NEW YORK STATE BAR EXAMINATION
FEBRUARY 2008 QUESTIONS AND ANSWERS

QUESTION 1

Ana, Bob and Cal were the sole directors and sole shareholders of Feet, Inc., a closely held New York corporation which owned and operated retail shoe stores. Ana, Bob, and Cal each owned 75 shares in the company. On January 2, 2002, Ana, Bob and Cal signed a written shareholders' agreement which provided in pertinent part:

Upon the death of any shareholder, Feet, Inc. shall, within sixty (60) days of receipt of a written demand from a duly appointed estate representative, purchase the shares of the deceased shareholder for $1,000 per share.

When the agreement was signed, the three directors orally agreed that the buy back provision would apply only if the corporation was making a profit.

In addition to being a director of Feet, Inc., Ana was also a licensed real estate broker and the sole director and shareholder of Ana's Realty, Ltd., a New York corporation. In June 2007, the directors of Feet, Inc., with Ana participating, voted to enter into a contract with Ana's Realty, Ltd. Prior to the vote, Ana disclosed to Bob and Cal that she was the sole shareholder and director of Ana's Realty, Ltd. The vote was two to one with Cal voting against the contract. The written contract provided that if Ana's Realty, Ltd. located a store for Feet Inc. to purchase, Ana's Realty, Ltd. would receive the customary commission of six per cent (6%) of the sales price when title closed. Ana soon found a desirable store at a favorable price, and in October 2007, Feet, Inc. purchased it.

In November 2007, Ana sent a written purchase order to Sal, the president of Shoe Co., and ordered 2,000 pairs of boots, to be delivered to the new store on or about December 1, 2007. The terms of the purchase order called for payment in full upon delivery.

On December 1, 2007, Shoe Co. delivered 2,000 pairs of running shoes to Feet, Inc.'s new store. Ana immediately had the shoes placed in an unlocked storage shed on Feet, Inc.'s property and notified Sal that she was rejecting the shoes. Sal told Ana that the shoes would be picked up within the week. However, three days later the shoes were stolen, and Sal told Ana that he was holding Feet, Inc. responsible for the loss of the shoes.

Cal died in December 2007. On February 1, 2008, Executor was duly appointed as the executor of Cal's estate. Executor gave Ana and Bob a written demand that Feet, Inc. purchase Cal's shares of stock pursuant to the written shareholders' agreement. Bob then informed Executor that Feet Inc. had not made a profit for the past three years, and therefore, the corporation would not buy back Cal’ s shares. Executor has confirmed that Feet, Inc. has not made a profit for the past three years.

(a) Is Feet, Inc. liable to Shoe Co. for the loss of the running shoes?

(b) Was the contract between Feet, Inc. and Ana's Realty, Ltd. voidable?

(c) Is evidence of the oral agreement admissible in an action by Executor to enforce Feet Inc. 's obligation to purchase Cal's shares of stock under the written shareholders1 agreement?

ANSWER TO QUESTION 1

A. The issue is when a seller sends nonconforming goods and the buyer rejects for nonconformance, who bears the risk of loss on the goods.

When a contract is entered into for the sale of goods between merchants, the buyer bears the risk of loss once the goods leave the control of the seller, unless the contract provides otherwise. Where the contract provides that goods are to be delivered to a specific place, then the seller bears the risk of loss until the goods are delivered to such place. As the contract in this case was between merchants, then ordinarily Ana would be liable once the goods left Sal's control. Because the contract provided that the goods were to be delivered at the new store, Sal bears the risk of loss until Ana receives the goods.

Another issue is when the goods shipped to the seller are nonconforming, what are the obligations of the parties and who bears the risk of loss.

Once the goods are received by the buyer, the buyer has a reasonable opportunity to inspect the goods to ensure they are conforming to the contract before accepting delivery. If the goods are not conforming, the buyer must reject the goods within a reasonable period of time and notify the seller of the rejection. The seller is then responsible for the risk of loss on the nonconforming goods because there has been no acceptance. However, if the buyer does not take reasonable steps to prevent the destruction or loss of the nonconforming goods when the seller has indicated they will retrieve them within a reasonable period of time, the risk of loss transfers to the buyer.

In the present situation, Ana immediately rejected the shipment of nonconforming shoes upon delivery and immediately notified Sal that she was rejecting the shoes. Because of this rejection, Sal still bears the risk of loss on the shoes. Where the seller has indicated they will retrieve the nonconforming goods within a specified period of time, the buyer has a duty to protect the goods from loss for that times period. Here, Ana is under a duty to exercise reasonable care to prevent the loss or damage of the shoes until Sal can retrieve them. By placing the shoes in an unlocked storage shed, Ana has breached here duty to reasonably protect the shoes until Sal can retrieve them within the week. Sal has not abandoned the shoes, because he indicated he would pick them up within a week, and therefore Ana cannot reasonably rely on any defenses that Sal intended to abandon the shoes. In this case, because Ana breached her duty to protect the conforming goods until Sal was able to pick them up within a week, Feet Co. is liable for the loss of the shoes and Sam can recover the value of the shoes as damages. Sam will not be able to recover the shipping costs because they were nonconforming goods. Furthermore, if the shoes had not been damaged because of Ana's negligence, Ana would be entitled to recover from Sam her reasonable damages for storing the nonconforming shoes until Sam had retrieved them. As the shoes no longer exist, Ana is not entitled to recover anything for their storage and she must pay Sam damages for his loss. Sam still has the opportunity to cure his breach of the contract by sending conforming goods because the contract provides that the boots be delivered on or about December 1. Therefore, Sam is not in present breach of the contract if he ships conforming goods (boots) and they arrive within a reasonable time after Dec. 1.

B. The issue is whether in a closely held corporation, an interested director transaction is voidable because it was not approved by enough disinterested directors.

Interested director transactions are not invalid provided that a number of mechanisms are complied with to ensure the fairness of the transaction. The transaction must be disclosed to the Board of Directors and either all of the disinterested directors must approve the transaction, or the transaction is approved by a majority director when quorum requirements are met. Failure to disclose the transaction before it is voted on renders the contract voidable, however if after the approval the Board of Directors determines the transaction was fair and reasonable and not an improper attempt by the director to abuse their position, then the Board may ratify the transaction.

In this case, the contract is voidable because it was not approved by a majority of the disinterested directors. There are only three directors in Feet Inc. To have quorum would require a majority of the directors present, which is satisfied in this case because all are present, and a majority of disinterested directors must approve the interested transaction. Ana and Bob approved the transaction but because Ana was an interested director, her vote does not count. Therefore, the transaction was not properly approved by the majority of disinterested directors and is void unless the directors determine that the transaction was fair and reasonable. Because of the few directors in this corporation, it is unlikely that the Board will determine that the transaction was fair. Therefore, the transaction is voidable and likely will be voided.

C. The issue is whether an oral modification to a contract is admissible to determine the meaning of the contract.

The Parol Evidence Rule allows the admission of evidence of the terms of an agreement that the parties intended to be included in the agreement, but were not reduced to the writing where on its face the obligations of the parties are not clear or the terms are ambiguous. Evidence or writings created after the agreement was signed are not admissible under the Parol Evidence Rule.

In this case, the oral modification was entered into concurrently with the execution of the shareholders agreement. The Parol Evidence Rule will allow such evidence to be admissible to clarify the terms of the agreement. This agreement is clear on its face, and does not contain any ambiguous terms and therefore it is unlikely that the parties have any argument to admit the evidence of the oral agreement as parol evidence.

D. The issue is whether oral evidence of an agreement is admissible when interpreting a contract.

Where the parties have reduced their agreement to writing, it is presumed that the writing contains the entire intention of the parties. Any oral modification after the execution of the agreement is therefore not admissible unless the parties can provide evidence that the oral modification was binding in equity. This may be achieved if the parties can show detrimental reliance on the oral modification, past performance, custom or business practice.

The present agreement has not previously been judged between the parties, however, if it can be shown that execution of the agreement was induced by the oral agreement, then evidence of the agreement will be admissible to provide an equitable remedy.

E. The issue is whether the written agreement constitutes the Best Evidence.

The Best Evidence Rules requires that when there is written evidence, such written evidence is the best evidence and therefore the only evidence that must be admitted. The Best Evidence rule applies only to legally operative documents such as contracts

The written agreement in this case is the best evidence. It therefore will not be contradicted by any oral evidence to the contrary absent an ambiguity in the contract. Because the evidence of the provision to buy back shares only if the corporation is making a profit is oral evidence, such evidence does not satisfy the Best Evidence Rule and is not admissible.

ANSWER TO QUESTION 1

A. Is Feet, Inc. liable to Shoe Co. for the loss of the running shoes?

First, there are no agency issues with respect to the purported agreement between Feet, Inc. and Shoe Co. Ana is a shareholder and director of Feet Inc., and there is no evidence that Anna did not have actual express authority to bind Feet, Inc. to a contract for the purchase of 2,000 pairs of boots from Shoe Co. nor is there any evidence that Sal did not have authority to bind Shoe Co.

Second, there is no evidence that there was not an offer and proper acceptance with respect to the purported agreement. There is no evidence that Ana and Sal intended to form a unilateral contract that could only be accepted by Shoe Co. via delivery of conforming shoes or by Feet, Inc. via payment in full upon tender.

Third, there is no evidence that consideration was lacking for the purported contract between Feet Inc. and Shoe Co.

Finally, there is no evidence of any defense to formation or Statute of Frauds issue with respect to the contract. The contract is for a sale of goods, and thus Article 2 of the Uniform Commercial Code applies; under Article 2, a written purchase order may satisfy the Statute of Frauds with respect to a contract for the sale of goods even if it is not signed by the party subject to enforcement so long as both parties are merchants and the party to whom the confirmation is sent does not timely object.

Thus, it appears that there was a binding agreement between Feet, Inc. and Shoe Co. for the sale of 2,000 pairs of boots by Shoe Co. to Feet, Inc. whereby Shoe Co. promised to deliver 2,000 pairs of boots to Feet, Inc. on or about December 1, 2007 in exchange for payment in full upon delivery.

Generally, under Article 2 of the Uniform Commercial Code, a seller of goods must provide goods that perfectly comply with the buyer's expectations - the "perfect tender rule." Obviously, Shoe Co. did not comply with the perfect tender rule - Shoe Co. delivered 2,000 pairs of running shoes instead of 2,000 pairs of boots. Thus, Shoe Co. breached the contract between Feet, Inc. and Shoe Co. Upon delivery of the nonconforming goods, Feet, Inc. had three options: 1) to reject the entire shipment and seek damages for breach of contract equal to Feet, Inc.’ s anticipated benefit from the sale of the boots, 2) to accept the entire shipment and seek damages for the difference between the value of the boots and the value of the running shoes to Feet, Inc., or 3) to reject the shipment outright and seek damages. Ana chose the third option, and rejected the goods.

Under Article 2, a buyer may reject nonconforming goods by providing notice to the seller of the intention to reject within a reasonable time after delivery. Failure to promptly reject within a reasonable time for inspection after delivery may give rise to an implied acceptance. That does not, however, appear to apply in the instant Case, where Ana "immediately" had the shoes placed in an unlocked storage shed and notified Sale that she was rejecting. It appears Feet, Inc. validly rejected the goods, and Sal acknowledged this rejection by indicating that the shoes would be picked up.

Article 2 requires that a buyer that rejects a shipment of goods must take reasonable steps to protect the goods. Further, it appears that Feet, Inc. bore the risk of loss with respect to the shipment of running shoes. The contract between Feet Inc. and Shoe Co. was a "delivery contract" - it required Shoe Co. to deliver the goods directly to Feet, Inc.’ s business location. Under Article 2, the risk of loss in a sale of goods under a delivery contract passes from seller to buyer upon delivery to the buyer’ s location.

Thus, Feet, Inc. should be liable for the stolen shoes both because Feet, Inc. failed to take reasonable steps to safeguard the rejected shoes (by placing the shoes in an unlocked storage

shed) and because Feet, Inc. bore the risk of loss for the goods after delivery by Shoe Co. in compliance with the contract.

B. Was the contract between Feet, Inc. and Ana's Realty, Ltd. voidable?

Ana is both a large shareholder and a director of Feet, Inc. Ana also appears to be acting as an officer of Feet, Inc. - she was placing purchase orders for shoes. As a director, an officer, and perhaps as a controlling shareholder participating in management of Feet, Inc., Ana owes two duties to Feet, Inc. - the duty of care and the duty of loyalty.

Under the duty of care, Ana must discharge her duties to Feet, Inc. in good faith and with the care, skill and prudence of a reasonably prudent person under the circumstances, A director or officer of a corporation may be shielded from personal liability for violations of the duty of care by the Business Judgment Rule (under which courts generally decline to second guess the acts of corporate management), through reliance on professionals or, in her capacity as a director, by an exculpatory clause in Feet, Inc/s certificate of incorporation.

However, none of these defenses are available for a director or officer that has violated the duty of loyalty. As a director, an officer, and perhaps as a controlling shareholder of Feet, Inc., Ana must discharge her duties to Feet, Inc. in good faith and with the conscientiousness and honesty of a fiduciary. Generally, the duty of loyalty forbids a corporate director, officer or, perhaps, a controlling shareholder from engaging in self-dealing, usurping corporate opportunities, and making secret profits.

The instant case obviously implicates the duty of loyalty. The contract between Feet, Inc. and Ana's Realty is a classic "interested director transaction."

Generally, interested director transactions violate the duty of loyalty owed by a director to the corporation.

Such transactions do not always violate the duty of loyalty, however. An interested transaction may not violate the duty of loyalty if the directors of the corporation approve the interested transaction by a majority vote of disinterested directors or, if such directors cannot form a majority vote, by a unanimous vote of disinterested directors.

In the instant case, the disinterested directors of Feet, Inc. did not sufficiently vote to approve the real estate brokerage contract. Since there are three directors, two must vote in order to act on behalf of the corporation (there is no evidence that the certificate of incorporation provides for unanimous voting). However, since Ana is interested in the proposed transaction, her vote cannot count toward a majority, although it may count toward a quorum. Thus, both of the disinterested directors - Bob and Cal - had to vote in favor of the brokerage contract in order for it to be an approved interested director transaction. By voting against, Cal denied approval. The contract was voidable by Feet, Inc.

C. Is evidence of the oral agreement admissible in an action by Executor?

Generally, a party may not introduce an earlier or contemporaneous oral " side agreement" for the purpose of contradicting the terms of an unambiguous written agreement. This is known as the parol evidence rule. The instant "side agreement" appears to violate the Parol Evidence Rule. It is an oral side agreement meant to be introduced to add a new term to the shareholder agreement.

There are exceptions to the Parol Evidence Rule. Parol evidence may be admitted to clarify ambiguous terms within the "four corners" of the written agreement. Parol evidence may be

admitted if the oral understanding at issue arose after the execution of the written contract. However, in the instant case Feet, Inc. does not seek to clarify the terms of the shareholder agreement but to add a new term - a condition precedent to the unambiguous redemption obligation. The introduction of such evidence is forbidden by the Parol Evidence Rule.

Of course, Feet Inc. may have other defenses to the redemption claim. A corporation generally may not redeem its own stock while insolvent - failing to pay its debts as they come due because a redemption or repurchase constitutes a distribution to shareholders.

QUESTION 2

When Joe refused to pay a gambling debt he owed to Mark, Mark told Joe that he knew members of a gang and that he would have them kill Joe. Both Mark and Joe are adults. Mark then contacted Ron and Sam, both age 15 and members of a local gang. Mark asked them to give Joe a severe beating but expressly told them not to use weapons.

Two days later, while looking for Joe, Ron and Sam, who were unarmed, saw him getting into his car in a parking lot. They began to run toward Joe. Joe saw them running toward him and noticed they were wearing bandanas indicative of gang membership. Thinking that Mark had sent them to kill him, Joe reached in the glove compartment of his car for a handgun and shot at Ron and Sam, wounding both.

Although Joe explained Mark's threat to the police, he was arrested and charged with two counts of assault in the first degree.

Ron and Sam were also arrested and charged with attempted assault.

Based on Joe's explanation and statements given to the police by Ron and Sam, Mark was arrested and charged with conspiracy and criminal solicitation.

Based on the foregoing facts:

(a) If Joe raises the defense of justification, is it likely to be successful?

(b) (1) Did the actions of Ron and Sam constitute the crime of attempt to commit an assault?

(2) If so, do Ron and Sam have any defenses?

(c) Did Mark commit the crimes of (1) conspiracy and (2) criminal solicitation?

ANSWER TO QUESTION 2

A. The issue is whether Joe’ s claim of justification (self defense) is a valid defense for his shooting Ron and Sam

Under NY Penal Law, a party is allowed to use the affirmative defense of justification. This means that a party had a reasonable belief that he was in imminent danger. A party is only allowed to use deadly force if he reasonably believes that his life is in imminent danger or he is in danger of serious bodily harm. Under NY Penal Law before a party can use deadly force he has

the duty to retreat - except if he is in his house or he cannot do so safely or the party using deadly force is a police officer.

In this case, Joe was under the reasonable belief that his life was in danger because Mark explicitly threatened that he would have gang members kill him. Sam and Ron approached Joe wearing bandanas that he associated with gang membership and therefore his belief was reasonable that his life was in danger. Therefore, Mark's belief was reasonable and under the common law approach he would have been justified in using deadly force and he would not be guilty of assault.

However, a party in NY as mentioned above is required to retreat before using deadly force. In this case, Joe did not retreat and therefore his use of deadly force was unjustified. A defendant raising justification as an affirmative defense must prove the defense by a preponderance of evidence and the prosecution in a criminal case must prove that the defendant was unjustified beyond a reasonable doubt (in a civil case by preponderance of evidence).

The second issue is whether Joe committed the crime of assault in the first degree.

Assault under the NY Penal Law is the unlawful application of force against the victim that results in physical injury. Assault in the first degree is when the defendant uses a weapon and the victim is seriously injured.

In this case, Joe used a gun to shoot at Sam and Ron, and they were presumably seriously injured (although the facts do not state the extent of their injuries). A party is charged with two counts of crime by counting the number of victims. In this case. Joe assaulted Sam and Ron- there are two victims and therefore two counts.

The crime of assault is a specific intent crime, the defendant must have specific intent to commit the assault. Generally, an unreasonable belief would be a valid defense to a specific intent crime. Here, the belief that Joe was going to be killed would be a valid justification for assault under common law, but as mentioned above, it is not valid under NY Penal law because the party has the duty to retreat prior to using deadly force. Rather, he should have retreated or responded with equal force- that was not deadly- yet Joe did not and therefore his defense of justification is likely to not be successful.

B. (1) The issue is whether Ron and Sam committed the crime of attempted assault.

The crime of attempt is a specific intent crime. Under the NY Penal law, a party is guilty of attempt when they come dangerously close to committing the actual crime.

In this case, Ron and Sam went to the parking lot looking for Joe. They went there with the intent to commit an assault (unlawful application of force resulting in injury) against Joe. The fact that they were unarmed does not matter because they were still able to commit assault against Joe by beating him up and therefore injuring him. They were running towards Joe- apparently in an attempt to hurt him - in an attempt to commit the crime of assault. The fact that their attempt was interrupted by Joe shooting them shows that they were guilty of attempt because they came very close to the completion of the crime. They are therefore guilty of attempted assault on Joe.

(2) The issue is whether Ron and Sam have any defenses to the crime of attempted assault.

There are two possible defenses that Ron and Sam could raise;

The first defense is infancy. Under NY Penal Law, a defendant who is 14 or 15 years old can only be charged for serious crimes against people or property. In this case, Ron and Sam were going to

beat up Joe. It is unclear to what extent they intended to hurt Joe or whether this constitutes "serious" but it most likely would be considered a serious crime because they were part of a gang and sent to give him a "severe beating."

Therefore, the defense of infancy would not apply to Ron and Sam because the crimes they were going to commit was a serious crime. At the same time however, they did not in fact commit the crime of assault- they merely attempted to commit the crime, so Ron and Sam have a strong argument that their age is in fact a valid defense because they did not ultimately commit a serious crime against people or property.

The second possible defense is withdrawal. Under the common law, a party can withdraw from a crime by renouncing the crime making a substantial effort to prevent the crime. The renunciation must be because of a guilty mind. Under the NY Penal Law, a party can only renounce a crime if because of a guilty mind they actually prevent the crime from occurring. In this case, however, Sam and Ron did not renounce the crime and therefore this defense does not apply.

C. (1) The issue is whether Mark committed the crime of conspiracy

In NY, under NY Penal Law the crime of conspiracy is committed when parties intend to agree, the actually do agree, and they intend to commit an unlawful act or a lawful act by unlawful means. In addition, in NY, an overt act in furtherance of the conspiracy must be committed.

In this case, Mark, Ron and Sam agreed that Ron and Sam would beat up Joe. The agreement can be inferred from the actions. The overt act in furtherance of the conspiracy was going to the parking lot to beat up Joe. Therefore, Mark can be guilty of conspiracy.

Under the common law, a co-conspirator is vicariously liable for all other crimes committed by the co-conspirators in furtherance of the conspiracy. In NY, under the Penal Law, however, a co-conspirator is not vicariously liable for the crimes of its co-conspirators so Mark is not liable for the attempted assault.

In addition, NY follows the unilateral approach whereby a party can be convicted of conspiracy even if the co-conspirators are not in fact engaged in the conspiracy (i.e.: under cover agents). Under the common law, in order for there to be a conspiracy there must be a meeting of guilty minds.

(2) The issue is whether Mark committed the crime of criminal solicitation.

The crime of solicitation is a specific intent crime. It occurs when a defendant asks or requests that another party commit a crime. The act of solicitation occurs upon the asking - whether or not the parties are incompetent or reject the solicitation.

In this case, Mark asked Ron and Sam to beat up Joe. Upon asking, the crime was committed and therefore Mark is guilty of criminal solicitation. A party cannot withdraw or renounce solicitation because the crime is committed upon asking. It does not matter that Ron and Sam were infants - Mark committed criminal solicitation.

ANSWER TO QUESTION 2

A. The issue here is whether Joe can raise a defense of self defense when he used deadly force to repel those he believed were attempting to kill him.

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In New York, generally a person is guilty of a homicide if the act with the intent to kill another human being. Generally, this is punishable but the defendant may raise certain affirmative defenses. The defendant bears the burden of proving an affirmative defense via a preponderance of the evidence. One of these defenses is self defense. Generally, self defense allows one threatened with the use of force against his person or property may defend against the use of such force with force. When deadly force is used (such as by shooting a gun with the intent to hit the other person), it is only justified when threatened with deadly force against the person. The standard used is that of a reasonable person. Deadly force is never justified to be used for the protection of property. Also, generally a person has the duty to retreat before using deadly force if a person can safely do so. There are however certain exceptions to this duty to retreat, for instance when a person is in his own home and was not the initial aggressor in a confrontation.

In this case Joe acted with deadly force in shooting Ron and Sam. Although he did not kill them, shooting at them with a firearm and wounding them is clearly sufficient. For Joe's actions to be justified, Sam and Ron must have been threatening him with deadly force. Joe's belief that they were there to kill him based on a prior threat is not enough. Here, Ron and Sam did nothing other than run at Joe. There is no indication that they possessed or brandished any dory of deadly weapon. Therefore, this action is not enough for a reasonable belief that Joe was being threatened with deadly force.

Also, since Joe was not in his home and does not fit into any of the other exceptions, Joe had a duty to retreat before using deadly force if he could do so in a safe manner. The facts here state that Joe was getting into his car when the confrontation occurred. It seems therefore that he would be able to safely retreat. This also leads to the conclusion that Joe was not justified in using deadly force. Therefore, Joe could not use the defense of justification.

B. (1) The issue here is whether Ron and Sam had committed enough of a significant step toward the completion of an assault to justify a charge of attempt.

Generally, a defendant can be charged with an attempt to complete a crime when he has the intent to complete the crime and has completed a significant step towards completion of the crime. Mere preparation is not enough however. The defendant must be judged to be dangerously close to completion of the crime. Thus, to be convicted of attempted assault the defendants must have had the intent to commit assault, which involves the impermissible touching of or offense with another, and complete a significant step towards that goal.

Here, Ron and Sam were asked to give a severe beating to Joe. If completed, this action would involve impermissible touching of Joe and thus would constitute assault. Thus, one can state that they had the requisite intent required for an attempt conviction. The question then arises whether the actions of searching for someone and then running toward them is enough to be a significant step toward completion. Given the facts, the act of running toward someone is past the stages of mere planning or preparation and part of the execution. It also serves to intimidate the witness and put a fear of bodily harm in him. Thus, in this case the defendants acted with the requisite intent to complete the crime of assault and completed a significant step in the commission of that crime. Thus, they could be found guilty of attempt to commit an assault.

(2) The issue here is whether Ron and Sam can claim incompetency because they are age 15.

In New York, generally people are held liable for their actions, but in some cases they may be judged incompetent. One of these is when they are underage. Generally, New York treats those aged 16 or older as adults in criminal cases, can convict those 14 and 15 of serious crimes, and those 13, 14 and 15 of second degree murder. Those younger than these ages must be dealt with via juvenile proceedings.

Here, Ron and Sam are 15. Thus, they can only be convicted if they are -charged with second degree murder or a "serious crime." Since murder is not applicable here, the question is whether attempt to commit assault is a serious offense. While they did not have any weapons, which works in their favor, they intended to give someone a "severe beating." This would seem enough to satisfy the question and thus Ron and Sam could be tried as adults.

C.(1) The issue is whether Mark committed conspiracy.

To be convicted of conspiracy; (i) a defendant must have had a meeting of the minds to engage in criminal behavior with another person or persons, and (ii) someone in the conspiracy must have committed a step in furtherance of the conspiracy's goals. A defendant in NY can still be convicted even if the others in the conspiracy do not have the requisite intent to complete the crime.

Here, Mark reached an agreement with Ron and Sam for them to beat Joe. This is a sufficient intent and meeting of the minds to engage in the criminal behavior of assault. The fact that Ron and Sam are underage does not save Mark since even if they were judged incompetent in New York, Mark can still be convicted for having the requisite intent. Ron and Sam then sought out Joe so that they could give him the beating (and ran at him when they found him). This is enough to satisfy the step in furtherance of the conspiracy. It need not be Mark that completes the step, merely someone in the conspiracy. Thus, Mark can be convicted for conspiracy.

(2) The issue is whether Mark can be convicted for solicitation

Someone can be convicted for solicitation when they approach another with the intent of inducing the other person to engage in criminal behavior.

Here, Mark sought out Ron and Sam to convince them to give Joe a severe beating. Giving Joe a beating would constitute assault. Therefore, Mark can be convicted of soliciting Ron and Sam.

QUESTION 3

Ann and Jack lived together but never married. In November 2000, Ann became pregnant with Jack's child. After Ann told Jack about her pregnancy, Jack left Ann, saying he wanted nothing to do with the child.

In 2001, while still pregnant, Ann met and married Rick. Shortly thereafter she gave birth to a boy she named Billy, and she listed Rick as Billy's father on the birth certificate. Although Rick knew that Billy was not his biological child, Rick supported Billy and, with Ann's encouragement, treated Billy as his own son. Aim and Rick both held Billy out as Rick's biological child, -Billy called Rick "Daddy" and developed close bonds with Rick. Ann never sought or received any child support from Jack. Jack was aware of Billy's birth and, although Jack never doubted that Billy was his biological son, he never made any contact with Billy and did not object to Billy being raised to believe that Rick was his biological parent.

In 2005, after a chance meeting, Jack and Ann decided that they wanted to renew their relationship and raise Billy together. Ann and Rick thereafter separated, and Jack filed a petition seeking a declaration of paternity, establishing that he was Billy's father. Ann did not contest Jack's petition, but Rick, who was permitted to join the proceeding as a respondent, moved to dismiss the petition, asserting that Jack should be estopped from claiming paternity and Ann should be estopped from acquiescing in that claim. A hearing was held at which uncontested

proof of the above facts was presented. After a hearing, the court (1) dismissed Jack's petition on the basis of the doctrine of equitable estoppel.

In 2006, Ann and Rick divorced. The judgment of divorce incorporated but did not merge the terms of a separation agreement entered into by the parties. The separation agreement provided that Rick would be entitled to weekly visitation with Billy and would pay Ann $250 per week in child support, an amount in compliance with the guidelines set forth in the Child Support Standards Act.

In January 2007, Ann began to refuse to permit Rick to have any contact with Billy. Rick continued to attempt to exercise his right to visitation, but Ann actively interfered with all attempts by Rick to see Billy. As a result, Rick stopped paying child support. In July 2007, when he was $5,000 in arrears in child support, Rick moved to cancel the arrears and suspend his obligation to pay child support, in light of Ann's interference with his visitation. The court (2) granted Rick's motion in all respects.

Ann thereafter again began to permit Rick to have visitation with Billy, and Rick resumed paying child support. Rick has now filed a petition seeking a downward modification of his child support obligations. At the hearing on his petition, Rick testified that he was fired from his job as a graphic designer in October 2007 for violating a company policy on computer use. Rick admitted that there are many jobs available in the area consistent with his education and ability, but testified that he applied for several positions and has not been hired.

(a) Were rulings (1) and (2) of the court correct?

(b) How should the court rule on Rick's petition?

ANSWER TO QUESTION 3

A. (1) The issue is whether the Court should dismiss a petition seeking a declaration of paternity by a biological father based on the doctrine of equitable estoppel.

In NY, the doctrine of equitable estoppel is a remedy in equity designed to prevent a party from altering their position on which another party relied, when to do so would cause unreasonable detriment to the other party. Under NY Domestic Relations Law, there is a presumption of paternity of a child born in wedlock, or who was conceived shortly before wedlock. This child then becomes a marital child who has rights and obligations from his married parents. When a party through his actions or words continues to affirm the existence of a fact, they may not materially change their position on that fact when another party has reasonably and foreseeably relied on that party's position. To allow such a material change would work an injustice on the party and the courts will not allow such a wrong to happen. In a paternity issue, a parent may not be denied parental rights without notice and a hearing. In determining parentage, a court will also consider the best interests of the child.

Here, the child Billy was born to Ann and Rick while married. Thus, there is a presumption that the child is the biological child of both parents. Throughout Billy's life, both Ann and Rick have acted as though Rick was Billy's father and held themselves out as though Rick was Billy's father. Ann listed Rick as Billy's father on the birth certificate and encouraged Rick to treat Billy as his own son.

Ann never sough or received any child support from Jack, showing that she was not acting as though Jack was the father. Ann's entire performance since Billy was born has been to continue to act as though Rick was the father of Billy. Rick, for his part, treated Billy as his own, supported Billy, called him daddy. All persons in contact with Ann, Rick and Billy probably believed that Rick was Billy's father. In addition, Jack never asserted any of his parental rights, indeed telling Ann when she was pregnant that he wanted nothing to do with Billy, and then Jack did not support Billy, contact Billy, or object to Rick's raising of Billy as though Rick were Billy's father.

Now, Jack wants to materially alter his position for the last four years. Ann and Rick have both relied on Jack's position over the last four years that he did not want to assert paternity rights. Jack gave no intention of ever wanting to change his position, nor wanting to act as Billy's father. True, he has the right to change his mind, but Jack's actions have also caused Billy to grow up loving a man named Rick as his father, and believing Rick to be his father. A court will consider the environment of a child in determining parental rights and whether it is in the best interests of the child. It would be injustice to allow Jack to change his mind now, because Billy will be wronged through no fault of his own and taken from the man he believes to be his father. Ann and Rick's reliance on Jack's position, and Billy's growing up with Rick as father, will require a remedy in equity of equitable estoppel, and allow the court to deny Jack's petition, otherwise an injustice would be served in denying Rick his rights to act as father, and in denying Billy the right to continue to believe Rick is his father.

(2) The issue is whether the court should ever cancel child support arrearages or suspend child support payment agreements in a valid separation agreement when the other parent interferes with visitation rights.

In NY, married parties are free to enter into valid separation agreements in order to define their rights as to property, maintenance, and child support and child custody. The separation agreement must be valid to be enforceable, that is, it must be signed and acknowledged, and at some point filed with the court. Separation agreements are governed by normal contract principles. If the separation agreement says nothing, it will be incorporated with a divorce order, but will survive the divorce order. In order to change child support in a separation agreement, the moving party must show an unexpected change in circumstances and extreme hardship on the party. In addition, the best interests of the child must be considered.

Here, Ann and Rick have a valid separation agreement that has been filed with the court during the divorce hearings, and the separation agreement is incorporated with the judgment of divorce, but the agreement does not merge, thus the terms and the agreement of separation as a whole survive the divorce. This places the stricter standards of modifications on a moving party.

In NY, a court may not cancel arrearages. Once a party has agreed to a separation agreement and agreed to child support amounts, such amounts are fully enforceable and due as indicated in the agreement. A court will never cancel child support arrearages absent a showing of fraud in the inducement or unconscionability or some other serious defense that might result in rescission of the contract. Here, Rick agreed to pay Ann $250 a week. The contract does not say what would happen if Ann interfered with Rick’ s visitation rights. However, under normal contract principles, the parties are deemed to have put down in writing their intentions, and the court will not allow a party to change the terms of an agreement after the fact. The agreement is clear and says Rick owes Ann $250 every week for child support. The judgment of arrears was entered in July 2007 for $5000. This judgment is fully enforceable and a judge may not cancel the arrearages.

In addition, child support is a duty to the child and as discussed above, Rick has treated Billy as a biological child. Child support is a right arising out of the child itself. The child has a right to be supported by both parents, and in NY, a parent must support his child until age 21 unless special

circumstances. It is true that Ann is interfering with Rick's visitation rights, and Ann is breaching the separation agreement. Under normal contract principles, such breaching conduct could suspend Rick's obligation. However, Ann's bad behavior or misconduct cannot waive Billy's rights to support from his father. In the interests of Billy, Rick must pay the arrearages in order to support Billy and allow Billy's lifestyle to continue on the same level Thus, absent a showing of unexpected change in circumstances, a judge may not suspend child support obligations.

B. The issue is how a court should rule on a petition by a father to modify child support obligations based on the changed circumstance of being unemployed.

As discussed above, when child support obligations have been made in a separation agreement, the court will only allow modification based on a showing of changed circumstances and extreme hardship on the party. The best interests of the child will also be considered. If a party shows that circumstances have changed such that the parties did not provide for them in the separation agreement, and to force the parent to continue to pay child support would force an extreme undue hardship on him, the court may modify the agreement as to child support obligations. However, the court must also consider the best interests of the child, and whether a modification of the child support obligations would cause undue harm to the child or place the child in a much worse position or threaten the child's well being. In NY, the loss of job and resulting unemployment may be sufficient to request modification of the child support obligations. However, there must also be extreme hardship to the party, and the party should have "clean hands", otherwise the court will not allow a party to escape his obligation to pay child support under NY law.

Here, there is a valid separation agreement which outlines Rick's child support obligations. The agreement has survived the divorce order, and the court may only modify the child support obligations if Rick shows that there has been an unforeseen change in circumstances, and that if he is forced to continue to pay the same amount of child support at $250 a week, it will be extreme hardship to him. Here, Rick has lost his job. Unemployment has often been considered by NY Supreme Court to be a sufficient change in circumstances. If Rick has no income, it is an extreme hardship to make him pay child support at the present time. In addition, as discussed above, Rick owes $5000 in arrearages which he must also pay. It may be an extreme hardship to keep the current child support payments at the same level as before. However, here, Rick does not have clean hands. He has been fired because he violated company policy. He has not tried very earnestly to find another job. He may need to look harder to find a job, or to find a different job. In addition, the court must consider the best interests of the child. While it would not be in Billy's best interest to make his dad pay child support until Rick is insolvent, it does not appear that Rick is yet insolvent or will continue to be. Rick may find a job. Rick and Ana already agreed to the child support payments of $250 a week and this is the amount Billy has been living on. Billy's right to child support does not disappear because his father has lost his job. Perhaps a court may consider a temporary suspension of child support payments while Rick looks for a job, with-the arrearages to be paid immediately once he has found a position. Likely, a court will find that Rick is trying to avoid Ms payment of child support, especially given his previous hesitation to pay child support, and the court should not modify the separation agreement because it is not in Billy's best interest and Rick does not have clean hands in seeking this remedy.

ANSWER TO QUESTION 3

A. Rulings of the Court

(1) Dismissal of Jack's Petition on the Basis of the Doctrine of Equitable Estoppel

The issue is whether Jack's petition for a declaration of paternity can be denied on the basis of equitable estoppel.

Under New York Domestic Relations Law, in ruling on a petition for a declaration of paternity, the court will consider the best interests of the child paramount. The court may deny a declaration of paternity in the face of a valid presumption of paternity and where the parties have relied on the previous and longstanding manifestations of paternity prior to the action. A child born during marriage is considered a marital child, and the child of a marital woman is presumed, absent other evidence, to be the marital child of her husband.

Here, Ann became pregnant with Jack's child in November 2000, and while still pregnant, married Rick in 2001. Billy was born during Anne's marriage to Rick, therefore, he is presumed to be a marital child and further is presumed to be the son of Anne and Rick and not Jack's son.

These presumptions may be overcome by evidence to the contrary. However, in any action for a declaration for paternity and other actions involving children, the best interests of the child are paramount and the declaration of paternity may be denied under the doctrine of equitable estoppel. Under this doctrine, parties who have relied on an agreement to treat paternity as that of one party and have continuously done so will be later estopped from denying that paternity.

Here, clearly there is evidence that could rebut the presumption because Ann and Jack conceived Billy before Ann ever met Rick, and Ann, Jack and Rick are all aware that Jack is the natural father of Billy. However, Jack told Ann that he wanted nothing to do with the child when Ann was pregnant and, although later aware of Billy's birth and never doubting that Billy was his biological son, never made any contact with Billy and never objected to Billy being raised to believe,. that Rick was his biological parent. Jack will be estopped from declaring paternity because he allowed Billy to be raised under the belief that Rick was his father and allowed Rick to act m the role of father to Billy.

Further, Ann encouraged Rick to treat Billy as his biological child, both of them held Billy out as their biological child, and in every way treated Rick as Billy's father. Rick is listed on Billy's birth certificate as Billy's father, and the two of them always held Rick out as Billy's father, with Billy calling Rick "daddy", Rick supporting Billy and the two of them developing close bonds for four years. Considering that Billy believes that Rick is his father, looking at the facts from the perspective of the best interests of the child, equitable estoppel should block Jack from being able to declare paternity after being aware of Billy but allowing Rick to raised and supported Billy for his entire life.

Equitable estoppel can be used to stop Jack from declaring paternity; the court correctly dismissed Jack's petition. It should be noted that under the New York and Federal Constitution, unwed fathers have a right to a meaningful relationship with their children, provided that they grasp that opportunity. Whether the father has grasped the opportunity will be measured in terms of the child's life. Here, Jack never grasped the opportunity to bond with his son until much later, although he knew that Billy was his son from the time of his conception. Jack knew Ann was pregnant and left Ann when she was pregnant, telling her he wanted nothing to do with the child. Jack was aware of Billy's birth and never doubted that Billy was his biological son. However, Jack never made any contact with Billy although he was able, and never objected to Billy being raised to believe that Rick was his biological parent.

(2) Grant of Rick’ s Motion to Cancel Arrears and Suspend Obligation to Pay Child Support

The issue is whether Rick may cancel his arrears in child support due to Ann having interfered with all attempts by Ricky to see Billy per their visitation agreement.

Under NY Domestic Relations Law, arrears in child support and maintenance may not be cancelled, even if not reduced to a judgment. Furthermore, the right to child support is independent from the right to visitation, such that one parent's interference with the other parent's custody rights does not cut off the liability of the parent whose custody rights are being interfered with for other obligations of child support or maintenance.

in this case, there was a valid agreement for visitation and child support from the terms of a separation agreement that was incorporated but not merged into the divorce decree. Therefore, the terms of the separation agreement are binding upon the parties unless modified by the court; The agreement provided that Rick would be entitled to weekly visitation with Billy, and Ann was entitled to receive from Rick $250 per week in child support. Aim was therefore entitled to receive this money to care for Billy. Rick was entitled to his visitation, but these rights were not dependent on each other. Ann's refusal to permit Rick to have any contact with Billy and her active interference with all attempts by Rick to see Billy will not allow Rick to stop paying child support. Rick is therefore liable for the arrears of $5,000, and the court was incorrect in granting Rick's motion to cancel the arrears.

With respect to future payments, courts will not suspend child support during periods of misconduct of a spouse in interfering with the other parent's rights to visit the child. The rationale is that this will punish the child and not the culpable party - the misbehaving parent. However, the court may use other methods of compelling the spouse to comply with a visitation agreement, such as normal enforcement measures like penalties or even contempt. Here, Ann is guilty of misconduct because she is interfering with the right of Rick to visit with Billy. Absent special circumstances a parent has a right to frequent and regular contact with his child. Ann is interfering with this right of Rick by interfering with Rick's visits and refusing to permit Rick to be a part of Billy's life. While the court was incorrect in granting Rick's motion to suspend future payments of Rick to Ann for the benefit of Billy, the court may use other enforcement methods like contempt or penalties to compel Ann to respect Rick's visitation rights.

(b) Court's Ruling on Rick's Petition

The issue is whether a party may have his child support obligation reduced when such obligation was created under a valid separation agreement incorporated into a divorce decree.

The court may modify child support and maintenance provisions to fit the needs of the parties. Parties whose child support obligations have been created under a valid separation agreement that was incorporated and survived a divorce decree must show that failure to modify will work an extreme hardship against that spouse.

Here, Rick and Ann's divorce judgment incorporated but did not merge the terms of the separation agreement; the separation agreement therefore survives the divorce decree. Separation agreements are presumed to be incorporated and survive the divorce unless there is express language to the contrary. Under the terms of the agreement, Rick was to pay Ann $250 per week in child support. Rick can only have that amount modified if he proves to the court that the child support will work an extreme hardship on him, generally due to a change in financial circumstances. As always, the court must also consider the best interests of the child in considering the downward modification. Self-induced change in-circumstances will not serve as the basis for a modification.

Rick has failed to show that not receiving a downward modification will work an extreme hardship on him. Rick was fired from his job as a graphic designer in October 2007 for violating a company policy regarding computer use. While this is not exactly a self-induced change in

financial circumstances, there is some fault on Rick's part that tilts the balance against a finding of extreme hardship since he brought some of the hardship on himself.

Also, Rick has admitted that there are many jobs available in the area consistent with his education and ability, but testified that he applied for several positions and has not been hired. This is not a sign that he has exhausted his possibilities or that he has even exercised due diligence in attempting to find a new job, but merely that he has applied for several positions and has not yet been hired. His evidence appears to work against him because given that there are many jobs available in his area consistent with his education and ability, it is possible that he will find a job soon. This is not sufficient proof of an extreme hardship and Rick's petition should be denied.

QUESTION 4

Driver was traveling west on State Street at 35 miles per hour, the posted speed limit. He entered the intersection of State Street and Main Street without stopping or reducing his speed. Driver's vehicle struck broadside a car traveling southbound through the intersection on Main Street. Normally, a stop sign would have faced westbound traffic on State Street, but the night before, vandals had stolen the stop sign. Driver was familiar with the intersection, but on this occasion did not observe that the stop sign normally controlling westbound traffic on State Street was not in place. There was no traffic control device for traffic proceeding southbound on Main Street.

Passenger was riding in Driver's vehicle. Although wearing a seat belt, she sustained a fracture to her right arm. Passenger was taken to the hospital following the collision. Physician said that her broken arm did not require surgery and simply placed it in a cast. Three months later, on the day of her last visit to Physician, Passenger was advised that the fracture was not healing, so Passenger decided to change her care from Physician to Surgeon.

Surgeon told Passenger that the type of fracture which Passenger sustained should have been treated differently at the beginning so as to permit proper healing. Surgeon performed a surgical procedure, causing Passenger additional pain and suffering, but also permitting Passenger's fracture to properly heal.

Passenger retained Attorney to represent her interests in any claim against Driver and Physician. Passenger agreed to pay a contingent fee of 1/3 of the amount of any settlement or judgment obtained, after deduction of the expenses of litigation. No writing memorialized this agreement.

Two years and eight months after the accident, Attorney duly commenced an action on Passengers behalf against Driver and Physician to recover damages for Passenger's pain and suffering. The complaint alleged negligence against Driver and malpractice against Physician.

In answering the complaint, Driver asserted that the accident was not his fault and was unavoidable, and in any event, that the non-healing of the fracture was not caused by the accident. Physician and Driver each raised an affirmative defense based on the statute of limitations.

(a) Was the action timely commenced against each defendant?

(b) Assuming the action was timely commenced as to Driver:

(1) Analyze the issues relating to the liability of Driver for Passenger's non-economic loss arising from the accident, including a discussion of the merits of Driver's defense that the accident was not his fault and was unavoidable; and

(2) Analyze the issues relating to the liability of Driver for Passenger's pain and suffering arising from Physician's alleged malpractice.

(c) Will Attorney be entitled to any legal fee for his work on behalf of Passenger if a settlement or judgment is obtained?

ANSWER TO QUESTION 4

A. At issue is the statute of limitations for negligence action and for medical malpractice.

The statute of limitations for a personal injury action in negligence is three years from the time the injury occurred. Here, the action was brought two years and eight months from the accident; hence, the action against the Driver was timely commenced. On the other hand, medical malpractice suits has a two and a half year statute of limitations. Generally, the statutory period is reckoned from the dale of malpractice (here the date of the misdiagnosis). Thus, the action against the Physician would have been out of time. NY however has a continuing treatment rule. In case the patient is under continued treatment for the same condition that gave rise to the malpractice suit, the statute of limitations shall be reckoned from the last day of the treatment. Here, Passenger continued to see Physician for the same broken arm, the last day being three months after the accident. Thus, applying the continued treatment rule, Passenger had two years and nine months within which to bring her action against Physician. Thus, action against Physician is timely. . .

B. (1) The first issue is whether Passenger can hold Driver liable for her injuries under negligence claim.

To bring an action in negligence, the plaintiff must prove that: (i) defendant has a duty to foreseeable plaintiffs, (ii) breach of that duty, (ii) breach was the actual and proximate cause of plaintiff s injury, and (iv) damages to plaintiff’ s person or property.

Here, Driver has a duty to stop or reduce speed when crossing an intersection as an ordinary prudent person would do under the circumstances to avoid accidents or collisions at intersections. He owes this duty to other motorists and his passenger that could be hurt should there be any intersection collisions. He breached that duty by not stopping and reducing his speed when he crossed the intersection thereby hitting another car. The accident resulting from Driver's breach was the actual and proximate cause of Passenger's injury. Thus, Passenger will be able to establish all the elements of negligence and hold Driver liable to Passenger. Further, the missing stop sign normally present at the intersection will not absolve Driver's negligence. The facts state that Driver is familiar with the intersection and should have known that he should have stopped at the intersection. Thus, Driver's defense that the accident was not his fault or was unavoidable has no merit.

(2) The issue is whether a defendant can be held liable for additional injury to plaintiff arising from another person's negligence.

A tortfeasor is liable for all harm suffered by the plaintiff which are the normal incidents of or within the increased risk of defendant's negligent act. Another tortfeasor's independent, separate negligence will not supersede defendant's liability if the intervening event is foreseeable. Further, the law presumes that intervening negligent medical treatment is foreseeable as a matter of law.

Applying the foregoing rules, Physician's malpractice is, under the law, a foreseeable intervening event. Thus, Defendant is liable for Passenger's pain and suffering arising Physician's malpractice in treating Passenger's broken arm resulting from Defendant's breach.

The next issue is whether Driver can claim contribution from Physician.

NY CPLR allows a tortfeasor to seek contribution from another person whose act contributed or aggravated the damages that the defendant might be required to pay the plaintiff. Here, there is no question that Physician was negligent in misdiagnosing Passenger's conditions thereby causing Passenger additional pain and suffering. Thus, Physician has indeed contributed to the Driver's liability to Passenger. Driver can therefore seek contribution from the Physician.

C. At issue is whether a lawyer can charge contingency fees in negligent actions and whether the retainer agreement should have been in writing.

Under the Code of Professional Responsibility, when the fee is expected to be $3,000 or more, a written retainer agreement must be executed describing the scope of services, billing and fee arrangements, and the option of the client to bring any fee dispute for arbitration. In any case, a contingency fee arrangement (where the lawyer's fee is dependent on success of the action) must be in writing, which should describe how the fees are to be determined, and signed by the client. Otherwise, the attorney will not be allowed to recover the contingency fee and would be limited to reasonable fees for actual services rendered.

Here, there is a contingency arrangement since Attorney's fee is dependent on the amount of settlement or judgment. Thus, Attorney violated the Code of Professional Responsibility when he did not execute the retainer in a signed writing with the client. Thus, Attorney will not be allowed to collect his fees based on contingency but would be able to recover only a reasonable amount of fee commensurate to his services.

ANSWER TO QUESTION 4

A. Action Against Driver

The issue is whether the Statue of Limitations for an action in tort for personal injury based on negligence has run.

Under the CPLR, actions for personal injury have a three years statute of limitation which accrues from the date of the injury. Note that NY does not have a discovery rule, so it is immaterial when the plaintiff actually discovered that she was injured, the statute of limitations will always run from the date that she was actually injured. No exception to the rule, such as that which applies a discovery rule for exposure to a toxic substance, applies to this case.

Under the CPLR, statutes of limitations are timed from the anniversary date of the injury. If the anniversary falls on a public holiday or Sunday, the plaintiff may timely commence her action on

the following business day. In order to be timely under the applicable Statute of Limitations, the plaintiff's action must be commenced either on or before the relevant anniversary date.

In this case, because Passenger is alleging that she suffered personal injury due to Driver's negligence, the applicable statute of limitation is three years.

Because Passenger's action was duly commenced two years and eight months following the occurrence of the injury (and therefore the accrual of the statute of limitations), and because two years and eight months is within the three year statute of limitations, Passenger's action against driver was timely commenced.

Action against Physician

The issue is whether the statute of limitations for an action based on medical malpractice has expired, or if a toll for continuous treatment applies.

Under the CPLR, actions based on medical malpractice, whether they are tortuous or contractual in nature, have a statute of limitations of two years and six months.

The rules stated above with regard to general provisions of CPLR Statute of Limitations apply.

Also under the CPLR, however, there is a toll for continuous treatment. If a patient continues to see the same doctor for the same condition, the cause of action will not accrue until the doctor's treatment of the patient for that specific condition has ended. The statute of limitations will run for two years and six months from the end of the treatment.

In this case, because Passenger was treated for her broken arm for three months following the accident by Physician, the two year and six month statute of limitations in her cause of action against Physician would not begin to accrue until the end of such continuous representation. Therefore, the statute of limitations for Passenger's suit for medical malpractice against Physician would not expire until two years and nine months following the accident.

Because Passenger could have brought timely suit against Physician up to two years and nine months following the accident, and; because Passenger actually did timely commence an action against Physician two years and eight months following the accident, Passenger has timely commenced an action against physician.

B. (1) The issue is whether Driver committed a tort of negligence against Passenger, and whether a broken arm constituted a serious injury under NY's No Fault Insurance Statute.

In order to be liable for negligence a plaintiff must establish that; 1) the defendant owed a duty of care to the plaintiff, 2) the defendant breached that duty of care, 3) the breach was the actual and proximate cause of the plaintiff's injuries, and 4) the plaintiff has suffered actual injury.

A defendant will owe a duty to avoid negligence to a defendant if the defendant was in the zone of danger likely to be created by plaintiff's actions.

Absent an applicable special duty of care, the applicable duty is to behave as a reasonable person under the circumstances. Circumstances may include a person's familiarity with streets and traffic patterns.

A breach is the actual cause of injury if but for the breach the injury would not have occurred. A breach is the proximate cause of the injury if the resulting injury was a reasonably foreseeable consequence of the breach.

In this case, because Passenger was riding in Driver's car, Passenger was in the zone of danger of Plaintiff s actions; therefore Driver owed a duty to Passenger.

Because no special statutory standard of care applies, Driver owes Passenger a duty to behave as a reasonably prudent person under the circumstances. In this case, a reasonably prudent person under the circumstances of being familiar with the intersection, would have observed that the stop sign was missing and would have slowed down or stopped to see if any traffic were coming. Because Driver did not slow down or stop, Driver breached a duty owed to Passenger. But for Driver's breach, the accident would not have occurred and the breach was the actual cause of passenger's injury. Because it is foreseeable that when a person fails to exercise caution at an intersection with which he is familiar as having a stop sign, that the person may strike other cars in the intersection, the breach was the proximate cause of Driver's injury.

Finally, because driver actually did suffer a broken arm and additional pain and suffering he is liable in tort. It is immaterial that the accident was not his fault, Driver may be liable in tort even though he was not at fault in the accident.

It should be noted that in NY there is a reformed Pure Comparative Negligence Statute, such that a tortfeasor who is 50% or less responsible for a defendant's injury cannot be made to pay for 100% of the victim's non-economic loss. This statute does not apply however to operators of motor vehicles (besides police or firemen). Because Driver operated a motor vehicle, this statute does not apply to him.

(2) The issue is whether a broken arm constitutes a serious injury under NY's No Fault Insurance Statute.

Under NY law, every driver of a registered car is required to obtain No Fault Insurance. Under No Fault Insurance, the passengers of each car and pedestrians struck by a car are covered by the insurance of the car.

A person may not bring a suit against a driver of a car insured by No Fault Insurance for pain and suffering, unless the plaintiff alleges a serious injury or greater than a basic economic loss. A serious injury will be one requiring surgery or resulting in loss of a limb or body function.

Because Passenger's injuries required surgery, it will likely be viewed as a serious injury. The fact that the injury was aggravated by malpractice does not relieve Driver of liability for all of the pain and suffering resulting from his negligent act. Nevertheless, under the CPLR, Driver may obtain contribution from Physician for any portion of the pain and suffering that is attributable to him.

C. The issue is whether Attorney and Passenger entered into a valid fee arrangement and if not, what will happen.

Under the NY Code of Professional Responsibility, lawyers have an obligation to state fee arrangements clearly at the beginning of representation. If the fee is to be on a retainer basis for $3000 or more, or if the fee is to be on contingency, it must be in writing in order to be enforceable. If not, it will not be enforceable and the court will award a reasonable fee to prevent the unjust enrichment of the client.

In this case, because the fee arrangement proposed by Attorney was for one third of her eventual recovery, the fee arrangement was a contingency fee. Because the contingency fee arrangement was not in writing, it cannot be enforced against passenger. Nevertheless, because Passenger cannot be unjustly enriched, the court will award the reasonable value of Attorney's services during the case to Attorney.

QUESTION 5

Theresa, a widower, asked her close friend, Ann, an attorney, to draft a Will for her and to serve as the Executrix of Theresa's estate. Ann orally advised Theresa that she could draft the Will and that anyone could serve as an Executrix, even a lay person. Ann also stated that as Executrix, she would be entitled to commissions, and as an attorney, she also would be entitled to receive legal fees for the administration of Theresa's estate. Theresa told Ann that she wanted to leave her diamond ring and her Picasso painting to her only child, Debra; the sum of $200,000 to Ann, in consideration of their close friendship; and the balance of her estate to Debra's daughter, Gina.

In December 2003, Theresa went to Ann's office to sign the Will that Ann had drafted. After reviewing the document, ensuring that it accurately reflected her intent, and declaring it her Will, Theresa signed the Will in front of Debra and Ann's secretary, Jane. Both signed as witnesses, and each signed an affidavit attesting to the execution of the Will.

The Will contained the following provisions:

(1) I give my diamond ring and my Picasso painting to my daughter, Debra;

(2) I give $200,000 to my attorney and friend, Ann, in consideration of our close, long-term friendship;

(3) I leave the residue of my estate to my granddaughter, Gina;

(4) I appoint my attorney, Ann, as Executrix.

In February 2007, Theresa sold the Picasso painting to a private collector for $3 million dollars. She immediately opened a new account in her name only at Big Bank and deposited the proceeds into that account.

Theresa died on December 15, 2007, survived by Ann, Debra and Gina. Theresa left a net estate of $5 million dollars, consisting of her home, various stocks and bonds, the bank account in her name in Big Bank, containing only the proceeds of the sale of the Picasso painting, and her diamond ring, valued at $50,000.

Thereafter, Ann filed Theresa's Will with the Surrogate's Court seeking to have it probated. Debra duly filed objections to the probate of Theresa's Will on the grounds that: (1) the Will was not properly witnessed, and (2) the Will is a product of undue influence because Ann, as attorney-drafter of the Will, also receives a bequest. Debra also asserts that she is entitled to the Big Bank account in the event the court admits the Will to probate.

Ann has opposed Debra's objections and has submitted proof of the relevant facts set forth above.

(a) How should the Surrogate's Court rule on Debra's objections to probate:

(1) that the Will was not properly witnessed; and

(2) that Ann, as the attorney-drafter and a beneficiary under the Will, exercised undue influence on Theresa in the execution of the Will?

(b) If the Will is admitted to probate, will Debra be entitled to receive:

(1) the diamond ring; and

(2) the proceeds of the B Bank account?

(c) To what extent is Ann entitled to receive both Executrix's commissions and legal fees?

ANSWER TO QUESTION 5

A. How should the Surrogate's Court rule on Debra's objections to probate: (1) The Will was not properly witnessed.

The issue is whether attestation of a Will by an interested witness invalidates the Will.

Under New York Estates Powers and Trusts Law (EPTL), a proper execution of a Will requires that a Will be signed by the testator over 18 years of age with testamentary capacity at the end of the Will and be attested by two witnesses, that the testator either sign the Will in the presence of both witnesses or acknowledged his signature before them, that the testator publish the Will (declare the Will to the witnesses to be his last Will), and that both witnesses sign within 30 days of each other.

Here, all the elements are present. The Will was signed by Theresa in the presence of two witnesses, declared it to them, and they signed simultaneously.

The affidavit asserting the elements of proper execution signed by the attested witnesses would satisfy the requirements for admission of the Will to probate without the testimony of such witnesses if there is no will contest. If there is will contest, the witnesses must testify (or if one witness is unavailable at least one of the witnesses must testify) or if both witnesses are unavailable other evidence (proof of at least two signatures - that of testator and at least of one witness) must be produced to admit the Will to probate.

(2) Ann as the attorney-drafter and a beneficiary under the Will, exercised undue influence on Theresa in the execution of the Will.

The issue is whether the testamentary gift to an attorney who drafted the Will but was also a personal fired of the testator fails due to undue influence.

Under Estates Powers and Trusts Law and Surrogate's Court Procedure Act, the party challenging the Will based on undue influence must normally show that there was exercise of undue influence (mere opportunity to exercise influence or mere susceptibility to it are insufficient), that this undue influence overpowered the Will of the testator, and that the disposition would not have been made but for such undue influence. However, there is an inference of undue influence where a person in confidential relationship with the testator, including an attorney, took active part in drafting and execution of the Will. In such cases, the court is required to engage in Putnam Scrutiny even sua sponte. However, the inference of undue influence can be negated by showing

that there was an independent basis for the disposition to the person in confidential relationship, such as long friendship.

Here, there is an inference of undue influence by Ann as an attorney who was in confidential relationship with Theresa and drafted Theresa's Will. However, there appears to be no evidence of actual exercise of under influence by Ann, and the gift can be explained by the longstanding friendship between Ann and Theresa. There is no evidence that Ann's influence overpowered Theresa's Will resulting in a different disposition because it was Theresa's initiative to include the gift to Ann in her Will. Therefore, the gift to Ann under the Will is valid.

B. If the Will is admitted to probate, will Debra be entitled to receive:

(1) The diamond ring

The issue is whether an interested witness is entitled to the testamentary gift if that gift is less than her intestate share.

Under the EPTL and Surrogate's Court Procedure Act, a bequest under a Will to one of the attesting witnesses will not invalidate the Will, but the gift to such a witness (called an interested witness) will fail, unless; 1) the other two disinterested witnesses attest the Will, and 2) if the interested witness is also an intestate distributee, he would receive the lesser of his gift under the Will or his intestate share.

Debra here was an interested witness because she both witnessed the Will and was a beneficiary under it. Although Debra is an interested witness, the Will as such was properly executed and should be admitted to probate. As an interested witness who attested the Will, Debra would be entitled to the lesser of her intestate share or the gift under the Will. Here, Debra is the only daughter Theresa had and Theresa had no surviving spouse. Therefore, under the EPTL in case Theresa died without a Will, Debra would be entitled to Theresa's entire estate. Therefore, Debra would take the lesser gift, which is the gift under the Will. Because the gift of the Picasso painting adeems, Debra is entitled to the diamond ring only.

(2) The proceeds of the B Bank account

The issue is whether the specific gift fails whether the property given as a gift is not owned by the testator at his death and where proceeds of its sale are received before the testator's death.

Under the EPTL where a specific gift is made to a beneficiary under a Will and at the time of death, the testator is not the owner of the property in question or the property is not found, the gift is deemed to adeem, or fail. The only exceptions to this rule is when the property is sold under a contract and the proceeds for the property are paid after the testator's death or whether a property is destroyed and insurance proceeds are paid after the death. In such case, the beneficiary of the specific gift is entitled to the proceeds.

Here, the gift of Picasso's painting to Debra was a specific gift. Theresa was not the owner of the painting at her death and the proceeds of sale were received before her death. Therefore, no exception to ademption applies and this gift to Debra fails.

For reasons described above Debra is not entitled to the proceeds of the sale in the B Bank account.

C. To what extent is Ann entitled to receive both Executrix's commissions and legal fees?

Under New York statute, if an attorney who drafts the Will is appointed the executor of the testator's estate, he is required to give to the testator a written statement disclosing that not only attorneys may be appointed as executors. If the attorney is appointed an executor, he would be required to both the statutory commissions and legal fees from the estate. The acknowledgment has to be in writing and signed by the testator and attested by two witnesses. The Surrogate's Court has interpreted this provision to mean that the disclosure has to be in a document separate from the Will. Failure to comply, results in the attorney receiving only half of statutory commissions.

Here, although Ann did disclose the required elements, she failed to disclose them in writing and Theresa did not sign the witnessed acknowledgment. Therefore although Ann is allowed to serve as an executor (and such an appointment is not considered a beneficial gift) she would be entitled only to one half of statutory commissions.

ANSWER TO QUESTION 5

A. (1) The issue is whether a Will that is witnessed by a person who is also a beneficiary and executor under the Will is valid,

In order to probate a Will, the proponent of the Will must: 1) establish that the testator had testamentary capacity (i.e., testator is 18 or over and there is no existence of undue influence), 2) that the testator signed at the bottom of the Will (or testator directed someone else to sign the Will on her behalf, in which case such person may not sign as a witness), 3) that the testator published to the witnesses that they are witnessing a Will, 4) that there are two attesting witnesses who will sign the Will (though they do not have to sign in front of the testator or sign in front of each other), 5) they must sign the Will within 30 days of each other, 6) that they must sign in the capacity as witnesses and not as notary public, and 7) that the testator either signed the Will in the two attesting witnesses1 presence or acknowledge her own signature in their presence. The fact of this case suggests that there is valid execution and the self-proving affidavit is evidence of valid execution (and they replace the necessity of requiring the two attesting witnesses to testify that the Will was validly executed, unless there is an objection).

The fact that an attesting witness is a beneficiary or is appointed as an executor under the Will does not affect the validity of the Will. Therefore, the fact that Ann is a beneficiary and an executor of the Will does not affect her competence as an attesting witness. However, the bequest under the Will to an attesting witness is void, unless such witness would have been an intestate distributee had the testator died without a Will, in such a case the beneficiary may obtain the lesser of her intestate share or the bequest under the Will. Since Ann is only a friend and not an intestate distributee, she is therefore not entitled to receive the $200,000 under the Will. The Will is construed as if Ann predeceased the testator and as such the gift will lapse (and since Ann is not a brother, sister or issue of Theresa, the anti-lapse rule doesn't apply) and will go to the testator's residue (i.e. to Gina).

(2) The issue is whether a drafting attorney is presumed to have exercised undue influence by the mere fact that she was also a drafting attorney of the Will.

Under the disciplinary rules of NY, a lawyer may not suggest that a gift be made to the lawyer. In this case, Ann did not solicit that the gift be made and as such she is not in violation of the disciplinary rules. However, there is a presumption of undue influence (i.e., existence of undue

influence, the undue influence overpowers the testator such that she cannot exercise free will and mind, and the product of such undue influence is a Will or bequest that would not have otherwise made absent the undue influence) when a person is in a confidential relationship with the testator and she was active in the procurement of the Will. Also, the Doctrine of Putnam Scrutiny automatically infers that there is undue influence when a gift is made to the drafting attorney. It is important to note that the Will contestant has the burden to establish the existence of undue inference. However, if the drafting attorney does not satisfy such inference, then such inference/ presumption is satisfied. Therefore, Ann should put forth evidence to show that there is no existence of undue influence and that the gift was made to her due to their longstanding friendship. In this case, since Ann is a good friend with Theresa, Ann will be able to establish that she did not exercise undue influence over Theresa in the preparation of the Will.

B. (1) The issue is whether a beneficiary who is also an attesting witness is entitled to receive a gift under the Will.

As mentioned above, a Will is valid even if an attesting witness is also a beneficiary under the Will. However, such beneficiary may only receive the lesser of the value of the gift under the Will ($50,000) or her intestate share had the testator died without a Will. In this case, Theresa's net estate is $5 million and Debra's intestate share would have been $5 million since Theresa is a widower and Debra is her only child. Therefore, Debra is only entitled to receive $50,000.

(2) The issue is whether a specific bequest is adeemed if it does not exist at the time of the testator's death.

The general rule is that a beneficiary is not entitled to the receipt of a specific bequest if it does not exist at the testator's death. A specific bequest is one that is referred to specifically and is not a sum of amount. If the testator bequests a sum of money, then that is a general bequest, but if the testator bequests a sum of money from a specific source, then that is demonstrative bequest. Both general and demonstrative bequests are not subject to ademption. In this case, the painting is a specific bequest since such object is specifically referred to in the Will. Since the painting was sold prior to Theresa's death, it is adeemed, and therefore Debra is not entitled to receive the painting or the value of the painting. However, if the proceeds of the sale of the specific bequest or proceeds from casualty insurance in connection with the specific bequest were received after the testator's death, or if a conservator of the testator's estate sold a specific bequest and such proceeds of sale are traceable, then the beneficiary is entitled to receive such proceeds or sale or insurance (and in the case of sale by a conservator, the beneficiary may only recover to the extent of proceeds traceable by the beneficiary). However, in this case, the exception to the general rule does not apply since the proceeds of the sale were received prior to Theresa's death. Accordingly, Debra is not entitled to receive the value of the painting.

C. The issue is whether an attorney may act as an executor of the testator's estate and whether she is entitled to deceive legal fees from the estate,

An attorney may act as an executor of a testators estate provided that she disclosed in writing to the testator that: 1) anyone can be an executor; 2) such executor is entitled to receive statutory commission; and 3) she is also entitled to receive legal fees from her representation of the estate. The testator must sign and acknowledge such written disclosure in front of two witnesses. Failure to comply with this requirement results in a one-half reduction in executor-attorney's statutory commission. In this case, since Ann's disclosure was not in writing and that Theresa did not sign and acknowledge such disclosure in front of two witnesses, Ann is only entitled to receive half of the statutory commissions she would otherwise be entitled to receive. However, Ann remains eligible to receive legal fees from Theresa's estate for the representation of the estate.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2008 QUESTIONS AND ANSWERS

MPT - In re Lisa Peel

Applicant's law firm represent Lisa Peel, a private citizen who operates an Internet blog on which she posts news stories about local government, as well as movie reviews and items about her family activities. Following her post about a local school official taking $10,000 in audiovisual equipment for personal use, the district attorney subpoenaed Peel to testify before the grand jury and to produce all of her interview notes in an effort to get her to reveal the identity of the sources for her story. Peel seeks the law firm's advice on whether she can resist the subpoena. Applicants' task is to draft a memorandum analyzing whether Peel would be considered a "reporter" under the Franklin Reporter Shield Act, and therefore be protected from being compelled to reveal her confidential sources. The File contains the instructional memorandum from the supervising partner, the transcript of the client interview, a copy of Peel's school-corruption post, a copy of the subpoena, and a news article about the development of blogs as the newest form of journalism. The Library contains excerpts from the Franklin Reporter Shield Act, various dictionary definitions, and two cases.

ANSWER TO MPT

MEMORANDUM

To: Henry Black
From: Associate
Re: Peel Subpoena

Date: February 26, 2007

Question Presented

The issue examined in this memo is whether Lisa Peel can successfully move to quash the subpoena duces tecum she has been served with on the grounds that she and her blog are protected under the Franklin Reporter Shield Act (FRSA).

Short Answer

Ms. Peel bears the burden of establishing that the FRSA's qualified privilege applies to her and her blog. Under the facts she has presented, Ms. Peel will likely prevail in meeting her burden of establishing that she is a reporter and her blog is a news medium.

Analysis

The FRSA precludes courts from compelling "reporters" to disclose the sources of their information or unpublished materials, with several exceptions that do not apply here. (FRSA Section 902). As the court affirmed in Bellows, under the FRSA, the burden of proving that the FRSA's qualified privilege applies is on the party claiming the privilege. See also Wehrmann v. Wickesberg (Franklin Supreme Court 2002). The issue of whether Ms. Peel is protected under the FRSA turns on whether she will be considered a "reporter" and whether her blog can be

considered a "news medium", within the meaning of the FRSA. I will address each of these issues in turn.

Reporter

The FRSA defines "reporter" to mean "any person regularly engaged in collecting, writing or editing news for publication through a news medium." (FRSA Section 901). The FRSA does not address whether bloggers such as Ms. Peel constitute reporters within the meaning of the Act. However, courts have extended the term reporter to include individuals falling outside the most strict and traditional definition of that term.

In interpreting the FRSA, the court will first look at the plain language of the statue. (See Tichenor 2003). Where that language is unambiguous, courts must enforce the statute as drafted. For example, as the Franklin Supreme Court explained in Tichenor, where the statue enumerates various covered activities, such enumeration implies the exclusion of all others. As applied here, that means that the definition of reporter will be limited to those who are regularly engaged in "collecting, writing or editing" news. Ms. Peel has informed us that she engages in activities similar to those that a reporter would in collecting information in order to write and publish news stories. For example, like a reporter, Ms. Peel attends public meetings, reads agendas, minutes and budgets. She also places calls to relevant individuals to conduct investigatory interviews. Like a reporter, Ms. Peel then uses the information that she has collected to write summaries and comments for her blog that could be characterized as "writing" news. On the other hand, Ms. Peel also posts agendas and minutes on her blog. Merely posting these items does not appear to constitute "collecting, writing or editing." Further, the Franklin Supreme Court held in St. Mary's Hospital that simply paying for newspaper ads does not fall within the protections of the statute. However, many of Ms. Peel's blogging activities, including those at issue here, range far beyond merely posting information online and instead involve affirmative efforts on Ms. Peel's part to gather and compile information that she then posts. Further, her posts do not constitute paid ads. On the whole, Ms. Peel's activities do seem to fall largely within the scope of "collecting" and "writing." Most importantly, the specific activities at issue fall solidly within the scope of "collecting" and "writing."

Ms. Peel must also demonstrate that she is "regularly engaged" in the activities of collecting and writing news. Ms. Peel states that she generally posts new items on Fridays, or sometimes not until the weekend. This implies that she only posts new items to her blog once a week. This is much less regular than an ordinary newspaper, which publishes items daily. However, as Ms. Peel has informed us, her blogging involves a rural community town too small to support a daily paper. In fact, there is just one county-wide daily newspaper. Ms. Peel can argue that she posts to her blog with the frequency expected of a reporter in a small community with no local daily paper. For example, her posting frequency could be compared to a weekly paper in a rural community. Additionally, Ms. Peel publishes with a regular frequency, which distinguishes her blog from internet bulletin boards, where users do not necessarily post at regular frequencies. (See Hausch).

Ms. Peel must also demonstrate that she is engaged in collecting and writing "news." News is not a defined term in the statute. Where the language of a statute is unclear, the court can turn to external aids to interpret the statute. (See Tichenor 2003). The Columbia Supreme Court has held that defamatory messages posted on sports internet bulletin boards are not "news". The activities of Ms. Peel that gave rise to the subpoena are of the type that would ordinarily be classified as news, as they concern matters of public concern about the expenditure of public funds at a public school. Furthermore, as discussed in the article "Blogs Competing with Newspapers and Networks," blogs are increasing being used to cover the topic of "news." On the other hand, Ms. Peel has said that in addition to using her blog to post articles like the one presently at issue that touch on matters traditionally considered news, she also uses her blog to post personal items, such

as pictures of her pets and travels, gardening tips, and the like. While some of these activities could be characterized as human interest type stories that would be carried in a newspaper, some of them are simply personal and non-newsworthy. However, because the particular article at issue here concerns a topic that is ordinarily considered newsworthy, Ms. Peel should prevail in establishing that she is engaged in collecting and writing "news."

Characterizing Ms. Peel as a reporter, despite the fact that she is not a traditional reporter, is in line with the Franklin Court of Appeal's recent willingness to expand the term "reporter" to include photographers of newsworthy items in the Bellows case. There, the court put a great deal of weight on the fact that the purpose behind the FRSA was to encourage the "free and unfettered flow of information to the public." The court found that even though the photographer at issue was not a typical reporter, she met the statutory definition of the term because she was regularly engaged in collecting a certain form of news for publication in a news medium. Likewise, courts have recently found that a freelance writer for a magazine and an author for a medical journal author constitute reporters within the meaning of the act. (See Kaiser and Halliwell). The court's willingness to look at the Act's purpose in construing its terms, and include individuals beyond those holding traditional reporter positions, will help Ms. Peel. In addition, the fact that Ms. Peel was covering a topic that is of great public interest, but which the only local county-wide daily newspaper refused to cover, also supports characterizing Ms. Peel as a reporter, as this is consistent with the FRSA's purposes.

The fact that Ms. Peel is not paid like a regular reporter will not be determinative, nor will the fact that her blog is a hobby, not a full time job. The court will primarily be concerned with the nature of Ms. Peel's activities. As long as Ms. Peel can establish that her intent at the inception of gather the information about the alleged corruption discussed in her article was to disseminate investigative news to the public, she will be able to qualify for protection under the act. See Hovey. Here, once Ms. Peel received the information about the School District funds, she initiated an investigation and the end result was a news-like story.

Ms. Peel will likely be able to carry her burden in establishing that she is a reporter.

News Medium

In addition to establishing that Ms. Peel meets the statutory requirements for a reporter, Ms. Peel must establish that her blog meets the definition of a "news medium." This term is defined in the statute to mean "any newspaper, magazine, or other similar medium issued at regular intervals and having a general circulation."

Tichenor tells us that where, as here, the statutory language is unclear, canons of statutory interpretation can be used. One such canon, ejusdem generis, tells us that when general words follow specific words, the general words must be construed to include only similar kinds of things as indicated by the specific words. Here, that means that the blog must be considered to be like a newspaper or magazine to be covered. As the article "Blogs Competing with Newspapers and Networks" explains, blogs are increasingly being used as a source of news, and even as a way for traditional news outlets to convey news. Bloggers have recently received press credential at political events. All of these point to blogs being increasingly considered news mediums, especially where their content is news related.

Here, Ms. Peel has told us that she uses her blog to post information about local government and local government events, and publishes her own commentaries about related issues. Furthermore, she has over 3,500 registered users in a town of 38,000 people, and has over 15,000 hits on her blog. This means that Ms. Peel is covering new-related topics in her blog and is reaching a wide audience given her location and target audience. Although Ms. Peel sometimes uses her blog to cover non-news related items, she consistently uses it to cover items related to local government,

including the article at issue here. Although there is some risk that the court would focus on the personal and non-news related items in Ms. Peel's blog, it is likely that it would also consider that she is filling a void that is left by the death of local newspapers covering similar topics of public concern.

Ms. Peel will likely be able to carry her burden in establishing that her blog is a news medium.

Conclusion

Ms. Peel will most likely be able to establish that she and her blog qualify for protection under the Act and, as a result, should prevail in moving to quash the subpoena.

ANSWER TO MPT

MEMORANDUM

To: Henry Black
From: Applicant
Re: Application of FRSA to Lisa Peel

Date: February 26, 2008

Introduction

This memo will analyze the applicability of the Franklin Reporter Shield Act (FRSA) to Lisa Peel in her activities as a blogger. A court will analyze the application of the FRSA in light of the fact that competing interests are at stake under the Act and must be addressed in determining the scope of the FRSA. (Bellows) Therefore, it is necessary to analyze the competing interests and also whether Ms. Peel in her activities will fall under the FRSA. Each section will enumerate the competing sides of the argument and the likelihood of Ms. Peel or her work falling under the FRSA.

Conclusion

Based on the competing interests at stake under the FRSA, Ms. Peel's status as a reporter and that her work through the blog can be construed as publishing information through a news medium, it is likely that Ms. Peel's subpoena can be quashed and that she will not be required to produce her sources. Additionally, because there is no controlling authority in the jurisdiction tending to show that the internet blog writer will not receive protection under the FRSA, it is likely that Ms. Peel will not have to produce the identities of her sources.

However, this is not a clear-cut case because of a lack of definitions in the statute and the facts of Ms. Peel's working hours, status as a non-traditional reporter and that she claims her blogging is a "hobby". These facts would all be considered by a court in determining application of the FRSA.

Application of FRSA: competing interests

The stated purpose of the FRSA is to "safeguard the media's ability to gather news". The Act is intended to "promote the free flow of information to the public". If the FRSA applies, the court will be unable to compel a reporter to disclose "unpublished news sources or information received from such sources." (FRSA 900) Therefore, if the FRSA is applicable to Ms. Peel, the court's subpoena duces tecum which requires her to produce all "files, notes, reports and any other documentation...and all persons interviewed for or sources described or quoted..." will be quashed. Ms. Peel explained that she does not want to reveal her sources because she fears that

insiders "will never talk to [her]" if they believe that their identities will be revealed and because they fear that if they talk to her and reveal information they will lose their jobs. (Interview) Therefore, it seems at least that Ms. Peel's interest in protecting the identity of her sources is so that she can publicize information that the public wants to know. Ms. Peel's purpose does seem to be to want to promote the free flow of information to the public and in this area, the competing interest of free flow of information would likely weigh in her favor.

Peel's status as reporter

In addition to the free flow of information, Ms. Peel and her activities must also fall under the Act in order to qualify for protection under the FRSA. The FRSA protects "reporters".

Reporter

"Reporter" is defined in the FRSA as "any person [who] regularly engaged in collecting, writing or editing news for publication through a news medium." [FRSA 901(a)] Ms. Peel does collect and write and edit news that she then posts on her blog. "Collecting" since it is not defined in the statute itself was determined in Bellows to mean "gather or assemble". In Bellows, the court found that taking photographs of newsworthy events was considered "collecting". Similarly, by posting minutes, summarizing the minutes and giving information and posting agendas about public meetings, Ms. Peel is also "collecting" such that she could fall under the statute. Additionally, Ms. Peel is the one writing the primary news pieces that others comment on and she edits her own pieces.

Publication

Ms. Peel's work as a report must also be for "publication". Publication is not defined in the FRSA. Under Franklin's rules of statutory interpretation, a court will look to a dictionary to help interpret "the plain and ordinary meaning of a word" where the legislature does not define the word. (Bellows) In this case, the American Heritage Dictionary defines "Publication" as ..."the communication of information to the public." Here, Peel is intending to communicate information through her blog to the public. Taking the dictionary's definition to help interpret the plain meaning of the word, Peel would likely be seen to be collecting and writing and editing work "for publication".

News Medium

It will be of great importance whether or not Ms. Peel's blog constitutes a "news medium" under the definition of the FRSA. If it does, then she is likely to receive protection of the FRSA. If it does not, then she will likely be forced to produce the identities of her sources and comply with the subpoena or face contempt of court.

"News Medium" is defined in the FRSA as "newspaper, magazine, or other similar medium issued as regular intervals..." [FRSA 901(b)]. An argument in favor of the fact that her blog is a news medium is that 'other similar medium' is not defined in the act. Statutory rules of interpretation in the Franklin courts will interpret a statute on its face and not give it contrary meaning if it is clear and unambiguous. However, when the language is unclear a court can use canons of statutory construction such as ejusdem generis (Lane) to determine whether the activity fits in the list of enumerated activities. Here, the issue is whether or not Ms. Peel's blog is considered in the same category as "newspaper" and "magazine". A blog could be considered such a medium because all three disseminate news and information to the public through the written word.

Arguments against this use of ejusdem generis however include that both a newspaper and a magazine are the printed word and printed on paper. The internet blog however is virtual and is not printed on paper. This would weigh in favor of the blog not counting as "news medium".

The news medium must also be published at regular intervals. Ms. Peel explained that she publishes about once a week and usually on Fridays, but sometimes on the weekends. This could be considered "regular interval" however because she does not publish at the same time on the same day every single week. It would be a factor counting against the blog as being a "news medium".

Additionally, the information must be in 'circulation'. Circulation is not defined in the FRSA so again, resorting to a dictionary to give interpretation to the plain meaning of a word is acceptable. (Bellows) Circulation under the dictionary is defined as passing news from person to person. Here, Ms. Peel is passing 'news' from person to person because she puts the blog posting up on her website to which 3500 are registered.

Whether or not a blog counts as a news medium has also been considered generally by outside sources. In an article by America Today, the blog is understood to be no longer just a personal journal but is also used as a news outlet and by news sources and is a way to share news. However, this perception is not held by all and some view the blogger as simply a writer/ publisher/editor who has no certainty of truth. If this view were to prevail then because Ms. Peel is a blogger and does all of her own writing and editing and is not employed by another news source as are some bloggers, then this would weigh against the blog counting as a "news medium".

Intent to gather news

Also at issue and must be considered is whether Ms. Peel had the intent at the inception of the newsgathering process to disseminate investigative news to the public. (Bellows) If she had such intent when she gathered the news, then she is more likely to be covered by the FRSA. Ms. Peel explained that she goes to town meetings to learn of vital public information and disseminate that information to the public. When she began investigating the possibility of corruption by the Greenville School District Superintendent, she did so with the intent of bringing that information to the public. (Interview) Therefore, it is likely that she meets this test of intent at the inception of the newsgathering. Her purpose in revealing the information was to bring to light the corruption and reveal it.

Of note though is that she did intend to gather news when she set out to investigate the corruption, but she does not limit the postings in her blog to 'news' but also includes information about her personal travels and her family pets. Because her blog is not entirely devoted to news gathering, and when she gathers information it is not entirely for the news process will weigh against application of the FRSA to Ms. Peel by the court.

Application of the FRSA to a non-traditional reporter

Additional factors that must be considered in determining whether or not the FRSA will apply to Ms. Peel's activities are that what she is publishing through is a "blog" which is defined by the American Heritage Dictionary as an "online personal journal".

The FRSA has been found to apply in situations of non-traditional reporters where the reporter was a "freelance writer" and where the reporter was an "author in a medical journal". (See Bellows citing Kaiser and Halliwell) Ms. Peel's actions could similarly be construed to be like a freelance writer because she is not paid by an employer for her work - she does it independently

at her own choosing and on the topics of her choice and additionally, she is not working for a traditional newspaper but her own personal 'journal' in which reports newsworthy information. These cases will be persuasive in finding that the act applies to Ms. Peel because all three are from the Franklin courts.

However, there is additional case law that might lead a court to find that the FRSA is inapplicable to such non-traditional news reporting. The Columbia Supreme Court found that a defamatory message on a sports internet bulletin board was not news and was not published at regular intervals such that the poster of the message was not protected by the FRSA (Bellows quoting Hausch). Because Ms. Peel's blog is similarly on the internet and could be claimed to not be published at regular intervals because she does not post at the same time each week or even every day, this case may have persuasive authority despite the fact that it is not a controlling authority.