NEW YORK STATE BAR EXAMINATION
FEBRUARY 2005 QUESTIONS AND ANSWERS

Question-One
Fen and Bud, who are close friends and partners in several business ventures invited Stu to invest in a business corporation they were forming to be known as NUEE Corp. Stu invested $25,000 but has not actively participated in NUEE Corp.'s business, which is the selling of new and used electronic equipment. Upon its formation, NUEE Corp. issued 100 shares, 25 to Stu, 40 to Fen and 35 to Bud all for valuable consideration. Fen and Bud were elected as the only officers and directors of NUEE Corp. A shareholders agreement among NUEE Corp., Fen, Bud and Stu includes a provision that if any shareholder wants to sell his shares, he is required to offer them to the corporation, which must purchase them at a fair price to be determined by the accountants for the corporation. Since its formation no additional shares have been issued by NUEE Corp., no shares have been transferred, and the directors and officers have not changed.

Stu has learned that Fen, without the knowledge of Bud and Stu, has been using corporate funds to purchase stolen electronic equipment, including a truckload of equipment which had been stolen from Vic Corp. The stolen equipment is then sold by NUEE Corp. as used equipment.

All sales by NUEE Corp. of used equipment are done by bills of sale which do not expressly warrant title to the equipment and state that the equipment is sold "AS IS" and "WITH ALL FAULTS."

Several pieces of the equipment stolen from Vic Corp. were sold by NUEE Corp. to Luz Corp. Vic Corp., which does business with Luz Corp., discovered those pieces in the possession of Luz Corp. and has successfully reclaimed those pieces from Luz Corp.

Stu has also learned that Fen has sold some items from NUEE Corp.'s inventory at higher prices than are recorded in Fen's sales reports, keeping the excess for his personal use. Disregarding any issues of criminal law:

1 What are the rights, if any, of Luz Corp. against NUEE Corp.?
2. What are the rights, if any, of NUEE Corp. against Fen?
3 Assuming that NUEE has a right to recover against Fen, what actions, if any, may Stu take to enforce the rights of NUEE Corp.?
4. Will Stu be able to force dissolution of NUEE Corp.?

ANSWER TO QUESTION 1
1. The issue is whether NUEE's disclaimer of warranties is a bar to a claim against it by Luz Corp. A seller issues various warranties, both express and implied, upon sale of its goods. Along with those warranties, the seller may further disclaim liability for actions against it regarding the property/goods sold. A seller may expressly disclaim liability for its items by stating that the goods are sold "as is". A buyer who accepts goods "as is" does so on their own risk. This type of disclaimer puts the buyer on notice, that should the goods not perform as expected, it is the buyer's loss. A seller further impliedly warrants merchantability, fitness for a particular purpose, and that it has title to the goods sold. The implied warranties of fitness for a particular purpose essentially warrants that the goods are going to be proper for the purpose for which the buyer intended (the seller must know or have reason to know of the purpose). The implied warranty of merchantability states that the merchant, dealing in goods of the kind sold, warrants that they are in good condition. The implied warranty of title states that the merchant has good title to the goods sold. As noted above, a seller can disclaim liability by expressly stating the buyer buys the goods "as is", which is an effective disclaimer unless the buyer is injured by the product. In which case, an action lies against the seller. However, he may still be liable for breach of implied warranty. Here, Luz Corp. does not have any breach of express warranty claim against NUEE Corp. In buying the goods "as is", they were put on notice that NUEE did not expressly warrant

anything as to the goods. However, although no express warranties were given (and therefore not breached), the seller impliedly warrants that it has good title and thus Luz may have an action for breach of warranty of title. The express disclaimers were as to the condition of the equipment, and would be expected in a business selling new and used goods. But as to title, although NUEE did not expressly warrant good title, there was no express disclaimer as such. Even where the express disclaimers were good as to the issue of title, NUEE's action in selling stolen goods was fraudulent. Luz as a bona fide purchaser (for value and without notice of their nature would have an action against the corporation for recovery of the price paid or the difference between price paid and market value.

2. The issue is what duties a director, officer, and majority/controlling shareholder has towards a corporation. An officer of a corporation is an agent of the corporation, with actual authority to bind the corporation to actions within the scope of its business and with implied authority by virtue of the position held. A director's duties are more managerial. Shareholders are normally not personally liable above or beyond the amount of stake they hold in the corporation. A closely held corporation is one in which there are few shareholders who run the corporation. In a closely held corporation, the shareholders have the same duties of loyalty and care towards the corporation as do the officers and directors. These duties are fiduciary duties with which they must comply. The Duty of Care states that the director/officer/controlling shareholder must exercise his/her decision-making and actions in a reasonably prudent cautious manner and with the skill and care that a reasonably prudent person would exercise in like circumstances. The duty of loyalty requires that the director/officer/controlling shareholder exercise judgment and act in a manner that is honest and fair to the corporation. The specific duties that may be breached are: the duty not to compete with the corporation, the duty not to usurp corporate opportunity, and the duty not to engage in an "interested director transaction" (self-dealing). Defense against the breach of duty of care is the Business Judgment Rule, which states that when a person's misfeasance causes damages to the corporation, he must show that he exercised informed reasonable judgment with the skill, care and caution for a reasonable person in like circumstances. To defend against an interested director transaction, the director must show the action was fair to the corporation who entered or that it was approved by proper vote upon full and fair disclosure.

Here, NUEE has the right to bring an action against Fen for breach of both Duty of Care and Loyalty. As an agent of the corporation, he has bound it to acting in an illegal, fraudulent scheme using its corporate funds. As a result, the corporation will be liable for its actions as caused by Fen. Fen's misfeasance and lack of due care has caused the corporation to suffer damages. Further, in keeping the excess profits obtained from the sale of stolen goods purchased through his improper use of corporate funds, he has engaged in self-dealing and an action against him will lie for breach of duty of loyalty. He further cannot argue that the funds were used in the "best interest" of the corporation because he never fully informed the corporation and there was no vote. NUEE will certainly have the right to remove Fen from the corporation.

3. The issue is whether Stu may bring a shareholder's derivative action to enforce NUEE's rights. A shareholder may sue to enforce the corporation's rights (not the individual shareholder's) upon a showing that the suit would be proper. The shareholder must have owned shares at the time of the winning or loss, must own them throughout the litigation, must show that he fairly and adequately represents the shareholders, and must make a demand on the Board which pleads the issues with particularity and asks the Board to take action. If he does not make this demand, he must give good reason for doing so. He may also be required to post bond. In situations where a majority of the board are not disinterested and making a demand would be futile (because they would certainly deny him) the shareholder must specifically explain this lack of the demand letter. The court will ultimately decide whether it was properly done. Here, Stu owns 25 shares and Bud owns 35. He may duly call a board meeting and make the demand on the Board. If both he and Bud vote, the necessary majority can approve the suit. Stu is a proper shareholder to bring

the action. He owns shares at the time of the action and now, and can fairly represent the shareholders and the corporation. It must also be noted that in a close corporation, a shareholder derivative suit may not be proper. In which case, an action to disgorge profits would be proper against Fen as well as a return of any funds used to buy the stolen goods.

4. The issue is when may a corporation dissolve. Besides voluntary dissolution, a corporation may be dissolved by judicial action. The majority of shareholders may petition and ask for dissolution upon a deadlock among directors, if the corporation is no longer profitable, or if, as here, the corporation is engaging in illegal or fraudulent practices and 20% of shareholders bring an action for dissolution. Stu owns 25% o of the corporation by virtue of his shares. It does not matter that he has not actively participated in the business. He is still a shareholder and is still affected by the corporation's loss, especially due to his large investment. He may ask the court to dissolve the corporation and this petition can be granted as he is a 25% shareholder.

ANSWER TO QUESTION 1

1. The issue is whether Luz Corp. has a claim under the warranty of title against NUEE Corp. when the bills of sale expressly disclaims all warranties by stating "as is" and "with all faults". Because this is a sale of goods, the transaction should be governed by UCC. Under UCC, when the seller is a merchant, there are implied warranties of title, warranty of merchantability, and there may be implied warranty of fitness for a particular purpose, In a sale of goods. The implied warranty of title warrants the buyer that the seller has valid title and right to convey the goods. Implied warranty of merchantability warrants that the goods are fit for the ordinary purposes. Implied warranty of fitness purposes comes into play when the seller knows that the buyer purchases the goods for a particular purpose and the buyer relied on seller's expertise to select the goods. When the seller expressly states facts to the buyer, there may be also express warranties. The implied warranty of merchantability and implied warranty of fitness for a particular purpose may be expressly disclaimed by conspicuously doing so in the agreement and expressly mention the warranties to disclaim. Words like "as is" and "with all faults" are effective to disclaim the implied warranties of merchantability and fitness for a particular purpose. The implied warranty of title and express warranties, however, cannot be disclaimed.

In this case, NUEE did not make any express warranties to Luz Corp., and Luz Corp. did not rely on NUEE for the selection of equipment for a particular purpose. Thus, there is no implied warranty of fitness for a particular purpose. Because NUEE is a merchant, there are implied warranty of title and warranty of merchantability. The implied warranty of merchantability has been disclaimed, but warranty of title was not. The warranty has been breached here because NUEE does not own the equipment and Luz Corp. suffered damages. Thus, Luz Corp. can recover from NUEE the purchase price they paid for the equipment because of the breach of warranty of title.

2. The issue is what rights NUEE Corp. has against Fen for his breach of duty.
The directors and officers of a corporation are fiduciaries to the corporation and the shareholders, and they owe the corporation duty of care and duty of loyalty. The directors and officers have to exercise the standard of care that a reasonably prudent person would have exercised under the same situation and like position. However, business judgment rule protects the directors and officers if they make decisions in good faith, are reasonably informed, and have rational basis. Duty of loyalty means the directors and officers have to discharge their duties in good faith and with conscientiousness, honesty, and morality to the corporation. The directors and officers cannot commit acts harmful to the corporation, make secret profit, compete with the corporation, and waste corporate assets under these doctrines. Directors and officers are personally liable for the damages caused to the corporation for the breach of their duties.

Fen has violated duty of care because he used corporate funds to purchase stolen goods and then sell them. A reasonably prudent person in his position would not have done that. He cannot enjoy the protection of business judgment rule because he knew that the equipment was stolen and such transaction will be harmful to the corporation. Fen also violated duty of loyalty by embezzling funds from the corporation and kept them for his personal use. He wasted corporate assets and made secret profits for himself. Thus, NUEE Corp. can recover from Fen for the loss that NUEE suffered in the stolen equipment transaction to Luz Corp.. Also the corporation can make Fen disgorge the money he has embezzled from NUEE Corp.

3. The issue is whether Stu can initiate a shareholder derivative suit against Fen.
A shareholder may bring a derivative suit against the directors and officers who have violated their duties on behalf of the corporation. Before filing a derivative suit, the shareholder has to demand the Board of Directors to sue first. A shareholder does not need to actually demand if he or she can show that such demand would be futile, (e.g., when the Board of Director is interested, and the Board of Directors was not reasonably informed when making the decision). The remedy from the derivative suit will be paid to the corporation and the shareholder can recover reasonable cost of litigation. The court might order the remedies to be directly paid to the shareholders if payment to the corporation would benefit the defendants. A shareholder may also sue the director, the officer, or the corporation directly (not a derivative suit), if he or she has been injured by the act of the defendant. In this case, Stu may bring a derivative suit against Fen on behalf of the NUEE Corp. for his breach of duty. Stu can show that the demand for Board of Directors to sue first would be futile because Fen is one of the only two directors. If the corporation wins, the remedy can be paid directly to Stu and Bud because the payment to the corporation will benefit Fen, who owns 40% of the outstanding shares. Stu may also sue Fen directly because his interest as a shareholder was injured by his improper conducts.

4. The issue is whether Stu will be able to force dissolution of NUEE Corp.
Involuntary dissolution may be done by a shareholder owning more that 20% of the shares. They must show that the Board of Directors is deadlocked. The Board of Directors cannot be elected for two consecutive years, or a shareholder can force dissolution by showing the directors and officers seriously violated their duties owed to the corporation. If the other shareholders want to prevent the dissolution, they have to buy out the share owned by the shareholder. Here, Stu owns 25% of the outstanding shares and can force dissolution of NUEE Corp. by showing that Fen, a director and officer of the corporation and 40% shareholder, has seriously violated his duties to the corporation. If Bud disagrees with Fen, then there is a deadlock Board. Fen and Bud may purchase the shares owned by Stu if they want to prevent the dissolution.

Question-Two
One night, Dobson and Vance were in a local bar. Vance threatened and taunted Dobson, and a fight ensued. Brent, the bartender, ejected Vance from the bar.

Later that evening when Dobson left the bar, Vance approached him in the parking lot brandishing a knife. The two men fought, and Dobson was stabbed in the arm. Dobson knocked Vance to the ground and ran to his car which was parked 50 feet away. Dobson grabbed a loaded pistol from the glove compartment of his car and returned to where Vance was just getting up off the ground. Vance, still holding the knife, lunged at Dobson. Dobson shot Vance, killing him. Dobson ran back to his car and drove away. Brent, who was watching from inside the bar and had a clear view of the entire incident, called the police.

Oakes, the investigating officer, arrived at the bar and questioned Brent. Brent told Oakes what he had observed earlier that evening in the bar and in the parking lot. He provided a description of Dobson and of the car and also provided a license plate number. He described Dobson to Oakes as a white man of about 35 years of age, short with a slight build, closely cropped hair and a

short, neatly trimmed beard. Brent told Oakes that, although the person he described was a regular patron of the bar and Brent recognized him as such, he did not know his name. Oakes determined that the car Brent described was registered to Dobson. Oakes then went to Dobson's home to question him about the events.' Dobson voluntarily spoke to Oakes, but denied being in the bar that evening and denied any involvement in the shooting. He further denied that he knew Vance. Oakes asked Dobson to accompany him to the police station and to participate in a lineup, "to clear things up." Dobson voluntarily agreed and was taken to the police station where he was placed in a lineup. There were four other men in the lineup of the same race, and of the same general age, height and build as Dobson. All of the men had similar facial characteristics and hair styles, except Dobson had a beard and none of the other participants in the lineup had any significant facial hair. Brent picked Dobson out of the lineup and identified him as the man he had seen fighting with Vance in the bar and in the parking lot, and whom he had seen shoot Vance. After the lineup, Dobson was taken to an interrogation room by Oakes, and Oakes read Dobson his Miranda rights. Dobson said that he wanted to speak to a lawyer and would have to retain one, as he did not have a lawyer. Dobson was then taken to a jail cell. Two hours later, Dobson called for Oakes and said that he changed his mind and that he was willing to talk to him without a lawyer. Oakes again read Dobson his Miranda rights, and Dobson then signed a written waiver of his rights. Oakes then interrogated Dobson, who confessed that he shot Vance. Dobson was then arrested and charged with murder and unlawful possession of a loaded weapon.

Dobson was arraigned on the charges, and an attorney was retained to represent him. After Dobson was indicted, his attorney moved (a) to suppress the lineup identification on the ground that the lineup was improperly conducted. Dobson's attorney further moved (b) to suppress any in-court identification by Brent on the ground that the improper lineup tainted any subsequent identification. Finally, Dobson's attorney moved (c) to suppress Dobson's confession on the ground that it was taken in violation of his right to counsel.
At the suppression hearing, Brent testified to his prior familiarity with Dobson and to his opportunity to observe him over an extended period of time on the night of the shooting, both in the bar and in the parking lot. Oakes testified to the circumstances surrounding the lineup and Dobson's confession.

The court granted the motion (a) to suppress the line-up identification, but denied the motions (b) to suppress the in-court identification and (c) to suppress Dobson's confession.

At trial, Brent testified to the events he observed on the night of the shooting. Dobson took the stand and testified that, on several occasions prior to the night of the shooting, Vance had approached Dobson and threatened to kill him. He further testified that, twice before, Vance assaulted Dobson, but, although Vance was a larger and stronger man, Dobson was able to escape from Vance's attack. Dobson admitted that he shot Vance, but claimed that he did so in self-defense because Vance had already stabbed him and was again threatening him with a knife.

Was the ruling of the court correct as to each of Dobson's motions?

Analyze the legal issues relating to Dobson's claim of self-defense.

ANSWER TO QUESTION 2
1. a. The issue here is if there is any violation of the defendant's constitutional rights, including due process and right to counsel.
A defendant has a right of due process under both U.S. Constitution and New York Constitution. In a pre-charge line-up, the line-up process must not be unreasonably suggestive or otherwise discriminating and improper. If there is violation, such identification should not be admitted. Here, the pre-charge line-up is very suggestive. The witness described that the suspect has a neatly trimmed beard, but none of the other participants in the line-up had any facial hair. The

witness defmitely will identify the defendant in the line-up. There is a violation of the due process right and according to the exclusion rule and such evidence must be excluded. It is also notable that there is no violation of the defendant's right under the 5th or 6th Amendment, as it is not a custodial situation and no Miranda rights attach. Also, it is not a post-charge situation and no right to counsel attaches. But there is a violation of due process and the evidence should be excluded. The court was correct to grant the motion to suppress.

b. The issue here is if an in-court identification must be excluded when a previous line-up identification is tainted.
According to NYCPL, an in-court identification is admissible if the witness identified the defendant in court based on his previous knowledge which is trustworthy and obtained by him in previous transactions, even if the line-up identification is tainted. Such in-court identification is regarded as independent evidence and will not be excluded. Here, Brent identified the defendant in court, based on his prior familiarity with the defendant. His testimony is trustworthy and the evidence is independent. Even though the prior line-up was tainted, the in-court evidence is admissible. The court was correct to deny the motion to suppress.

c. The issue here is if the defendant's confession was obtained in violation of his 5th or 6'" Amendment right.
As discussed above, if evidence, including confession, is obtained in violation of the defendant's constitutional right, such evidence must be excluded under the exclusion rule. In New York, the defendant has an indelible right to counsel. Such right attaches when: 1) the defendant is in custody and requests a counsel, 2) in assignment, and 3) filing of charging instrument. Once the indelible right attaches, the right cannot be waived if the counsel is not in presence. Here, when the defendant was taken for interrogation, he asked for a lawyer. Though such a requirement must be specific and otherwise will not trigger the attachment of right to counsel, the defendant here was clearly requiring a counsel. The indelible right attached. Though he later changed his mind, his right to counsel could not be waived because there was no counsel. It was not a "blur-out" situation because the police actually interrogated him. Therefore, the defendant's right to counsel was violated and the court was wrong to deny the motion.

2. The issue here is self-defense.
Self-defense is a justification of an otherwise unlawful act. In New York, self defense is a defense to a defendant, but not an affirmative defense. The general rule is that a person can use reasonable force to protect himself against unlawful acts. The force he can use must be reasonable. To use deadly force, there must be danger of serious injury or threat of life. Also, self-defense is only available for current and immediate danger, instead of future danger. In New York, when using deadly force, the person has an obligation to retreat if such retreat is safe. In some situations, such as burglary and arson and if it is in one's dwelling, retreat is not required. Here, the defendant claimed self-defense, but the facts show that he was able to safely retreat. He did run to his car and could have driven away. As he did not retreat, his self-defense defense is not valid. Also, he cannot claim that he used self-defense because the victim threatened him repeatedly. There was no imminent danger and no self-defense available.

ANSWER TO QUESTION 2
1. a. The issue is whether a line-up violates the due process rights of a suspected person when none of the other participants in the line-up has facial hair that was material for the description by the identifying witness. The Due Process Clause of the 14th Amendment is violated when a line-up is unnecessarily suggestive and has the likelihood of misidentification. Here, the facial hair and beard of Dobson were essential in the description by Oakes. Besides the slight build, closely cropped hair and the short, neatly trimmed beard, none of the characteristics given by Oakes were special. The age of 35 years and the size are very general. Therefore, a line-up in which only the suspected person has the special characteristics while all other fulfill only the very general characteristics of race, age, height and build, but not the special characteristics as

to facial hair, is unnecessarily suggestive. This has the likelihood of misidentification, since the witness, who has testified mainly to the special characteristics, will pick the one with the facial hair characteristics he described. As a result of the violation, the line-up identification must be suppressed under the exclusionary rule. It should be noted, that Dobson had no right to have counsel present at the pre-charge line-up. Thus, the court was correct in granting this motion.

b. The issue is whether an in-court identification must be suppressed as poisoned fruit of a pre-charge line-up in violation of the due process rights. Generally, all fruits from unlawfully obtained evidence are regarded as "poisoned" by the former violation and must be excluded. However, in the case of a line-up, there is an exception that applies here. When the witness recognized the suspected person from observations independently from the former line-up, his in-court identification can be based on this independent source and thus must not be excluded. Here, Brent can testify that he had an extended period of time to observe Dobson on the night of the shooting. Thus, he can recognize him independently from the former line-up. Therefore, the in court identification by Brent must not be excluded and the court was correct in denying the motion.

c. The issue is whether a waiver of the right to counsel by someone in custody is valid when made without the presence of a lawyer.
Under the 5`h Amendment of the U.S. Constitution, as applied to the states through the 14th Amendment, a person in custody has a right to counsel when interrogations take place. Once he claimed that right, any interrogation as to any crime has to stop. The
police cannot start further interrogations on their own. However, if the suspected volunteers to answer on his own, the police might ask him.

Under the NYCPR, one cannot waive his right without the presence of one's lawyer once the indelible right to counsel has attached. Under the 6th Amendment of the U.S. Constitution, a person has a right to counsel after formal charges are brought. Applying these rules to the facts, Dobson first claimed his right to counsel when he was first interrogated (asked by the police by explaining the Miranda rights) when in custody (here in a jail cell). Thus, the 5th Amendment rights attached. The 6t Amendment rights did not yet attach, because no formal charges were brought. After Dobson has asked for counsel, all interrogations needed to cease and they did so. When the police started the new interrogation, it was because Dobson came on his own. Thus, generally the police could make new interrogations. However, since Dobson had claimed his right to counsel when first asked, the indelible right to counsel attached, and he could not waive it without presence of his counsel. It is irrelevant that he has not yet determined a counsel. Therefore, the confession made in violation of the indelible right to counsel must be suppressed and the court erred in denying the motion.

2. At issue, is what a defendant has to show when making the affirmative defense of self-defense.
Self-defense is an affirmative defense. To have this defense, a defendant must show that he reasonably believed that force was about to be used on him and that the amount of force he used was reasonable. When using deadly force, he must show that he reasonably believed that deadly force was about to be used against him. Under the NYCRP, he has a duty to retreat before using deadly force when he safely can do so. Here, Dobson was first justified in knocking Vance because Vance provoked him, stabbed him in his arm, and thus committed battery against him. However, the attack ceased when Vance was on the ground and Dobson at his car. When Vance, just getting up off the ground, lunged at Dobson, Dobson could reasonably believe that force (and because of the knife and the former battery), even deadly force, was to be used against him. However, since he was at his car, he could safely retreat and had a duty to do so. Although he arguably could claim that Vance made a continuing attack all the time, he attacked him several times before as Brent testified and had attacked him just reasonably, there is no right to self-

defense because of a latent attack and no right when one has a safe way to retreat. Thus, Dobson cannot claim self-defense here.

Question-Three

After five years of marriage, Wilma filed for divorce, claiming that her husband Harold had committed adultery. At trial, Wilma's brother, Tom, testified that he discovered Harold and his longtime secretary kissing one another while they were both naked in a bedroom at the parties' home one afternoon. This evidence was not disputed or explained by Harold. Tom further testified that he informed Wilma of his discovery the same day it occurred. The proof also established that Harold and Wilma continued to cohabit for two months after Wilma was informed of her brother's observations, trying to work things out, but they were unable to do so.

Harold contested the divorce on all available grounds and claimed that the proof was insufficient to establish adultery. During the marriage, the parties purchased a home which they used as their marital residence. They held title to the residence as tenants by the entirety. Harold paid 75% of the purchase price from his pre-marital assets, and the parties took out a mortgage for the remaining 25%. The mortgage payments, as well as the costs of improvements, were paid for out of joint funds acquired during the course of the marriage. The home was purchased for $100,000; at the time the divorce action was commenced, it was appraised for $150,000.

After trial, the court awarded a judgment of divorce in favor of Wilma on adultery, the only ground set forth in her pleading. The court made an equitable distribution ruling awarding Wilma a sum equal to one-half of the amount of marital funds used for the mortgage payments and the improvements to the residence during the course of the marriage. The court also awarded Harold title to the residence.

During the time the divorce action was pending but-prior to trial, Wilma gave a mortgage to her aunt to secure a loan of $50,000. The mortgage was intended to provide a lien on the parties' residence. Shortly after the judgment of divorce was entered, Harold brought a separate action against Wilma and her aunt to cancel the mortgage on the property. The court dismissed the action, finding that Wilma could unilaterally mortgage the property and that the mortgage survived entry of the divorce decree.

1. Did the court err in awarding Wilma a divorce?
2. Assuming the judgment of divorce was valid, and without regard to any other distribution and the mortgage to Wilma's aunt, did the court err with respect to its distribution ruling concerning the title to and the funds expended on the marital residence?
3. Did the court correctly rule on Harold's action to cancel the mortgage?

ANSWER TO QUESTION 3

1. The law governing this problem is the Domestic Relations Law.

The first issue is whether adultery was an adequate basis for granting a divorce in this case. Adultery is a valid ground for divorce, but it cannot be proven by only testimony given by one of the parties to the action. It must be corroborated even by circumstantial evidence by clear and convincing evidence (it is a class B misdemeanor) that the alleged adulterer was inclined to do so on that he had the chance. However, even if it is proven that the spouse committed adultery (sexual relations with someone other than your spouse), it cannot be used as grounds for divorce if there was condonation (forgiveness by the spouse). Here, Wilma's alleged adultery, and her brother corroborating this with a specific incident of finding Harold "naked" and "kissing" his secretary, would probably satisfy the burden of proof for adultery. However, Wilma knew about the incident and continued to cohabit with her husband. She forgave him by doing so. Therefore, unless Harold has committed adultery again, there were no adequate grounds for divorce based on adultery. The court has erred.

2. The next issue is whether the court was correct in its equitable distribution of the marital property. If a divorce is valid, a spouse is entitled to equitable distribution of the marital property (whatever was acquired during the marriage). This would include a home purchased during the marriage, even if separate property was used to purchase it. However, the spouse's separate property is deemed to have merged into the marital property and that spouse may recover what was put into it (the dollar amount at the time of purchase - not the percentage because he is not entitled to recover the appreciated value of the asset). In distributing marital property, separate property, duration of marriage, income before and after the marriage, and anything else the court deems appropriate (such as fault) may be taken into consideration. Also, anything a spouse has done to improve the value of the asset is considered. There is no per se rule on who actually receives the residence. It may be awarded to one party or ordered to be sold with the proceeds distributed. Here, Harold put in 75% of the funds to purchase the home. The percentage does not matter and it does not matter what the home is worth now. For the purpose of getting back his separate property, he would only get the dollar amount of what he put in at the time the property merged into marital property. However, he did put in 75% and jointly paid for the mortgage. Therefore, there was nothing wrong with awarding him the home. Wilma partially paid the mortgage out of their joint marital property. The funds were joint and it is presumed that she contributed 50% of the 25% left on the mortgage. Therefore, half of the amount of that plus extra for improvements during the marriage (it is now valued at $50,000 above the purchase price) was adequate. The court was correct in its ruling.

3. The issue is whether a court can allow one spouse to transfer interest on real property held as tenants by the entirety (a joint tenancy with right of survivorship). The general rule is that one cannot without the other spouse's consent. However, a spouse may secure a loan on property held by spouses as tenants by the entirety, but the lien will be subject to the other spouse's right of survivorship.
Here, Wilma secured a loan by giving her aunt a lien on the home prior to the divorce. The property was held as tenants by the entirety. This is okay, but the aunt will not be able to collect on that lien unless Wilma would be predeceased by her husband.
The court ruled correctly. However, the tenants by the entirety are dissolved after the divorce and the property would be held as tenants in common had Harold not simply received the whole property pursuant to the divorce.

ANSWER TO QUESTION 3
1. The issue is whether a divorce may be granted after there is behavior indicating condonation by the innocent party.
The law in New York is that adultery may be proved by circumstantial evidence if it is sufficient to support the inference of adultery, but that there are several defenses to a divorce action based on this ground. Condonation is one of the defenses available in
New York, and it occurs when a spouse, who with knowledge of the adultery, continues to cohabit with the spouse after the adultery occurred. Here, the facts indicate that condonation did occur. The facts indicate that Wilma, . the innocent party, was told that the adultery occurred, but that she continued to cohabit with Harold "trying to work things out". Only after they were unable to do so, did she
seek divorce. Hence, the court erred in granting Wilma a divorce because her condonation serves as a valid defense against her action in the state of New York.

2. The issue is what factors may the court look at when it makes an award of property under the equitable distribution law in the state of New York. The law in New York is that a court may validly look at a number of factors in making an award of property under the equitable distribution laws. These factors include, but are not limited to, the extent of active or passive contribution by each one of the spouses. Here, the facts indicate that although Harold paid for 75% of the original $100,000 purchase price, the remaining 25% was paid for out of joint funds

acquired during the marriage. In addition, at the time of the divorce the house had an appraised value of $150,000, thereby there was an increase in appreciation due at least in part by efforts of both of the spouses. The wife's contributions are entitled to be factored into the award decision. The appreciation of the value of the house does not represent mere passive appreciation of an asset purchased by the husband's separate property. Accordingly, the court erred in giving Wilma only an amount equal to one half of the sum of the marital funds used for the mortgage and improvement. The court should have given her an amount equal to what proportion of the increase in value she is responsible for.

3. The issue is whether a mortgage by one of the spouses destroys a tenancy by the entirety in the state of New York.
The rule in New York is that one of the spouses may mortgage his interest in property without destroying the tenancy by the entirety. New York follows the rule that the mortgage will affect a lien on half on the interest in the property, by that the property will remain titled in both spouses. Here, Wilma mortgaged the property before the divorce action. She was entitled to do so without affecting Harold's interest. Accordingly, the court was correct when it found that Wilma could mortgage the property and that the entry survived the decree.

Question-Four
On April 10, 2004, Fred completed and signed an application required by the New Valley Children's League to enroll his 10 year-old son, Peter, to play baseball in the 2004 season in the Ten-Year-Old Division. The application required Fred to attach a copy of Peter's birth certificate. League rules provided that children be placed in a division with children of their own age and that the parent of each child purchase a batting helmet to be worn by the child during games.

Thereafter, Fred purchased a batting helmet, manufactured by Helmet Corp., at his local sporting goods store. The helmet was labeled as approved by Helmet Corp. for use by children up to the age of 16. Fred became concerned that it was not equipped with a securing chin strap, and he fashioned a chin strap which he attached to the helmet through holes that he made in the helmet with his power drill.
On June 15, 2004, Peter was playing in a League game when he was hit in the head by a ball thrown by Tom, the other team's pitcher. The ball struck the side of Peter's helmet with such a force that the helmet shattered and Peter was severely injured. Fred, who was sitting in the stands, witnessed the entire event and accompanied Peter to the hospital in an ambulance. One week later, Fred learned that Tom was 14 years old and the New Valley Children's League had not obtained a copy of Tom's birth certificate when it accepted Tom's 2004 application to play in the Ten-Year-Old Division.

Fred duly commenced an action on Peter's behalf for negligence against the New Valley Children's League to recover damages for Peter's serious injuries. The complaint also included a separate cause of action on Fred's behalf for negligent infliction of emotional distress, alleging that he suffered post traumatic stress disorder as a result of observing the incident. In its verified answer, the League asserted as an affirmative defense to Peter's cause of action (1) that it owed no duty to Peter because Peter had assumed the risk by participating in the sport of baseball. In addition, the League's answer asserted as an affirmative defense to Fred's action for negligent infliction of emotional distress (2) that it failed to state a cause of action.

Fred also duly commenced a strict products liability action on Peter's behalf against Helmet Corp. to recover damages for Peter's serious injuries. In its verified answer, Helmet Corp. asserted as an affirmative defense (3) that the product had been modified by Fred, releasing Helmet Corp. from any liability.

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Analyze and fully discuss the substantive law as it relates to the affirmative defenses raised by the defendants as set forth above, numbered (1), (2) and (3).

ANSWER TO QUESTION 4

1 The issue is whether the assumption and risk of engaging in a sport will defeat a claim for negligence. In order to bring a successful claim for negligence, the plaintiff must prove that 1) the defendant owed a duty to that plaintiff, as one who was a foreseeable plaintiff, 2) that the defendant breached their duty to the plaintiff, 3) that the defendant's breach was both the actual and legal cause of the plaintiff's damage, and that 4) the plaintiff was in fact damaged. There are several affirmative defenses that maybe raised in response to a claim for negligence, one of which is assumption of the risk for ordinary accidents that usually occur in a specific situation, such as injuries incurred while playing a sport.

In this case, Peter was injured by playing baseball. The duty of care that New Valley Children's League owed to Peter was based on that, and a reasonably prudent person standard required of those that run such activities. In light of the fact, New Valley Children's League specifically required that all participants furnish their birth certificates and that only children of the same age are allowed to play in the same league. The failure of New Valley Children's League to check Tom's birth certificate, thereby allowing a 14 year-old to participate with the ten year olds, was clearly a breach of their duty. The breach of this duty allowed an older child, likely to be much stronger than the rest, play against Peter, who was in fact injured as a result of the force with which Tom threw the ball. New Valley. Children's League allowing Tom to play on the team with the ten year olds was the actual cause and the legal cause of Peter's injury. It is the actual cause because of the fact that Tom, a 14-year-old child, was allowed to play with Peter, and he would not have been struck so hard with the ball during the course of the game. It is the legal cause because it was the direct cause of Peter's injury. Tom's throw caused the ball to hit Peter and Peter was hurt. Finally, Peter suffered damages. The affirmative defense of assumption of risk cannot be sustained because Peter did not assume-the risk of playing baseball with kids much older and arguably much stronger. Peter merely assumed the risk of playing with other ten year-old children, as that was required by New Valley Children's League and expected by Peter. Peter's injury was not of the type normally caused by playing baseball with other children his age. Thus, New Valley Children's League's failure to perform their duty of ensuring that teams were made up of appropriate aged participants was breached.

2. The issue is whether a parent can bring a claim for negligent infliction and emotional distress. A claim for Negligent Infliction of Emotional Distress that is brought by a bystander can only be sustained if that bystander was an immediate family member of the injured party, if the bystander was in the immediate zone of danger, and if the bystander suffers some physical manifestation as a result of his emotional distress. In this case, Fred will not be able to sustain a cause of action for Negligent Infliction of Emotional Distress. Fred will meet the, first requirement, that the bystander must be an immediate relative, because Peter was injured and Fred is his father.
However, Fred will not meet the requirement that he must be in the immediate zone of danger. Fred was in the stands at the time that Peter was hit, although he was a witness, his proximity will not be close enough to be considered as the immediate zone of danger. Finally, Fred has failed to allege that he suffered any physical manifestations or problems as a result of the emotional distress. Fred claims he suffers from posttraumatic stress disorder, which does not mean that he has had any actual physical harm. The affirmative defense raised by New Valley Children's League for failure to state a cause of action for Negligent Infliction of Emotional Distress is likely to be granted.

3. The issue is whether a plaintiff will succeed on a claim for strict liability when the plaintiff has made a modification to the product. One may bring a claim against a manufacturer

under the theory of strict liability for a manufacturing defect or design defect. The plaintiff must allege that the manufacturer or retailer of the product owed a strict duty not to put unreasonably dangerous products into the stream of commerce. If they do, and one is injured by that product do to a design defect or manufacturing defect that existed at the time it left the manufacturer, and the user is a foreseeable user, using the product in a foreseeable way, and the product causes damage, they will be strictly liable. However, a manufacturer may raise an affirmative defense where the product has been altered in such a way as to make it defective after leaving the manufacturer's control. This defense will be available and will prevent liability even in the case where the product's design was defective and there was a hypothetical alternative design that infers negligence where a person violates a statute, the principles of this doctrine may be analogized to the facts here. By not obtaining Tom's birth certificate, new Valley League breached the duty owed to Peter. Because the policy requiring proof of the children's ages could be considered as being designed in an effort to protect children from the extent of injury they may experience in the sport to children of their own age, Tom's 14 year-old force can be said to be a substantial factor in causing the injury to Peter. The League's own policy indicates that it could foresee that children playing with older children would result in harm, thereby indicating that Peter's harm was foreseeable. Because Peter sustained serious injuries as a result of the League's breach, the elements of negligence have been satisfied. Therefore, the League owed a duty to Peter and a prima facie claim for negligence may be established.

ANSWER TO QUESTION 4

The issue is whether Fred, on behalf of Peter, assumed the risk of the injury that Peter sustained. Under New York tort law, assumption of risk is a defense to negligence, but does not necessarily negate that a duty was owed to the plaintiff in question. Assumption of risk is a doctrine, which may deny a claim for negligence where the plaintiff reasonably assumes the known risks of the foreseeable harm. In a contributory negligence jurisdiction, assumption of risk totally bars a plaintiff's claim where the defense of assumption of risk is properly asserted. In a comparative negligence statute, the court will apportion the party's fault based on their relative culpability in causing the harm, which resulted. New York is a pure comparative negligence jurisdiction. Tort law dictates that express assumption or risk may arise by contract or waiver, whereas implied assumption of risk may occur where participants of a sport consent to the ordinary risks of the game. Here, the defense of assumption of risk should fail because Fred, by entering Peter into the ten year-old division, can only be said to have assumed the risk of injury Peter might sustain playing against other ten year-olds. Fred did not assume the risk that Peter would be injured playing against a 14 year-old, which certainly changes the scope of foreseeable risks Peter might face because a 14 year-old is generally bigger, stronger, and able to exert more force upon hitting a baseball bat than a ten year-old. Therefore, the League's defense of assumption of risk should not succeed because Fred, on Peter's behalf, only assumed the risk of Peter sustaining an injury inflicted by another ten year old.

The issue is whether Fred's claim based on strict products liability should succeed.
Under New York tort law, strict products liability imposes absolute liability on a manufacturer, or retailer of a defective product, which results in injury to any foreseeable plaintiff. The plaintiff does not have to be a purchaser of the product to assert a claim in strict products liability. A strict products liability claim may be based upon one of three theories of strict products liability: 1) defective product liability, 2) inadequate warning, and 3) manufacturing defect. A claim for strict products liability requires the plaintiff to show: 1) that the product was defective when it left the hands of the manufacturer or seller, 2) that the product was not substantially altered when it reached the plaintiff, 3) that the product caused an injury when it was being used in an intended or unintended foreseeable use. Here, Helmet Corp.'s defense, that the product had been modified by Fred, is plausible because Peter sustained an injury while using the helmet, which Fred had substantially changed by securing a chinstrap himself, and making holes in the helmet with his power drill. However, it is arguable whether Helmet Corp. should have foreseen that its product

would be used by: "children up to the age of 16" as the label provided it could be used, and whether this permitted, and foreseeable use made the probability of altering the product more foreseeable. Because Fred substantially changed the helmet when Peter sustained his injury however, it is likely that a court would find that Helmet Corp. is not liable for the injuries sustained by Peter. Therefore, Fred's claim on strict products liability should be denied.

The issue is whether Fred's claim for negligent infliction of emotional distress should succeed based on his witnessing the injury to Peter. Under New York tort law, for a claim based on negligent infliction of emotional distress, the plaintiff must demonstrate that the defendant was negligent and the plaintiff must either: 1) sustain an injury or 2) be an immediate family member of the victim of a physical injury and be in the zone of danger. Here, Fred's claim for negligent infliction of emotional distress should not succeed because Fred, although he is Peter's father, was not in the zone of danger when Peter sustained his injuries. Fred was in the stands when Peter was hit by the ball thrown by Tom. Absent any indication that Fred was injured or within the zone of danger, even as an immediate family member of Peter's, Fred's claim for negligent infliction of emotional distress cannot be established. Therefore, Fred's claim for negligent infliction of emotional distress should not succeed.

Question-Five
Dan and Wanda were married in 1995. In January 2000, Dan had his lawyer, Len, prepare a will for him. The will named Eric, Dan's brother, as executor and provided that Dan's net estate would be divided equally between Wanda and Eric. Under Len's supervision, Dan executed the will, which was witnessed by Kit and Wit.

Dan died in January 2004, survived only by Wanda and Eric. At the time of his death, Dan's estate consisted of $500,000 in a savings account in his name alone at B Bank. Wanda was aware of the account. On behalf of Eric, Len filed Dan's will and a petition for probate with the Surrogate's Court. The court then issued a citation to be served on Wanda. Len hired Phil, a process server, to serve Wanda with the citation. Phil went to Wanda's house and knocked on the front door. Wanda opened the door slightly and asked Phil who he was. When Phil announced that he was a process server with a citation to serve, Wanda slammed the door shut and said she would not accept the citation from him. Phil then taped the citation to the front door, yelled to Wanda that he had done so, and left the premises. Phil took no further steps to serve Wanda. Wanda moved to dismiss the petition on the ground that the court lacked personal jurisdiction over her. After a hearing at which Phil and Wanda testified, the court (1) denied her motion. Wanda then filed objections to probate claiming that the will was improperly executed and, that Dan lacked testamentary capacity. At trial, Kit testified that although he recognized his signature on the will, he did not remember the circumstances of its execution. Wit testified that she heard Dan say that the document was his will and that he wanted Kit and Wit to witness his signature. Wit further testified that Dan signed the will at the end of the document in the presence of both witnesses, and then both Kit and Wit signed the will in the presence of Dan and Len, who was supervising the execution in his office. Len asked Wit if in her opinion, Dan was mentally sound when he signed the will. Wanda's attorney objected to the question on the ground that Wit, as a layperson, was not competent to render an opinion regarding Dan's testamentary capacity. The court (2) overruled the objection.
Wit then testified that, in her opinion, Dan appeared to be mentally sound when the will was executed. Wanda then testified to a number of acts that Dan had committed since 2001 that impressed her as irrational. There was no other evidence presented regarding Dan's testamentary capacity. Based upon the foregoing pertinent evidence, the court (3) ruled that Dan had testamentary capacity when the will was executed, and that the will was properly executed and should be admitted to probate.

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One year after Eric was issued Letters Testamentary, Wanda still had not received any distribution. When questioned, Eric told Wanda that after paying all creditors, there was no money left in the estate. Doubting Eric's explanation, Wanda consulted a lawyer and asked what, if anything, she could do to verify Eric's claim concerning the assets in the estate.

(1) Did the court properly deny Wanda's motion?
(2) Did the court correctly overrule Wanda's objection to Wit's testimony?
(3) Did the court properly admit Dan's will to probate?
(4) What legal remedies does Wanda have to verify Eric's claims?

ANSWER TO QUESTION 5

1 . The court correctly denied Wanda's motion to dismiss for lack of personal jurisdiction. To exert personal jurisdiction over individuals, a New York court must have some basis for jurisdiction and also provide the individual notice and an opportunity to be heard. Notice must meet the New York statutory provisions for service upon a natural person and also meet constitutional due process standards. It must conform to traditional notions of fair play and substantial justice. Under Article 3 of NYCPLR, service upon a natural person can be accomplished by personally delivering a summons, if this cannot be accomplished with due diligence by affixing the summons (without notice or the complaint) to the door of defendant's dwelling or actual place of business and mailing the same to her last known address within 20 days. According to New York case law, personal delivery is effective when the person making service tenders the summons (without notice or complaint) upon the defendant to be served, and the defendant has actual knowledge that she is being served with a summons. If a defendant closes her door after a process server informs her she has been served, service is complete and the server need only leave the papers at the door. Here, Wanda was served by personal delivery when Phil informed her that she was being served. Leaving the papers at her doorstep was proper under these circumstances. It is worth noting that the server need not have followed up with mailing the summons to Wanda, as he was not attempting "nail and mail" service.

2. The court correctly overruled Wanda's objection to Wit's opinion testimony. In New York, a layperson may testify as to her opinion, where the witness has personal knowledge of the underlying facts, and her answer does not require hypothesizing or expert knowledge. Here, the issue is Dan's mental state at the time he executed the will - something Wit in fact personally observed. This did not require expert knowledge of mental processes; only Wit's opinion based on her personal knowledge.

3. Dan's will was properly admitted to probate on sufficient proof of the will as Dan's valid and final will. The proponent of a will has the burden to prove every element to prove that the will is valid. To create a valid will, the testator must have intended to create an instrument that disposes of his property upon his death and must have understood that what he created was in fact his will. The formalities required of a will are that the testator intentionally signed a written will, at the end. He declared it to be his final will, and that he did this in the presence of two attesting witnesses, who signed in each other's presence. To prove this occurred, the court will require testimony by the attesting witnesses, or if one is unavailable or cannot remember the details of the signing, proof may be based on the testimony of only one witness. The standard for lack of mental capacity is whether testator suffered from an insane delusion that caused him to make a will that ignored the objects of his natural bounty (spouse, children, etc.). An insane delusion is not merely irrational behavior, but rather a set of circumstances on false reality that only exists in his "perverted imagination". Here, Wit's testimony alone will suffice, if Kit cannot remember the circumstance of Dan's will ceremony. Wit testified that all the required elements of a valid will were present. . Wanda's claim that Dan acted irrationally at other times does not establish that he lacked mental capacity at the time he signed his will.

4. Wanda may seek an accounting from Eric, but she should have waived provisions under the will and elected for a spousal share at the time the will was probated. Beneficiaries under a will may demand an accounting from the executor, and the executor must show that he distributed the testator's assets according to the will and New York law by showing all assets, debts and expenses. If the executor fails to do so, he must reimburse estate and beneficiaries for any improper distributions. Wanda should have waived the will in writing and elected to take her spousal share, which would have been the first $50,000 of the net estate, or one third of the net estate.

ANSWERS TO QUESTION 5

1. The issue is whether a person has been served with process and the court has personal jurisdiction when a process server tapes a citation to a person's door when they refuse to accept service. The rule is that due process requires a person be given adequate notice of all cases in which they must appear. Personal service is made by placing the papers in the person's hand. "Nail and mail", where process is affixed to the door of a person's home and also mailed to the person, is proper. Here, Phil did not serve Wanda with personal delivery because he did not place the papers in her hand. Also, Phil did not satisfy the requirements for "nail and mail" because he did not mail the papers to Wanda. It is irrelevant that Wanda has actual notice of what the papers say. Thus, the court erred in denying Wanda's motion.

2. The issue is whether a layperson can give their opinion on an ultimate issue such as Dan's testamentary capacity. Generally, the rule is that such a layperson cannot. However, in a probate proceeding, a person may give testimonial evidence in the form of an opinion as to whether testator understood the nature of the act of making a will, extent of his holdings, and the objects of his bounty. Here, as a witness to the will, Wit is competent to testify in the form of her opinion that Dan was mentally sound when he signed the will.

3. The issue is whether Dan properly executed the will and if the testimony of the witnesses satisfied it. A will is properly executed when a person 18 or older with testamentary capacity signs his will at the end, in the presence of two witnesses or acknowledges his earlier signature. The witnesses also sign the will and testator publishes the will. Where one witness to the will cannot remember the events of execution, the will is properly admitted on the proof of the witnesses signatures and testimony of one witness as to due execution. Here, Wit testified to the due execution of the will and Kit testified as to his signature. Thus, the will was properly executed. There is an issue as to whether Dan had testamentary capacity since there is evidence he had acted irrationally since 2001. The rule is that testamentary capacity must exist only at the time the testator is executing the will, not before or after, even if it is only during a lucid interval. Here, Wanda's testimony does not relate to the specific point when Dan executed his will, therefore, it is irrelevant. Thus, the will was properly admitted to probate.

4. The issue is whether the wife of a deceased testator has any remedy to see how her deceased husband's estate was distributed. The rule is that a party with an interest in the estate is entitled to an accounting from the executor of the estate. Wanda is interested in the estate as a beneficiary under Dan's will as well as her right to a spousal election. Thus, Wanda may demand Eric make an accounting of the estate.

MPT

In re Rose Kingsley (February 2005, MPT-1). Applicants' law firm represents Attorney Rose Kingsley in a fee dispute with Attorney Karen Sheats. Kingsley temporarily hired Sheats to assist her in the Moreno case, a complex toxic tort case. The two lawyers entered into a fee-splitting agreement whereby Sheats would receive 30% of Kingsley's final fee from the case. Sheats was also to be paid $50 an hour for her work on the case as an advance on the 30% contingency. After

Sheats had devoted 600 hours to the case and been paid $30,000 for her work, she felt that the case was too time consuming and was not going to succeed, so she quit. When Kingsley recovered a $10 million fee for settling the Moreno case, Sheats demanded 30% of the $10 million settlement. Applicants are asked to draft a memorandum for the supervising partner analyzing whether, under Rule 200 of the Franklin Rules of Professional Conduct, Sheats was Kingsley's partner or associate, and whether the correspondence between Kingsley and Moreno complied with Rule 200's disclosure requirements for fee-splitting arrangements. The File consists of an instructional memo, a transcript of an interview with Kingsley, a letter from Sheats' counsel, the Kingsley-Sheats fee agreement, a letter from Kingsley to Janice Moreno, and a memo from Sheats. The Library contains Rule 200 of the Franklin Rules of Professional Conduct and two relevant cases.

ANSWERS TO MPT
To: Thomas Burke From: Applicant Re: Rose Kingsley
You have asked me to look into two issues related to the application of Rule 200 of the Franklin Rules of Professional Conduct to the case of Rose Kingsley. Rule 200 allows fee-splitting among its lawyers, only if the lawyers are in a partner-partner or partner-associate relationship, or if the client is given full written disclosure of the fee splitting arrangements and the client gives informed written consent.
1. Greene was not a partner or associate of Kingsley for the purposes of Rule 200. The issue is whether or not Karen Greene and Rose Kingsley were in a partner-partner or partner-associate relationship, in which case Rule 200 would allow fee-splitting even absent client's informed written consent. As explained below, Karen Greene and Rose Kingsley were not in either type of relationship. Under the Franklin Court of Appeal decision in Chambers v. Kay (2002), which is binding precedent in this jurisdiction, a partnership is "an association of two or more persons to carry on as co-owners, a business for profit, connoting co-ownership in partnership property, with a sharing of profits and losses of a continuing basis." In this case, Kingsley's interview transcript suggests that Greene was merely temporarily hired, with no intention by either party of establishing a continuing association based on shared profits and loss. Therefore, there was no partnership, and no partner-partner relationship between Greene and Kingsley. Chambers also contains a definition for when a temporarily engaged lawyer is an associate. The determination hinges upon whether the lawyer worked "with" or "for" the main lawyer. A court will look to "the totality of the circumstances", and consider two key factors: 1) the degree of the main lawyer's control or supervision of the temporary lawyer, and 2) whether the temporary lawyer's compensation is a fixed salary or an hourly rate, or is on a contingent basis. The Court of Appeal ruled that even if factor one is ambiguous, factor two is "the more indicative evidence."

In this case, Kingsley testified that she exercised considerable legal oversight and control over Greene, for instance, forbidding Greene from having sole face-to-face contact with the client. Additionally, Kingsley was the only attorney or record. However, Kinsley also indicated that Greene had a "relatively free hand" on technical issues, due to Greene's engineering expertise. From these facts, it is somewhat more accurate that Greene was supervised, since the legal actions are more significant. To the degree this is true. This would tend to suggest Greene was an associate. However, these factors are ambiguous and not determinate. Turning to the "more indicative" issue of compensation, it is clear that Greene was working on a contingent basis for 30% of any legal fees. The $50 per hour she was paid was merely an advance on the contingent fee, according to the fee agreement between Kingsley and Greene. Therefore, Greene was not an associate, since associates are paid by salary or hourly wage and not on a contingency basis, as per Chambers.

Therefore, Greene was not a partner of Kingsley because there was no association with profit sharing, and Greene was not an associate of Kingsley because she worked with (not for) Kingsley as evidenced by the contingent fee agreement. Therefore, any

fee-sharing agreement will be valid and enforceable only if it satisfies the elements listed in Rule 200, discussed in part two below.
2. Rule 200's fee-splitting requirements have not been met. In the absence of a partner-partner or partner-associate relationship, which as discussed in part one is not applicable here. Rule 200 requires any fee-splitting arrangement between lawyers to: 1) be disclosed fully in writing to the client and consented to by the client in writing, and 2) not be increased solely by reason of the division provision and not be unconscionable. Margolin v. Shemaria, a 2000 Franklin Court of Appeal case binding on this jurisdiction, held that Rule 200 is "satisfied only by full compliance with the rule's written-disclosure and written-consent requirements". This is because Rule 200's "purpose is client protection to the maximum extent possible". In this case, the written disclosure in Kingsley's letter to the client, dated October 23, 2002, is clearly insufficient because it does not contain any of the relevant terms of the fee-splitting agreement, only that such an agreement existed. Thus, the client's written acknowledgement is void. Additionally, the client's acknowledgement does not even purport to consent to the agreement, only that the client understands the letter. Greene's subsequent telephone conversation with the client about the agreement is insufficient to cure the defect in informed notice, because it was not in writing. Margolin makes clear that to protect the client, Rule 200 will be strictly construed. Therefore, as in the facts in Margolin, noncompliance with Rule 200 renders the fee-splitting agreement unenforceable. Our client, Kingsley, therefore will not have to abide by the terms of the agreement with.Greene, and does not have to pay what Greene is seeking under the unenforceable agreement.

Note: Rule 200 also requires the fee not to be increased solely by reason of a fee splitting agreement, and not be unconscionable. Nothing in the facts suggests Kingsley's standard 33% contingency fee was increased solely due to the retention of Greene's services. Additionally, a 33% contingency fee is standard practice for many trial lawyers, and therefore not unconscionable. Therefore, Kingsley is not in breach of this obligation under Rule 200.

ANSWER TO MPT
To: Thomas Burke From: Applicant Re: Rose Kingsley
1. Karen Greene was neither a partner nor an associate for purposes of Rule 200 of the Franklin Rules of Profession Conduct. Under Rule 200, a lawyer shall- not divide a fee for legal services with a lawyer who is temporarily engaged and who is not a partner or associate of the lawyer. As will be shown, Karen Greene is in neither relation to our client Rose Kingsley.
A. Greene was not Kingsley's partner under Franklin Law. According to the Franklin Court of Appeal in the case Chambers v. Kay, partners within the meaning of Rule 200 means an association of two or more persons to carry on, as co-owners, a business for profit, connoting co-ownership in partnership property, with a sharing in the profits and losses of a continuing business. In that case, the two lawyers shared an office and maintained case files and shared staff. However, the court held that this was not sufficient to constitute a partnership. They did not act as co-owners nor did they share profits and losses of a continuing business engaged in the practice of law.

Here, our client retained Greene, in her words, "to do the investigation and discovery because of her engineering background" to work on this particular Moreno case. Greene worked in the same office, but only on a temporary "as needed" basis. The facts even tell us that Greene was attempting to build her own practice working out of her home and it was for that reason that she left the Moreno case before trial. On the basis of these facts, it is clear that they were not operating as partners since there was absolutely no sharing of profits and losses of a continuing business operation.. Greene was clearly a temporary worker, the strongest evidence of this being her early resignation from her position. It is unlikely Greene will argue otherwise. She may be more likely to argue that she was in an associate position vis-a-vis our client.

B. Green was not Kingsley's associate under Franklin Law. According to the court in Chambers, for the Purposes of Rule 200, an associate is a lawyer who works for rather than with, another lawyer. The court applied a totality of the circumstances test looking to a continuum from close supervision and non-contingent compensation at one end, to loose supervision and a contingent fee on the other. The factors bearing on the evaluation for how closely a temporarily engaged lawyer is supervised are: 1) the direct and indirect control of the supervision; 2) oversight of the temporarily engaged lawyer in legal and factual aspects of a case; 3) control over the working environment; and 4) the relationship to the client. In the Chambers case, the court found that the supervision was not particularly close because Kay was allowed to conduct discovery and appear in court on the client's behalf. In the instant case, Kingsley retained full control over the legal side of the case because Greene was a new lawyer and that Greene was never allowed face-to-face contact with the client outside of her presence. Greene will argue that this is indicative of an associate relationship under Rule 200. In the Chambers case, Chambers was given more freedom than this. However we can argue that Greene was given a lot of freedom on the technical side of the case. The court in Chambers stated that the degree of supervision is "far from dispositive" and that the contributions of the lawyers in any case will vary according to the elements of the case and each lawyer's individual strengths and areas of expertise. Here, we can point out that Greene's area of expertise was the more technical side of things and that she was given a "relatively free hand" in handling that side of the case. Whereas, Kingsley was the counsel of record and the more experienced attorney, so naturally she controlled the legal side of things.

The second and more indicative evidence of the parties' relationship is the compensation agreement between the lawyers. In the Chambers case, the lawyers agreed that Chambers would be paid solely on a contingent fee basis, specifically, as a percentage of any contingent fee that Kay received from the client. The court, viewing the evidence as a totality of the circumstances, combined the evidence of loose supervision and the contingent fee to hold that Chambers was not Kay's associate for the purposes of Rule 200. Greene will argue that because she was being paid on an hourly basis, in addition to the contingent fee arrangement, that she thus qualifies as an associate when the evidence is viewed together with the closer degree of supervision here than in the Chambers case. We can argue that the presence of any form of contingency agreement is wholly contrary to an associate relationship. An associate is only paid a salary for her work. Furthermore, on the facts, the fee-splitting agreement specified that the $50 per hour paid to Greene was an advance on the contingent fee agreement. Therefore, the contingent fee was predominately the intent of the parties and Greene cannot be considered an associate under Rule 200.

2. The requirements of Rule 200 have-not been met by the fee-splitting agreement between Kingsley and Greene. The Franklin Court of Appeal interpreted these requirements in the case Margolin v. Shemaria and is applicable to our case.
The court in Margolin stated that fee-splitting is prohibited between lawyers who are not related as partners or associates unless the client has consented in writing to the fee-splitting agreement after a full disclosure of the arrangement has been made in writing. The total fee charged by all lawyers is not increased solely by reason of the arrangement. The purpose of the Rule is to protect the client to the maximum extent possible. The court emphasized that the rule is a "bright-line rule" and full compliance with the rule's written disclosure and written consent requirements are required. The writing must contain the extent of, and the basis for, the splitting of fees by two or more lawyers. The client should not have to mentally retain such information throughout the pendency of the case.
In the Margolin case, the written disclosure requirement was not satisfied. The client only received oral disclosure of the fee-splitting agreement and gave oral consent thereto. Our case again presents a hybrid situation. Kingsley's notice to Moreno of the fee agreement with Greene was deficient in that it failed to disclose the terms of the agreement. The client's confusion is evident by the memorandum from Greene to Kingsley in which she stated that she had explained the terms of the agreement orally to Moreno and she had consented orally. This is the very

problem, which Rule 200 is seeking to avoid. It seeks to protect the client to the "maximum extent possible". This requires strict compliance with the written disclosure and written consent requirements.

Greene will argue that this case is distinguishable from the Margolin case since Moreno consented in writing to the fee splitting agreement having been ???? terms orally. She may also try to argue that to deny the enforceability of the agreement would be unfair to her as a lawyer. She will argue compliance with Rule 200(2) in that Moreno was assured in writing that the fee would not be increased as a result of the feesplitting agreement and that in fact it was not so therefore, there was no harm to the client. All of these arguments will fail. We can rely on the Margolin case to argue that since the terms of the fee-splitting agreement were not actually disclosed to Moreno in writing, instead being orally transmitted to her by phone, that there was not full compliance with Rule 200. The fact that Moreno was not harmed is of no consequence. Furthermore, the fact that Greene will lose out because of this is also irrelevant since the court in Margolin stated that the purpose of the rule is "not lawyer protection, but client protection to the maximum extent possible". Greene is a lawyer and should have protected her own interests by ensuring that Rule 200 was fully complied with.