squarely within the statutory scheme. Since Evan, the employee, did suffer a grave injury as defined by the CPLR, the judge incorrectly granted the motion to dismiss Renee and Carp’ s cross-claim against Apple for contribution.

Thus, the judge was correct in part and incorrect in part on the motion to dismiss.

2. The issue presented is whether Carp was an agent of Renee's or was an independent contractor.

The general rule is that a principal is liable for the torts committed by her agent in the scope of employment. A person is an agent and not an independent contractor if; 1) there was assent, 2) acting for the benefit of the principal, and 3) the principal maintained control over the alleged agent's activities.

In this case, there was assent to work on Renee's behalf because both parties agreed that Carp would lay the carpet. He was working for the benefit of Renee because he was helping Renee finish the job. Renee did not maintain control over Carp's activities on the job. It is true that Renee set his hours and place where he would work. However, Carp selected and supplied which adhesives he would use, and he also brought and used his own tools. In addition, Carp decided what methods to use in laying the carpet. Since, Renee did not control his activities, Carp was an independent contractor.

There are several exceptions to the general rule that a principal is not liable for the torts of her independent contractor. A principal will be liable for torts by an independent contractor if the independent contractor is engaged in ultra-hazardous activities. While the definition of ultra-hazardous activities is liberally construed, in this case, laying down a carpet will not be held to be ultra-hazardous because there is nothing inherently dangerous about putting down a carpet.

For the foregoing reasons, since Carp was an independent contractor because Renee lacked control over his activities and no exception applies, Renee will not be liable for his negligence.

3. The issue presented is what damages are recoverable in the wrongful death action and who may recover. The general rule is that the only damages recoverable in a wrongful death action are pecuniary economic losses due to the employee not working anymore. Pain and suffering are not recoverable in a wrongful death action. In this case, the only damages that are recoverable are lost earnings and other economic losses. There can be no recovery for pain and suffering, emotional harm, or loss of consortium.

The next issue is who may recover in a wrongful death action. The rule is that only a decedent's distributees may recover for such damages. In contrast, in a survival action, recovery would go to the estate. In this case, Evan's wife, Willie, and his two children would recover as his devisees. His sister, Sara, would not recover in a wrongful death action because she is not a statutory distribute. His wife and children survived him, therefore they are the distributees.

ANSWER TO QUESTION 4
1. a. Worker's Compensation

The issue is whether a decedent's family may maintain a wrongful death action against the decedent's employer, or whether it is barred under worker's compensation.

The worker's compensation regime replaces tort suits by employees against employers in New York. While an employee may obtain reimbursement without needing to prove fault, he is barred from filing tort claims against the employer. All covered employees are subject to the worker's compensation rules. A limited recovery is available for medical expenses, two thirds of the salary and, if the employee dies, funeral expenses and a lump sum death benefit. Nothing may be recovered for pain and suffering and punitive damages are impermissible. Finally, wrongful death actions may not be maintained by the family.

In this case, Evan is an employee of Apple and his injuries resulted on the job and is therefore covered under worker's compensation. Thus, his estate would be barred from bringing a tort claim and his family may not maintain a wrongful death action. Thus, the court properly granted the motion.

b. Contribution

The issue is whether a third party may obtain contribution from an injured party's employer from injury caused on the job.

In general, under worker's compensation, a third party may not obtain contribution from the injured party's employer. An exception exists when the employee has sustained grave injury, meaning death, disfigurement, etc. Contribution may be received from a party whose conduct contributed to, or aggravated the damages a defendant owes to the plaintiff. The statute of limitations is six years from payment.

In this case, Evan suffered a grave injury because he died. Apple contributed to the damages as Evan's employer. Therefore, Renee and Carp may seek contribution and the court incorrectly dismissed their cross-claims.

2. Agency

The issue is whether Renee is vicariously liable for Carp's negligence through a principal-agent relationship.

A principal is vicariously liable for an agent's torts if an agency relationship exists, and the conduct was within the scope of the agency. An agency relationship exists if; 1) there is assent (voluntary, mutual agreement), 2) the agent's actions benefit the principal, and 3) the principal has the right to control the agent, meaning the power to supervise the matter of the relationship. A person is not vicariously liable for the torts of an independent contractor unless engaged in ultra-hazardous activities or through the doctrine of estoppel. A person does not have the right to control an independent contractor's conduct.

In this case, Renee and Carp mutually agreed to have Carp lay carpet in exchange for compensation, and thus there is assent. Furthermore, Carp's work laying carpet benefits Renee in her renovation. Although Renee supplied the carpet and determined the hours Carp would work, this is not enough to find that Renee had the right to control Carp. Carp selected and supplied the adhesives, used his own tools and determined the methods utilized to lay the carpet. Therefore, Carp was able to control the way in which he worked. As such, no agency relationship exists, and he is an independent contractor. Consequently, Renee is not liable for Carp's negligence.

3. Wrongful Death Recovery

The issue is who recovers in a wrongful death action and what may be recovered.

In a wrongful death action, the plaintiffs may recover pecuniary damages, meaning economic damages including medical and funeral expenses, loss of support and possible diminunition in inheritance. Punitive damages may also be sought. Noneconomic damages, such as pain and suffering, are excluded. A wrongful death claim may be maintained be the decedent's statutory distributees.

In this case, Willie and their two children may recover as distributees. Their recovery can include any medical expenses, funeral expenses, and the children's household maintenance and car

repairs as loss of support. They may also recover punitive damages, if sought in the complaint. Sara, as Evan' s sister, is not a statutory distributee and will not recover in the wrongful death action.

Question-Five

Theresa executed a will on June 11, 1990. First, she directed payment of all her outstanding debts and administrative expenses. Second, she made a specific bequest of an original portrait of her grandmother to her first cousin, Denise. Third, her residuary clause provided as follows:

All the rest, residue and remainder of my estate, real, personal or otherwise and wheresoever situate, including any bank accounts and insurance benefits (hereinafter called my "residuary estate"), shall be disposed of as follows:

(a) If Mother shall survive me, I give, devise and bequeath my entire residuary estate to my Trustee hereinafter named, in trust, to apply so much of the income therefrom to the support and maintenance of Mother as my Trustee, in her absolute discretion, deems necessary, accumulating any balance of the income and adding the same to principal.

(b) Upon the death of Mother, the then principal shall be paid over absolutely to my longtime friend Mary, or if she shall not survive me, to her issue surviving me, per stirpes"

Finally, the will nominated Abe as the executor and cousin Denise as trustee. Denise was also one of the three witnesses who attested to the execution of the will by Theresa.

Mother died on July 2, 1995, predeceasing Theresa.

Theresa died on January 5, 2003, leaving her cousin Denise and another first cousin, Robert, as her only surviving distributees.

On May 1, 2003, the will was admitted to probate. After being granted Letters Testamentary, Abe petitioned the court for a construction of Theresa's will. Abe contends that Theresa's intent, under subpart (a) of the residuary clause, was to create a trust for the benefit of Mother, only if Mother survived her, and that the residuary estate should be paid over to Mary because Mother predeceased Theresa.

Cousin Robert filed an answer to the construction petition, alleging that subpart (a) of the residuary clause created a trust if, and only if, Mother survived Theresa and that any remainder interest Mary had in the principal of the trust was contingent upon Mother's survival of Theresa. Robert asserts that the residuary should therefore be distributed pursuant to the laws of intestate succession. Robert also asserts that Denise, as a witness to the will, is disqualified from receiving any benefit under the will.

Theresa owned a life insurance policy insuring her life. The named beneficiary on the policy was Robert. Abe contends that because Theresa specifically included "insurance benefits" as part of her residuary estate, the proceeds of that policy should be payable to Mary. Robert claims the proceeds are payable entirely to him. The policy provided that policyholders could change their beneficiary designations "by written request filed at the Home Office of the Insurance Company. " Theresa never filed her will or any form designating a change of beneficiary with the Insurance Company.

You are a law clerk for the Surrogate Court Judge who asks you to write a memorandum

outlining the principles to be applied and the decision that should be reached on the following questions:

(a) How should Theresa's residuary estate be distributed?

(b) To whom should the proceeds of the life insurance policy be paid?

(c) What, if anything, is Denise entitled to receive from Theresa's estate?

ANSWER TO QUESTION 5
A. The issue is whether the testator's intent will govern the construction of a will that is otherwise valid on its face.

Under the New York EPTL, parole evidence is admissible to determine the intention of a testator who creates a will that is ambiguous on its face (example; leaving a gift to someone that doesn't exist). Such evidence can be obtained from the drafting attorney or third parties with relevant knowledge. Also, when a will is complete on its face, the court may interpret the will in order to arrive at the result most likely intended by the testator. To do this, a constructive trust will be created.

In this case, it appears that although Theresa's residuary clause would normally fail, the court will attempt to fulfill Theresa's wishes by awarding the residuary to Mary. Her intent is made clearer by the fact that Robert was not mentioned in the will. Furthermore, the attempted trust devised the entire principal to Mary on her issue. It does not appear that Theresa intended the gift to be conditioned on the survival of her mother.

Also, the fact that eight years passed between Mother and Theresa's death indicates that she was under the impression that she had properly devised the residuary of her estate. Therefore, the residuary estate should be bequeathed to Mary.

B. The issue is whether a broad residuary clause, containing "insurance benefits", acts as a valid designation or change of beneficiaries under an existing policy.

An insurance policy is a contract between the insured and the insurer. The terms of the contract regarding designation of beneficiaries govern the extent to which an insured can change the beneficiaries pursuant to a will.

In this case, Theresa has not complied with the contractual terms of the insurance policy. She has not filed a written request with the home office. Therefore, her will is ineffective in changing the beneficiary of that policy. Note: Had Theresa specifically mentioned the insurance policy and directly stated that she desired the beneficiaries be changed, the court may consider altering the payment of the benefits. Nonetheless, the proceeds should be paid to Robert.

C. The issue is whether the attestation of an interested witness affects that witness' grants under the will.

Under the EPTL, a valid New York will must be in writing, signed and attested by two witnesses. If one of the two witnesses is a beneficiary to the will, that gift fails, but the will is otherwise valid. (Note: If the interested beneficiary is also an intestate distributee, she takes the lesser of the specific bequest or intestate share.) However, if two separate witnesses attest to the will in addition to an interested witness, there is no affect. The interested witness is simply discarded and the will is probated with the other two witnesses.

In this case, although Denise witnessed the will, there were two other witnesses. Therefore, Denise's specific bequest of the portrait is not affected. Her attestation is merely disregarded and Theresa's will will be probated pursuant to the other disinterested witnesses.

Note: If the residuary clause is in fact held to its strict meaning and fails, then Denise is also entitled (with Robert) to half of the residuary, as Denise and Robert are Theresa's only living intestate distributees.

ANSWER TO QUESTION 5

A. First, note that the will was validly executed as it met the five requirements of due execution: 1) the will was signed by Theresa, 2) the will was written, 3) the will was signed at the end of the document, 4) it was published to witnesses that it was Theresa's will, and 5) the will was witnessed by two disinterested witnesses.

In distributing an estate, New York has established, as a matter of policy, the goal of accomplishing the testator's intent. In doing so, courts tend to enforce a will if it seems to more closely represent Theresa's intentions than intestacy. Such is the case here, and Theresa's will should be honored and intestacy avoided.

There is a triable issue of fact as to what Theresa meant in paragraph (a) of her will. Whether she desired that her money be placed in trust regardless of his mother's surviving him is for this court to determine. However, seeing as the alternative is intestacy, we should examine the will in a light most favorable to finding Theresa's intent.

It is clear that Theresa bequeathed a large sum (residuary) to Mary. Accordingly, it seems that it was her intention to leave money to Mary. Theresa also made specific reference to Denise, but in doing so granted her a painting, not money. The will makes no mention of Robert, but Theresa made separate provisions for him through the insurance policy. The question of whether Theresa's mother's survival was a condition precedent to the creation of the trust is a valid one. However, a close look at the testator's intent under her will can reasonably lead this court to enforce the will rather than allow Theresa's estate into intestacy. If the estate passes through intestacy, Robert and Denise will get all and Mary will get nothing. This seems to be clearly against Theresa's intent since Theresa made sure to leave an ample sum for Mary. Accordingly, the will should be upheld and Theresa's estate distributed as follows: trust to Mary and painting to Denise.

B. The life insurance policy should go to Robert. New York does not allow a will to incorporate another document (such as an insurance policy) by reference. Furthermore, the insurance policy is a private contract between Theresa and the insurance company. They are not bound by the distribution of Theresa's estate, but only by their agreement under the policy agreement, unless properly changed by Theresa. The insurance company had specific procedures to change the beneficiary, but Theresa never did so. Accordingly, the insurance company is bound by the policy agreement, which names Robert as the beneficiary. The insurance company should honor that agreement independent of the distribution under the will as an enforceable contract.

C. Denise is entitled to the specific bequest of the painting under the will. The fact that Denise witnessed the will is all right because the EPTL requires that two disinterested witnesses sign the will. It has been held to be acceptable if an interested witness signs, as long as two other disinterested witnesses sign as well, and there are three total. If Denise was one of two witnesses, the will would have been upheld, but Denise would have forfeited her share. If she stood to gain from intestacy under such a circumstance, she would lose that right as well and would take the less valuable of the two amounts. Despite her "interest", Denise was well within her right to act as a third witness and Theresa's will was validly executed and enforceable.

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MPT
In re Franklin Forum (MPT-2) In this performance test, applicants' law firm represents the Franklin Forum, a newspaper that is about to publish an exposé on questionable sales practices used by several local laser eye surgery companies. Some of the information for the exposé was obtained by three Forum reporters who took jobs with the laser eye surgery companies as "patient counselors" without revealing that they were reporters for the Forum. The Forum's publisher has decided to publish the exposé but has asked applicants' law firm for an opinion on the legal protections and legal risks associated with publishing the exposé. Applicants' task is to draft a two-part objective memorandum to the supervising partner analyzing (1) whether the First Amendment protects the Forum from liability for fraud, breach of duty of loyalty, and trespass as a result of the reporters' actions; and (2) whether the First Amendment protects the Forum from liability to the laser eye surgery companies for damages to their reputations, i.e., publication damages. The File contains the supervising partner's instructing memo; excerpts of the partner's interview with the Forum's publisher; and the reporters' memo to the Forum's news editor describing their investigation. The Library consists of two cases that bear on the subject.

You may order copies of the July 2003 MPTs and their corresponding point sheets from NCBE, in January 2004 on the NCBE website, http://www.ncbex.org, or telephone, (608) 280-8550.

ANSWER TO MPT
To: Conrad Williams

From: Applicant

Date: July 29, 2003

Re: Franklin Forum

Brief Factual Statement

As you know, we represent Franklin Forum, a newspaper that has been publishing in Franklin for about three years. Recently, Barbara Davis, the publisher of the paper came to obtain advice about possible liability involved with the publishing of stories obtained as a result of undercover investigative reporting. Three reporters from the Forum submitted applications for employment to laser eye care centers throughout Franklin. All were accepted and engaged in employment with the eye surgery centers as "patient-counselors". None revealed their concurrent employment with the Forum. Based on these undercover experiences, interviews with patients, personal consultations as possible patients and investigations with the appropriate state agencies, the reporters from the Forum would like to publish their findings concerning the eye care industry. They seek legal advice through their publisher about possible tort liability. The following is the memoranda concerning the law in this area.

Tort Liability

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Our client may be held liable under three separate theories of tort liability. Their elements are set forth as follows.

1. Fraud - The plaintiff must establish a) the defendant made a false representation of material fact; b) the defendant knew it was false or made it with reckless disregard for truth or falsity and c) intended that the plaintiff rely on it. Also d) the plaintiff must be injured by reasonably relying on the false representation. The elements of fraud were defined by the Franklin Supreme Court in the Food Lion case. The court in the Food Lion case acknowledged that in an undercover situation, where individuals do not reveal their true intention, all of the first three elements of fraud are met. Only the fourth standard is at issue. The court, in looking at the fourth standard, determined that merely lying on a job application did not cause damage to the plaintiff, and found that the plaintiff was not entitled to wages paid because the employees showed up and did the work required of them.

The Food Lion case is determinative here. The first three parts of the fraud standard are not at issue because it is known that Franklin Forum intended for the laser eye surgery centers to rely on their outward appearance as mere prospective employees. The fourth standard is not going to be successful for any possible plaintiff because it would be hard to show injury in relying on the misrepresentation. All three reporters applied for and were trained and paid for their patient-counselor positions. However, the Food Lion case establishes that this is not enough. Further, since the employees showed up and performed the work, any potential plaintiff would not succeed on a fraudulent inducement to pay wages claim.

2. Breach of Duty of Loyalty - The standard as defined by the Food Lion case is that an employee owes a duty of loyalty to its employer. The court in Food Lion stated that it is implicit in any contract for employment that the employee remain faithful to the employer and his interest throughout his term. Employee acts are considered inconsistent with this interest when they are on a payroll while acting deliberately in an adverse interest to the employer.

Through the various investigation techniques, the Forum reporters have uncovered various pieces of information. It is important to note the difference between the info obtained from talking to former patients, and even from pretending to be a patient, from the information obtained while working undercover. The information obtained from pretending to be a patient and from other investigation does not violate any duty of loyalty. The duty of loyalty can only be violated by insiders working against the employer. When they became employees of the laser eye care centers, they undertook a responsibility to be loyal to their employer. Instead, they entered with the intent to obtain information adverse to the interests of their employers. The reporters here obtained employment in order to expose careless and dangerous practices of the eye care centers, which they intended from the beginning. The Forum would be liable for breach of the duty of loyalty.

It is important to note here however, that in the Food Lion case, the damages awarded for the breach of loyalty claim were only $1.00, an amount upheld on appeal. As a result, even though this reporting may breach this tort, the damages to the paper would be at a minimum.

3. Trespass - The last tort, also as defined in Food Lion is as follows: a) it is trespass to enter upon another’ s land without consent; b) consent accordingly is a defense; c) consent can be obtained even through misrepresentation; and d) consent is canceled out if a wrongful act is done in excess of, and in abuse of, authorized entry.

The reporters in this situation did not use fraudulent names or backgrounds in obtaining their jobs. This distinguishes any possible claim from the settled case law which all deals with fraudulent resume submissions. Once again, the method by which the information is obtained is important. Pursuant to the Desnick case, an agent with a concealed camera who obtained consent

to enter a clinic by pretending to be a patient were not trespassers. Similarly, when Lois Fitzgerald entered Enhanced Vision' s Surgical Eye Center pretending to be a patient of the clinic, she was not trespassing in that scenario because she was entering a place open to the public. Any information obtained as a result of that consultation is not going to violate the tort of trespass.

On the other hand, since this case is distinguishable from Desnick in other respects, it does not apply where the defendants are employees who gained false access rather than those pretending to be patients. Instead, since consent here was not based on resume fraud, the Forum would likely only be accountable on the ground of trespass sustainable due to a later breach of loyalty. As in Food Lion, the wrongful acts that happened after consent was given (in this case because the employer hired the employees, impliedly consenting to their presence on the premises) go outside the scope of consent and exceed authority given by the employer to enter as an employee. As a result, liability may result if the story is published.

Constitutional Law Issues

Generally, written thoughts and ideas are protected by a heightened level of scrutiny under the First Amendment. Our client, the Forum, would like to know if they too are entitled to the heightened scrutiny. The United States Supreme Court in Cohen held that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects. As the Cohen case suggests, the heightened scrutiny is not automatically applicable to every case involving newsgathering. The media can do its job effectively.

Accordingly, here the law of torts applicable to the Forum are of general applicability. As a result, the Forum will not be entitled to heightened scrutiny on these claims because the primary effect is to neither hurt nor help. These torts apply to the daily lives of citizens and as such will not lend more protection to investigative reporting of the Forum.

The second issue of concern is whether the Forum will be liable for damages that laser eye surgery companies will have to pay in the form of publication damages. The primary issue here will be if the laser eye surgery centers can prove the proximate cause elements of the damage. As stated in Food Lion, it was the practices themselves (revealed by the reporters), not the reporting that was the proximate cause of the injury. If the damages incurred by the publication were incurred because of a loss in confidence or due to unhealthy practices, it was the company who had itself to blame.

In the same respect, if the eye care centers wish to recover from the Forum for possible publication damages, then they must show the reporting as the proximate cause of the loss rather than the bad practices revealed as the causation for loss in consumer confidence. As a result, the Forum would likely not be liable for any publication damage brought as a result of a lawsuit. It is important to note that the Franklin Supreme Court in Food Lion did not get to the issue of proximate cause because it determined that Food Lion was trying to circumvent the process and collect damages for defamation without being able to prove it since the reports were true. Similarly, a court will likely not allow suit here for the non-reputational torts mentioned in this memo as a grounds for obtaining damages only available under a traditional defamation action. The stricter First Amendment standards require a showing of actual malice, which could not be proven in this case. Accordingly, although our client may be liable if it breaches non-reputational torts, the damages assessed against the Forum are not likely to be staggering. As a result, the Forum might consider publishing the story if it has a strong interest in doing so.

ANSWER TO MPT

To: Conrad Williams

NEW YORK STATE BAR EXAMINATION
JULY 2003 QUESTIONS AND ANSWERS

From: Applicant

Re: Franklin Forum

Date: July 29, 2003

The issues that our client, Barbara Davis, publisher of the Franklin Forum, has brought to us are twofold: 1) whether the First Amendment of the U.S. Constitution shields an employer from torts that have occurred during investigative reporting, and 2) whether the First Amendment protects an employer/publisher from publication damages relating to those torts. In order to understand the protections and potential liabilities, it is first necessary to briefly summarize the facts concerning Franklin Forum and it' s reporting concerning sales tactics used in the laser eye surgery industry. Then, the memorandum will analyze the scope of the First Amendment vis-a vis the torts of fraud, breach of duty of loyalty, trespass and if those torts were even committed by Franklin Forum employees. Finally, the memorandum looks at the prospect of possible publication damages and the shelter of the First Amendment.

Statement of the Facts

This potential problem concerning the First Amendment, scope of tort damages and publication damages arises out of the investigatory tactics of three reporters of the Franklin Forum, a relatively new paper situated in Franklin City. No articles have yet been published, though at least five stores are expected to emerge. We are advising the Franklin Forum' s publisher, Barbara Davis, as to potential liability.

Three reporters of the Franklin Forum, Ted Morrison, Lois Fitzgerald and Kevin Clark, who focus on health and safety issues, decided to investigate the aggressive and manipulative sales tactics of the laser eye industry upon receiving an anonymous call from a "patient counselor" at Enhanced Vision, a major provider of laser eye surgery in Franklin. Specifically, these reporters decided to look into the biased, unprofessional "patient counselor" position, manipulative sales tactics and complicated, discombobulatory rate structures used by laser eye care companies that negatively affect consumers.

The reporters initially tried traditional tactics to gain information about the industry, visiting care centers as potential patients, talking to former employees, discussing industry concerns with experts, and writing to state and federal agencies. In order to gain more information, Ted, Lois and Kevin took actual positions as "patient counselors" at three different laser eye centers: Enhanced Vision, Laser World and Eye Care Specialists, respectively.

It is important to note that each reporter submitted accurate resumes with correct names and background information. The only information left off the application was their employment with the Forum. Each went through the training program, was never asked about their employment plans and worked for seven weeks, gaining information to be used in the forthcoming articles on the way.

Argument

1. Did the Franklin Forum' s reporters commit the torts of fraud, breach of duty of loyalty, and trespass? If so, is the paper protected by the First Amendment?

The general rule is that the press is not given any additional protection from generally applicable laws under the First Amendment. As the Supreme Court noted in Cohen, "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has

incidental effects on its ability to gather and report the news". See Cohen v. Cowles Media (1991) . Enforcement of the criminal laws, copyright protection laws and common law of torts, if taking the form of a generally applicable law, "is not subject to strict scrutiny than would be applied to enforcement against other persons or organizations". Because investigative reporting is not inherently expressive as an act itself, reporters are still subject to generally applicable tort laws. If Ted, Lois, and Kevin committed torts in their investigative reporting, they and their publisher, Franklin Forum, will be held liable. See Food Lion v. ABC, Inc. (1999).

A. Did the reporters commit the tort of fraud?

To prove fraud, the plaintiff must establish that the defendant; 1) made a false representation of material fact, 2) knew it was false (or made it with reckless disregard for truth or falsity), 3) intended plaintiff rely upon it, and 4) the plaintiff must have reasonably relied upon it.

Here, it is not clear at all that Ted, Lois and Kevin made any misrepresentations. They gave their correct names and correct backgrounds, and there is an argument that failure to discover that they were reporters was solely due to their employer's negligence. Thus, unlike defendant ABC in Food Lion, Franklin Forum's reporters took no affirmative steps in misrepresenting. However, a court might find that the omission of their present employer, the paper, was sufficient to be a "false representation of a material fact". Even so, just as was the case in Food Lion, plaintiffs will be unable to prove costs incurred were caused by reasonable reliance on misrepresentations.

Rather, while Ted, Lois and Kevin had no experience, no experience as a "patient counselor" was required. They completed the training as required, and there is no evidence that they performed at a level unsuitable to their status as new employees (though none recovered bonuses, there is no evidence of reprimand). Thus, although they are not protected from the torts of fraud by the First Amendment, they will be found "not liable" under any suit by potential plaintiffs (the eye care centers) because the cause of action for fraud cannot be met.

B. Did the reporters breach the duty of loyalty?

As explained by the court in Food Lion, "an employee owes a duty of loyalty to the employer. It is in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment". Moreover, "employees are disloyal when their acts are inconsistent with promoting the best interest of their employer at a time when they were on the payroll and when they deliberately acquired an interest adverse to their employer".

Here, like ABC in Food Lion, Ted, Lois and Kevin owed their employer eye care centers a duty of loyalty. However, their interest was to expose the eye care centers to the public. They served Franklin Forum's interest at the expenses of the eye care centers by gathering negative facts via investigatory reporting. Thus, because they had the requisite intent to act against the interests of the eye centers, they and Franklin Forum are liable, in all likelihood, for the breach of duty of loyalty.

C. Did the reporters commit a trespass?

It is a trespass to enter upon land without the consent of the owner. However, consent is a defense, even if obtained via a wrongful act, unless it is done in excess of and in a breach of authorized authority. However, the court has adopted the Seventh Circuit's analysis in Desnick, finding that consent based on a resume misrepresentation does not turn a successful job applicant into a trespasser. Rather, trespassing occurs if the reporters made wrongful acts in excess of their authority to enter the premises as employees.

Unlike Food Lion, the reporters here did not take any extra steps that an otherwise valid employee might. There was no secret videotaping. Rather, the Forum's reporters only acted within the valid parameter of their jobs. Thus, even though they breached the duty of loyalty, they cannot be found liable of trespass because they stayed within the requisite breach of consent, even if illegitimately obtained.

2. Is the Forum protected by the First Amendment from publication damages?

With Food Lion and Hustler Magazine, the court has held that plaintiffs cannot use generally applicable tort law to "make an end run" around the First Amendment. Instead, when publication is on a matter of public concern, the NY Times v. Sullivan "actual malice" standard for defamation must be met to gain publication damages like lost good will and loss of sales. That is, plaintiff must prove "a false statement of fact made with actual malice, that is, with knowledge that it is false or with reckless disregard for the truth or falsity of the statement".

Here, potential plaintiffs will not be able to meet the high standard by clear and convincing evidence. Instead, because the article is true and truth is an absolute defense, no publication damages will be forthcoming. Thus, Hustler and the NY Times will protect, using the First Amendment, from an end run using generally applicable law.

Conclusion

The Forum should be concerned about liability for the breach of the duty of loyalty. Such liability is not protected by the First Amendment, because it is a valid, generally applicable law. However, the paper is probably protected from fraud and trespass changes because of applicable tort law and failure to make out a prima facie case. Finally, the Forum is protected from an end run around the First Amendment and from possible publication damages because of the NY Times "actual malice" test.