NEW YORK STATE BAR EXAMINATION
JULY 2004 QUESTIONS AND ANSWERS

Question-One
Fish Inc., a domestic corporation, owns and operates a chain of seafood restaurants in New York State. A duly noticed meeting of the board of directors of Fish Inc. was held in January 2003. All five of Fish Inc.'s directors were present.

At the meeting, a proposal was presented for BevCo, a liquor distributor, to provide Fish Inc. with its beverage requirements in accordance with a schedule of prices for a period of three years. Dirk, one of the directors of Fish Inc., advised the board that he is the sole proprietor of BevCo. The certificate of incorporation of Fish Inc. is silent as to restrictions on contracts between the corporation and its directors. The board voted three to two in favor of the proposal, with Dirk voting in the majority. No vote of the shareholders was taken.

At the same meeting, the president and the chief financial officer of Fish Inc., who were not directors, presented a report regarding the feasibility of opening a new restaurant in Utica, New York. The report recommended opening the new restaurant based upon information regarding the concentration of seafood restaurants in the area and surveys regarding the dining patterns, economy and demographics of Utica. The president and chief financial officer of Fish Inc. were trusted, long-time employees of Fish Inc. However, the report they presented contained latent inaccuracies in the facts presented and the projections made, due to the carelessness of the president and chief financial officer in investigating the proposed new restaurant site. Relying on the report, without independent investigation, the board approved the construction of the new restaurant.

The grand opening of the Utica restaurant was planned for May 1, 2003. In anticipation of a large opening day crowd, on April 5, 2003, Fish Inc. contracted with Barnacle, a seafood distributor, for delivery of specified seafood on May 1, for a price of $20,000. On April 15, Barnacle advised Fish Inc. that, due to problems with suppliers, he would be unable to fill the order. Fish Inc. immediately faxed a letter to Barnacle urging him to comply with the contract and advising him that Fish Inc. expected Barnacle to deliver the seafood as promised.

On April 27, having heard nothing from Barnacle, Fish Inc. placed an identical seafood order with Cod, another distributor, to be delivered on May 1. Cod advised Fish Inc. that the price was $25,000, which was the then market price, due to the need to arrange supply and shipment on short notice.

On April 29, Barnacle advised Fish Inc. that he would deliver the seafood in accordance with the contract. Fish Inc. advised Barnacle that the order had already been placed with another supplier, and that it would not accept delivery from Barnacle. Barnacle was unable to cancel the contracts he had made with his suppliers to fill the Fish Inc. order and was unable to re-sell the seafood before it spoiled, at a loss of $15,000.

Barnacle brought an action against Fish Inc. to recover $20,000 as damages for breach of contract, consisting of the $15,000 he paid for the seafood and $5,000 in lost profits. Fish Inc. counterclaimed to recover the $5,000 it had to pay above its contract price with Barnacle to obtain seafood. Following a non-jury trial, the court granted judgment for Barnacle in the amount of $20,000 and dismissed Fish Inc.'s counterclaim.

A competitor of BevCo has now proposed to provide the beverage requirements of Fish Inc. to its restaurants at prices that are 20% below the prices Fish Inc. is paying to BevCo.

The Utica restaurant is now floundering, experiencing significant losses every month.

(a) Was the court's ruling in the action of Barnacle vs. Fish Inc. correct?

(b) May Fish Inc. avoid the contract with BevCo?

(c) May the directors of Fish Inc. be held liable for mismanagement for voting to open the restaurant in Utica?

ANSWER TO QUESTION 1
A. The issue is what effect should be given to Barnacle' s statement that they were unable to perform. Is it an anticipatory repudiation?

As this is a contract for the sale of goods, it should be noted that the Uniform Commercial Code, as adopted by New York, shall apply. Further, it should be noted that both parties are merchants as they either deal in the specific goods sold or have specialized knowledge of the business practices involved. Barnacle, because they sell fish, and Fish Inc. because as a seafood restaurant they would be considered as having specialized knowledge of the practices.

An anticipatory repudiation occurs where a party unequivocally states that they are unable or unwilling to perform. Under the facts, Barnacle specifically states that they would not be able to perform the contract, and based on that they performed an anticipatory repudiation.

Further, under scenarios when a party states there is potential that they may not be able to perform the opposing party is entitled to ask for further assurances and, if none are given, may trust the other party as in breach and do not have to perform under the contract. Though Fish Inc. did not have to, their fax was an opportunity for Barnacle to unrepudiate the contract, which they chose not to do at the time.

As to what effect an anticipatory repudiation has, it gives the non-repudiating party the ability to not perform their portion of the contract and treat the contract as breached as of the time of the repudiation. Based on that, Fish Inc. was entitled to go out and find other suppliers as of the April 15th repudiation.

As to damages, under the UCC, when a party is in breach of contract, the opposing party is entitled to either cover, which is going out and finding substitute goods, or bring suit without covering. If they choose not to cover, they will not recover any damages that could have been mitigated.

As Fish Inc. chose to cover, and then cover would be deemed reasonable, the proper equation for recovery would be cover price minus contract price. Based on that the $5,000 counterclaim was proper.

Based on these facts, the court was improper in finding for Barnacle and instead should have found for Fish Inc. in the amount of $5,000.

B. The issue is what is the effect of an interested director transaction under the New York Business Corporation Law.

As Fish Inc. is a domestic corporation incorporated in New York, all of its internal affairs are governed by the New York Business Corporation Law.

The BCL specifically sets forth that a corporate director owes a duty of loyalty to the corporation - specifically the level of honesty, trustworthiness, and fairness that the law requires of fiduciary. As such, self-dealing is prohibited and interested director transactions may be set aside.

However, this does not apply if 1) the contract was fair and reasonable at the time of inception or 2) after full disclosure the contract is adopted by the Board of Directors, shareholders or unanimous vote of the Board of Directors, if interested directors are needed for a quorum.

Under the facts, Dirk is certainly an interested director as he owns BevCo., a company Fish Inc. is contracting with. Further, while he did disclose and the Board of Directors did adopt the contract by a majority vote, the BCL provides that the vote of the interested director may not be included under these circumstances.

As the vote was three to two in favor of the contract, and Dirk voted in the majority, his vote is excluded leaving two to two and this is not a majority for purposes of adoption.

Finally, as the shareholders were not presented with the opportunity to vote and there was not a unanimous vote of non-interested directors, the contract was an improper contract and can be avoided by Fish Inc.

C. The issue is whether the directors violated the duty of care by opening the restaurant and whether they are protected by the Business Judgment Rule or their reliance on the report of the chief financial officer.

Under New York law, directors and officers of a corporation owe a duty of care to the corporation, specifically the level of diligence, care and skill that an ordinarily prudent person would exercise under similar circumstances in like positions. While this is the rule, under the business judgment rule, a court will not second-guess the decisions of the Board if it was reasonably informed, in good faith, and had a rational basis.

Further, while Board members are liable for all actions taken by the Board of Directors, unless they specifically dissent in writing to the corporate secretary or on the record at the meeting, they have a valid excuse if their decision was based on reasonable reliance on someone they were entitled to rely on, such as counsel or an officer.

Under the facts, there was a proper meeting regarding the new opening in Utica, and the Board of Directors was reasonably informed. While the information the Board of Directors was relying on was incorrect, they were entitled to rely on it as it was presented by the president and chief financial officer who was a "trusted" employee.

Based on this, the Board of Directors would not be liable for mismanagement in voting to open the restaurant.

ANSWER TO QUESTION 1
A. Barnacle v. Fish Inc.

The issue is whether a party that anticipatorily breaches a contract may retract its intent to breach and seek damages under the contract when the other party refuses to carry out the terms of the contract.

A party breaches a contract anticipatorily when it expresses clearly and explicitly its intent not to perform under the contract before performance is due. An anticipatory breach is a present breach of contract, and the non-breaching party may seek damages immediately. Here, Barnacle anticipatorily breached its contract with Fish Inc. when it advised Fish Inc. on April 15, that "due to problems with suppliers", it would be unable to fill the Fish Inc. order for May 1.

A party that anticipatorily breaches a contract may retract its repudiation and restore the contract provided such retraction is timely. Timely means the non-breaching party has not yet relied on the breach by obtaining substitute goods for example. The non-breaching party may require assurances of intent to perform from the party that had breached however.

Here, Fish Inc. relied on Barnacle's anticipatory breach by seeking substitute goods from Cod. Barnacle did not retract its repudiation until April 29, when it announced intent to deliver, and Fish Inc. relied on the breach on April 27, when it placed an order from Cod. Note that Fish Inc.'s April 15 fax and Barnacle's subsequent silence do not constitute a retraction because a party could not reasonably rely on such silence after Barnacle's clear expression of repudiation.

Barnacle's retraction was not timely and therefore, Barnacle did breach the contract anticipatorily. The court erred when it awarded Barnacle's damages – Barnacle was not entitled to recover anything because it breached the contract.

Moreover, because Barnacle's anticipatory breach was a breach of the contract, Fish Inc. was entitled to seek damages. Fish Inc. sought cover, which is the difference between the contract price and the price of substitute goods ($5,000). The court should have awarded Fish Inc. $5,000.

B. May Fish Inc. avoid the contract with BevCo?

The issue is whether a corporation may avoid its obligations under a contract with a company in which a director is the sole proprietor.

Interested director transactions are transactions between a corporation and a party in which a director has a personal interest. The transaction between Fish Inc. and Barnacle was an interested director transaction because Dirk is one of Fish Inc.'s directors and he is the sole proprietor of BevCo.

A corporation may enter into an interested director transaction if it is shown to be fair and reasonable to the corporation at the time entered or, after complete disclosure from the interested director(s). The transaction is approved by 1) a shareholder majority vote (not counting interested shares), 2) a majority vote of the directors, not including the interested directors, or 3) a unanimous vote of the disinterested directors if the number of disinterested directors voting is insufficient to constitute a majority. If the transaction is not approved by one of these three methods, the board of directors does not have the authority to enter into the transaction and the corporation may seek to void it.

Here, Dirk disclosed his interest in the BevCo contract. There was, however, no shareholder vote. At the director's meeting, with five directors present including Dirk, a vote of three disinterested directors was required to approve the transaction (three is a majority of the four disinterested directors). The vote was three to two, with Dirk being one of the three directors to approve the transaction. The vote was insufficient to authorize the board to enter the contract.

Note the fact that the contract was a requirements contract which does not prevent it from being enforced. Under the UCC, requirements contracts are valid. The corporation may void an improperly approved interested director transaction unless it can be shown that the transaction was fair and reasonable to the corporation when entered. Here, the transaction was not fair and reasonable to the corporation at the time made because Fish Inc. was able to obtain prices 20% lower with a competitor of BevCo. Therefore, Fish Inc. may avoid the transaction as the Board had no authority to enter into the contract and could not properly accept it.

C. Director Liability for the Utica restaurant

The issue is whether the directors of Fish Inc. can be held liable for a business decision based on careless and inaccurate reports from company officers.

Under the duty of care, directors are obligated to carry out their duties to the corporation, in good faith, with the good faith and judgment of an ordinarily prudent person acting under similar circumstances. Courts will review the day-to-day business decisions of the Board of Directors under the business judgment standard, which implicates the duty of care. Directors are entitled to rely, in good faith, on reports and projections prepared by officers, committees, and outside consultants, such as accountants and lawyers, in evaluating business decisions.

Here, the decision to open the Utica restaurant will be reviewed under the business judgment standard because it is in accordance with the day-to-day business decisions of Fish Inc.. The directors were entitled to rely on the officers' reports in making their decision.

The facts indicate that the reports were prepared by the "trusted, long-time employees", the president and chief financial officer. However, in this situation, an ordinarily prudent person, in addition to relying on the office reports, would have made some investigation or outside verification of the process and/or the facts involved in preparing the reports. Here, the reports contained latent inaccuracies and projections and an ordinarily prudent person would have done additional work to verify the results or check the facts before deciding to invest corporate resources in opening a new restaurant. Minimal verification and fact checking would likely reveal the officers' careless errors. Because the directors did not meet the standard of care required by not being prudent, they breached the duty of care.

A director who breaches the duty of care will be liable to the corporation if his breach causes injury. Here, the violation resulted in Fish Inc. opening a restaurant that is experiencing significant losses. Therefore, the directors may be held liable for their misfeasance.

Question-Two

Nick asked Dom if he could store a tractor on Dom's property. A few days later, Dom overheard Nick tell a mutual friend that the tractor was stolen. Unbeknownst to Nick, Dom was a reliable police informant, who advised the local sheriff's office of Nick's statement. Dom told the sheriff that the tractor was now located on Dom's property, but that Nick had kept an ignition key. He told the sheriff that Nick was actively trying to sell the tractor by phoning potential buyers.

With Dom's consent, the sheriff inspected the tractor. By tracing an identification number stamped on the tractor, the sheriff located the owner, who confirmed that his tractor had recently been stolen. The sheriff obtained a warrant authorizing a search of Nick's house for the stolen tractor's ignition key, as well as "any other property which would be considered contraband."

During a search of a closed cabinet in Nick's house, the sheriff found a gun wrapped in clear plastic and adjacent to it, an ignition key for the tractor. Later, another gun wrapped in cloth was found hidden underneath Nick's bathroom sink. Both guns were unregistered.

The sheriff also obtained a warrant to place a wiretap on Nick's telephone line. The warrant application specified Nick's home address and the phone number for the telephone line, the only one which serviced his residence. It also set forth the reasons for believing Nick committed a crime and the type of communications sought to be intercepted, which included admissions of his theft of a tractor and his efforts to sell it by telephone. No other representations appeared in the application for the warrant. Between the time of the issuance of the warrant, which specified the phone number set forth in the application, and the installation of the wiretap, the phone number for the line was changed, although the line continued to be listed in Nick's name. After 40 days,

the sheriff intercepted a telephone communication by Nick that he stole the tractor. The following day Nick was arrested and charged with grand larceny and possession of unlicensed firearms.

Nick pled not guilty to the charges, and his counsel moved to suppress the evidence seized in the search and any admissions recorded during the phone wiretap. As the newest member of the District Attorney's office, you are asked to prepare a memorandum for the District Attorney outlining the likely outcome of the motion to suppress. You are asked to focus on the following questions:

1. Was the search warrant valid?

2. Should any of the evidence gathered during the search be suppressed?

3. Was the wiretap warrant properly issued?

4. Assuming the court concludes that the wiretap warrant was properly issued, should the admission obtained during the wiretap be suppressed?

ANSWER TO QUESTION 2

1. The issue is whether there was probable cause to issue the warrant and was it valid because of the listed items to be searched.

The 4th Amendment, as applied to the states through the 14th Amendment, protects individuals from unreasonable searches and seizures by the government. The police may search private areas, such as a home, only upon obtaining a warrant based on probable cause, by a detached magistrate, and specifying the place to be searched and items to be seized.

Here, the warrant was based on probable cause. A person takes the risk that his communications with another will be reported to the police. Here, Dom told the police about what he heard Nick say regarding the tractor being stolen. The sheriff then verified these facts through his own inquiry. Therefore, the Aguilar Spinelli Test used in New York was satisfied (basis for facts and reliability).

Here however, the warrant was not specific enough in the items that were being searched for. The key was a proper item, but "any other property…" is too vague and would not allow a reasonable police officer to know what he was searching for. Therefore, the warrant was invalid.

2. The issue is whether the police could properly rely in good faith on a defective warrant.

If as discussed above, the warrant was defective, the police in New York may not rely in good faith on it, as is allowed by the U.S. Constitution. New York’ s CPL denies police the good faith reliance on a defective warrant and will exclude the evidence (the mandated remedy for 4th Amendment illegal search and seizure).

Therefore, if the warrant was invalid, all evidence seized would be excluded. Had the warrant been limited to just the key, the sheriff also would not have been permitted to look for and seize the gun in the cloth, but maybe could have seized the one in a plastic bag. When executing a valid search warrant, the police may seize items in the "plain view" that are "plainly contraband". Here, there is an issue of whether the gun in the plastic bag was contraband, since the sheriff did not know just by looking at it that it was not registered. The one in the cloth would not be in the plain view. Since the search was already improper, both guns and the key should be excluded.

3. The issue is whether the wiretap warrant was specific enough and supported by probable cause.

Like search warrants, wiretap warrants must be obtained with probably cause and be specific as to the persons and communications which will be tapped. This is governed by the 4th Amendment, through the 14th Amendment.

Here, the warrant did specifically give Nick's address and phone number but did not state what persons would be included. However, this may be trivial since it did specify the types of communications sought (admissions of theft and attempts to sell). The warrant also was supported by probable cause based on the same information given to the magistrate.

4. The issue is whether Nick's phone number change and the specified duration of the warrant affect the admissibility of the evidence obtained.

The warrant was issued for Nick's number at the time of issuance. Although his number subsequently changed because it was still listed in his name, the police could reasonably rely that the number was still his. This does not equate to good faith reliance on a defective warrant because the warrant was valid when issued. Had the police later learned that the number was no longer Nick's, the tapping should have been ceased immediately because the warrant was issued to collect information about Nick and not some third person who later acquired the number.

A wiretap warrant may be issued for 30 days. After its conclusion, a notice must be sent to the suspect. Here, the evidence was tapped during the 40th day. At that point, the originally issued warrant was ineffective. Thus, the sheriff was conducting an illegal search and the evidence must be excluded.

ANSWER TO QUESTION 2
1. The issue is what requirements are necessary in order to have a valid search warrant.

In order for a search warrant to be valid, there must have been probable cause (reliable information that it is likely that evidence of illegality will be found at a particular location) to issue the warrant, the warrant must state with particularity the place to be searched and the item to be seized, and it must be issued by a neutral and detached magistrate. These requirements stem from the 4th Amendment's right to be free from unreasonable searches and seizures. In New York, there is an additional requirement that if the information underlying the affidavit came from an informant, the informant must be shown to be reliable and he must state the basis for his information.

Applying the rule to the present case, part of the warrant will be found to be valid and part will have to be invalidated. To begin with, the warrant was based on probable cause – Dom consented to the sheriff's coming onto his property to inspect the tractor, and as a result of that inspection, the sheriff was able to determine that the tractor had been stolen. Moreover, the first part of the warrant, authorizing a search of Nick's house for the stolen tractor's ignition key is valid because it is a statement of a particular item to be searched for, and it is in connection with this particular item that the warrant was able to be procured in the first place. On the other hand, the second part of the search warrant, that the police may search for "any other property, which would be considered contraband" is too broad and vague. Authorizing such sweeping searches is precisely what the 4th Amendment is designed to protect against.

Therefore, assuming that the other requirements for obtaining a valid warrant were met (that the warrant was issued by a neutral and detached magistrate and that the police can show that Dom was reliable and that the basis of his information was reliable), part of the search warrant was valid and part was invalid.

2. The issue is whether evidence gathered during a search pursuant to a search warrant can nonetheless be suppressed.

In order for a defendant to object to the admissibility of evidence, it must first be shown that the defendant has a valid 4th Amendment right. To have a 4th Amendment right, the action to which the defendant is objecting must have been committed by a government agent or a private person acting on behalf of the government, and the defendant must have a reasonable expectation of privacy in the item seized, as well as standing to object to the object's admission.

Here, the seizure was committed by a government actor (the sheriff). The defendant did have an expectation of privacy in the item seized (because it was within his home) and he did have standing to object to the admission of the evidence because he owned the premises that was entered and he had possession of the item seized. Therefore, Nick had a 4th Amendment right to be free from unreasonable searches and seizures.

Next, we need to determine whether the seized evidence can be suppressed. Under the exclusionary rule (a court-created rule to help enforce the 4th Amendment), evidence can be suppressed if it was obtained illegally. For example, if it was obtained without a search warrant. Moreover, any "fruits" of the illegal search can also be suppressed, if it is shown that the police did not have an independent source for the secondary evidence (for example, if the police would have discovered the evidence anyway, the evidence will not be considered "fruit"). Many states employ the "good faith" exception to the warrant preference rule, under which illegally seized evidence may nonetheless be admissible if the police had a good faith reason to rely on the warrant. However, New York does not recognize the good faith exception. Therefore, if the warrant is invalid or if evidence was obtained in violation of the warrant, the evidence seized will be inadmissible, unless one of the recognized exceptions to the warrant preference rule applies.

In the present case, the gun wrapped in clear plastic and the key to the tractor will both be admissible. The warrant was valid insofar as it permitted the police to search for the key to the tractor. As a result, the police were authorized to search the closed cabinet, because it was possible that the key was hidden there. The police were also authorized to seize the gun because they found it while they were looking for the key. Thus, the gun was in plain view. The plain view exception is one of the exceptions to needing a valid search warrant. Therefore, even if the second half of the warrant were invalidated due to vagueness, the police were entitled to seize the gun because they found it while searching for the key.

However, after the police found the key, they should have ended their search. Although the police were acting under the permission of the search warrant, the second half of the warrant was over-broad, and therefore invalid. Since we are in New York and the police cannot use "good faith" as an excuse, we would need to find another exception in order to admit the second gun into evidence. The exceptions available are: plain view, search incident to lawful arrest, automobile exception, consent, hot pursuit, evanescent evidence, and stop and frisk. Here, none of the exceptions applies to the second gun. Therefore, the gun was unlawfully seized and it should not be admitted.

In conclusion, the first gun and the key should be admitted into evidence, and the second gun should be suppressed.

3. The issue is whether the warrant to place a wiretap on Nick's phone was properly issued.

The general rule is that a warrant must be obtained before the government can place a wiretap on one's phone or eavesdrop into one's conversations. The exception to the rule, which is not applicable here, is that every person must be wary of the "unreliable ear" (the possibility that the person to whom is talking is bugged or that the person will consent to the police's

eavesdropping). Therefore, the warrant will be valid if it is based on probable cause, is precise, states with particularity the conversations to be listened to, and was issued by a neutral and detached magistrate.

Here, the warrant was properly issued because it was based on probable cause and it specified the address and phone number that were to be wiretapped. It also stated with particularity, which types of conversations were to be focused on. Had the warrant merely stated that the police were entitled to listen to "all conversations", the warrant would have been over-broad. Here, however, it was specific. But, in a wiretap warrant, there needs to be particularity as to both the content of the conversations listened to and the amount of time the police can listen. Otherwise, the 4th Amendment would be useless, because the government would be able to listen to all the conversations of a suspect until an incriminating statement was made. This intrusion would be too broad. Moreover, the warrant was procured based on a conversation that Dom overheard between Nick and a mutual friend. Had Dom not overheard this conversation, there would be no reason to think that the tractor was stolen or that Nick was attempting to sell it over the phone. Because of these two problems, it is possible that the warrant would be considered improper.

However, since Dom is a reliable police informant, it is likely that a court would find that his information was enough for a finding of probable cause. Moreover, Nick did not have an expectation of privacy in his conversation, since he spoke in public and loud enough for others to hear. Therefore, despite the two minor problems with the warrant, it will nonetheless be deemed properly issued.

4. The issue is whether an admission may be suppressed even if it was obtained pursuant to a properly issued warrant.

The rule is that a search warrant must state with particularity the item to be seized or the place to be searched. However, in certain situations, there are exceptions to this rule. One such exception is if the police are issued a valid search warrant for a suspect’ s home and they search the entire home not realizing that someone besides the person named in the warrant also lives at the address given in the warrant. If the police find illegal items in the unnamed person’ s part of the home, the court will admit the evidence regardless of the fact that the second person was not named in the warrant.

In the present case, a similar situation arose. Nick’ s phone number and address were named in the warrant, but after the warrant was issued, Nick changed his phone number. Therefore, the police were listening into Nick’ s conversations, but the incorrect phone number was in the warrant. In such a situation, the court would probably let the evidence come in. The goal of the warrant was to listen to Nick’ s conversations over Nick’ s phone line, not to listen to the conversations that occurred over a particular phone number.

However, the police may have a problem in that it took the sheriff 40 days to intercept a useful telephone conversation. It seems that 40 days is too long to continue to listen to someone’ s conversations if you have not yet heard anything of value. The warrant should have placed a time limit on the government’ s ability to listen in. However, they did not, and the police relied on the warrant. The police cannot use the "good faith" exception to the warrant preference rule to justify their actions, because that exception is invalid in New York. Since none of the exceptions named above apply in this situation, the admission obtained by the police will be suppressed. However, it could be used against Nick at trial for impeachment purposes, as illegally seized evidence is allowed for that purpose.

Question-Three

NEW YORK STATE BAR EXAMINATION
JULY 2004 QUESTIONS AND ANSWERS

In January 1989, Harry and Wanda were engaged to be married. After pooling their savings, they decided to purchase Blueacre, improved real property located in the Bronx. In June 1989, at the closing of title to the premises, Harry and Wanda paid one-half of the purchase price by certified check and both signed the mortgage documents for the balance due. The deed delivered to them was made to Harry and Wanda, "as husband and wife." Shortly thereafter, Harry and Wanda both moved to Blueacre and began to live together.

In June 1990, one year after they purchased Blueacre, Harry and Wanda were married. In 1991, Harry and Wanda planted a vegetable garden on a 50-foot strip of the property adjacent to a stream which they believed to be the boundary line to their property. Harry and Wanda installed several posts and a six-foot high fence around the garden to protect it from small animals and to clearly delineate the boundary line between what they thought was Blueacre and the property of their neighbor, Nancy. From time to time, at Wanda's invitation, Nancy would pick vegetables from the garden for her use.

In June 2002, Nancy decided to sell her home. In preparation for the sale, she hired a surveyor to perform a survey of her property. The survey revealed that the 50-foot strip where Harry and Wanda had planted the garden was not on Blueacre but was actually located on Nancy's property.

Nancy approached Harry and Wanda and asked that they remove the garden and fence. Harry and Wanda refused. Nancy convinced them to meet with a common neighbor, Art, an attorney, who had represented Nancy in the purchase of her property, to discuss a possible solution to the problem of the garden and the fence. At the meeting, Art advised the parties that he would act neutrally to mediate the dispute. After two lengthy mediation sessions, Art's attempts to get the parties to agree upon a settlement were unsuccessful. When Harry and Wanda refused to stop using the property, Art told them that he would see to it that Nancy "got her land back."

In January 2003, Art, as attorney for Nancy, commenced an action to quiet title to the 50-foot strip of land. In their answer to Nancy's complaint, Harry and Wanda asserted the affirmative defense of adverse possession. Harry and Wanda filed a motion to disqualify Art from representing Nancy on the ground of his prior role as a mediator. The court (1) denied the motion.

After trial of Nancy's action, the court found that Nancy was the fee simple owner of the 50 foot strip and that (2) Harry and Wanda had failed to establish that they were owners of the 50 foot strip by adverse possession.

In April 2004, Harry decided to seek a divorce from Wanda, quit his job and travel around the world. He moved out of Blueacre and consulted with an attorney who advised Harry that he had no cause of action for a divorce. However, Harry needed money to accomplish his dream of world travel, and Blueacre was his only asset. In May 2004, Harry commenced an action against Wanda seeking the partition and sale of Blueacre and half of the proceeds. In Harry's action, the court found:

(3) that as a result of their marriage, Harry and Wanda owned Blueacre as tenants by the entirety, and (4) that Harry is not entitled to the partition and sale of Blueacre.

Were the numbered rulings correct?

ANSWER TO QUESTION 3

1. The first issue is whether an attorney who acts as a neutral mediator can subsequently represent one of the parties in an action against the other party. As a mediator, Art is entitled to hear all sides of the story from Nancy, Harry, and Wanda. When an attorney acts in this capacity, it is unethical for him to subsequently represent one of the parties in a subsequent action. The basis

for this rule is to promote mediator neutrality through mediation processes and to prevent the mediator from later revealing any confidential information that he may have obtained during the course of the arbitration. Additionally, it clearly gives the mediator, turned adversary (Art), an unfair advantage because he has been privy to all the information at a prior point in time. As a result, the court ruling was improper and they should have granted Harry and Wanda's motion.

2. The second ruling involves the issue of whether or not Harry and Wanda were owners of the strip by adverse possession. More specifically, whether permitting Nancy to pick vegetables from the garden defeated their adverse possession claim.

In order to assert adverse possession, Harry and Wanda must show that: 1) they had exclusive possession of the land, 2) their possession was uninterrupted for ten years (the statutory period for adverse possession), 3) their possession was notorious and open, 4) they were not under a disability at the time the adverse possession began, 5) their possession was continuous, and 6) their possession was hostile to the true owner (Nancy).

In this case, Harry and Wanda used and possessed this tract of land continuously and uninterrupted from 1991 to 2002, thus satisfying the ten year statutory period. Furthermore, neither Harry nor Wanda was under a disability where the possession began in 1991. The couple notoriously and openly possessed the land by constructing a highly visible vegetable garden. This occupation of the land was hostile toward Nancy because Harry and Wanda did not seek Nancy's permission to use the land, they did not openly recognize the true owner of the tract of land, and they did not offer to buy the land from Nancy. The final element for adverse possession is exclusivity. Although Nancy was permitted to pick vegetables from the garden at Wanda's invitation, this does not defeat the exclusivity element of adverse possession. Instead, it shows that Harry and Wanda held themselves out as the true owners of the tract. The occasional use of the garden by Nancy did not amount to her occupying or possessing the land. As a result, Harry and Wanda have established their ownership of the tract by adverse possession and ruling two was incorrect.

Additionally, it should be noted that the existence of the fence delineating the boundary line and around the garden was not objected to by Nancy. As a result, under the Doctrine of Acquiescence, Nancy's failure to object to this boundary line serves to signify her approval of the delineation. Therefore, the boundary marked by the fence should prevail.

3. The issue is whether Harry and Wanda took Blueacre as tenants by the entirety despite them not being married when the deed was delivered. In New York, a tenancy by its entirety is only available in real property and cooperative shares. However, in order to establish a tenancy by its entirety, the parties must be married when title closes. This is a prerequisite for forming a tenancy by its entirety.

Therefore, although Harry and Wanda were engaged to be married, they were not married when the deed was delivered and cannot hold Blueacre as tenants by the entirety. Although the language in the deed identifies them as husband and wife, this is invalid and insufficient for creating a tenancy by its entirety. A valid marriage must exist.

When parties are not actually married when taking property as tenants by its entirety, New York law considers these concurrent tenants as joint tenants with the right of survivorship. Therefore, ruling three is incorrect because the parties were not married when acquiring Blueacre and, thus, cannot own it as tenants by the entirety.

Additionally, the property adversely possessed by Harry and Wanda (even if they were deemed tenants by the entirety) is taken as tenants in common because property adversely possessed by concurrent tenants is taken as tenants in common.

4. The issue is whether joint tenants are permitted to partition and sell property. Joint tenants are allowed to convey their interest in the property to a third person. Doing so converts the joint tenancy into a tenancy in common. Similarly, joint tenants can seek to partition the property (as can tenants in common). If the parties cannot agree on joint possession of the property or how to divide possession, a partition is an appropriate alternative. The proceeds from the sale will be divided between the joint tenants.

Here, it is clear that Harry and Wanda cannot agree on the divided possession of Blueacre. As a result, a partition and sale would be appropriate and ruling four was incorrect.

It is important to note that the court was treating Harry and Wanda as tenants by the entirety. If this were the case, the only way to destroy a tenancy in the entirety is by way of death of one of the spouses, dual transfer of the property, or one spouse becomes a debtor in bankruptcy. In this case, the tenancy by its entirety would not have been destroyed because the parties were still married (not divorced). In such tenancies by its entirety, partition is inappropriate and thus should not be ordered.

ANSWER TO QUESTION 3

1. The issue is whether Art violated the New York rules of professional responsibility in representing a current client in a case directly adverse to his former clients.

New York rules of professional responsibility do not permit the representation of any client in a matter that is directly adverse to a former client on the subject matter to which the attorney formerly represented the former client. This is considered a conflict. Former disadvantaged clients can waive this conflict. Art is an attorney. He acted as a mediator. Whether or not he was paid for this mediation, he acted in his official capacity as an attorney. He mediated the dispute between Nancy, Harry, and Wanda. He learned information that would become material to his representation of Nancy and it could be used against Harry and Wanda. He helped commence this suit against Harry and Wanda. Harry and Wanda did not waive the conflict. In fact, they petitioned the court to remove Art. Art should have been removed. The court was incorrect in allowing him to remain as Nancy' s attorney.

New York rules of professional responsibility do not permit one who acts as a mediator to ever represent either of the parties in whose mediation he participated.

2. The issue is whether Harry and Wanda successfully completed the requirements of adverse possession such that they owned the 50-foot strip of land. New York permits one to obtain good title of land through adverse possession for the statutory period, which is ten years. Adverse possession must be continuous, open, hostile and notoriously exclusive.

Harry and Wanda' s possession of the strip was continuous. They had a fence up continuously from 1991 to 2002. They planted a garden on the property. There is no suggestion that they abandoned the property or stopped using it for any time during the ten years. Note that a vacation is not abandonment.

Harry and Wanda' s possession was open. They openly built a fence. They treated the property as their own such that a casual observer would believe that it was owned by Harry and Wanda. They enjoyed the property as any owner would.

Harry and Wanda' s possession was hostile. New York does not require that hostility be satisfied by a party actually recognizing that he/she does not have good title. New York does not reward such an intentionally hostile party and regard the innocent accidental adverse possessor. Rather,

New York requires only that Harry and Wanda treated the property as their own such that any individual would know Harry and Wanda to be the owners. Harry and Wanda satisfied this by building a fence and planting a garden that kept others out.

Harry and Wanda' s possession was exclusive. Exclusivity can be learned from the fact that there was a fence up and they grew vegetables there, which prevented others from coming on the property without permission. The facts note that Nancy waited until being invited onto the property before she would pick vegetables.

Harry and Wanda' s possession was actual and notorious. They had a fence up and treated the land as their own. They enjoyed it as any owner would.

Note that Nancy' s suit to quiet title actually came too late anyway. She should have filed before the statute of limitations ran out. However, if the dates had been slightly different and she filed late because she was trying to reach a settlement, then the court might impose some equitable solution and allow her quiet title suit to be brought late.

3. The issue is whether Harry and Wanda, who own Blueacre, are tenants by the entirety, or if they own it as joint tenants.

New York recognizes the special conveyance of real property to a couple as tenancy by the entireties. In general, any conveyance to a married couple will create the tenancy by the entireties unless the deed says otherwise. In fact, it is the favored method of holding land for married couples and the court will assume that a married couple holds as tenancy by the entireties unless the deed otherwise notes.

The tenancy by the entireties has special attributes. A tenancy by the entirety has the right of survivorship. It does not allow for partition except voluntarily together, when both spouses are indebted as a judgment against them as husband and wife or jointly, or by divorce. The real property is protected from creditors or either spouse individually. Under New York law, though a party may alienate his/her part to a creditor or by sale, the person purchasing will only have what the party had to give. One half undivided interest with no right to bring partition case with possession is to be granted only if he/she survives the other spouse. This means that a person who buys such an interest will only take if that spouse survives the other spouse.

That said, Harry and Wanda did not take as tenancy by entireties. Tenancy by entireties is only afforded to husband and wife. Though they were a couple and though they were ultimately married they were not husband and wife, therefore they were not permitted to take as tenancy by entirety. If they wanted to hold as tenancy by entirety they could have sought a reformation of the deed or to have the deed reissued to them after their wedding as tenancy by entirety.

When a non-married couple buys property (or individuals), the preferred disposition is as joint tenants with the right of survivorship. The disposition of joint tenants with the right of survivorship is preferred in New York in the absence of a contrary provision in the deed. The joint tenancy is created by the four unities: time, title, interest and possession. They received the deed at the same time by the same instrument. They have equal interest, one half undivided, with right of use and possession of the whole and survivorship. Harry and Wanda hold as joint tenants.

Note there are other types of ownership of property to more than one person, if as a tenant in common without the right of survivorship. This is the result when a joint tenancy is severed. Wanda and Harry own the 50-foot strip of property as tenants in common. When one adversely possesses a piece of property it is not gained as joint tenants but only as tenants in common.

The court wrongly determined that Harry and Wanda owned as tenancy by entirety. They own as joint tenants.

4. The issue is whether Harry may force a partition of Blueacre.

Tenants by the entirety have no right to force a sale. If Harry and Wanda owned as tenancy by entirety, Harry could not force a sale of Blueacre.

In general, joint tenants (or their creditors) have the right to partition jointly owned property. Partition can be involuntary by agreement, in kind, or by sale. When property is undeveloped and unimproved, the preferable method of partition is in kind. This permits the property to simply be divided. It allows any party to sell and it has the least hold on alienation. Harry cannot ask the court to partition in kind because the property is improved and there is not usually a way to equitably divide improved property.

Harry could seek a voluntary partition agreement by Wanda where she could agree to purchase his interest. There is nothing in facts to suggest that Wanda would agree to this. Harry can petition the court for a partition by sale. A partition by sale will take into account how much each party owns of a piece of property. Unmarried individuals who own property jointly must prove contribution. Married couples are assumed to own the property 50/50 regardless of actual contribution. Though Harry and Wanda were not married when they bought, Harry and Wanda were engaged when they purchased. The fact that they were married, lived there, and owned as a married couple will allow the court to assume that their ownership is 50/50.

Note that Harry is likely estopped from denying this and trying to prove contribution because the property was deeded to them, as husband and wife, and they have owned it together as marital assets for years.

The court wrongly denied Harry the right as a joint tenant to partition for sale of Blueacre.

Harry can automatically alienate his portion of the strip obtained by adverse possession since it is owned as a tenancy in common. He should move to quiet title, get a deed issued, and sell his half of undivided interest.

Though Harry has no grounds for divorce, he can request a separation and then ask for a conversion divorce. A separation can be decreed by the court or can be entered into voluntarily without the court. It should be negotiated by the parties, written, acknowledged by a notary, and filed with the court. After one year, the court can grant a conversion divorce. A conversion divorce is not permissible, however, if there are no grounds and the other party does not agree.

Question-Four
Paul, a New York resident, was driving through an intersection in New York City when his car was struck by a car driven by Dan. At the time of the collision, Dan was speeding and had run a red light. As a result of the collision, Paul's car was pushed onto the sidewalk, striking Walker, a pedestrian.

Shortly after the accident, Officer Ike interviewed Paul, Dan and Walker. Officer Ike's accident report noted that Dan's vehicle was registered in State X and insured by AutoCo, a State X company that does business in New York, but that Dan's driver's license listed a New York address.

Walker declined medical assistance at the scene, but later went to her doctor complaining of a headache. The doctor examined Walker, ran some medical tests, and charged Walker $500.

Walker had no health insurance and paid the doctor $500 in cash. Walker has timely filed a claim with Paul's automobile insurance carrier seeking reimbursement for her medical expenses.

Complaining of neck and back pain, Paul was taken by ambulance to the hospital, where he was examined and released. No diagnostic tests were performed on Paul. He later went to his doctor for treatment. Paul did not miss any time from work as the result of the accident.

In his application to AutoCo for insurance, Dan misrepresented that he resided at, and would garage his car at, his mother's State X address. AutoCo always sent Dan's insurance premium bills to the State X address. Upon receipt of the police accident report, AutoCo retroactively cancelled Dan's insurance, based on the misrepresentations made by Dan in his application. Dan commenced an action in New York against AutoCo seeking a declaratory judgment that his policy was in effect at the time of the accident, because New York law does not permit retroactive cancellation of automobile insurance policies. AutoCo's defense is that State X law permits retroactive cancellation, if the cancellation is based on a misrepresentation that was material to the risk when assumed. During discovery, Dan admitted that although he was a New York resident, he stated in his application for insurance that he was a State X resident who would garage his car in State X.

In January 2004, Paul duly commenced an action against Dan in Supreme Court to recover damages for his personal injuries caused by Dan's negligence. Dan's attorney had Paul examined by a physician retained by Dan, who submitted an affidavit which stated that although Paul complained of neck and back pain, there were no objective physical findings to corroborate those complaints.

After discovery was complete, Dan moved for summary judgment on the ground that Paul had not suffered a serious injury as defined by New York law. Dan's motion papers included the affidavit of the physician retained by Dan, and Paul's deposition testimony that he missed no time from work as a result of the accident. In opposition to Dan's motion, Paul submitted an affidavit from his doctor, which noted Paul's complaints of pain, and provided a diagnosis of back and neck sprain, for which he prescribed a continuing course of therapy from the date of the accident to the present time. The affidavit did not reference any objective testing to support the doctor's diagnosis or include any indication that Paul's daily activities were limited in any way because of his injuries.

(1) Is Walker entitled to recover $500 from Paul's insurance company?

(2) In Dan's declaratory judgment action, should the New York court apply the law of New York or the law of State X?

(3) How should the court rule on the summary judgment motion?

ANSWER TO QUESTION 4
1. Walker’ s recovery from Paul’ s insurance

The issue is whether a pedestrian hit by a driver can recover for his damages under the no-fault insurance scheme.

New York has a no-fault insurance policy that states when there is an auto accident, rather than sue, the driver looks to his insurance policy to reimburse him for any personal injuries he suffered as a result of the accident, as long as they are not serious injuries. The fault or negligence of the parties does not matter, as long as the covered driver was not intoxicated or intentionally caused

the accident. New York extends the no-fault coverage to passengers of the drivers and pedestrians that may have been injured by the accident.

Here, Paul was not negligent when he hit Walker, the pedestrian. However, Walker can still look to Paul's insurance company to reimburse him for his medical expenses because they are not based on serious physical injuries (it was only $500 for a headache and some medical tests). Even though it is Paul who is covered by the policy and he was not at fault, Walker can be reimbursed by Paul's insurance company because no-fault policy does not take negligence into account and extends to pedestrians injured in a car accident.

2. Declaratory Judgment

The issue is what choice of law the New York court should choose when the claim is about the interpretation of an insurance policy.

In New York, when the claim is about an insurance policy, New York courts apply the law of the state from which the insurance policy is issued. It is an exception to the center of gravity test New York courts use when assessing what law to apply when deciding a contractual dispute between two parties from different states.

Here, the New York court should apply State X's law because AutoCo is a State X company and therefore, the policy was issued from State X. The insurance company exception thus applies. Since the dispute was about an insurance policy, and State X is the state from which the insurer issued the policy, State X law should be chosen.

3. Summary Judgment Motion

The issue is whether a doctor's affidavit, unsupported by any objective testing, raises a genuine issue of material fact in a summary judgment motion where another doctor found there were no objective findings to prove damages.

A motion for summary judgment is brought by a party seeking to dismiss another party's claims after an answer to the original complaint has been served. The motion must be supported by documentary evidence and/or affidavits by people with personal knowledge of the events in the case. The standard the court used is that there is no genuine triable issue of material fact disputed between the parties. The elements that a party must prove when he brings a negligence action are duty, breach of duty, factual and legal causation, and damages. A party must raise a genuine triable issue of material fact for all these elements in order to defeat a summary judgment motion.

Here, the only issue that Dan is raising in his summary judgment motion is that Paul suffered no damages because he suffered no serious physical injury. His motion is supported by the requisite evidence because he has submitted an affidavit of a doctor who says that he could find no objective findings that Paul suffered from any damage and Paul's deposition that he missed no work. The doctor's affidavit is supported by personal knowledge because the doctor personally examined Paul himself. If Paul did not counter any of Dan's information, there would be no genuine triable issue of material fact on the damages issue and summary judgment would be granted. However, Paul submitted an affidavit from his own doctor where the diagnosis was a back sprain and a long course of treatment. This affidavit is based on personal knowledge as well because Paul's doctor examined Paul himself. But the affidavit contains no objective testing or anything suggesting that Paul was limited in any way. Although it is true that the weight of the evidence is certainly against Paul, Dan's motion for summary judgment should be denied because Paul has raised a genuine triable issue of material fact. A reasonable fact finder might conclude Paul's doctor is correct. A neck and back sprain that requires continuous treatment

constitutes a serious physical injury, at least enough to satisfy the damages element in a negligence action.

Therefore, Dan's motion for summary judgment should be denied because Paul has raised a genuine triable issue of material fact that he actually did suffer damages in his negligence claim.

ANSWER TO QUESTION 4

1. The first issue is whether Walker is entitled to recover $500 from Paul's insurance company despite the fact that Paul was not negligent in causing Walker's injury.

In New York, all resident drivers are required to obtain liability insurance and no-fault insurance up to $50,000. In an action seeking personal injuries as a result of a car accident a plaintiff is relegated to the no-fault insurance scheme to seek recovery in the absence of a more than basic economic loss. This includes medical expenses equaling 80% of lost wages and other miscellaneous expenses that exceed $50,000 in one year, or the plaintiff must have incurred a serious physical injury. All drivers, passengers and parties hit by the automobile are covered by the no-fault insurance scheme. Further, all of these parties are covered whether they are negligent themselves or whether the driver was negligent.

Here, Paul is a New York resident and therefore, his car must have no-fault insurance. Also, the facts indicate that Walker was struck by Paul's car. Therefore, Walker is within the no-fault insurance scheme. Further, any claim he has against Paul for personal injuries is relegated to the no-fault insurance scheme, and it is no defense that Paul was not negligent. Since Walker is seeking damages for personal injury as regards to his medical expenses, and he has not incurred more than basic economic loss or a serious physical injury, he is entitled to recover the $500 from Paul's insurance company.

2. The second issue is whether Dan is entitled to have New York's law on retroactive cancellation of insurance policies applied in his suit brought in New York.

As a New York law and State X's law regarding the retroactive cancellation of insurance are different there is a conflict of law issue. In resolving conflict of law issue is the New York courts use the government interest analysis. In this analysis, the courts will identify the conflicting laws, the policies underlying those laws, the connection the states have to the transaction and to the parties, and the extent those policies interact with those connections. Here, the conflicting laws are whether an insurance company is entitled to retroactively cancel insurance. State X permits retroactive cancellation if the cancellation is based on a misrepresentation that was material to the risk when assumed. The policy underlying this law is likely to protect the insurance company's assets from unrealized risk and potential liability due to an insurance applicant's fraud. On the other hand, New York does not permit the retroactive cancellation of insurance policies. The policy underlying this law is likely to ensure that injury plaintiffs are entitled to some recovery for their injuries. Here, the facts show that AutoCo was a State X company, the potential applicant, Dan, provided a State X address, the insurance premium bills were sent to that address, and the insurance company issued the policy in reliance on that address. All these contacts favor applying State X's law to this declaratory judgment action. Further, as this action is between Dan, the potential defendant, and the insurance company, none of New York's pro plaintiff policies are implicated in this action. Therefore, under a government interest analysis New York should apply the law of State X. As further support for this conclusion under a typical contract analysis under a conflict of law is the "center of gravity test". This test analyzes the domicile of the parties, the place where negotiation for the contract took place, the place of execution, and the place of performance. Further, New York law provides an exception for insurance policies. For insurance policies, New York applies the law of the state where the policy was issued. Here, the

state was State X. All these factors seem to favor State X law, and accordingly State X law should apply to this declaratory judgment action.

3. The final issue is whether Paul has satisfied his burden of proof to establish a serious injury so as not to be relegated to the no-fault insurance scheme.

Dan, as the moving party for summary judgment, must submit evidence in the form of affidavits, documents, or discovery materials from people with personal knowledge showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Paul, as the opposing party, cannot just rest on his pleadings or a general denial, but must also submit evidence in a similar form to show the existence of a genuine issue of material fact.

Here, as described above, if a plaintiff is covered by the no-fault insurance scheme, that plaintiff is relegated to pursuing his/her personal injury claims against the insurance company. Here, since Paul was the driver of the car he will be forced to pursue a personal injury remedy against his insurance company unless he is able to establish that he has suffered more that basic economic loss or a serious physical injury. Serious physical injury includes loss of a limb, death, severe disfigurement, loss of the function of an organ, or other severe physical injury. As Paul has not claimed to have suffered more than basic economic loss, his claim to escape the no-fault insurance scheme must be based on severe physical injury. Dan, as the moving party, has submitted proper evidence in the form of an affidavit from the position and Paul's testimony that he has missed no time from work. In opposition, Paul has only submitted an affidavit, which notes his complaint of back pain and a neck sprain. This evidence does not fall within one of the categories for establishing a serious physical injury to escape the no-fault insurance scheme. Dan has submitted appropriate evidence establishing that Paul has not suffered a serious physical injury. Paul has not introduced any contrary evidence from which a reasonable juror could conclude that his injuries fall within one of the serious physical injury categories. Dan has established that there are no genuine issues of material fact and he is entitled to judgment as a matter of law. Therefore, Paul's claim for personal injuries he is relegated to the no-fault insurance scheme and must sue his insurance company to recover.

However, if Paul was seeking recovery for any property damage caused by Dan's negligence, he would not be relegated to the no-fault insurance scheme on these grounds.

Question-Five

Hub and Win were married in 2002. Prior to their marriage Hub and Win orally agreed that each would execute a will naming the other as sole beneficiary. Shortly after their marriage Win executed a will prepared by her lawyer. The will named Hub as the sole beneficiary but did not refer to the oral agreement.

Hub died in June 2004, a resident of New York, survived by Win and his mother, Mona. The only will discovered among Hub's effects upon his death was a will which his lawyer, Len, had prepared and Hub had executed in 2001. In the will Hub named Mona as sole beneficiary and Len as sole executor.

Hub's estate, after payment of all debts, administration expenses and funeral expenses, consists of (a) a condominium at a Vermont ski resort in Hub's name alone free of any liens, valued at $180,000; (b) a joint savings account in the names of Hub and Mona, the only deposit into which was made by Hub when he opened the account in 2001, having a balance of $90,000; (c) a joint checking account in the names of Hub and Win, having a balance of $30,000, all of which had been provided by Hub; and (d) a savings account in the name of Hub, in trust for Mona, the only deposit into which was made by Hub when he opened the account in 2001, having a balance of $120,000.

NEW YORK STATE BAR EXAMINATION
JULY 2004 QUESTIONS AND ANSWERS

Win has inquired of Len as to her rights in Hub's estate.

1. To what extent may Len advise Win about her rights?

2. To what extent, if any, does Win have rights in Hub's estate under the agreement to execute mutual wills?

3. Assuming Win has no rights under the agreement, and the 2001 will is admitted to probate, what rights, if any, does she have in Hub's estate?

ANSWER TO QUESTION 5

1. The issue here is whether Len has a conflict of interest that would preclude him from advising Win of her rights. Under New York's Code of Professional Responsibility, a possible conflict of interest arises when a lawyer's own interest may affect his/her representation.

In simultaneous representations, a conflict arises if the lawyer's representation of one client would affect his judgment with respect to the other client. In situations involving a lawyer's own interests, a conflict arises where the lawyer's own interests would affect her representation of her client. In both situations, the client can waive the conflict if 1) a disinterested lawyer would think that the lawyer in question could adequately represent the client in the case and 2) the client waives the conflict after full and complete disclosure of the conflict and potential consequences.

Here, Len has a conflict both because of his simultaneous representation of Hub's estate (as executor) and Win, and because of his own interests as the executor of Hub's estate. In his simultaneous representation, he needs to try and dispose of the assets as Hub intended, which is clearly against Win's interests because she received nothing under Hub's will. Furthermore, there is a conflict of interest between Win and Len's own interest as executor. If Win wants to challenge the validity of Hub's will, Len could lose his statutory commissions or attorney's fees. A disinterested attorney would not think that Len could adequately represent Win in light of these conflicts. Therefore, Len may not advise Win except to tell her to get her own attorney in the matter.

2. The issue here is whether Win and Hub entered into a valid agreement to execute mutual wills. Under New York's Estates, Powers and Trusts Law (EPTL), contracts to execute wills are valid but only if expressly stated in the will. Furthermore, under the EPTL, a will that is complete and unambiguous on its face cannot be varied by reference to extensive evidence.

Here, the oral agreement to execute mutual wills is invalid because there is no reference to it in either will. Furthermore, despite the fact that Win's will does name Hub as sole beneficiary, extensive evidence (i.e., testimony about the existence of an oral agreement) will not be admitted to support her contention that the naming of Hub as sole beneficiary was made pursuant to a contract to execute mutual wills. Win's will was unambiguous and complete on its face. Therefore, Win has no rights under the agreement.

Note also that even if this were an anti-nuptial agreement, it would still have to be in writing by both parties and acknowledged. Since it was not in writing, the contract was invalid.

3. The issue here is what Win's elective share of Hub's estate will be. Under the EPTL, a disinherited spouse is entitled to take an elective share of her deceased spouse's estate making the elective within the statutory period after decedent's death. The elective share statute entitles the spouse to receive the greater of $50,000, or one third of the spouse's net estate, augmented by testamentary substitutes and 6% interest after filing of testamentary.

Testamentary substitutes include a variety of things such as totten trusts and survivorship accounts. A totten trust is a bank account, which the decedent opened in his name, as trustee for the beneficiary. The creator of the account holds exclusive power over the contents of the account during his lifetime (partial revocation each time he withdraws) and at his death, the beneficiary is entitled to any funds remaining in the account. On the other hand, a survivorship account is one in which both people named on the account have full power to withdraw, and at one person's death the survivor receives the remainder.

Note also that a spouse is entitled to receive certain things such as furniture, the car, and cash up to $15,000, in a total amount up to $56,000. This share comes off the top of the estate and is not included in the elective share.

Here, Hub's net estate consists of the condo at a Vermont ski resort worth $180,000. It is irrelevant that the title was in Hub's name alone. The net estate will be augmented by the two survivorship accounts and the totten trust. As to the joint savings account of Hub and Mona, one half will be considered a gift to Mona regardless of consideration furnished because it was created in 2001, before Hub and Win were named. Only the other half is included as a testamentary substitute. Next, the joint and survivor account for Hub and Win is includable as to one half because joint and survivorship accounts between spouses are also considered a gift equal to one half. Finally, the totten trust, which Hub held as trustee for Mona will be added to the net estate in full as a testamentary substitute. Next, subtract the amount of the joint savings account passing directly to Win.

As a result, Win's estate share is one third ($180,000) + ($45,000 + $15,000+ $120,000) minus $15,000 = $105,000. Therefore, Mona is entitled to $105,000 + $15,000. She already received the additional amount for the personal items; car ($15,000), up to $50,000 for a total of $120,000 plus the extra. The elective share is payable pro rata out of other parties' shares.

ANSWER TO QUESTION 5

1. The issue is whether an attorney and will trustee for a decedent may advise a person who contests the will.

Under the EPTL, an attorney for a decedent is deemed to be in privity of contract only with the decedent. As an executor, that person has a fiduciary duty to the decedent to see that the wishes expressed in the will are carried out. As such, an attorney with such a conflict of interest may not take on a will contestant as a client unless the decedent waives the conflict, which is obviously impossible once the person has died. An attorney in such a position may not reveal confidences and secrets of the decedent, even after death (per the CPLR).

Here, Len is both Hub's attorney in executing the will and executor charged with a duty to execute Hub's will. He may not reveal any of Hub's secrets and confidence, and his duty to Hub as a trustee is in conflict with Win's interests. Thus, Len may not advise Win as to her rights and may only advise her to seek counsel of her own.

2. The issue is whether an oral contract to execute mutual wills is enforceable in New York, and the consequences of breach after the death of a breaching party.

In general, contracts to execute mutual wills are enforceable in New York. However, such an agreement must be in writing, signed, and acknowledged by the party to be charged (here, the decedent). In addition, the claiming party must not have breached the agreement and have stated in their own will the concurrent obligation for the one person to name the other in their own will. Here, we have merely an oral promise to execute mutual wills. Win did create a will, naming

Hub, but because she failed to include a record of the mutual obligation in her own will, Hub never became bound by the contract. The merely oral promise to create mutual wills is, therefore, unenforceable by Win, and she has no rights in Hub's estate under that contract.

3. The issue is how much of Hub's estate will pass to Win as part of her elective share.

Under the EPTL, a spouse has a right to take an "elective share" of a decedent spouse's estate to the extent that her testamentary share falls below that amount. The elective share is the greater of $50,000 or one third of the decedents estate. The net estate for election purposes also includes "testamentary substitutes", to ensure that such substitutes cannot be used to prevent passing to a spouse, thereby defeating the policy behind the rule. It should also be noted that the spouse is entitled to a statutory set-aside of farm equipment ($15,000), furniture ($10,000), marital car ($15,000), cash ($15,000), and various media ($1,000). Here, if Win is entirely denied anything under Hub's will, she can elect to take her elective share within six months of the will's probate or one year from death.

Hub's general estate includes the $180,000 condominium. The joint savings account in the names of Hub and Mona is considered a survivorship account created prior to the marriage. In New York, the creation of such an account is considered an irrevocable gift to the other as to 50% of the moneys contributed. Because this account was created pre-marriage, 50% of the account ($45,000) is not a testamentary substitute, but rather a pre-marriage gift. However, the other amount is a testamentary substitute to the extent that Hub's contribution (100%) can be shown. Thus, $45,000 of the joint savings account is in the net estate. The joint checking account has a right of survivorship to Win, who takes that $15,000. The other half is considered part of the net estate.

Finally, the account in trust for Mona is considered a "totten trust" because the creator could revoke at will and the beneficiary would not receive until the creator's death. The totten trust is considered a testamentary substitute to the extent not revoked by will or by lifetime withdrawal.

Thus, Hub's "net" estate is $360,000 [$180,000 (condominium) + $45,000 (joint saving account) +$15,000 (joint checking account) + $120,000 (totten trust)]. Therefore, Win is entitled to $120, 000 from the net estate less the amount passing to her by survivorship rights in the joint checking account ($15,000). Win is entitled to recover $105,000 to be taken from Mona's proceeds (in addition to the aforementioned statutory set-asides).

MPT
In re Graham Realty, Inc. v. Brenda Chapin (7/04-2)

Applicants work in the Franklin Legal Aid Society representing Brenda Chapin, a tenant in an apartment building owned by Graham Realty, Inc. (GRI). GRI has brought a summary eviction proceeding against Ms. Chapin for failing to pay her rent. Ms. Chapin has been withholding her rent for seven months because GRI has refused to repair numerous defects in her apartment, notwithstanding her repeated requests. To successfully defend against GRI's eviction action, Ms. Chapin will have to prove that GRI breached the implied warranty of habitability. Applicants' task is to draft a case planning memo that identifies and evaluates Ms. Chapin's claims, counterclaims, defenses, and/or remedies in the eviction action. The File consists of the Legal Aid Society's intake officer's interview with Ms. Chapin, a letter from Ms. Chapin to GRI's building manager detailing the defects in her apartment, the Legal Aid Society's case planning memorandum guidelines and examples, City of Avon Building Inspector Violation Report, and a newspaper article. The Library contains sections of the Franklin District Court Act and the Franklin Real Property Code, as well as two cases.

NEW YORK STATE BAR EXAMINATION
JULY 2004 QUESTIONS AND ANSWERS

ANSWER TO MPT
TO: Joseph Murray, Supervising Attorney

FROM: Applicant

DATE: July 27, 2004

RE: Graham Realty, Inc. v. Brenda Chapin

Claim: Breach of Franklin Real Property Law/Breach of Implied Warranty of Habitability

Legal Authority: Section 500 of the Franklin Real Property Law requires that landlords who lease residential premises warrant that the premises and all common areas are safe, clean, and fit for basic human habitation. This implied warranty of habitability cannot be waived. Substantial violations of applicable housing codes are prima facie evidence that the landlord has breached the warranty of habitability. (Virgil v. Landy)

Element #1: The landlord failed to deliver or failed to maintain premises that are fit for human habitation and for the uses reasonably intended by the parties.

Evidence available to show Graham Realty, Inc. failed to deliver premises that were fit for human habitation:

-Testimony by Brenda Chapin that the bathroom ceiling leaks and that chunks of plaster have fallen in the bathroom; that there is a smelly, slimy green fungus spreading in the bathroom on the wall; that there are cracks and holes in the walls; that the apartment needs painting and plastering; that heat and hot water sometimes do not work; that there are rats in the apartment; and that the elevator is sometimes out of service for three to four days.

-Copy of the May 21, 2004, letter written by Brenda Chapin to Mr. London, the building manager, cataloging her complaints (including the plaster falling, rats, and lack of heat).

-Copy of the violation report from the Avon Building inspector.

Element #2: The tenant must show she notified the landlord of the deficiency or defect not known to the landlord and allowed a reasonable time for its correction.

Evidence available to show Chapin notified Graham Realty, Inc. of the defects in her apartment and allowed a reasonable time for correction:

-Testimony by Chapin that she left numerous messages for Mr. London on his answering machine and with his secretary. Also testimony that she informed Victor, the superintendent, of the needed repairs.

-Testimony by Mr. London’ s secretary that Ms. Chapin left several messages.

-Copy of Chapin’ s May 21, 2004 letter to Graham Realty, Inc.

-Testimony by Victor, the building superintendent, that Ms. Chapin notified him of the defective conditions.

Remedies:

NEW YORK STATE BAR EXAMINATION
JULY 2004 QUESTIONS AND ANSWERS

A. Rent Abatement

Legal Authority: Section 240 of the Franklin District Court Act authorized the housing division to fashion any remedy to enforce housing standards to accomplish compliance or to protect and promote that public interest. This includes, but is not limited to, abatement of rent, remedial damages and punitive damages. (§240 Franklin District Court Act). Rent abatement damages are equal to the difference between the value of the apartment as warranted and the value as it exists in its defective condition.

Elements: Determine the percentage reduction of habitability or usability based on the area affected, amount of time tenant is exposed to the defect, the degree of discomfort and annoyance the defect imposes, the health-threatening affects of the defect, and the extent to which the tenant finds the defect to make the premises uninhabitable. This is deducted from the agreed upon monthly rent for the premises as properly warranted. (Virgil v. Landy)

Evidence of the reduction of habitability based on the defects on the premises:

-Testimony by Chapin concerning the extent to which the defects interfere with her use of the premises, make living there uncomfortable or unsafe.

-Testimony by her daughter, Mary, concerning the rats in the apartment and her fear of them. Mary could also testify about her head injury from the falling plaster.

B. Remedial Damages

Legal Authority: Section 240 of the Franklin Real Property Law allows for remedial damages when a tenant incurs out-of-pocket expenses to remedy a defect of which she has informed the landlord but the landlord has failed to repair within a reasonable time. (Virgil v. Landy)

Elements: The tenant must show that she incurred out-of-pocket expenses to correct a problem the landlord failed to correct on notice.

Evidence in support of Ms. Chapin' s remedial expenses:

-Testimony by Ms. Chapin that she spent $79 on a space heater and that her electric bills have greatly increased due to additional use of the heater and stove to heat the apartment and water for bathing.

-Receipt for the space heater.

-Past and present copies of the electric bills.

C. Punitive Damages

Legal Authority: Section 240 of Franklin Real Property Law allows a tenant to recover punitive damages to punish conduct that is morally culpable, to deter repetition of the same action by landlords. When a landlord fails to make repairs, such that a showing of bad spirit and wrong intention is evident, punitive damages are recoverable by the aggrieved tenant. (Virgil v. Landy)

Elements: Tenant must show that the landlord had notice of the defect and persistently failed to make repairs that were essential to the health and safety of the tenants.

Evidence that Graham Realty, Inc.' s persistent failure to repair was morally culpable:

-Testimony by Chapin of her repeated attempts to inform Graham Realty, Inc. of the defects.

-Copy of Chapin's letter to Graham Realty, Inc. informing of the problems.

-Copy of the Avon Gazette article indicating that Briggs is being gentrified and that landlords are trying to force current tenants out to allow newer, high class tenants to move in.

There are additional damages available to Chapin that may not be pursued through the summary eviction proceeding. Chapin also has a claim for negligence against Graham Realty, Inc. based on the injury sustained by Mary. Chapin may be able to recover for the medical expenses she paid and her lost wages from work due to caring for Mary. However, this claim will need to be filed in a separate action, as summary proceedings are reserved for resolution of quick cases involving traditional landlord-tenant disputes and housing standards. (Bashford v. Schwartz)

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Claim: Breach of Franklin Real Property Law/Warranty of Habitability

Legal Authority: §500 of Franklin Real Property Code provides that in every rental agreement for residential premises, the landlord shall be deemed to warrant that a) the premises are fit for human habitation; and b) the occupants shall not be subjected to any conditions that would be dangerous, hazardous, or detrimental to health or safety. (Virgil v. Landy)

Element #1: Landlord caused occupants to be subjected to dangerous conditions, detrimental to their health and safety.

Evidence available to show landlord caused Brenda Chapin and family to be subjected to dangerous conditions:

-Testimony of Brenda Chapin regarding condition of bathroom, loss of heat, non-functioning elevator, and rodent problem.

-Testimony of superintendent regarding rodent infestation and other conditions.

-Pictures taken by Brenda Chapin.

-Violation report by building inspector.

Legal Authority: A substantial violation of an applicable housing code shall constitute prima facie evidence of breach of the warranty of habitability. (Virgil v. Landy)

Element #2: Landlord has documented violations of the "hazardous" and "immediately hazardous" class for conditions existing in Brenda Chapin's apartment.

Evidence available to show violation of housing code:

-Violation report by building inspector

Legal Authority: In order to bring a cause of action for breach of implied warranty of habitability, tenant must show that he or she notified the landlord and allowed a reasonable time for correction of the defect. (Virgil v. Landy)

Element #3: Ms. Chapin notified landlord of dangerous conditions and allowed a reasonable time for correction.

Evidence available to show notice to landlord:

-Letter from Brenda Chapin to Herb London, Graham Realty, Inc.' s building manager, indicating her numerous phone calls and messages.

-Testimony of Herb London' s secretary regarding Ms. Chapin' s numerous phone calls.

Remedy: Reduction of rent through abatement

Legal Authority: Remedy provided under §240 of Housing Division of Franklin District Court Act for enforcement of housing standards – remedies shall include the reduction of rent through abatement. The measure of rent abatement damages shall be the difference between the value of the dwelling, as it exists in its defective condition. (Virgil v. Landy)

Element #1: Ms. Chapin is entitled to abatement of rent to the extent of the reduction in fair rental value due to defective conditions.

Evidence available to show difference between value as warranted and value in defective condition:

-Copy of Ms. Chapin' s lease.

-Testimony of Ms. Chapin and superintendent regarding defective conditions.

-Pictures taken by Ms. Chapin showing defective conditions.

Remedy: Withhold rental payments

Legal Authority: A tenant may, where there has been breach of implied warranty of habitability, withhold the payment of rent. (Virgil v. Landy)

Evidence available to show breach of implied warranty of habitability: See above.

Remedy: Remedial Damages

Legal Authority: §240 of Housing Division of Franklin District Court provides that remedies for enforcement of housing standards include imposition of remedial damages. Remedial damages are available for measures taken by tenant when landlord is notified of defect but fails to remedy it within a reasonable time, and tenant has incurred out-of-pocket expenses to remedy defect.

Element #1: Landlord was notified of defects in Ms. Chapin' s apartment

Evidence available to show notice to landlord:

-Ms. Chapin' s letter to Herb London.

-Violation report by building inspector.

Element #2: Landlord failed to remedy defect within reasonable time

Evidence available to show landlord's failure to remedy defect:

-Letter from Ms. Chapin to Herb London.

-Testimony of superintendent.

-Testimony of Ms. Chapin.

Element #3: Tenant has incurred out-of-pocket expenses to remedy defect.

Evidence available to show Ms. Chapin's expenses:

-Electric bills.

-Receipt for space heater.

Note: Ms. Chapin will probably not be able to recover the damages incurred in Mary's medical expenses, or Ms. Chapin's lost wages, as a result of the injury Mary suffered from the plaster falling on her head. Franklin case law states that "where questions of negligence, proximate cause, and damages are contested and require discovery" that would delay summary proceedings, the claims should be brought separately, rather than as counterclaims. (Bashford v. Schwartz)

Remedy: Punitive Damages

Legal Authority: §240 of Housing Division of Franklin District Court provides that punitive damages are available. Punitive damages may also be awarded to punish conduct that is "morally culpable", as where a landlord, after receiving notice of a defect, persistently fails to make repairs that are essential to the tenant's safety. When such behavior points to the "bad spirit and wrong intention" of the landlord, punitive damages may be increased. (Virgil v. Landy)

Element #1: Landlord received notice of defects in Ms. Chapin's apartment, and in common areas, yet persistently failed to make repairs.

Evidence of notice to landlord:

-Ms. Chapin's letter to Herb London.

-Violation report by building inspector.

Evidence that landlord persistently failed to make repairs:

-Testimony of Ms. Chapin and Herb London's secretary regarding numerous calls.

-Testimony of superintendent that no action was taken or authorized to remedy defects.

-Pictures taken by Ms. Chapin showing defective conditions.

NEW YORK STATE BAR EXAMINATION
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