NEW YORK STATE BAR EXAMINATION
FEBRUARY 2006 QUESTIONS AND ANSWERS

Question-One
Officer observed Driver driving a late model luxury automobile with Passenger sitting in the front passenger seat. After checking the license plate on his computer and learning the car was stolen, Officer pulled the car over. Officer observed that the steering column was broken and saw a screwdriver in the ignition. Officer placed both Driver and Passenger under arrest, searched the car, and recovered a loaded gun from the glove compartment. After Officer advised Passenger of his Miranda rights, Passenger stated, "When Driver picked me up, I saw the screwdriver in the ignition and I figured the car was stolen."

The forgoing facts were presented to a grand jury, and Driver and Passenger were indicted for the crimes of criminal possession of a weapon and criminal possession of stolen property. At their arraignment, Lawyer filed a notice of appearance on behalf of both Driver and Passenger and entered not guilty pleas for both of them. The Prosecutor did not serve Lawyer with notice of Passenger's statement at that time.

One month after their arraignment, Lawyer served discovery demands on behalf of both Driver and Passenger. In response to Lawyer's demand, Prosecutor informed Lawyer of Passenger's statement and turned over police reports that set forth the date, time and substance of the statement. Lawyer did not move to suppress Passenger's statement.

Lawyer timely filed a motion to dismiss the indictments against both Driver and Passenger claiming there was insufficient evidence presented to the grand jury to sustain either charge. In opposition, Prosecutor asserted that sufficient evidence was presented to the grand jury to sustain both charges against both Driver and Passenger.

As to both Driver and Passenger, the court denied the motion to dismiss (a) the criminal possession of stolen property charge and (b) the criminal possession of a weapon charge.

(1) Were rulings (a) and (b) correct as to each defendant?

(2) Assuming rulings (a) and (b) were correct, was Prosecutor's notice of Passenger's statement sufficient to allow its admissibility against Passenger at trial?

(3) Assuming rulings (a) and (b) were correct, what obligations, if any, do Lawyer and the court have with regard to Lawyer's representation of both defendants?

ANSWER TO QUESTION 1
1. a. The issue is whether the collected evidences are sufficient to make a prima facie case for the criminal possession of stolen property as to both Driver and Passenger.

Under the New York Criminal Law, in order for the grand jury to indict a person for a particular charge, the grand jury must have sufficient evidences to make a prima facie case for the charge. One is guilty of the criminal possession of stolen property if he or she knowingly possesses stolen property.

In this case, because his car was stolen, which was verified by the officer checking the license plate, it is obvious the car was stolen. It is also evident that Driver knew that the car was stolen because the steering column was broken and there was a screwdriver in the ignition. In order to drive a car, the driver needs a key. Driver should have known that the car was stolen. Moreover, based on the fact presented, it can be inferred that the Driver himself stole the car. Therefore, the grand jury successfully made a prima facie case for knowingly possessing stolen property as to Driver.

However, the grand jury failed to make the prima facie case as to Passenger, because Passenger was merely riding the car and not in a position to control the car. She had not known that the car was stolen until she saw the ignition. It cannot be said that she "possesses" the car as she is merely a passenger. Thus, the grand jury failed to make a prima facie case as to Passenger.

Therefore, the court was correct in denying the motion to dismiss the criminal possession of stolen property as to Driver.

b. The issue is whether the collected evidences are sufficient to make a prima facie case for the criminal possession of weapon as to both Driver and Passenger.

Under the New York Criminal Law, in order for the grand jury to indict a person for a particular charge, the grand jury must have sufficient evidences to make a prima facie case for that charge. One is guilty of the criminal possession of a weapon if he or she knowingly possesses the weapon.

In this case, the weapon was in the glove compartment. Because both Driver and Passenger can exercise their control over this area, it can be inferred that both knew of the existence of the weapon. It should be noted that Passenger was riding in the front seat. This might suggest that she has a close relationship with Driver and should have known that the weapon was in the glove compartment. Thus, the grand jury made a prima facie case for this charge.

Therefore, the court was correct in denying the motion to dismiss the criminal possession of the weapon as to both Driver and Passenger.

2. The issue is to be admissible when Prosecutor should have served the Passenger’ s statement.

Under the New York law, immediately after the arraignment, the prosecutor must submit the defendant’ s statement; otherwise this evidence will be inadmissible.

Here, Prosecutor did not submit the statement in question one month after the arraignment only in response to Lawyer’ s discovery demand. Prosecutor should have submitted the statement much earlier without being served the discovery demand. Prosecutor failed to obey the procedure. Therefore, the Prosecutor’ s Passenger’ s statement is inadmissible in the trial.

3. The issue is whether Lawyer had a conflict in representing both Driver and Passenger, and whether the court should correct this possible conflicting representation.

Under the New York Professional Responsibility Code and Regulation, a lawyer cannot represent clients who might have conflicting interests against each other, unless (i) the lawyer informs the clients of the risk of the potential conflict, (ii) the clients agreed to this representation, and (iii) the agreement is in writing. Although some conflicting representation might be cured by this method, the lawyer cannot represent the clients who have apparent conflicting interest against each other. The standard is that a lawyer with reasonable experience, skill, and morality will think the representation is not conflicting and can take it.

Here, Lawyer did not do anything on the above. Lawyer did not inform Driver and Passenger of the potential conflict and both clients agreed to his representation in writing. Moreover, especially in the criminal case, while the court dismisses both charges as to both Driver and Passenger, their status (i.e. driver in the stolen car and mere passenger) clearly creates the conflicting interests in the charges. A reasonable lawyer would not take this dual representation given that in the proceeding, it will be clear that the conflicts are huge. Lawyer cannot continue to represent both Driver and Passenger.

Therefore, Lawyer should have remedial actions including withdrawing the current representation as to both Driver and Passenger. Also, the court has no obligation to correct this potential conflict because it has no better knowledge as to Driver and Passenger than Lawyer has. The court is not required to correct this potential conflicting situation.

ANSWER TO QUESTION 1

1. a. The issue is whether there was sufficient evidence put forth before the grand jury by the prosecution to indict Driver and Passenger for criminal possession of stolen property.

Under the NYPL, the prosecution must put forth sufficient evidence before the grand jury that the grand jury can conclude that the defendants committed all elements of the crime and that there is reasonable cause that the defendants committed the crime. The exclusionary rule does not apply to grand jury proceedings. Therefore, inadmissible evidence that would not be allowed at trial may be submitted to the grand jury. In New York, a grand jury consists of between 16-23 people and 12 people are needed to indict the defendants.

At trial, the defendants may be able to assert the 4th Amendment privilege against unlawful search and seizure. The defendant must have standing which arises when the defendant has an expectation of privacy in the place to be searched or the item seized.

Under the NYPL, the elements of criminal possession of stolen property is that the defendant must have taken property of another or be in possession of someone else' s property with the intent to deprive the true owner of their property.

Here, the prosecution put forth sufficient evidence to charge Driver with criminal possession of stolen property because the Officer testified that when he pulled the car over he observed the steering column was broken and saw a screwdriver in the ignition. This was sufficient evidence to show that the car was stolen because a car would not normally be in such condition. Furthermore, there is reasonable cause that Driver is the defendant in criminal possession of stolen property because Driver was behind the steering wheel. Furthermore, there is sufficient evidence to conclude the car was stolen because when Officer ran the license plate he learned the car was stolen.

Therefore, the prosecution presented sufficient evidence to conclude Driver committed the offense of criminal possession of stolen property and the court was correct in denying the motion.

There was also sufficient evidence to indict Passenger because Passenger was found in the stolen car when he was apprehended by Officer. There was also sufficient evidence to show the Passenger knew the car was stolen because after being given Miranda warnings, Passenger said, "when driver picked me up, I saw the screwdriver in the ignition and I figured the car was stolen. " This statement was voluntarily given to Officer.

Therefore, there was sufficient evidence to indict Passenger on the charge of criminal possession of stolen property and the court was correct in denying the motion.

b. The issue is whether there was sufficient evidence put forth by the prosecution in order to indict Driver and Passenger of criminal possession of a weapon.

As stated above, the prosecution must put forth sufficient evidence before the grand jury for the grand jury to conclude the defendant committed the crime charged. Under the NYPL, the elements of criminal possession of a weapon is the defendant must knowingly be in possession of a weapon or firearm. When several people are pulled over in a vehicle and drugs or weapons are

found, every passenger is charged with criminal possession of the drugs or weapons. Automatic standing is given to passengers and drivers of an automobile when drugs or guns are found in the car where possession arises due to presence in the vehicle. Under the NYCLP, after a defendant has been arrested, the police may not search closed containers in the defendant's wingspan. Evidence of the gun may be presented to the grand jury because the exclusionary rule does not apply to grand juries.

Here, there was sufficient evidence that was presented to the grand jury to charge Driver with criminal possession of a weapon because the gun was recovered when Driver was pulled over by Officer. In addition, Driver was in possession of the car and the gun was contained within the car. Driver would be automatically charged with criminal possession of the weapon even though he may not have known the weapon was in the car when he stole it. He was found to be in possession when the Officer recovered the gun.

Here, there was also sufficient evidence to indict Passenger with criminal possession of a weapon because the gun was found in the glove compartment of the car and passenger was in the car. Even though Passenger may not have known of the gun, he will be charged with possession because he was in the car when the gun was recovered by the police.

Therefore, there was sufficient evidence before the grand jury to indict both Passenger and Driver of criminal possession of a weapon and the court was correct in denying their motion.

2. The issue is whether the prosecution served timely notice to Lawyer as to Passenger's statement.

Under the NYPL and NYCPL, a prosecutor must serve notice to the defense attorney at arraignment or 15 days after arraignment of any statements made by the defendants to the police. In addition, any statements made after arraignment must be given to the defense as part of Rosario material, which is any material the prosecution intends to use at trial against the defendants, such as grand jury testimony, police reports, medical reports, and criminal history of prosecution witnesses.

Here, the prosecution did not timely give Lawyer notice of Passenger's statement because the statement was given one month after arraignment which is more than 15 days after arraignment and the statement was made to the police prior to arraignment.

Therefore, the prosecution may not be able to use Passenger's statement in the prosecutor's case in chief. However, the prosecution may use the statement to impeach Passenger, if Passenger testifies at trial.

3. The issue is whether there is a conflict of interest for Lawyer to zealously represent both Driver and Passenger.

Under the NY Code of Professional Responsibility, a lawyer must zealously represent their client and have the client's best legal interests in mind during the representation. When there is a conflict of interest, the lawyer may ask to be dismissed from the case or the lawyer can continue representation of both clients, if the lawyer discloses the conflict to both clients and the clients agree to continue the representation. In addition, the court must make an inquiry into whether the client's interest will be served by allowing the attorney to represent both clients.

Here, there is a conflict of interest because Lawyer represented both Driver and Passenger at arraignment and entered not guilty pleas on behalf of both of them. A conflict arises because they have both been charged with the same crime that arose out of the same transaction. The Lawyer must speak to both clients and get their permission to continue representation. Lawyer must

address the court, and the court could determine whether the lawyer should continue representation.

Therefore, since there is a conflict, Lawyer should be excused from representing both defendants. It should also be noted that at trial, evidence of Officer's observations may not be admitted because probable cause that the vehicle was stolen arose after the vehicle was stopped. There was no indication of a traffic violation for the officer to check the car's license plate.

Question-Two

In February 2000, Joe duly executed and delivered a deed to his vacation property, Lakeside, to his son, Howard, and daughter-in-law, Wendy. Howard and Wendy duly recorded the deed in the county clerk's office. They recently learned that Joe and his sister, Sis, had purchased Lakeside together in February 1985 and had taken title as "Joe and Sis, as tenants in common." Joe died in 2001, but Sis is alive. Sis has never occupied Lakeside. Joe used Lakeside for one month every summer and rented it out for the balance of the year. Joe kept all the rent and paid all property taxes and expenses of maintaining and improving Lakeside until he gave the deed to Howard and Wendy. Like Joe, Howard and Wendy have used Lakeside for one month each summer, renting it out for the balance of the year and retaining all of the rent. They have paid all taxes and other expenses. The rent has always exceeded all of the expenses of Lakeside.

Howard and Wendy recently adopted Child through a private placement adoption. Child was born November 1, 2005 to Meg who was unmarried. On November 15, 2005, Meg signed and duly acknowledged before a notary public a proper written consent to the adoption. Howard and Wendy took custody of Child and duly commenced an adoption proceeding. On February 1, 2006, an order of adoption was made. Meg had claimed she did not know the identity of Child's father. In fact, Meg knew that Don, with whom she was living when she became pregnant, was Child's father. Don left Meg when he learned of the pregnancy. Last week, Meg called Wendy and informed her that Don was Child's father, that he had returned and wanted to marry Meg and raise Child, and that she was revoking her consent.

1. What are the rights of Howard and Wendy in Lakeside?

2. May Meg now effectively revoke her consent to Child's adoption?

3. May the order of adoption of Child be vacated on the ground that Don never consented?

ANSWER TO QUESTION 2

1. The issue is whether Sis' interest in Lakeside as a tenant in common has been defeated through Joe's adverse possession.

A party may not transfer a larger interest in property than what he owns. In a tenancy in common, each party owns a one-half undivided interest in the whole property, with the right to occupy and possess the whole. There are no survivorship rights with a tenancy in common; upon the death of one tenant, the tenant's interest passes through devise or intestacy. Where parties hold property as tenants in common, one tenant may obtain title to the whole through adverse possession. To obtain title to property through adverse possession, the adverse party must meet the following requirements for possession: 1) open and notorious, 2) hostile, 3) exclusive, 4) continuous, and 5) actual. Possession is "hostile" if it is under any claim of right, including under color of title. Possession is "exclusive" and "continuous" even if the possessing party only lives there part-time, and leases the property part-time. In New York, a party must meet the requirements for adverse possession for ten years to obtain ownership rights. However, where the adverse

possession will defeat an ownership interest of a tenant in common, the adverse party must meet the statutory requirements for 20 years. Adverse possession may be tacked (added together for purposes of meeting the statutory requirement) on both the true owner's side and the possessor's side. Only the total time of adverse possession is used to determine whether the statutory requirements have been met.

Here, Howard and Wendy only obtained ownership of Lakeside in February 2000, whereas Joe and Sis had purchased Lakeside in February 1985. Although Joe was a rightful owner of Lakeside, he nonetheless met the exclusivity requirement by paying all property taxes and maintenance expenses alone, and met the "continuous" and "actual" requirement by living there part-time and leasing the property for the remaining part of the year. However, only 15 years had elapsed between Joe and Sis' purchase and Howard and Wendy's ownership, which is insufficient to divest Sis' rights as a tenant in common. Because property interests may be tacked for the purposes of adverse possession, Howard and Wendy need only possess Lakeside exclusively through 2005 to divest Sis of her ownership rights. However, in the interim, they hold only a one-half undivided interest in Lakeside with Sis as a tenant in common, because Joe could not transfer more than he owned.

It should be noted that, because they are married and otherwise meet the requirements for a joint tenancy (identical time, title, and interest), Howard and Wendy take Lakeside as tenants in the entirety. A tenancy in the entirety, like a joint tenancy, grants survivorship rights to each spouse, and has the added protection that a creditor may not levy against the tenancy unless he is the creditor of both spouses.

2. The issue is under what circumstances a biological other may challenge an order of adoption entered after a duly commenced adoption proceeding.

In an adoption undertaken through a private placement, a biological mother may revoke her consent to her child's adoption using any of the "real defenses" available in contract law. For example, she may allege that the agreement was based on fraud, duress, or misrepresentation, or that she was incapacitated at the time she entered the contract. However, if the biological mother was the party who engaged in fraud or misrepresentation, she may not use this fact to her advantage to void an otherwise valid adoption.

Here, the facts indicate that the adoption proceeded without incident. Meg signed and acknowledged her consent before a notary public, an adoption proceeding was duly commenced, and an order of adoption was made. Given these facts, the only evidence upon which Meg could seek to revoke her consent to adoption is misrepresentation. However, Meg engaged in the misrepresentation, by first stating that she did not know the identity of Child's father, and later confessing that she had lied, and that the biological father was Don. Because Meg cannot use her own misrepresentation as a sword with which to void the adoption agreement, she may not now revoke her consent to Child's adoption.

3. The issue is whether a court may vacate an order of adoption based on the protest of a biological father who left the biological mother upon learning of the pregnancy.

Generally, the consent of both parents is required to effect an adoption. However, where the adopted child is non-marital, the consent of the biological father may not be required in certain circumstances. To protect his legal rights in the child, courts will look to the extent to which the biological father "assumed parental responsibility." The court will include such factors as the extent of his interaction with the mother during pregnancy, whether the father paid for medical expenses incurred during pregnancy, and his willingness and ability to assume custody and care for the child (as opposed to merely protesting an adoption). A biological father waives his legal rights to a child under several circumstances, one of which is abandonment.

Here, there is no evidence that Don sought to assert parental responsibility prior to this point. When he learned of Meg's pregnancy, Don abandoned Meg, with whom he had been living. He did not reappear until after the adoption had been completed. Given these facts, the court will not vacate the order of adoption.

ANSWER TO QUESTION 2
1. Howard and Wendy's rights in Lakeside

a. The first issue is whether Joe effectively held title to Lakeside in fee simply as a result of implied ouster of his co-tenant Sis. Generally, co-tenants have undivided rights to possess the whole, own separate and unique interests in the estate, cannot convey more than they own, and cannot prevent the other co-tenant from possessing the entirety or collecting rent or other income from the estate. However, New York law has recognized that one co-tenant may be able to acquire the entire estate via an adverse possession theory. This is called implied ouster and works when one tenant has exclusively held continuous, open, and actual possession to a concurrent estate for 20 years or more. Exclusive possession means that the absent co-tenant has never possessed the estate, and for purposes of the statute of limitations, a tenant may use tacking to add on the time spent on the estate by those who are in privity with him (e.g. renter – a reasonable nexus is sufficient).

Here, Joe has not satisfied the statutory period for implied ouster and did not have full title in fee simply to convey to Howard and Wendy.

b. The second issue is whether a recording statute protects Howard's and Wendy's interest in Lakeside. New York is a race-notice jurisdiction and holds that upon effective conveyance of a deed (legally executed in writing and proper delivery). The first bona fide purchaser to record will hold title as against other claimants. A bona fide purchaser is one who takes for value, in good faith, and without notice of any defects in title (e.g. other owners, bad deed). The Shelter Rule applies in New York to protect one who takes title from a bona fide purchaser and give him the same defenses as the original conveyor bona fide purchaser had.

Here, Joe duly executed the deed but he did not have full title to convey. There are two defenses that Sis can raise against Howard and Wendy. 1) That they should have had notice (actual, inquiry, or record/constructive) because Joe and Sis had taken title as "Joe and Sis, as tenants in common." Arguably, Howard would have actual knowledge that his aunt owned the property – this is not an egregious notice requirement – and if not, he could have easily done a title search to find out. Inquiry notice probably would not have helped here since Sis never used Lakeside. 2) The other defense Sis will have is that Howard and Wendy are not bona fide purchasers because they did not take for value; hence the recording statute will not protect them.

c. The third issue relates to the rights between spouses when a bequest is give.

Generally, a bequest remains the separate property of the spouse to whom it is given unless the grantor expressly provided otherwise. Here, Joe appears to have executed and delivered the deed to Howard and Wendy with interest that they both hold title. So, if Joe had had full title to convey, they would have both taken as tenants by the entirety because the unities of time, title, interest, possession, and marriage would have been present.

2. The issue is whether consent to an adoption is revocable.

Adoption agreements are controlled by contract law and are subject to the same defenses to formation as contracts. Duress or incapacity could provide adequate defenses to the creation of an

adoption agreement, but when a mother simply changes her mind she may not revoke consent to the adoption, absent some provision allowing for said change of heart.

Here, Meg was unmarried and claimed not to know the identity of the father. Neither Howard, Wendy, nor the Family Court issuing the order of adoption could have suspected that she would later discover the paternity (or simply change her mind). Her call to Wendy informing her that she now knew the identity of Don was, apart from fraudulent, not a proper assertion of mistake of fact to prevent formation of the adoption consent agreement. Hence, she is not entitled to revoke the consent to Child's adoption.

3. The issue is whether a father's consent is required for adoption and if such consent is waivable.

The "best interests" of a child are of great importance to New York and the court will place emphasis on a parent's fitness when determining custody. Where a child is adopted without the father's knowledge or consent, the court will consider the age of the child rather than the date at which point the father began to show an interest in having custody (or objecting to the adoption of his child). Where the father cannot be located or is not known to the court, the mother may be considered to have sole custody for purposes of adoption proceedings.

Here, Don effectively waived his rights to custody when he abandoned Meg upon learning that she was pregnant. Although the court would ordinarily be interested in Child being raised in an environment with both of his parents married, an order of adoption should not be overturned because of Don's decision to reconnect with Meg and Child, especially since his intentions are future ones.

Question-Three
Bob was selling widgets out of his home as a sole proprietor. Bob was not paying his suppliers, and they were threatening to sue him. He decided to incorporate, and in August 2005 he filed a certificate of incorporation, creating Bob Corp. Bob is the sole shareholder and sole director of Bob Corp.

Bob Corp. did business from Bob's home. Bob Corp. did not open a corporate bank account but used his personal bank account to pay for both personal and corporate debts. Bob Corp. did not hold any corporate meetings or maintain any corporate books or records.

On October 3, 2005, no longer able to obtain widgets from his regular suppliers, Bob called Sell Corp., a manufacturer of widgets. Bob Corp. placed an order with Sell Corp. for 10,000 widgets at a price of $1 per widget, to be delivered on October 31, 2005, with payment due on delivery.

On October 4, 2005, Sell Corp. sent the following "Order Confirmation" to Bob Corp., signed by Sara, as President:

"Sell Corp. accepts Bob Corp.'s order for 10,000 widgets, at $1 each, delivery on October 31, 2005, payment due on delivery.

Interest: Bob Corp. shall pay interest of 1½ % per month on payments made more than 10 days after delivery.

Waiver of Warranties: 24 hours after delivery all warranties of merchantability are waived by Bob Corp."

There had been no discussion between the parties of any provision for interest or the waiver of warranties. On October 6, 2005, Bob Corp. received Sell Corp.' s "Order Confirmation." Bob Corp. never notified Sell Corp. that it was agreeing to or rejecting the provisions for interest on late payment or waiver of warranties and never signed a copy of the "Order Confirmation."

On October 31, 2005, Sell Corp. delivered the widgets to Bob Corp. Six weeks later, Bob Corp. still had not paid for the widgets. Sara called Bob who told Sara that Bob Corp. would not pay for the widgets because the contract was not enforceable and in any event, the widgets were defective. Sara responded that, pursuant to the parties' agreement which was enforceable, Bob Corp. was obligated to pay interest of 1½% per month for late payment, and under the contract, it had waived its rights to enforce the warranty of merchantability. In January 2006, Sara discovered that Bob Corp. was insolvent when it placed the order. Sell Corp. commenced an action against Bob Corp. and Bob individually to enforce the contract.

(1) Was there an enforceable contract between Bob Corp. and Sell Corp.?

(2) Assuming that there was an enforceable contract between the parties:

(a) Is Sell Corp. permitted to recover interest on the late payment from Bob Corp.?

(b) Has Bob Corp. waived its right to enforce the warranty of merchantability?

(c) May Sell Corp. successfully maintain an action against Bob individually?

ANSWER TO QUESTION 3

1. Was the contract between Bob Corp and Sell Corp unenforceable by virtue of the statute of frauds?

In establishing an enforceable contract between Bob Corp and Sell Corp, the following things must be established: 1) offer, 2) acceptance, 3) consideration, and 4) lack of defenses to enforcement.

An offer is an unequivocal manifestation of an intent to be bound. In the present case, Bob placed an order with Sell that listed the necessary material terms of price, quantity, and dates for performance. He evinced an unequivocal intent to be bound by the contract. Thus, there is an offer.

Acceptance is communication of an intent to be bound by the terms of the offer. The common law "mirror image" acceptance rule held that an acceptance must exactly mirror the offer. Any additional terms or variation would constitute a counter-offer, which revokes the offer. Under Article 2 of the UCC which governs contracts for sale of goods, mirror image is not the rule. As long as there is substantial agreement on the material terms, additional terms can be added (whether they are included or not is another matter, discussed later). Thus here, with the order confirmation, Sell has communicated its intent to perform the terms of the offer.

Consideration is a legal benefit rendered to, or detriment suffered by, each party – mutuality of promises. This element is met, as Bob is offering payment, and Sell is offering to provide widgets.

The primary one here is the statute of frauds. Certain contracts must be evidenced in writing to be enforced. One such contract is a sale of goods, under the UCC, for over $500. In the present case, the total sum that Bob is to pay under the contract is $10,000, thus the contract is within the statute of frauds.

The requirement for contracts for sale of goods over $500 is that there must be a writing stating the parties, the nature of the goods and quantity, and signed by the party against whom the agreement is to be enforced. Here, since the confirmation was signed by the President of Sell, this element is lacking.

However, there is an exception for documents known as a "confirmatory memorandum." In a goods contract between two merchants (for present purpose, this means two people carrying on a business or trade), a writing that confirms an agreement, and includes the necessary details, is sufficient if it is signed by the party enforcing it (not the party against whom it is enforced), as long as the party against whom it is enforced did not object. In the present case, both parties are merchants (Bob sells widgets, Sell manufactures them). The confirmation stated the necessary terms, and Bob did not object. For this reason, the statute of frauds obligation is met, and the contract is enforceable.

2. Assuming an enforceable contract

a. Was the interest term for late payment incorporated into the contract?

As stated above, under the UCC Article 2, the accepting party may add

additional consistent terms in its acceptance, and this is considered an acceptance, and not a counter-offer or rejection. In the present case, the added terms were not inconsistent with the agreed terms of the parties, as we are told.

The question is whether the additional terms are incorporated into the contract. The issue is known as "battle of the forms." An additional, consistent term will be added to a contract between merchants on three conditions: 1) the term is not material, 2) both parties are merchants, and 3) the offeror does not complain within a reasonable time.

Is the interest term material? A material term is one that significantly changes the nature of the bargain between the parties. It is generally held that a term adding interest to late payment of a contract price, as long as the rate of interest is reasonable, is not a material term. Here, a rate of interest of 1.5% per month is not excessive, is reasonable, does not fundamentally alter the nature of the bargain, and is therefore not a material term.

Both parties are merchants, as discussed above. They both trade in widgets. Further, Bob has not complained about the addition of the interest term. Therefore, the interest term has been added to the contract, and Sell may add interest to judgment debt obtained against Bob.

b. Was the disclaimer of warranty of merchantability incorporated into the contract? If not, did Bob waive the right to reject?

The warranty of merchantability is a promise that the goods are fit for the purposes for which goods of the type are normally used. The rule is that although an express warranty may never be disclaimed, and implied warranty relating to goods (either the general warranty of merchantability or the specific warranty of fitness for purpose) may be specifically excluded from a contract. The disclaimer must be clear and explicit. Here, Sell has used sufficient wording to disclaim the warranty.

Nonetheless, the question must be asked again as to whether the term was incorporated. As stated above, an additional consistent term will be added to a contract between merchants on three conditions: 1) the term is not material, 2) both parties are merchants, and 3) the offeror does not complain within a reasonable time. Here, both parties are merchants and the offeror (Bob) did not

complain within a reasonable time. However, a term negating a warranty is a material term. In effect, if would prevent Bob from having a remedy if the goods were of inadequate quality. This substantially alters the nature of the bargain between the parties. It is a material term, and is not incorporated into the contract.

Thus, the widgets were subject to an implied warranty of merchantability. However, failure of the goods to meet this standard can only give rise to reject for a limited period: a reasonable time for the buyer to inspect. Bob has had six weeks to inspect the goods and reject them – this is an ample time. There is no suggestion of a latent material defect that has only just become recoverable. Bob has waived the right to reject the goods, and is liable to pay for them. However, he may still recover expectation damages that can set off his liability to Sell, for the failure of the goods to meet the standard of merchantability.

c. Can Sell recover against Bob personally?

The normal rule is that separate corporate personality and limited liability protect shareholders of companies from liability for their debts. However, in certain cases, a court may "pierce the corporate veil" in the interests of justice. Several different bases are used to determine whether this should be done.

If corporate form is being used to perpetrate a fraud, a court may pierce the corporate veil. Here, we are told Bob formed the corporation as a result of threatened litigation by suppliers whom Bob failed to pay. It is apparent that he intends to use incorporation as a means of escaping personal liability for debts. As against Sell, it is likely that Bob Corp never had sufficient assets to pay the contract price, and Bob is merely using the corporation as a shield to perpetrate a fraud against Sell.

Where a court finds that no separate corporation really exists, and that the owner is really just conducting personal business under corporate guise, it may pierce the corporate veil. Here, Bob is sole shareholder and owner. He appears to have sole managerial power and responsibility, and is merely carrying on the same business he did before. Further, he commingles his own and corporate funds in one bank account, thus not separating between the property of the corporation and his own. There is no evidence, either, that he sufficiently capitalized the corporation to meet its foreseeable debts – as evidenced by its rapid insolvency. It would thus appear that the corporation is Bob's "alter ego", and is really him, in corporate disguise.

Both of the above grounds are rationales for piercing the corporate veil. There is an amply sufficient basis for allowing Sell to pursue Bob personally for satisfaction of its contractual claim.

ANSWER TO QUESTION 3

1. The question presented was if a contract between Bob Corp. and Sell Corp. formed, and if there are any defenses.

Before examining the question, it is necessary to establish the applicable law. The contract is for the sale of goods, and hence is governed by UCC Article 2. UCC Article 2 has been enacted by the legislature of New York and will apply to the transaction rather than traditional common law rules of contract. Additionally, as both Bob and Sell are in the business of buying or selling widgets and have special knowledge of the market, the UCC rules applicable to dealings between merchants will therefore apply.

Formation of a contract requires a meeting of the minds, as evidenced by an offer and acceptance. Both of these are judged objectively, and not on the subjective interpretations of the parties. In the given situation, Bob's order was the offer and Sell's "order confirmation" was the

acceptance. Bob may try to claim that Sell's order confirmation could not be an acceptance because it changed the terms of the contract. Between merchants under the UCC, however, the "mirror image" rule does not apply. A contract will be formed even if an acceptance is at variance with the terms of the offer. How the contract will be interpreted, is discussed more fully below.

There is no problem with consideration, at the time of formation this was a bilateral contract. Bob gave a promise to pay and Sell gave a promise to sell the widgets. Bob may try to claim that the contract is not valid because of a violation of the statute of frauds. UCC Article 2 subjects all contracts for the sale of goods over the amount of $500 to the statute of frauds. This means that the contract cannot be oral. There must be a writing, ordinarily signed by the party to be charged, which contains all the material terms. The order confirmation serves as the written memorandum of the agreement, and it contains all material elements such as a description of the goods, an amount, and the date of delivery. Though price and date of payment are included, the contract would not fail for excluding these elements as the court can reasonably set both.

Bob will show that he never signed the memorandum. But under the UCC rules applying to merchants, a signature can be implied by the failure to object within a reasonable amount of time (ordinarily ten days). There Bob never objected to the order confirmation, so he will be charged with signing the document.

Even if Bob could be successful in making a claim based on the statute of frauds, Sell could estop him from doing so. A party can be estopped from raiding the statute of frauds when the other party has completed performance. Here, Sell has completed performance because they have fulfilled their sole contractual duty, to deliver 10,000 widgets. Therefore, Bob could not even raise the statute of frauds. Because there was a valid contract formed, and because no defenses to the formation exist, there is an enforceable agreement between Sell and Bob.

2. a. The question presented is whether the interest term is material.

At the common law, when an offer and an acceptance varied between their terms, but the party's actions show that they clearly intended there to be an enforceable contract, Courts would apply the "last shot" doctrine. It stated that the last terms sent prior to performance of the contract would govern. The UCC did away with the last shot doctrine, and applies different rules to contracts as to the sale of goods.

As to the sale of goods between merchants, a variation between the offer and acceptance will become a part of the contract unless: i) it materially alters the contract, or ii) it is objected to within a commercial reasonable time (not to exceed 30 days). In the given situation, it is clear that Bob never objected to the inclusion of the interest payments.

Whether or not it materially alters the contract, is a matter of fact to be decided at trial. Based on the evidence, however, it would not materially alter the contract. The order confirmation clearly states a time for payment. If payment is not on this date and Sell Corp. is awarded a judgment on this transaction, it would be entitled to a statutorily set interest rate anyway. The rate, 18% per annuam, is not so high as to be unreasonable or unconscionable. Because it does not materially alter the contract, the interest clause will be enforceable.

b. The question presented is whether the waiver of warranties is material.

As noted above, a variation between an offer and acceptance between merchants is enforceable unless it is material or objected to. As Bob did not object, the only question is whether or not the clause materially alters the agreement. Chattels purchased from a commercial seller are automatically governed by a warranty of merchantability. Though, between merchants this

warranty can be waived, it must be waived expressly. The waiver of the warranties is also always material.

For the proceeding reasons, Bob has not waived the warranty of merchantability. If he can show that the widgets were defective, he will have a defense to his failure to pay.

c. The question is whether Sell can "pierce the corporate veil."

Ordinarily, shareholders in corporations are granted limited liability. That is, they cannot be held responsible for the liabilities of the corporation in excess of the amount of their capital contribution. This limited liability, however, can be taken away in the interest of justice. This is normally referred to as piercing the corporation veil.

There is no single precise test for a court to examine when determining when to pierce the corporation. Instead, it considers a number of factors; the most important (but not determinative) being the undercapitalization of the corporation. Other factors considered are fraudulent use of the corporate entity, action as an "alter ego", intermingling of funds, and failure to maintain corporate formalities.

As to Bob Corp., Bob is the sole shareholder and apparently never made a single contribution. He freely intermingled funds, and failed to maintain even the most rudimentary of corporate formalities. Bob clearly used the corporation as an "alter ego", in that he operated it solely for his own personal (and not corporate) benefit.

In addition to the things mentioned above, the court can also consider evidence which shows the interest of justice would be served by piercing the veil. It should be considered that Bob was operating as a sole proprietor and apparently only incorporated to get liability protection and also, the fact that Bob Corp. was insolvent when it placed the order. Because Bob, if not committing a fraud, was clearly acting to take advantage of the corporate form in an unfair way, the interests of justice support piercing the veil.

For the preceding reasons, it is clear that Sell will be able to continue against Bob personally and can "pierce the veil", removing Bob’s limited liability.

Question-Four

At 8 AM on October 5, 2004, Cal called the T Town Police Department and reported that his neighbor, Nash, who had threatened to kill him following a dispute the previous evening, was presently standing on Nash's porch with a shotgun pointing at Cal’s front door. The police dispatcher told Cal to stay inside, and that he would send a patrol car right over.

Due to the dispatcher’s mistake in recording Cal’s address, he sent the patrolman to the wrong street. The patrolman reported to the dispatcher that he was unable to find the address. The dispatcher told him to disregard the earlier call and made no effort to determine if an error had occurred in recording Cal’s address.

Cal remained inside his house while Nash continued to point the shotgun at Cal’s front door and to holler threats at him. Cal did not call the police again. At 11 AM, Cal’s friend, Parker, arrived at Cal’s house unexpectedly, having no knowledge of the morning’s events. As Parker approached the front door, Cal came out of the house to warn him to leave. Intending to kill Cal, Nash fired the shotgun, striking and injuring Parker. Nash was indicted for the crime of assault on Parker, and following a trial, Nash was convicted. On September 15, 2005, Parker duly commenced an action against Nash to recover damages for battery.

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Parker duly filed a Notice of Claim with T Town on December 5, 2004. On November 10, 2005, Parker duly commenced an action to recover damages for his injuries against T Town. Parker's complaint alleged the foregoing facts and alleged that T Town was negligent in providing police protection.

After issue was joined in both actions: (1) Nash moved for summary judgment, asserting that he could not be liable to Parker for battery, because, when he fired the shotgun, he had no intent to harm Parker; (2) Parker moved for summary judgment against Nash on the issue of liability, offering proof of Nash's conviction and asserting that the conviction was determinative of Nash's liability to him in the civil action; (3) T Town moved for summary judgment on the ground (a) that the statute of limitations barred Parker's claim, and (b) that, in any event, T Town could not be held liable to Parker for failing to provide police protection, as a matter of law.

How should the numbered motions be decided? Explain.

ANSWER TO QUESTION 4
1. The issue is whether, under the elements of the tort of battery and the doctrine of transferred intent, Nash can be found liable for battery of Parker.

Under New York tort law, there are three different and independent ways that one can be found liable for battery: 1) intent to cause an offensive and unwanted contact, and such contact results; 2) acting with reckless disregard of the possibility of causing an offensive and unwanted contact, and such contact results; and 3) intending to cause an assault (an immediate apprehension of offensive contact), which results in an offensive and unwanted contact. To be liable for battery, one person does not have to actually touch another person. That is, if a person uses or releases an instrumentality which itself contacts the plaintiff or anything connected to him, that would also give rise to a battery. (For example, throwing a ball at a person with the intent for the ball to contact him and such contact results, would constitute a battery, even though defendant did not himself touch the plaintiff directly.)

The doctrine of transferred intent also applies to battery. That is, if defendant intends to offensively contact person A, but actually contacts person B instead, it is no defense that he did not intend to commit a battery against person B. Thus, in this hypothetical, defendant would indeed be liable to person B in battery under the doctrine of transferred intent.

Procedurally, in New York, a court should grant a motion for summary judgment if, viewing the evidence in the most favorable light to the non-moving party, no reasonable trier of fact could conclude that an issue of material fact exists for trial. It remains to apply the facts to the law as outlined, to the three individual and separate ways the tort of battery may be realized.

The first way a battery can result is satisfied here. It is evident that Nash intended to shoot Cal, which would certainly constitute a battery against Cal. Because of the doctrine of transferred intent, Nash mistakenly hitting Parker does indeed constitute a battery against Parker.

The second way a battery can be satisfied is also triggered here. That Nash pointed a gun, and shot the gun in close proximity to Parker, and the doorstep was in reckless disregard of the possibility of causing the contact. Thus, the shooting of Parker constitutes a battery. The doctrine of transferred intent is not even needed to satisfy this separate way of causing a battery, considering that recklessness is the ground.

The third way of causing a battery is also satisfied. Nash continued to point the gun at all times. This put Cal in apprehension, as evidenced by Cal's asking Parker to leave. Parker apparently

was not in similar apprehension, given that Parker did not seem to be aware that Cal was there with the gun. In any case, Cal was in immediate apprehension of harm. The fact that Nash was committing assault and that offensive touching results with another party (under the doctrine of transferred intent), a battery is also committed under this third theory.

For these three independent reasons, Nash's motion for summary judgment should be denied, because a reasonable trier of fact could conclude, viewing the evidence in the most favorable light of Parker (the non-moving party), that Nash committed a battery against Parker.

2. The issue is whether the doctrine of issue preclusion applies to bar Nash from contesting liability against Parker's battery claim, in light of Nash's conviction for criminal assault.

At issue here is Parker's attempt to invoke issue preclusion against Nash. What Parker is also trying to invoke might also be referred to under the doctrine of res judicata, or alternatively, offensive collateral estoppel. This essay will proceed in calling this doctrine the one of "issue preclusion." In New York, issue preclusion may be invoked if: 1) the issue was actually and conclusively decided in the first litigation; 2) the burden of proof in the first action is the same as, or more difficult than, the burden of proof in the second action; and 3) the party against whom enforcement is sought had a similar motive and opportunity to defend the claim in the first action.

Before applying the three elements, it is important to outline the issues in each case. In the criminal case, the conviction of "crime of assault" in New York requires the prosecution to prove, beyond a reasonable doubt, that the defendant intended to cause an offensive and unwanted contact against the victim (also, the doctrine of transferred intent applies). The tort of battery is satisfied by proving the same thing, under method one of establishing the tort of battery as discussed above. The burden of proof for the tort of battery is a lower threshold, requiring only proof (by the plaintiff) by a preponderance of the evidence.

As this discussion reveals, the issues in the criminal trial (already over) and the tort of battery are the same. Thus, element one is satisfied. As far as element two of the doctrine of issue preclusion, it is also satisfied because the criminal trial had a higher burden of proof. Thus, it can be used in the instant tort case, which requires only a preponderance of the evidence. Finally, element three of issue preclusion is also satisfied. Parker had even a greater motive to defend himself against criminal charges, and there was a full trial where Parker had an opportunity to do so.

Parker's motion for summary judgment should be granted. In viewing the evidence in the most favorable light to Nash, no reasonable trier of fact could conclude that Nash's conviction does not bar him from relitigating the same issue here.

3. a. The first issue is whether the statute of limitations had expired.

To render a claim against a town in New York, one must file a notice of claim within 90 days of the occurrence. Then, the action must be filed within one year after that 90 day period expired (15 months after the occurrence).

Here, the claim was filed within 90 days so that satisfies the first requirement. The action was filed just over thirteen months after the occurrence so that satisfies the second requirement. Thus, the statute of limitations had not expired, and the Town's motion for summary judgment should be denied.

b. The second issue is whether the Town owed a duty to protect Nash against harm.

The elements of a negligence claim are: 1) duty, 2) breach, 3) causation, and 4) damages. Generally, one owes a duty to foreseeable plaintiffs. However, the Supreme Court has held that

the government does not owe a duty to protect a plaintiff from harm by third parties, unless the government itself created the harm.

Here, Parker appears to be a foreseeable plaintiff. He was present at the time when a man was pointing a gun at a house, and the police did not act reasonably in responding. The problem for Parker, however, is that Supreme Court precedent bars his claim because the government itself merely was negligent in responding and critically did not create the harm. In other words, the government did not owe a duty to protect Parker.

Thus, despite the sympathy one may have for Parker, T Town's motion for summary judgment that it cannot be held liable to Parker for failing to provide police protection should be granted.

ANSWER TO QUESTION 4

1. The issue here is whether Nash's intent to injure Cal can be transferred to Parker, who was actually injured by Nash. According to the doctrine of transferred intent, when an individual has the intent to commit a crime or a tort against one individual, if in the act of trying to accomplish that tort or crime another is injured, the intent to harm one party can be transferred to the party that actually was injured. Did Nash have the intent necessary for a battery against Cal? The answer is yes. Nash spent the morning standing outside of Cal's house and holding a shotgun towards the door while hollering out threats. This clearly demonstrates an intent to do injury to Cal, as he had a dangerous instrumentality and made statements indicative of his intent to use it. As soon as Cal made himself available for attack, Nash promptly made good on his threats, thus leaving no room for doubt as to intent.

However, when the shot was fired, it was Parker, not Cal who was injured. Since Nash meant to commit a tort against Cal and since he performed the act that he believed would give rise to that tort, then his intent transfers to Nash, who actually was injured by the tort committed.

2. The issue is whether Nash's prior criminal conviction, based on the same transaction and nucleus of operative facts, functions as issue preclusion, not allowing Nash to relitigate the facts surrounding his attack on Parker. First, it is important to note that in New York the crime of criminal assault comprises essentially the same conduct as the tort of battery. The assault conviction does cover the same factual issues as the battery charge. This being said, in order to use a prior court judgment for preclusive effect, not only must the facts involved be the same and the charges involved be highly similar (as they are here), but additionally the defendant must have been given a full and fair opportunity to litigate the matter and to confront his accusers. For example, pleading guilty to a speeding ticket would not necessarily lead to issue preclusion in a negligence matter arising from the same set of facts. This is because the incentives to vigorously contest a speeding ticket and the resources invested into such a matter are not commentate to the incentives and the resources invested and the stake that is involved in a multi-million dollar personal injury suit. However, in this case Nash had a jury trial on the criminal assault. As such, he had the benefit of legal representation, and with his liberty issue at stake (not going to jail) he had a strong incentive to vigorously contest the charge against him. Thus, having satisfied the prerequisites for issue preclusion, the prior conviction can be admitted and used to grant Parker's summary judgment motion as to the issue of liability. Of course, further legal proceedings would still be necessary on the damages issue.

Criminal convictions are not always admissible against a defendant. In a civil trial these would normally only be admissible for impeachment purposes, but because the criminal conviction here goes to the essence of the matter and liability, it will be allowed in as to the liability issue.

3. a. The issue here is whether the one year and 90 day statute of limitations on actions against municipalities has been complied with. The statute of limitations began running the day the tort

occurred, October 5, 2004. Starting from that date, Parker had 90 days to file a notice of claim with the municipality in order to put them on notice and to preserve his cause of action. Parker complied with this requirement, as he filed the notice of claim on December 5, 2004, less than 90 days after the date of the tort. However, the statute of limitations was not renewed at that point. Parker did not have one year and 90 days from when the notice of claim was filed. The one year and 90 days was still measured from the date of the tort. Thus, this complied with the one year and 90 day statute of limitations for the claim against the municipality.

b. The issue here is if Town is immune from prosecution for negligent police work as a matter of law. Did Town owe a specific duty to Parker? The general rule of thumb is that where there is liability towards everyone, then there is liability towards no one. The police department cannot be held generally accountable for its lack of effectiveness by its citizens. For example, if my block is infested with drug dealers and I call the cops and they do nothing about it, I have no cause of action because the police owe me no specific duty that is different from the duty they owe to everyone on my block or everyone else in the city. However, a municipality may be liable for inadequate police protection if it contractually agrees to be or contractually undertakes to provide a certain level of protection for a specific individual or institution. Example: If in order to secure a stadium deal with a sports franchise, the city promised that franchise a certain level of police protection. The municipality may also be liable for inadequate police protection when it has a special relationship with an individual and through that relationship obligates itself to provide a certain level of effective police work and that individual relies upon this obligation to his detriment.

Parker reached out and called the municipal police by dialing the Town Police Department. The police dispatcher told Cal to stay inside and that a police car was on the way, thus giving specific instructions to Cal, which he followed. However, this does not create the sort of special relationship between Cal and the municipality that would be necessary for Town to owe a duty in this case. Cal was merely a regular citizen, the same as every other citizen in Town, and his request for police assistance did not differentiate him from any other citizen in Town. His request for police assistance did not differentiate him from any other citizen requesting such assistance or generally relying upon the effectiveness of the police (i.e., anyone walking down the street at night). The fact that the dispatcher told Cal to stay indoors does not establish that Town gave him an assurance or assumed a burden, which he then relied upon to his detriment, thus creating a cause of action. The dispatcher merely gave Cal a routine response, not in any way especially tailored to his situation. Additionally, Cal cannot say that he relied upon the dispatcher. Under the circumstances, with Nash waiving a gun at his front door, it is safe to say that Cal would not have left the house even without the dispatcher’ s advice.

Furthermore, unlike the transferred intent doctrine available in a battery action, Parker could not be the beneficiary of any duty owed by the city to Cal. Parker was only incidentally at Cal’ s house. His presence was not foreseen by Cal or the municipality (thus negating proximate cause even if the Police had assumed an obligation to Cal). Therefore, Parker has no reasonable ground to stand on in trying to hold the police/municipality negligent and liable in the performance of their duties.

Question-Five
On October 1, 1990, Agnes and Bob were married. It was the second marriage for both. On October 10, 1996, Agnes duly executed a Will which left specific cash bequests of $10,000 to each of her three children, Ann, Sam and Carol, and left her entire residuary estate to her husband Bob, who was also the named executor. The 1996 Will, by its express terms, revoked a previous Will duly executed in 1988, which left everything to Agnes' three children in equal shares.

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Agnes died on January 15, 2006. When Bob sought to probate the 1996 Will, he retained Attorney Johnson, who had drafted that Will. Shortly after he was engaged to handle the probate of the Will, Attorney Johnson learned that a later Will of Agnes had recently been offered for probate. That instrument had been prepared by Attorney Williams and had been executed on December 15, 2005. It contains specific cash bequests of $10,000 each to Ann and Sam, with the residuary bequeathed to Carol. There is no provision in the 2005 Will for Bob.

Attorney Williams will testify that Agnes called him from the hospital on the morning of December 13, 2005 and advised him of her specific wishes regarding her new Will. He will also say that in that phone call, Agnes sounded confused and told him the medication she was on was affecting her memory. He will further testify that Agnes told him she had learned from Carol that Bob might have a gambling problem, so she wanted Carol to be her executrix. Attorney Williams will acknowledge that he was aware that Carol was in her mother' s hospital room when Agnes called his office. On December 14, 2005, the day before the 2005 Will was signed, Agnes discharged herself from the hospital against medical advice following surgery for a serious medical problem.

Bob has also learned that Attorney Williams is Carol' s personal attorney and that Carol drove her mother to Attorney Williams' office on the day that the 2005 Will was executed. Carol was present with her mother at the time she executed her 2005 Will. The execution of the Will was witnessed by Attorney Williams and his secretary, both of whom will testify that Agnes appeared alert and lucid as she read and signed her Will.

The assets owned by Agnes at the time of her death were stock valued at $300,000, a vehicle valued at $14,000, a savings account with a balance of $150,000, and a $50,000 life insurance policy on her life with Bob the named beneficiary.

(1) On what grounds might Bob contest the 2005 Will and is he likely to succeed?

(2) If Bob is unsuccessful in contesting the 2005 Will, what rights may he assert in connection with the assets owned by Agnes at the time of her death?

ANSWER TO QUESTION 5

1. Under New York law, a testator must have testamentary capacity at the time of the execution or revocation of a testamentary instrument. The testator must understand the nature of the act he or she is engaging in (that he or she is making a Will), the nature and extent of his or her property, the natural objects of his or her bounty, and be able to devise an orderly scheme of distribution. All that the testator need be is lucid at the time of the execution of his or her will. The level of capacity required is less than that required to contract.

Here, two days before Agnes executed her Will, she was "confused" and admitted that her medication was impacting her memory. Clearly, Agnes may not have had testamentary capacity at that point. Agnes, however, need only have had testamentary capacity when she executed her will. On the date of the execution of the Will, some two days later, Agnes appeared both "alert" and "lucid", giving an indication that she possessed the requisite testamentary capacity to make her Will. Therefore, it is unlikely that Bob will succeed in such a claim.

Undue influence is a dominating force on the testator' s mind that destroys the testator' s free agency and forces him or her to embody the intentions of someone else in his or her Will. Undue influence may be shown by influence in fact, that the effect of the influence was to destroy the testator' s free Will, and that but for the undue influence, the Will would not have been executed as it was. When someone who receives a bequest under a Will, and who is also in a confidential relationship with the testator and instrumental in procuring the Will, a presumption of undue

influence arises. The court is less likely to find a confidential relationship, and thus undue influence, among family members.

Here, although it is clear that Carol may have exercised influence in the making of her mother's Will by making statements regarding Bob's potential gambling problem, and being the procuring cause of the new Will, it is unlikely that Bob would be successful in challenging the Will on those grounds.

A Will may be contested on the grounds of fraud where, an individual knowingly makes a material misrepresentation of fact, with the intent to induce reliance by the testator, which actually induces reliance to the testator's detriment.

Here, Carol's statement that "Bob might have a gambling problem", if made with the knowledge that it was false and with the intent to alter the dispositions in the Will, may be sufficient grounds to contest the Will. This will be Bob's best chance at contesting the Will.

2. Under EPTL 5-1.1A Surviving Spouse Right of Election, a surviving spouse who is not disqualified under EPTL 5-1.2 may elect to receive the greater of $50,000 or 1/3 of the decedent-spouse's net estate. The right of election may not be defeated by the decedent-spouse's Will. The right of election is calculated by first reducing the gross estate by the exempt personal property set-asides. Next, expenses, but not taxes, are paid to arrive at the net probate estate. Then, testamentary substitutes are brought back into the estate. EPTL5-1.1A then instructs that one takes 1/3 of the estate with the testamentary substitutes or $50,000, which ever is greater, and reduce that by the amount of testamentary substitutes received by the surviving spouse.

Here, the vehicle valued at $14,000 is an exempt personal property set-aside and will go to Bob ($15,000 vehicle limit). The stock valued at $300,000 and the savings account valued at $150,000 are both part of the probate estate and as such will be used to calculate the elective share. The $50,000 life insurance policy will pass outside of the Will, and thus will not be used in the elective share calculation. The gross probate estate then equals $450,000 ($300,000 + $150,000). Expenses are then normally deducted. Here, however, the expenses are not provided in the facts. Using $450,000 as the net estate, we then reduce by the amount of testamentary substitutes received by Bob. Here, Bob did not receive any testamentary substitutes. Bob's net elective share then is 1/3 of $450,000, or $150,000. Spousal right of election is a personal right and Bob must make such election within six months of letters being issue.

ANSWER TO QUESTION 5

1. The issue is whether there was anything in the creation of the 2005 Will that would enable the Will to be determined invalid as it was not properly executed.

In New York, when a person makes a Will they must have capacity to do so. Indeed it is possible for a person to be mentally incompetent for the purposes of having a guardian appointed, or for the purpose of criminal liability, and yet still have the requisite capacity to make a Will. It is a much lower standard. Essentially, a person will have mental capacity, if they understand what they are signing, they understand the value of the object, and they know the object of their bounty. Indeed even if someone is generally incompetent, they would be able to validly sign a Will during a lucid moment.

In this case, there is some evidence that Agnes was incapacitated. When she made the phone call to the Attorney, she sounded confused and said her memory was being affected by the medication. Furthermore, she had checked herself out of the hospital against medical advice. This does not indicate that she was thinking clearly at the time. These factors would tend towards incapacity that said at the time the actual Will was executed Agnes appeared alert and lucid. It

appears that the Will was signed during a lucid period, and thus it appears that capacity has been established. Thus, it appears unlikely that will succeed on this ground.

The Will could also be challenged on the ground that Carol exercised duress or undue influence over Agnes in the making of the Will. Generally, the courts are loathed to make such a finding. In certain special situations, a presumption of undue influence can be found, generally if it is a confidential relationship. That would include an attorney/client relationship or a parent/child relationship where the child has a durable power of attorney. Either way, in order to succeed on this ground, there is a need to show that the Will is not the product of Agnes' own volition.

In the case at hand there is no evidence that Carol has a durable power of attorney, and thus it will be hard to get the presumption of undue influence to be imputed. There is however, a lot of evidence that Carol has destroyed the free will of Agnes. In both of Agnes' two previous Wills she had been very consistent to treat each of her children equally. All of a sudden this has changed. She is treating Carol substantially better than the others. Furthermore, she has made the Will with someone other than her usually attorney without telling her husband, as he still thought the 1996 Will was valid. Indeed she used Carol's personal attorney. Furthermore, Carol was both in the room at the time that Agnes made the phone call to Attorney Williams in a confused state, and Carol then ensured that Agnes was driven to the Attorney's office and stayed there with Agnes while the Will was signed. Finally, the day before she had signed the Will, Agnes had discharged herself from the hospital against medical advice. It is possible that Carol exerted pressure on her to do this, as she was known to have been there at the hospital the day before. There is certainly a lot of circumstantial evidence intimating that Carol exercised undue influence. That said, Agnes did read and then sign the Will while in a lucid and alert state. There is no guarantee that undue influence could be made out on these facts. One other possible approach would be to try and claim that Attorney Williams was acting as an agent for Carol, and as such try to invoke the presumption of undue influence under the heading of attorney/client privilege, but it is unlikely that this would work.

There are two main grounds for Bob to challenge the Will. He can claim that Agnes did not have the mental capacity to make a new Will, or he can claim that Carol exercised undue influence/ duress over Agnes to see that the Will was made. However, his chances of success are not great, particularly on the first ground.

2. The issue here is what Bob is entitled to if the Will is allowed to stand.

In New York, there are a number of ways that Bob will be able to inherit some of Agnes' money. Firstly, there are the spousal deductions. There are a number of items that a spouse is entitled to, including a car up to the value of $15,000, cash up to $15,000, and a few other things, such as furniture totaling up to $56,000. These items are passed free from the claims of creditors and prior to the estate being calculated. Under the heading, Bob would be able to inherit the car, which comes in under the vehicle allowance, and $15,000 worth of the cash.

New York also views life insurance policies under the theory of contract, they are not considered to be part of the estate and they are not deemed to be testamentary substitutes for the purpose of the elective share. Thus, Bob would be entitled to the $50,000 that he would receive as the named beneficiary on Agnes' life insurance policy.

Finally, there is the issue of elective share. New York allows for a spouse who has been insufficiently provided for in a Will. New York provides for a spouse to have the ability to elect to take 1/3 of their spouse's estate as an alternative to what they are left in the Will (so long as the 1/3 is above $50,000, otherwise the spouse will get $50,000). In order to do this, they must notify the surrogate court of their intention. The estate for this purpose will include both the items left in the Will and testamentary substitutes.

Bob has already gotten the car, $15,000, and the $50,000 life insurance policy. None of these items either fall under the Will or are a testamentary substitute for the calculating of an elective share. The remaining items are $300,000 worth of stock and $135.000 in cash. That means that Bob should be able to claim $145,000 under his elective share. As Carol is the sole beneficiary of the residuary estate, she will have to pay this total amount to Bob. The fact that it is both Agnes' and Bob's second marriage should not preclude him from using the elective share statute.

Thus, even if he is unsuccessful, Bob will still have a number of rights. He will be entitled to the proceeds of the life insurance policy, the car, some cash under the spousal exemption, and his elective share.

MPT
State of Franklin v. Butler

The Franklin's State's Attorney's Office has subpoenaed Flora Hernandez, a mediator, to testify in its felony case against John Butler for illegally dumping chemical waste. Hernandez presided at a mediation between Butler and his former business partner, Lynn Long, during which Butler admitted to dumping the chemical waste into the Green River. Hernandez and Long were the only witnesses to Butler's admission, and Long has since died. Hernandez has filed a Motion to Quash the Subpoena, arguing that her testimony is protected by the mediation privilege of the Franklin Uniform Mediation Act (FUMA). However, there are several exceptions to FUMA's mediation privilege, and applicants, assistant state's attorneys, are asked to write a brief in opposition to the Motion to Quash. The File contains a instructing memorandum from the Senior Assistant State's Attorney, case notes, notes from a police officer's interview with Long, a copy of the Agreement to Mediate, and the Motion to Quash. The File also contains instructions for drafting persuasive briefs. The Library consists of portions of FUMA and two relevant cases.

ANSWER TO MPT
Statement of Facts

The instant dispute arises in the context of a criminal proceeding against defendant, John Butler, for unlawful disposal of hazardous waste. Mr. Butler owns and operates B&L Disposal. In July 2005, Mr. Butler and his previous partner, Lynn Long, along with mediator Flora Hernandez, executed an Agreement to Mediate in connection with a business dispute over Ms. Long's share of the business, and the mediation took place on August 15, 2005.

On September 2, 2005, Ms. Long approached the Elkhart Police Department and informed Officer Kevin Kelly that, during the mediation Mr. Butler stated that, during the previous month, he had dumped half of the collective chemicals on a couple of disposal jobs into the Green River near the Elkhart south footbridge rather than disposing of them at the approved site with formal permits.

The Green River is a popular recreational site for kayaking, fishing, and swimming. In October 2005, a police review of records from the Department of Natural Resources revealed elevated levels of several toxic chemicals and an unusually large number of dead bluefish just down river from the alleged dumping site during July and August 2005.

On December 9, 2005, as a result of Ms. Long's statements and the evidence of elevated toxins, the police charged Mr. Butler for the felony of unlawful disposal of hazardous waste under Section 330. Less than two months later, in late January 2006, Ms. Long died of a massive heart

attack. Ms. Hernandez thus is now the only witness to Mr. Butler's alleged admission of toxic chemical dumping. The prosecution has accordingly subpoenaed Ms. Hernandez, who has subsequently filed a Motion to Quash such subpoena, giving rise to the instant dispute.

I. The privilege under FUMA § 4 is not applicable and the court should hold an in camera hearing in a criminal prosecution for a felony that implicates public health and safety concerns and where the evidence is not otherwise available.

The privilege under Section 4 of the Franklin Uniform Mediation Act (FUMA) is not applicable in a criminal prosecution for a felony where the evidence is not otherwise obtainable. Section 6 of FUMA, which delineates the exceptions to the privilege against discovery or admissibility of certain "mediation communications" contained in Section 4, states that there is "no privilege under Section 4 if a court finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in a court proceeding involving a felony or misdemeanor." FUMA § 6(b).

In this case, the prosecution has clearly established all three elements of the statutory exception to the FUMA privilege. First, the evidence is clearly not otherwise available. Mr. Butler's statement was made in front of only Ms. Hernandez and Ms. Long. As Ms. Long passed away in late January 2006, Ms. Hernandez is the only potential witness who can testify to Mr. Butler's statement. Secondly, Mr. Butler's statement is sought to be offered in his prosecution for violation of Section 330, which is a felony. Finally, because this is a prosecution for a felony that implicates public health and safety concerns, the need for the evidence substantially outweighs the interest in protecting confidentiality. While courts generally recognize the public policy in favor of confidentiality of mediation proceedings, see Rinaker (Col. Ct. of App. 2004), Retail Store (15th Cir. 2004), such policy is not absolute but can be outweighed by substantial countervailing interests. For example, the goals of protecting the constitutional rights of criminal defendants and preserving the integrity of the truth-seeking process of trial were recognized as examples of such countervailing interests in Rinaker, a case which, although not binding on this court, is nonetheless persuasive since the Columbia Uniform Mediation Act (CUMA) is identical to FUMA. Rinaker (Col. Ct. of App. 2004).

In Rinaker, a criminal defendant in a misdemeanor vandalism proceeding sought to compel the testimony of Rinaker. The mediator, who was present when the owner of the car that the defendant allegedly vandalized, admitted that he did not see who threw the rocks at his car. The defendant sought the ability to compel the mediator to testify in the event that the car owner testified otherwise on direct examination at trial. He argued that his right to due process and a fair trial would be violated if he could not compel such testimony for impeachment purposes. The trial court denied the defendant's motion without a hearing. On appeal, the Columbia Court of Appeal overruled the decision and remanded to the trial court with instruction to conduct an in camera hearing to weigh the constitutionally based claim of due process and fair trial rights against the statutory privilege. The court recognized the policy of preserving mediation confidentiality, but noted that an in camera hearing preserves such confidentiality by disclosing such information only if necessary, probative, and credible.

While Rinaker is not binding or directly on point, it does stand for the important proposition that mediation confidentiality is not absolute but can be outweighed by substantial countervailing interests, such as in that case, a criminal defendant's need to present exculpatory evidence. Here, public health and safety issues are implicated. As noted, there exists scientific evidence of elevated toxins in the river and unusually high numbers of dead fish. If the defendant did indeed engage in illegal dumping in connection with the business activities of B&L Disposal, his activities have potentially affected public health and safety and will do so in the future because,

while the chemical levels are back to normal, he has exhibited his willingness to put his own interests ahead of society's and will likely dump again in the future. Accordingly, this court should, as found by the Rinaker court, hold an in camera hearing to determine whether Ms. Hernandez is competent to testify regarding the statement, whether the statement is probative, whether Ms. Hernandez is credible, whether the evidence is necessary, and whether competing goals of public health and safety, discussed further below, outweigh the policy of protecting mediation confidentiality.

II. The goals of protecting public health and safety substantially outweigh the policy of protecting mediation confidentiality.

The goals of promoting and protecting public health and safety outweigh the public policy of protecting mediation confidentiality, thus permitting a mediator's testimony to be compelled if public interests are implicated. In Retail Stores, the Fifteenth Circuit held that the public interest in maintaining mediation confidentiality outweighed the interests of two parties to a mediation to resolve a dispute over whether certain issues had been agreed upon or were left unresolved. In that case, a union and a company had participated in mediation regarding four issues, two of which both parties agree were resolved by the mediation. However, at the conclusion of the mediation, the union claims the last two issues were also resolved, but the company maintained the union agreed to leave them unresolved. The union petitioned the National Labor Relations Board (NLRB) to compel the mediator's testimony regarding what the parties resolved.

The Fifteenth Circuit recognized that, in that case, the trier of fact was faced with directly conflicting testimony from two adverse sources, and that a third objective source could present evidence that would likely resolve the dispute. The court held that the policy of maintaining mediation confidentiality outweighed the need for the evidence in that case. Notably, the court emphasized that, our holding today is limited to the facts before us and is based on the long history of mediation in the labor union context, the sophistication of the parties, the subject matter of this litigation, and the absence of any compelling public health or safety issues. We could envision a situation where public policy would lead us to a contrary result. Retail Stores (2004). Retail Stores is distinguishable from the facts at hand. There, the court deemed a private dispute between the two parties to the mediation over the results thereof did not justify overcoming the policy protecting mediation communications, and thus refused to hold that the NLRB erred in refusing to compel the mediator's testimony.

Here, the evidence is needed not in connection with a private dispute between two sophisticated business parties but in connection with a criminal prosecution for the felony of illegal dumping of hazardous materials which endangers public health and safety. The Green River is a popular recreational site for kayaking, fishing, and swimming. Toxic chemicals would not only be directly harmful to humans who engage in activities in the water, but also indirectly harmful to any others who consume fish from the Green River that are contaminated with toxins. These are exactly the "compelling public health or safety issues" the absence of which the Fifteenth Circuit found important to its holding in Retail Stores.

ANSWER TO MPT
Statement of Facts

The Columbia Uniform Mediation Act (CUMA) is identical to the Franklin Uniform Mediation Act (FUMA). On September 3, 2005, Lynn Long, the partner of John Butler in B&L Disposal, a waste disposal business, met with the Western County Police, and told them that Butler had admitted in a mediation conference that he had dumped toxic chemical waste into the Green River at the south footbridge on the outskirts of Elkhart. The dumping was alleged to have

occurred in July and August, at which time many bluefish died in the area of the dumping, and there were elevated levels of toxins found in the water. On December 9, 2005, Butler was charged under Section 330 of the Franklin Criminal Code for felony unlawful disposal of a hazardous waste. On February 1, 2006, Western County Authorities were informed that Long had died. The only parties present at the mediation where Butler's incriminating statement was alleged to be made, were Butler, Long, and the mediator, Ms. Flora Hernandez. The police have uncovered no witnesses to the alleged dumping. Many swimmers and kayakers use the river near the alleged dumping. On February 3, 2006, the Western County State's Attorney's office subpoenaed Ms. Hernandez to testify as to Butler's statement at the mediation. On February 17, 2006, Ms. Hernandez filed a Motion to Quash this subpoena through her attorney.

Argument

I. Because the testimony in question is the first-hand statement of a witness to an incriminating disclosure, and there are no other witnesses to either the disclosure or the underlying conduct, the testimony in question is not barred for lack of probative value, or being cumulative.

Although the FUMA provides that statements made during mediations are privileged and not admissible in a proceeding, there is an exception where the proponent of the evidence alleges that the mediator's testimony is relevant in a criminal matter involving a felony or misdemeanor, and the court determines that the evidence is not otherwise available, and that the need for the evidence substantially outweighs the interest in protecting mediation confidentiality. FUMA § 6 (b). Here, there is an attempt to subpoena a witness who was a mediator to testify in a felony criminal matter, and therefore Section 6 of FUMA applies. Under the case of Rinaker v. Superior Court of San Joaquin County, a case decided in Columbia under CUMA, which is identical to FUMA, and is thus persuasive authority, the trial must determine when there is a contest over whether a mediator's testimony may be used in a criminal matter, assuming the mediator is competent to testify (has memory of the statement, and that it was as alleged), the court must determine whether the evidence is probative, and determine that it is not cumulative and therefore unnecessary, before it undertakes a second inquiry to determine whether the interests of disclosure substantially outweigh the interests in protesting mediation confidentiality. Rinaker, 13 (Columbia Court of Appeal 2004).

A. Because Mr. Butler is charged with dumping waste into the river, the same conduct he admitted to Ms. Hernandez, Ms. Hernandez's testimony on the issue is probative of such conduct.

A statement has probative value if the statement has a tendency to make a confidential fact or proposition more or less probable than it would be without the evidence. Here, Butler's statement that he dumped waste, if admitted through the testimony of Ms. Hernandez, makes it more probable that he dumped the waste, and is therefore probative. The first requirement of admissibility of the statement is thus satisfied.

B. Because there are no surviving witnesses to either the dumping or the admission of dumping, then Ms. Hernandez's statement is not cumulative.

The police have been unable to find witnesses to Butler's alleged dumping. The only witnesses to his statement that he did the dumping were Long and Hernandez; and Long is dead. The testimony of Hernandez is necessary to convict Butler, and is thus not cumulative, satisfying the second requirement for admission of a statement to a mediator.

II. Because Butler denies the allegations, there is an interest in preserving the integrity of the truth-seeking process at trial and preventing perjury through the introduction of the evidence, and because the crime involves the dumping of toxic substances there are compelling health and

safety issues, all of which interests substantially outweigh the interest in keeping mediation confidential.

A. Because Butler denies the allegations, there is an interest in preserving the integrity of the truth-seeking process at trial and preventing perjury through the introduction of the evidence, which substantially outweighs the interest in keeping mediation confidential.

One of the requirements of probativeness and non-cumulativeness have been met, the Columbia Court of Appeal has ruled that although statements to mediators will ordinarily be excluded in order to protect the mediation process, and encourage parties to be candid, this may be sufficiently outweighed by the competing goals of protecting the rights of criminal defendants, preventing perjury, and preserving the integrity of the truth-seeking process in order to warrant disclosure. Rinaker at 13-14. While disclosure in this instance would not protect the interest of the defendant, it would clearly promote the integrity of the truth-seeking process at trial because it would allow the use of a statement that goes to the essence of whether it was true if Butler dumped toxic waste. And although there is no indication that Butler will necessarily take the stand and say otherwise, the court in Rinaker found the prevention of perjury to be an interest in a similar situation, where a witness had not yet testified, and it was unclear what they would say. As in Rinaker, these interests substantially outweigh the interest in protecting the confidentiality of mediation.

B. Because the crime involves the dumping of toxic substances, there are compelling health and safety issues, which interests substantially outweigh the interest in keeping mediation confidential.

In Retail Store Employee Union Local 79 v. National Labor Relations Board, (15th Cir. 2004), persuasive authority in this court, the court ruled that statements during mediation would not be disclosed by the mediator in order to resolve the underlying labor dispute. Stating that the issue was one of balancing competing interests, including the interests in favor of disclosure such as "the fundamental principle of American law that the trier of fact is entitled to every person’ s evidence. The court noted the important countervailing interest in confidentiality in mediation, including the promotion of private settlements through mediation, the encouragement of party honesty, and the protection of mediator impartiality. The court was careful to note however that its holding was based on "the absence of any compelling public health or safety issues", and that the court "could envision a situation where public policy would lead us to a contrary result." This is precisely such a case. Here, Butler’ s dumping endangered the swimmers and kayakers who used the river, and may have killed fish in the river, which died at the same time there were elevated chemical levels. Given the health and safety concerns, there is all the more reason to find that the interests in protecting the confidentiality of mediation were substantially outweighed by other interest, including public health and safety, but also including the prevention of perjury, and the integrity of the truth-seeking process. In addition, the ruling against disclosure in Retail Store Employee Union 79 should not be given significant weight by the court relative to Rinaker, because the former case did not involve interpretation of legislation identical to Franklin law.

Conclusion

For the foregoing reasons, Ms. Hernandez’ s Motion to Quash the subpoena should be denied.

NEW YORK STATE BAR EXAMINATION
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