NEW YORK STATE BAR EXAMINATION
JULY 2012 QUESTIONS AND ANSWERS

QUESTION-ONE

Dale was the owner of Blackacre, a commercial building. Part of the building was leased to Sam, who operated an antiques store in the leased premises. On July 15, 2010, Connie visited Sam's store and purchased an antique desk for $12,000. Connie paid for the desk in full, and told Sam that she would arrange to pick the desk up later that week. Sam moved the desk from the showroom to his storeroom in the leased premises, wrapped it and labeled it "Connie's desk -- to be picked up at her convenience."

That night a fire of unknown origin occurred, damaging the building and destroying the desk. Sam did not carry insurance on his inventory. Although Dale had insured the building with Fire Insurance Co., the insurance did not cover the contents of the leased portion of the building. When Connie arrived a few days later to pick up the desk, Sam told her that it was destroyed. He refused Connie's request for a refund, advising Connie that he did not have any insurance to cover her desk and was not liable for its loss.

Connie thereafter commenced an action against Sam to recover the purchase price of the desk. Connie's complaint alleged the above relevant facts. Sam moved to dismiss the complaint for failure to state a cause of action. The court (a) granted Sam's motion.

Immediately following the fire, Dale had called Fire Insurance Co. and reported the fire. Art, the adjuster who was assigned by Fire Insurance Co. to the claim, inspected the property to assess the loss. After the inspection, Art and Dale negotiated a settlement of Dale's claim. In exchange for a payment of $925,000, Dale duly executed a general release, releasing Fire Insurance Co. from "any and all claims for damages, known or unknown, arising out of the fire that occurred at Blackacre on July 15, 2010."

When Dale later undertook repairs to Blackacre, he discovered that the damage was more extensive than had been realized and specifically included irreparable smoke damage to portions of the air conditioning system that would cost $50,000 to replace. While damage to the air conditioning system was known to both parties at the time the release was signed, neither party knew the extent of the damage, and Dale assumed it could be repaired at minimal cost by cleaning the ducts.

Dale commenced an action against Fire Insurance Co. to recover the cost to replace the air conditioning system. Fire Insurance Co. raised the release as an affirmative defense. Dale moved to strike the affirmative defense on the ground of mistake. The court (b) granted Dale's motion. The action was thereafter settled.

Dale subsequently conveyed Blackacre "to my son, Brett, and my daughter, Debra, as joint tenants." In August 2011, in a duly recorded deed, Debra conveyed her interest in Blackacre to her son, Steve. Debra died in December 2011. Brett now claims that he is the sole owner of Blackacre, asserting that Debra's deed to Steve was inadequate to sever the joint tenancy, and

that he succeeds as sole survivor to the entire fee interest in Blackacre. Steve claims that he owns Blackacre as a tenant in common with Brett.

1. Were rulings (a) and (b) correct?

2. Who now owns Blackacre?

First Answer to Question One
1. a. The issue is who bears the risk of loss in a sale of goods contract between a merchant and a buyer.

Under the CPLR, a failure to state a cause of action is an affirmative defense that can be raised in a pre-answer motion to dismiss, in an answer, or through trial. The court grants a failure to state a cause of action when, assuming all facts in the complaint are true, there is no possibility of relief under the relevant law. All inferences are made in favor of the non-moving party.

Recovery of purchase price for a sale of goods contract will be governed by Article 2 of the UCC. Under Article 2, the elements of recovery for purchase price where the goods were destroyed are to show that there was an enforceable contract and that the other party bore the risk of loss. For there to be an enforceable contract, there must be a valid offer, acceptance, consideration, and for the sale of goods $500 and over, there must be a writing signed by the party charged with breach that states the quantity of goods. An exception to the requirement of a signed writing is if the goods have been accepted and paid for. There also need to be no defenses to formation for a contract to be enforceable. In a contract for a sale of goods between a merchant (one who regularly sells goods) and a buyer, the merchant bears the risk of loss until possession changes hands. If the seller was not a merchant, the risk of loss passes when the goods are tendered, meaning that the goods were made available for the buyer to pick up.

The party who bears the risk of loss will have to return any payment tendered on the contract and may also be liable for consequential damages, damages that were foreseeable at the time the contract was made, though seller's cannot recover consequential damages until Article 2.

Where goods are identified as belonging to the buyer are then destroyed through no fault of either party, a seller who bears the risk of loss will be excused from further performance by impracticability. However, this does not change that the seller, if a merchant before possession is transferred, bears the risk of loss and will have to refund any amount paid.

Here, Connie and Sam have an enforceable contract between them as there was offer and acceptance for the antique desk at $12,000. Although there is no signed writing, the contract is enforceable because it was paid in full and the goods were accepted by Connie because she had a chance to inspect the desk. There do not appear to be any defenses to formation.

The fire was an unforeseeable act of god that destroyed the antiques desk, though no fault of either party. Because Sam had identified the desk as "Connie's desk," he will be excused from further performance under the contract, meaning that he does not have to provide Connie with a

new desk. However, this does not change Sam's obligation to return the purchase price. Because Sam bore the risk of loss, there is a valid cause of action for return of the payment price.

Sam is a merchant because he owns and antiques store and regularly sells antiques. Sam bore the risk of loss because he had not transferred possession of the desk to Connie. Even though the desk was to be picked up at Connie's convenience, Sam bore the risk of loss until she did so because he was a merchant.

Therefore, the court incorrectly granted Sam's motion.

b. Court granted Dale's motion to strike the affirmative defense on the ground of mistake.

The issue is whether a mistake of cost will prevent an affirmative defense of release from being effective.

Under the New York CPLR, release is an affirmative defense that can be raised in the pre-answer motion to dismiss or in the answer. The plaintiff then has the opportunity to reply. A valid release occurs when there is an enforceable settlement between the parties. A valid release means that the party who settled has given up their claim against the other settling party, who is now free from that claim, and also cannot seek or be liable for contribution. Settlements are governed by contract law principles and are enforceable if there was an offer, acceptance, consideration, and no defenses to formation. One defense to formation is the ground of mistake.

Under New York law, mistake is a valid defense to formation of a contract where both parties make a mistake on a material part of the contract or where one party makes a mistake and the other party has reason to know of the mistake. A mistake as to value of the claim is generally not considered material. Therefore, where both parties underestimated (or overestimated) the cost or value of a promise, there is nonetheless an enforceable contract.

Here, Art and Dale negotiated a settlement of Dale's claim. Because it was duly executed, there was valid offer and acceptance. There was also valid consideration of the $925,000. Dale raised the ground of mistake because he had assumed that the air conditioning system could be repaired for minimal cost, when it will actually cost $50,000 to replace. Dale does not have a valid claim for mistake for several reasons. Although both parties did not know the extent of damage, courts generally do not consider that mutual mistake as to cost to the material. If Dale says that it was not a mistake as to cost but actually as to damage, the mistake was nonetheless not material because $50,000 is a relatively small amount of money relative to the overall size of the settlement ($925,000) and is unlikely to be considered material.

Because neither party new of the extent of the damage, this is not a situation where Dale's mistake will void the contract because it was known by the other party. It was either a mutual mistake that was not material as addressed above or a unilateral mistake that was not known to the other party.

Finally, the language in the release that Dale was releasing Fire Insurance Co from damages "any and all claims of damages," "known or unknown" suggest that this was a risk that the parties

understood that they were taking. Rather than a mistake, it was part of the benefit of the bargain to Fire Insurance Co.

Therefore, the court incorrectly granted Dale's motion because he did not have a valid claim of mistake.

2. The issue is whether a unilateral conveyance by one party of a joint tenancy severs the joint tenancy.

Under New York law, a joint tenancy is created when two or more parties are given a right to jointly possess property. There are four required unities for a creation of joint tenancy to be effective. The parties must take their interest at the same time, they must take their interest from the same title (though New York, unlike common law, does not mandate straw conveyers for a party to retain a share), they must have the same interest -- meaning that each is a joint tenant with right of survivorship, and each must have the right to possess the whole. Under a joint tenancy, there is a right to survivorship, meaning that if one joint tenant dies, the remaining joint tenants continue as joint tenants or, if there is only one joint tenant left, take the whole property. Therefore, an interest in a joint tenancy is not devisable or descendible, meaning that it cannot pass by will or intestate.

A joint tenancy can be severed by mutual conveyance to another party, petitioning the court for a forced sale or partition in kind, or when one party duly conveys their interest to another party. When one party duly conveys their interest to another party, that party takes as a tenant in common. If there are multiple joint tenants remaining, the joint tenancy will continue for those parties, with the new owner as a tenant in common. If there were only two original parties, the new owner and the original party that did not convey their interest will be tenants in common. Under the tenancy in common, there are no survivorship rights and the interests are freely alienable (transferable), devisable (can pass by will), and descendible (can pass intestate). Each tenant in common has the right to use and possess the whole.

Here, Dale conveyed Blackacre to Brett and Debra "as joint tenants." Because he specifically used the language of "joint tenants," he created a joint tenancy even though he did not mention the right of survivorship. Brett and Debra took as joint tenants because they took their interest at the same time (at the time of the conveyance) and in the same deed. Additionally, they each had the right to use and possess the whole and had equal interests as joint tenants. Thus, the four required entities are present.

When Debra conveyed her interest in Blackacre to Steve, she severed the joint tenancy. The joint tenancy was severed because Debra conveyed her interest during her lifetime, four months before her death in December 2011. Debra will have severed the joint tenancy even if Brett was unaware of the transfer and even if Steve did not give consideration for the transfer because it was a unilateral act of conveyance by a joint tenant.

Because there is only one remaining original joint tenant, the tenancy will be converted to a tenancy in common, with equal interest to Steve and Brett.

Therefore, Brett and Steve own Blackacre as tenants in common.

Second Answer to Question One

1. a. The issue is whether the seller or buyer bears the risk of loss regarding the destruction of goods before a buyer takes possession of the goods.

Under the CPRL, a motion to dismiss a complaint for failure to state a claim will be granted when the plaintiff fails to plead sufficient facts to make out a prima facie cause of action. All favorable inferences will be drawn in favor of the non-moving party.

Article 2 of the UCC governs the sale of goods. A contract between the buyer and seller has been formed when there is an offer, which is a manifestation of the intent to be bound, and an acceptance. When a contract specifies that goods will be picked up by the buyer from the seller's premises, and goods are destroyed without the fault of either the buyer or the seller, who bears the risk of loss turns on whether the seller is a merchant or not. A merchant is a seller who regularly deals in goods of the kind. A merchant seller will bear the risk of loss until the buyer takes possession of the goods, whereas a non-merchant seller bears the risk of loss until he tenders the goods by making them available for pick-up. When the seller specifically identifies goods to the contract, he will be liable for the loss of those specific goods when they are destroyed during the period in which he bears the risk of loss. The party who bears the risk of loss for destroyed goods will be liable. If it is the buyer, he will need to pay the contract price to the seller. If it is the seller, he will need to restore the purchase price and pay any damages for breach. Where the goods are unique, the seller may not substitute similar goods and retain the purchase price.

In this case, Sam and Connie had a valid contract for the sale of goods, so the UCC applies. Sam made an offer to sell the desk, and Connie accepted by tendering the purchase price. The agreement specified that Connie would pick up the desk later that week, and Sam identified the goods to the contract and labeled them to be picked up at Connie's convenience. Sam is a merchant, because he owns an antique store and regularly deals in goods of the kind. Therefore, Sam bore the risk of loss until Connie took possession of the desk. When the desk was destroyed without the fault of either party, Sam was liable. He will have to restore the purchase price to Connie, in addition to any incidental damages Connie may have suffered.

Therefore, the court incorrectly granted Sam's motion to dismiss, and Connie likely will succeed in her action to recover the purchase price.

b. The issue is whether there was a mistake as to a material assumption upon which the contract was based which renders the contract unenforceable.

Release from a claim is an affirmative defense that can be raised either in a motion to dismiss or in an answer. The party against whom the defense is raised can move to strike the defense. This motion will be successful if the movant can show that the contract creating the release is unenforceable or not applicable to the claim.

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A contract requires offer and acceptance, and it must be supported by consideration, which is bargained for exchange of value or legal detriment. The enforceability of a contract is subject to several defenses, including mutual mistake. The defense of mutual mistake provides that a contract is unenforceable where the parties to the contract are both mistaken as to a fact that was a material assumption upon which the bargain was based. If one party had reason to know of the other's mistake, the contract will be enforced on the terms of mistaken party. Generally, mistakes as to the exact value of the subject of the contract are not considered to be sufficient to void a contract.

In this case, Dale and Art, as an agent of Fire Ins. Co., entered into a contract for the release of Dale's claims against Fire Ins. Co arising from the fire. The contract was bargained for, and the parties exchanged consideration - Fire Ins. Co. agreed to pay $925,000, and Dale agreed to release his claims. The release specifically referred to all damages, known or unknown. At the time of the contract, both parties knew of the damage to the AC system, but neither knew the extent of the damage. The extent of damage, like the exact value of goods, is generally not a material assumption upon which the parties based their bargain. The grounds for mutual mistake are thus missing. The facts state that neither party knew of the extent of the damage. Dale may argue that because Art inspected the property, he had reason to know of the extent of the damage.

However, this does not appear to be the case from these facts, because it wasn't until Dale undertook more extensive repairs that he was able to identify the extent of the damage, so Art likely would not have seen it on his initial inspection. Finally, the fact that the extent of the damage was not a material assumption upon which the contract was based is further evidenced by the fact that the contract specified that it was a release for all damages, both known and unknown. Thus, it appears that it was a specific assumption of the parties that there may be some unforeseen damage.

Therefore, the court incorrectly granted Dale's motion to strike the affirmative defense on the ground of mistake.

2. The issue is whether a joint tenancy is transferable inter vivos, and if so what the effect of such transfer is on the right of survivorship.

A joint tenancy is a possessory interest in land held by two or more persons. A joint tenancy must be expressly created, since they are disfavored. Each joint tenant has an undivided right to possess the whole. The joint tenancy is characterized by the right of survivorship, which means that upon the death of one joint tenant his interest passes on to his co-tenant, giving the co-tenant (if there are only the two of them) a fee simple. However, while joint tenancies are therefore not descendible or devisable, they are freely alienable during the life of the joint tenants. A joint tenant may transfer his interest to a third party. Such transfer severs the joint tenancy, and converts it to a tenancy in common. A tenancy in common is a possessory interest in land where each co-tenant owns a 1/2 interest and has the right to possess the whole, but it is not characterized by the right of survivorship.

In this case, Dale created a joint tenancy between Brett and Debra, since he expressly conveyed the land as joint tenants. Debra had the right to transfer her interest in the joint tenancy during her lifetime, which she did by conveying the land to Steve. This conveyance severed the joint tenancy between Brett and Debra, and created a tenancy in common between Brett and Steve. Brett and Steve each own an undivided 1/2 interest in Blackacre, and have the right to possess the whole.

Therefore, Brett and Steve now own the land as tenants in common.

QUESTION-TWO

On October 1, 2011, Doug entered SmartShop, a department store in T Town. A clerk in the jewelry department believed that Doug was acting suspiciously and alerted Store Detective, an unlicensed private security guard employed by SmartShop. Store Detective watched Doug as he took a pair of jeans and a shirt from a rack and entered an enclosed fitting room carrying a knapsack over his shoulder. Store Detective entered a storeroom behind the fitting room. Through an air vent in the wall, he secretly observed Doug put on the jeans and shirt and then put his own pants and sweatshirt over them. As he was exiting the store, Store Detective stopped Doug and asked Doug to accompany him to the security office. Doug agreed, and upon arriving at the office, Store Detective took possession of Doug's knapsack. At Store Detective's request, Doug removed his outer clothing, revealing the jeans and shirt underneath.

Store Detective detained Doug until Officer, a police officer from T Town, arrived. Officer arrested and handcuffed Doug and took him into custody. As Officer was exiting the store with Doug, Store Detective approached and handed Officer Doug's closed knapsack. Officer asked Doug if he could search the knapsack, and Doug refused Officer's request. Officer nevertheless opened the knapsack and discovered multiple pieces of valuable jewelry from SmartShop, for which Doug was unable to produce receipts. Officer took Doug to the police station for booking. Doug was thereafter indicted on one count of grand larceny, for the jewelry, and on one count of petit larceny, for the clothing.

After arraignment, Doug's attorney moved to suppress: (a) Store Detective's testimony and the clothing, on the ground that the visual surveillance by Store Detective violated Doug's reasonable expectation of privacy and therefore constituted a constitutionally prohibited search; and (b) the jewelry, on the ground that Officer's search

of the knapsack was constitutionally prohibited. The district attorney opposed the motion. As to the jewelry, he specifically argued that the search was permissible as incident to Doug's arrest and, in any event, would have been inevitably discovered during an inventory search. The court denied the motion in all respects.

Before trial, the district attorney notified Doug's attorney that, if Doug elected to testify at trial, he would cross-examine him about a recent job termination for falsifying overtime records and about two prior shoplifting convictions in the past three years. At a pre-trial hearing, the court ruled that Doug could be cross-examined regarding (a) his job termination but not regarding (b) the prior convictions.

At Doug's jury trial on May 1, 2012, Store Detective, who had moved out of state, was unavailable to testify, and Doug was acquitted of all charges. Last week, Doug commenced an action against T Town seeking damages for false arrest. T Town has moved to dismiss Doug's action on the ground that it did not have prior written notice of the claim.

1. Did the court correctly deny the motion to suppress (a) Store Detective's testimony and the clothing and (b) the jewelry?

2. Were the court's rulings correct regarding (a) Doug's job termination and (b) his prior convictions?

3. How should the court decide T Town's motion to dismiss?

First Answer to Question Two

1. a. The issue is whether a private security guard's actions trigger the Fourth Amendment's protections. The Fourth Amendment, incorporated against the states by the Fourteenth Amendment, prohibits the government from engaging in unreasonable searches and seizures without a warrant. The fruits of a search conducted in violation of the Fourth Amendment will be suppressed in a later criminal trial against the target of the search. The Fourth Amendment applies only to government actors, and not to private actors. Government actors include government employees acting in the scope of their employment and also non-government employees who act at the direction of a government employee. Even non-government employees can be considered government actors under the Fourth Amendment if they are cloaked in governmental authority, such as security guards who are licensed by the government and granted the authority to arrest suspected criminals. An allegedly unconstitutional search will not result in the suppression of evidence obtained through that search if the search was conducted by a purely private actors not acting at the government's direction.

Here, Store Detective is a private actor because he is not employed by the government; rather, he is a private security guard. Store Detective did not act at the direction of any government actor. Store Detective was not licensed by the state and/or authorized to arrest suspected criminals. Because Store Detective is a private actor, the Fourth Amendment does not apply to his actions. Because the Fourth Amendment does not apply, it is improper to suppress his testimony about what he saw in the fitting room and to suppress the clothing he recovered from Doug.

In conclusion, the court properly denied Doug's motion to suppress with respect to Store Detective's visual surveillance and the clothing he recovered because the search at issue was not conducted by a government actor.

It should be noted that Store Detective's detention of Doug as he was exiting the store was privileged in tort under the shopkeeper's privilege. The privilege permits a store to detain a shopper reasonably suspected of shoplifting goods for a reasonable time and a reasonable purpose. Here, Store Detective stopped Doug because he reasonably suspected that Doug was a

shoplifter after observing him stealing goods from the store, and Store Detective's detention was reasonable under the circumstances.

b. The first issue is whether a search of a knapsack in the defendant's possession at the time of his arrest is valid as a search incident to arrest. The Fourth Amendment generally requires suppression of evidence obtained during a warrantless search. However, several exceptions permit the introduction of evidence obtained pursuant to a warrantless search. One Fourth Amendment exception is a search incident to the defendant's arrest. When arresting a target, a police officer can conduct a search of the defendant's outer clothing. Under federal law, the officer can also search closed containers that are within the defendant's "wingspan," or the area from which the defendant could obtain a weapon. However, under New York's more restrictive rule, closed containers in the wingspan can be searched only if the arresting officer believes that the arrestee is armed. If the officer knows no facts that would cause him to believe that the arrestee is armed, he cannot search closed containers as a search incident to arrest.

Here, Officer did not have a warrant to search the knapsack, which was a closed container within arrestee Doug's wingspan. Thus, Officer's search was valid as a search incident to arrest only if Officer had a reason to suspect that Doug was armed. There are no facts suggesting that Doug was armed. Therefore, Officer's search cannot be justified under the search incident to arrest doctrine as it applies in New York.

The second issue is whether the inevitable discovery doctrine allows admission of evidence obtained during an illegal search. Generally, the Fourth Amendment requires suppression of evidence obtained during an unconstitutional search. However, several exceptions apply where the exclusionary rule is not given effect. One exclusionary rule exception is the inevitable discovery doctrine. Under this doctrine, if the prosecution can prove through clear and convincing evidence that it would have inevitably discovered the fruits of its illegal search through constitutionally valid means, the fruits of the search can be admitted at trial. Here, the government claims it would have discovered the contents of the knapsack through an inventory search. The inventory search is another valid exception to the Fourth Amendment's warrant requirement. While processing a defendant at booking, the government can search the defendant's possessions if it does so pursuant to a valid and neutral inventory policy and if the search is conducted in good faith to protect against theft or loss of the defendant's possessions, rather than in bad faith to search for evidence to use against the defendant at trial.

Here, the government cannot meet its burden of showing inevitable discovery through clear and convincing evidence. The government has not shown that it would "inevitably" have searched the defendant's knapsack during booking because it has produced no evidence of how frequently it conducts inventory searches or of what items it searches during inventory searches. Nor has the government shown that any inevitable discovery would have been through constitutionally permissible means, because it has not produced any valid and neutral inventory search policy that it would have used during booking. Finally, the government has not proven by clear and convincing evidence that it would have conducted an inventory search in good faith. Thus, the inevitable discovery doctrine does not apply.

In conclusion, the court improperly denied Doug's motion to suppress with respect to the items found in his knapsack, because they were not discovered during a valid search incident to arrest and would not "inevitably" have been discovered during a valid inventory search. Absent a warrant, the court should suppress the evidence obtained from this search.

2. a. The issue is whether the prosecution can impeach the defendant's testimony through prior bad acts. A defendant who takes the stand at trial becomes a witness and can generally be impeached as any other witness can be impeached. Under New York evidence law, a witness can be impeached through evidence of his prior bad acts. In New York, the cross-examining party can impeach a witness through evidence of any prior bad act as long as it is vicious, immoral, or illegal. The cross-examining party cannot prove the prior bad act through extrinsic evidence; it can only raise the prior bad act during cross-examination. Where the witness is also a criminal defendant, the prosecution must give notice of intent to cross-examine using the prior bad act. The court must then hold a Sandoval hearing, where it determines if the cross examination is valid. The court should not permit cross-examination of a criminal defendant about a prior bad act if the probative value of that cross-examination is outweighed by the danger of unfair prejudice against the defendant. The court determines the probative value by evaluating whether the evidence allows the jury to assess the defendant's credibility as a witness, and it determines the unfairly prejudicial effect by evaluating whether the jury would use the prior bad act evidence for reasons other than assessing the defendant's credibility as a witness.

Here, the prosecution's intent to impeach Doug by evidence of his falsifying overtime records at his previous job is valid because it is an immoral and illegal prior bad act. The Sandoval limitation does not apply because the probative value of this impeachment is not outweighed by its danger of unfair prejudice. Proof of falsification of business records shows the defendant's prior dishonesty and could validly be used by the jury to assess whether the defendant is credible as a witness (i.e., whether he is being honest with the jury as a witness). There is some danger that the jury could use the evidence to show Doug's motive for shoplifting – his recent unemployment could give him a reason to steal clothes rather than buy them -- but that danger does not outweigh the evidence's probative value for showing Doug's untruthfulness.

In conclusion, the court correctly ruled that Doug could be cross-examined for his prior falsification of overtime records because its probative value for truthfulness is not outweighed by the danger of unfair prejudice against Doug. It should be noted that the prosecution cannot prove the falsification through extrinsic evidence (e.g., it cannot call Doug's former employer to testify that Doug falsified overtime records).

b. The issue is whether the prosecution can impeach the defendant's testimony through prior convictions for similar conduct. A defendant who takes the stand at trial becomes a witness and can generally be impeached as any other witness can be impeached. Under New York evidence law, a witness can be impeached through evidence of prior conviction. In New York, unlike under the Federal Rules of Evidence, a witness can be impeached based on any conviction for any crime, without respect to how serious the crime was or how long ago the defendant was convicted. Where the witness is also a criminal defendant, the prosecution must give notice of intent to cross-examine using the prior conviction. The court must then hold a Sandoval hearing, where it determines if the cross-examination is valid. The court should not permit cross-

examination of a criminal defendant about a prior conviction if the probative value of that cross-examination is outweighed by the danger of unfair prejudice against the defendant. The court determines the probative value by evaluating whether the evidence allows the jury to assess the defendant's credibility as a witness, and it determines the unfairly prejudicial effect by evaluating whether the jury would use the conviction for reasons other than assessing the defendant's credibility as a witness.

Here, the prosecution intent to impeach Doug is valid because Doug was twice convicted of shoplifting. However, use of the convictions to impeach should not be allowed because the danger of unfair prejudice outweighs the probative value of introducing the convictions. There is danger of unfair prejudice because the jury is likely to use prior convictions for shoplifting as evidence that the defendant has a character for shoplifting and thus was more likely to commit this shoplifting crime. There is little probative value because shoplifting convictions do not inform the jury substantially about the defendant's character for truthfulness, as shoplifting is not a crime that requires a dishonest act. Thus, the danger for unfair prejudice outweighs the probative value.

In conclusion, the court properly excluded evidence of the prior shoplifting convictions because of the danger of unfair prejudice.

3. The issue is whether a tort action against a municipality is timely where no written notice of claim has been given to the municipality. Under the Civil Practice Law and Rules, a party who plans to sue a municipality in tort must serve a notice of claim against the municipality within 90 days of the occurrence of the facts giving rise to the tort action. Failure to comply with this notice requirement is grounds to dismiss the claim against the municipality for failure to state a cause of action. A party that fails to comply with the notice requirement can move to file a late notice of claim if the late notice would not result in prejudice against the municipality. There is no prejudice where the municipality already has knowledge of the facts giving rise to the claim.

Here, the notice of claim requirement applies because Doug is seeking to sue a municipality, T Town, for the tort of false arrest. Doug has failed to comply with the notice requirement because he did not serve a notice of claim within 90 days of October 1, 2011, when his allegedly false arrest occurred. Thus, the court can dismiss his claim for failure to state a cause of action.

In conclusion, the court correctly dismissed Doug's claim against T Town because he failed to file a notice of claim against T Town. It should be noted that the court could give Doug leave to file a late notice of claim if it finds that T Town would not be prejudiced because it already knew of the facts giving rise to Doug's arrest.

Second Answer to Question Two

1. a. At issue is whether the security guard may be considered a government agent such that the search must meet the 4th amendment requirements. Also at issue is whether there was in fact a reasonable expectation of privacy in the fitting room.

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Under the 4th amendment, a person is protected from unreasonable searches and seizures by government agents, or people working at the direction of government agents, in their persons, property, papers, and effects. To qualify for 4th amendment protection, a search must be conducted by a government agent and the person must have had a subjective expectation of privacy in the place searched or item seized, and that expectation of privacy must be one that society recognizes as reasonable. A government agent is broader than just a police officer and may include private security personnel, but typically only if deputized with the power to arrest. If the search is conducted by a government agent and of an area in which there is a reasonable expectation of privacy, the search must be executed pursuant to a valid warrant, or one of the warrant exceptions must apply, in order for the search to be constitutional.

Here, a fitting room is an enclosed area in which a person would have a subjective expectation of privacy, and also an expectation of privacy that society recognizes as reasonable, as persons utilize a fitting room to undress and the room itself is enclosed on all sides. However, if a person holds something open to the public, there is no expectation of privacy (e.g., conducting illegal activity in your home, but in front of an open window). In this case, even though the Store Detective viewed the theft of the clothes through an air duct, it was in a storeroom in which the regular public could not access. Furthermore, a reasonable person would not expect that they could be viewed in a fitting room. Thus, there was a reasonable expectation of privacy in the fitting room, regardless of the fact it could be viewed into from the air duct. However, Store Detective is an unlicensed, private security guard who works for the store only (he is not also a cop who moonlights as a security guard). Thus, because he is not a police officer, was not acting at the direction of a police officer or other government agent, and is not deputized with the power to arrest, Store Detective cannot be considered a government agent. Because of this, though there was a reasonable expectation of privacy, the 4th amendment still will not apply because the search was not conducted by a government agent.

The court correctly denied the motion to suppress the testimony and clothing.

It should be noted that if the security guard was determined to be a government agent, then the fourth amendment protections would likely apply and the search would be unconstitutional as it was of a place where there is a reasonable expectation of privacy and without a warrant. However, Store Detective could argue that the plain view exception to the warrant doctrine applied. If the officer has lawful access to a place and views items whose criminality is immediately apparent from that place, plain view may apply. Detective had lawful access to the store room and air duct where he viewed the clothes, and criminality was immediately apparent as Doug hid the store's clothes underneath his own clothes in an effort to shoplift. Thus the warrant exception of plain view could apply and the search would then still be constitutional under this exception to the warrant requirement.

b. At issue here is whether the search of the backpack falls into any of the warrant requirement exceptions (specifically a search incident to arrest), and also whether the inevitable discovery doctrine applies to evidence that was found as a direct result of a violation of the 4th amendment rights.

Again, a person is protected from unreasonable searches and seizures by the 4th amendment, as discussed above. One exception to the warrant requirement, discussed above, is a search incident to lawful arrest. To meet this exception, the search must be contemporaneous with the lawful arrest, and the search is limited to objects in the suspect's wingspan. Furthermore, in NY, an officer may only open or search in closed containers within the wingspan if the officer reasonably suspects that the suspect is armed and dangerous. In addition, the exclusionary rule applies to any evidence received in violation of the 4th amendment, meaning the evidence cannot be presented in court. There is an exception to this rule, however, for inevitable discovery-- if the evidence taken in violation of the 4th amendment would have been found through another, legal basis. However, in NY, this exception does not apply to evidence that was found as a direct result of the illegal search, and only applies to secondary or derivative evidence.

In this case, Doug was lawfully arrested as his arrest for shoplifting was based on probable cause, since Detective had seen the stolen clothes and this evidence was relayed to Officer. Thus, Officer would be permitted to search within Doug's wingspan contemporaneously to the arrest. However, here, Store Detective handed Officer the bag after Doug was already handcuffed and being led out of the store. This is not contemporaneous to arrest, and furthermore, since Doug was handcuffed he could no longer even access the bag or its contents. (The purpose of this exception is to preserve evidence and officer safety for areas that the suspect can reach--if he is handcuffed the purpose for the exception no longer applies). In addition, because the Store Detective had control of the bag at the time of arrest, it likely was not in Doug's wingspan. Furthermore, the Officer could have only searched the bag even if it was contemporaneous and within the wingspan if he had believed that Doug was armed and dangerous, because the bag is a closed container. There are no facts to suggest this. Thus this was not a search incident to a lawful arrest because it was not contemporaneous, it was not within the wingspan, and there was no reason to believe Doug was armed.

Secondly, the exception to the exclusionary rule for inevitable discovery will not apply. The jewelry found inside of the bag was discovered directly due to the unlawful search. Had the officer not opened the bag, he would not have found the stolen jewelry.

This is direct evidence found from the violation. Because the jewelry was directly from the violation of the 4th amendment, and was not discovered secondarily or derivatively from it, the exception for inevitable discovery will not apply and the jewelry must be excluded.

The court incorrectly denied the motion to suppress with respect to the jewelry.

2. a. At issue is whether a defendant may be cross-examined and impeached by prior bad acts of falsifying job records.

Cross-examination is limited to evidence within the scope of what was discussed on direct examination, and impeachment evidence. A defendant who takes the stand puts his credibility into issue and thus may be questioned for purposes of impeachment on cross. Under NY evidence law, a defendant may be impeached by being questioned about prior bad acts which are immoral, vicious, or criminal, (that show moral turpitude) in an effort to question or cast doubt on the defendant's truthfulness. This is broader than the federal standard which is limited to acts

that are directly related to veracity. Overall, the court has the discretion to bar any evidence, though relevant, when its probativeness may be outweighed by prejudicial factors.

In this case, Doug was terminated from a job for falsifying overtime records. This is a prior bad act which relates directly to Doug's truthfulness, as he lied and falsified his hours. In addition it may be considered immoral or even potentially criminal for purposes of the NY standard. Thus, this is an appropriate topic on cross to impeach Doug with and is within the court's discretion to allow if it believes its probativeness weighs out.

The court correctly allowed cross examination on the issue of the job termination.

b. At issue here is whether the court has the power to deny cross examination of a defendant regarding prior criminal convictions from the past three years.

Under NY evidence law, any witness may be impeached by conviction of any crime. This is broader than the federal standard which requires that the crime relate to veracity, or if not, that it must be a felony (subject to the court's discretion/weighing). However, in NY, the court must make a pre-trial hearing if the defendant's convictions are going to be used to impeach defendant. At the hearing, the court must weigh the probativeness of the convictions against the prejudicial effect showing such past convictions will have on defendant. The court may bar any evidence of convictions if it determines that the defendant would be prejudiced, even if relevant or otherwise proper under evidence laws.

In this case, the shoplifting convictions can be used to impeach because they are a conviction of a crime that occurred within the past ten years (they are from three years ago). The court also correctly had a pre-trial hearing about admitting this impeachment evidence because it is for impeaching the defendant. In this case, because the current trial is about shoplifting, admitting the past shoplifting convictions would prejudice the defendant because the past convictions would show his propensity to commit this type of crime. The propensity would likely outweigh any probativeness this may have on his veracity, especially since shoplifting is not a crime that is directly related to veracity. It was within the court's discretion to suppress this evidence and the court correctly did so because it would be prejudicial to defendant.

The court correctly disallowed cross exam on the prior convictions.

3. At issue is whether knowledge of the facts of a transaction giving rise to a suit against a municipality may excuse plaintiff's lack of filing a written notice of claim within 90 days of the conduct giving rise to the claim.

Under the CPLR, to file suit against a municipality, a plaintiff must serve a sworn, written notice of claim on the municipality within 90 days of the conduct giving rise to the claim. If the plaintiff fails to do so, the claim may be dismissed for failure to state a cause of action. However, if the municipality has reason to know of the facts giving rise to the claim, the failure of serving the notice of claim may be excused by the court.

In this case, Doug never filed a notice of claim against T-Town before commencing the suit for false arrest. Thus, the claim may be dismissed. However, the police station, an entity of T-Town, would have had notice of the facts giving rise to the claim because Doug was arrested, charged, and brought to trial for shoplifting. Thus, the Town was clearly aware of the facts giving rise to this claim because it was the town's own police and prosecutors that pursued the arrest and charges against Doug. Thus, the court should not dismiss Doug's action on the basis that the municipality did not have prior written notice of the claim. However, the court may dismiss Doug's action because there are no grounds for a false arrest claim against a municipality when the defendant was lawfully arrested, but later acquitted. Doug was only acquitted because a witness could not testify. His acquittal does not make his original arrest unlawful, and the municipality should not be liable for false arrest based on these circumstances.

QUESTION-THREE

John and Sara were movie actors who were married in State X and lived there while pursuing their careers. In January 2011, they sold their State X home and relocated to New York intending to start new careers acting in plays. Sara met Bob while acting in her first play and, immediately after the play closed in October 2011, she and Bob moved together to State X, where they have since resided. John remained a New York resident.

In June 2012, John commenced an action for divorce in the New York Supreme Court on the ground that his marriage to Sara was irretrievably broken, and he sought equitable distribution of their property. Sara was served personally with the summons and complaint in State X by a local process server who was authorized to serve process

there. The papers served upon Sara also contained the statutory automatic orders required by the Domestic Relations Law addressing, among other matters, the sale of property held by the parties. Upon receipt of the papers, Sara put all of the jewelry she had received from John during the course of their marriage up for sale on an internet website at prices well below market value, and the jewelry sold within 24 hours. She then used the money from this sale to go with Bob on a luxury cruise.

Sara has moved to dismiss the complaint on the grounds that John has not satisfied the residency requirements to bring the divorce action in New York, and that the New York Supreme Court lacks personal jurisdiction over her. John has opposed both grounds of the motion. John also seeks to assert rights to the moneys received from the jewelry that Sara sold.

1. Does John satisfy the residency requirements for bringing a divorce action in New York?

2. Assuming that John has met the residency requirements:

(a) Does the court have personal jurisdiction over Sara?

(b) Assuming that the court does not have personal jurisdiction over Sara, may the court grant John a divorce on the ground that the marriage is irretrievably broken?

3. Assuming that the court has personal jurisdiction over Sara, what rights and remedies, if any, does John have with respect to Sara's sale of the jewelry?

First Answer to Question Three

1. At issue is whether a NY domiciliary who has lived in NY for 1 year and 6 months has satisfied the residency requirements to bring an action for divorce in New York Supreme Court. Under the DRL, in order to bring a divorce action, a domiciliary of NY must also meet one of three residency requirements. The parties to a divorce action will meet the residency requirements if both parties are residents of NY and the grounds for divorce arose here, if one party has lived in NY for a continuous period of 2 years, or if one party has lived in NY for a continuous period of 1 year and NY has some prior link to the marriage. Here, John is a domiciliary of NY because of his presence in NY and his intent to remain in NY. He has lived in NY for 1 year and 6 months (January 2011-June 2012), and NY has a prior link to the marriage because both parties were residents here during the marriage and Sara abandoned John in NY. Thus, John satisfies the residency requirements to bring a divorce action in NY

The Supreme Court has exclusive jurisdiction over actions deciding the status of a marriage.

2. a. At issue here is whether, in a divorce action, when a court has personal jurisdiction over a NY domiciliary spouse who has satisfied the residency requirements, the court also has personal jurisdiction over the other non-domiciliary party spouse. Under the DRL, in order to gain personal jurisdiction over a non-domiciliary party spouse, the spouse must come under one of the categories of the Matrimonial Long Arm Statute (MLAS). Categories of the MLAS relevant here include that the non-domiciliary abandoned the domiciliary party in NY, and that NY was the domicile of both parties when the grounds for divorce arose. Thus, under the MLAS, because both parties were residents here during the marriage and Sara abandoned John in NY, NY has personal jurisdiction over Sara

The non-domiciliary spouse must also be personally served with process by a process server authorized under the law of NY, the law of the state of the non-domiciliary, or an attorney licensed in the state. Here, Sara was served personally by an authorized process server, and therefore service of process was valid and complete.

b. At issue here is whether, in a divorce action, when a court does not have personal jurisdiction over a non-domiciliary party spouse, the court may still grant a divorce. Under the DRL, when a court has personal jurisdiction over one party (domicile plus residency requirements satisfied) the court also has in rem jurisdiction over the marriage. Thus, the court is able to grant a divorce ex parte. However, the court cannot adjudicate ancillary matters such as maintenance and distribution, without personal jurisdiction over both spouses. Here, if the court does not have personal jurisdiction over Sara it could still grant a divorce ex parte to John because of its in rem jurisdiction. However, the court could not hear John's claim to rights to the jewelry because that is an ancillary matter.

In order to grant a "no-fault divorce," one party must testify under oath that the marriage has irretrievably broken down for a period of at least 6 months. Here, if John so testifies, the court may grant the motion on those grounds. John might also have grounds for abandonment and adultery.

3. At issue here is what rights a spouse has to marital property sold by the other spouse in contemplation of divorce. Marital property consists of everything acquired during the marriage, without regard to which spouse has title or possession. Non marital property is property each spouse owned before the marriage, pain and suffering damages awarded to one spouse during the marriage, a bequest to one spouse that is kept in one spouse's name, and anything the parties agree to be kept as non-marital property. Here, the jewelry was acquired by John during the marriage and is therefore marital property; regardless of the fact that they were gifts to Sara or that Sara had possession.

The statutory automatic orders require both parties to give an accounting of their financial situations, and places a freeze on the marital property and after that point neither party is allowed to sell marital property or hide or waste marital property. The statutory orders exist to prevent one spouse from cheating the other spouse out of what is rightfully theirs in maintenance or equitable distribution. Thus, Sara's action to sell the jewelry after she received the statutory automatic orders, and to spend the proceeds of the sale on a cruise, was wrongful.

In an equitable distribution, the court may consider any factor the court deems relevant and equitable. Here, as a remedy for John, the fact that Sara intentionally wasted marital assets can be considered by the court as a factor against her, and the court can subtract the amount of the jewelry from her portion of the equitable distribution and award it to John.

Second Answer to Question Three

1. At issue is when a plaintiff has satisfied the residency requirements for bringing a divorce action in New York. The New York Supreme Court has exclusive jurisdiction over matrimonial actions. Under the NY DRL, in order for the Supreme Court to have jurisdiction over a cause of action for divorce, the plaintiff spouse must be a New York domiciliary and certain residency requirements must additionally be met. An individual with legal capacity is domiciled in the state where he is physically present and in which he has an intention to be domiciled (to remain). A divorce action can satisfy the residency requirements in one of three ways: (i) both spouses are NY residents and the grounds for the divorce arose in New York; (ii) either spouse has resided in New York for a period of at least one year and (a) the marriage took place in New York, (b) the plaintiff spouse was abandoned in New York, or (c) the parties at any time had a marital residence in New York; or (iii) both spouses have resided in New York for a period of at least two years. Satisfaction of the residency requirements is a condition precedent to a New York court's granting a divorce and, because the residency requirement goes to the merits of a claim, failure to comply with the residency requirements can result in dismissal for failure to state a cause of action.

John can satisfy the residency requirement through the second method. Here, John (the plaintiff spouse) has resided in New York for at least one year because he moved to New York in January

2011 and, thus, John has been in New York for nearly 1.5 years prior to filing for divorce in June 2012. Additionally, Sara and John resided as a married couple in New York from January 2011 until October 2011, when Sara moved back to State X on her own. Therefore, John can establish compliance with the residency requirement through the second method because he has lived in New York for more than 1 year and he can prove the additional element of "marital residence" because John and Sara lived in New York as a married couple for a period of nine months. Additionally, John is a New York domiciliary because (i) there is no evidence in the record that he does not have legal capacity and therefore can have his domiciliary of choice; (ii) John is present in the state of New York; and (iii) there is no evidence in the record that John does not intend to establish New York as his domicile. Therefore, John satisfies the residency requirements for bringing a divorce action in New York because (i) he is domiciled in New York, (ii) he has resided in New York for more than one year, and (iii) New York was once the location of the marital residence.

2. a. At issue is whether, assuming that the plaintiff has satisfied the residency requirements for bringing a divorce action in New York, the New York court has personal jurisdiction over a nonresident spouse. In order for a court to have personal jurisdiction over a defendant, the court must have a proper basis for personal jurisdiction over the defendant and the defendant must have notice of the action, accomplished through proper service. Any exercise of long-arm jurisdiction over a non-domiciliary defendant must comply with the due process of law. Under the New York Long-Arm Statute, New York has personal jurisdiction over a non-domiciliary spouse in a divorce action where the plaintiff spouse has established compliance with the residency requirements, detailed above. Turning to the "notice" requirement for the exercise of personal jurisdiction, a defendant can be served outside of New York in any way that a defendant could be served as authorized by the NY CPLR. Under the NY CPLR, service on a "natural person" can be effectuated by personal delivery. Personal delivery can be made outside of New York by (i) anyone over the age of 18 who is not a party to the action, (ii) a person licensed to perform service in that state, or (iii) by a licensed attorney in that state.

In this case, Sarah is subject to personal jurisdiction in New York through the long-arm statute assuming that John has satisfied the residency requirements for a divorce action in New York. Exercise of the long-arm statute in this fashion complies with notions of due process because, based on the fact that New York was the marital residence of John and Sara for nine months, Sara should reasonably expect to be subject to a divorce action in New York; Sara has sufficient minimum contacts with New York to make the exercise of long-arm jurisdiction just. Additionally, the "notice" requirement for the exercise of personal jurisdiction over Sarah has been met because Sara was served by method of personal delivery in State X by a process server licensed to perform service in State X. Sara was served by a valid method under the CPLR because she was personally served with the summons and complaint. Service was effectuated by a proper person because service was made by a process server licensed to serve process in State X. Therefore, the court has personal jurisdiction over Sara because personal jurisdiction can be met under the NY Long-Arm Statute and because Sara was properly served.

b. At issue is whether, assuming that the residency requirements in a divorce action have not been met, a New York Court may still grant a divorce on the ground that the marriage is irretrievably broken. Under the NY DRL, since 2011, the New York Supreme Court can grant

couples a divorce on the no-fault ground of "irretrievable breakdown of the marriage." In order to qualify for divorce on the grounds of "irretrievable breakdown of the marriage," (i) the moving spouse must plead that the marriage has been "irretrievably broken" for a continuous period of at least 6 months and (ii) the couple must have already settled all issues of property division and child care, custody, and support. The NY DRL does not make clear and the NY Court of Appeals has not clarified what exactly is meant by the phrase "irretrievably broken" nor what a moving party need show in order to establish that the marriage has been irretrievably broken for a period of 6 months. Nevertheless, as in any case for divorce, the case must satisfy the residency requirements for a divorce action, detailed above. Even where the requirements for a divorce on the ground of "irretrievable breakdown" have been met, the defendant spouse may nevertheless assert a defense of lack of personal jurisdiction. However, the defendant spouse must either (i) make a CPLR 3211 pre-answer motion to dismiss including the ground of lack of personal jurisdiction; or must (ii) not make a CPLR 3211 pre-answer motion to dismiss on any ground and assert the defense of lack of personal jurisdiction in her answer. The defendant waives the defense of lack of personal jurisdiction when she makes a CPLR 3211 pre-answer motion not on the ground of personal jurisdiction or fails to raise personal jurisdiction as a defense in her answer. Where the defendant asserts lack of personal jurisdiction on the basis of lack of proper service, the defendant must make a follow-up motion for summary judgment on the ground of improper service within 60 days.

Here, John has filed for divorce on the ground that the marriage is irretrievably broken. However, the court cannot grant the divorce on that ground because John and Sara have not, as of yet, settled the issue of distribution of their property because John has sought equitable distribution of their property. Therefore, the court must stay the granting of the divorce until all property issues have been dealt with. Nevertheless, the court cannot grant the divorce in any case because here we are to assume that the court does not have personal jurisdiction over Sara. Sara has not waived the issue of personal jurisdiction because Sara properly raised the ground of personal jurisdiction in her motion to dismiss and has not yet served an answer. Because we are told to assume that the court does not have personal jurisdiction over Sara, the court should dismiss the divorce action and cannot grant John a divorce on the ground that the marriage is irretrievably broken.

3. At issue is what right a plaintiff spouse has against a defendant spouse, assuming that the court has jurisdiction over the defendant spouse, where the defendant spouse sells marital property below price after receiving statutory automatic orders prohibiting the parties from selling assets or property during the pendency of the proceeding. Under the NY Equitable Distribution Law, marital property is defined as property, which is not separate property, that was earned or acquired during the marriage, regardless of whether title is held by one or both spouses. Separate property is property acquired by each spouse before the marriage; inherited or gifted to either spouse alone at any time; awarded to one spouse in a personal injury judgment; or is a result of passive appreciation. In a divorce, each spouse keeps his or her own separate property, but marital property is subject to principles of equitable distribution. Under the NY DRL, certain statutory automatic orders are required to inform each spouse that he or she cannot sell, destroy, or transfer any property during the pendency of the divorce proceeding. When a spouse disobeys such automatic orders, the distribution that he or she receives under equitable distribution will be

reduced based on the effect of her actions on either marital or separate property and he or she may be required to pay the his or her spouse for any deficiency in the share that spouse receives.

Here, the jewelry at issue is marital property because Sara received the jewelry from John during the course of their marriage. Sara directly disobeyed the automatic orders after receiving such orders by selling the jewelry online at prices well below market value. Sara's distributive share may be reduced to reflect the sale of the jewelry for less than fair market value and Sara may be held accountable to John on any resulting inability of the marital estate to satisfy John's equitable share.

QUESTION-FOUR

Owner owned a building in New York City that he leased to Tenant, a New York domiciliary, for use as a coffee shop. The lease agreement between Owner and Tenant provided that, in addition to monthly rent, Tenant would be solely responsible to repair and maintain the premises and to pay for all utilities. The agreement gave Owner the right to enter and inspect the building.

On November 1, 2011, Pam, a customer of the shop and a State X domiciliary, slipped and fell on water on the tile floor of the coffee shop and broke her arm.

Pam duly commenced an action in the New York Supreme Court against Owner and Tenant to recover damages for her injuries, alleging that Owner and Tenant were negligent in maintaining the premises. On affidavits proper in form, Owner moved for summary judgment stating the pertinent foregoing facts and claiming that, as an out-of-possession owner, he was not liable to Pam for negligence. Pam opposed the motion on the ground that Owner, having the right to enter and inspect the premises, was required to keep the premises reasonably safe and was liable for her injuries. The court (a) granted Owner's motion.

At trial Pam testified that, when she entered the coffee shop ten minutes before her fall, it was snowing outside. She also testified that she had not seen water on the floor before she fell, but only noticed it after she fell. Ernie, an eyewitness to the accident, was called as a witness by Pam. He testified that he had been sitting at a table in the coffee shop for 30 minutes before Pam fell and that he saw her fall. On cross-examination Ernie testified that he had not seen any water on the floor in the area where Pam fell until after she fell. When Pam rested her case, Tenant moved for judgment as a matter of law, contending that Pam failed to prove a prima facie case of negligence. The court (b) denied the motion. Tenant thereafter took the stand and testified, over Pam's objection, that after the accident Pam told him that she was sorry to have tracked snow into the coffee shop.

The law of State X limits recovery of damages for pain and suffering in any negligence action to $250,000. New York has no similar law. Tenant would like for the court to apply the law of State X, Pam's domicile, to any damage award for pain and suffering.

1. Were the court's rulings (a) and (b) correct?

2. Was the court correct to permit, over Pam's objection, Tenant's testimony regarding Pam's statement?

3. Which state's law should the court apply to any award for pain and suffering?

First Answer to Question Four

1. a. The issue is whether a landlord who reserves a right to enter and inspect the premises will be liable to a third party for personal injuries sustained on the premises.

As a preliminary matter, a motion for summary judgment should be granted if the court determines that there is no genuine issue of material fact, and that the moving party is accordingly entitled to judgment as a matter of law. Granting a motion for summary judgment means that the case does not proceed to trial. Denial of such a motion simply means that there is a tribal issue of fact for the jury, so the case will proceed to trial.

In order for Pam to prevail against Owner for a claim of negligence, she will have to show: (1) Owner owed her a duty of care; (2) Owner breached the duty of care; (3) Owner's breach was the actual and proximate cause of her injuries; and (4) damages. Here, the key issue is whether Owner owed Pam a duty of care.

Under New York Real Property and General Obligations Law, a tenant who leases land from a landlord will generally be solely liable to third parties who are injured on the premises. A landlord generally does not have a duty to make premises safe and thus will not owe third parties or tenants a duty of care, except in the following circumstances: (1) landlord has a duty to maintain and keep safe common areas; (2) landlord has a duty to warn tenant about latent defects known or should be known to the landlord; (3) landlord is liable for repairs that are assumed; (4) landlord is liable to repair defects that are unlikely to be fixed in a lease for property that is open to public use; and (5) landlord is liable for all defects arising out of a short-term residential lease. A tenant who has expressly promised to be solely responsible for repair and maintenance of the premises will absolve landlord of any liability for defects in the premises except in the five aforementioned exceptions.

Here, third party Pam sustained personal injuries while on the premises leased by Owner to Tenant. Tenant is therefore liable to Pam for her injuries. However, Pam will not be able to prevail against Owner, because none of the five exceptions that would cause Owner to owe a duty to keep the premises reasonably safe is present here: (1) the coffee shop was not a common area, but an area that was completely leased to Tenant and in his possession; (2) the injury did not result from a latent defect that Owner did not warn Tenant about; (3) Owner did not assume any duty to repair or maintain; (4) while the coffee shop is open to public use, the injury did not arise from a defect in the premises that Owner would've had to repair; and (5) this was not a short-term residential lease. A mere reservation of the right to enter and inspect the premises does not rise to the level of Owner assuming the duty to repair and maintain the premises, and so Owner owed no duty to Pam to keep the premises reasonably safe. Additionally, Tenant expressly assumed sole responsibility for repairs and maintenance of the premises, which is

evidence that supports a conclusion that Owner did not assume any duty to keep the premises reasonably safe.

Thus, the court was correct in granting Owner's motion for summary judgment because there is no genuine issue of material fact for the jury to decide. This is because as a matter of law, Owner did not owe a duty to Pam to keep the premises reasonably safe, and thus will not be liable to Pam for negligence.

b. The issue is whether a prima facie case for negligence has been met when the plaintiff has not alleged evidence that defendant breached his duty of care.

As a preliminary matter, a defendant can move for judgment as a matter of law at the close of evidence or when the opposing party has rested her case (note that the plaintiff can only move for judgment as a matter of law at the close of evidence). Here, as the defendant, Tenant was proper in moving for judgment as a matter of law when Pam rested her case. A judgment as a matter of law should be granted when the court determines that no reasonable person could disagree on the conclusion based on the evidence that has been presented. For a plaintiff to prevail on a claim for negligence, the plaintiff must show: (1) defendant owed her a duty of care as a foreseeable plaintiff; (2) defendant breached the duty of care; (3) this breach was the actual and proximate cause of her injuries; (4) damages.

Here, Pam has not shown a prima facie case for negligence. First, it is true that Tenant owed Pam a duty of care because Pam was a foreseeable plaintiff - this is because Tenant runs a coffee shop, and any customer is a foreseeable plaintiff (Pam was a customer and so will be foreseeable). Note that New York has abolished the common law doctrine premise liability which used different duties of care for different types of entrant (trespasser, known trespasser, licensee or invitee). Thus, Tenant will only owe Pam a duty of care of a reasonable, ordinary person. Second, it is also true that Pam has alleged damages, because she suffered an injury. However, it is unclear that Pam has satisfied the burden of proof to show both breach and causation. First, it is unclear whether Tenant has breached his duty of care at all, because it is unclear that a reasonable person would have acted any differently in running a coffee shop. This is because Pam has not shown by her testimony or Ernie's testimony that the water she slipped on was already present in the coffee shop before she entered - if it had already been present, then Tenant would've breached his duty of care because a reasonable coffee store owner would have mopped up the water to prevent people from slipping, and causation would also be established because the breach would've been the actual ("but for") and proximate ("foreseeable") cause of her injuries. The fact that there is no evidence indicating that the water was already present (since neither she nor Ernie remembers seeing water there) means that Pam has not satisfied a showing of breach, and thus cannot satisfy a showing for causation. From the evidence that Pam has alleged, it seems that she slipped on the water/snow that she brought into the coffee store from outside, because it was snowing on the day that she entered the coffee store. Thus, Pam's evidence will not be enough to show breach or causation because a reasonable coffee store owner would not have acted any differently from Tenant.

Therefore, because Pam has alleged no evidence indicating that Tenant breached his duty of care to Pam, Pam has failed to prove a prima facie case of negligence. The court was incorrect in

denying Tenant's motion because based on the facts that Pam has alleged, a reasonable person could not dispute the conclusion to be drawn from such facts.

2. The issue is whether an out of court statement made by the opposing party can be used in court to prove the truth of the matter asserted, and whether a valid exception to the hearsay exclusionary rule applies.

Hearsay is an out-of-court statement that is being used to prove the truth of the matter asserted. Under the Federal Rules of Evidence, as well as New York Evidence law, hearsay is inadmissible at trial unless an exception applies. This is because hearsay statements are not considered to be sufficiently reliable, because the declarant cannot be cross-examined by the person against whom the statement is used. One such exception to the hearsay exclusionary rule is the "party-opponent admission" exception, where a statement made by the party opponent can be admissible in court when used against the party opponent in spite of its hearsay status.

Here, Pam told Tenant on November 1, 2011 that she was "sorry to have tracked snow into the coffee shop." Tenant wishes to admit this out-of-court statement for the truth of the matter asserted so as to absolve himself of liability for negligence - if Pam was the one who tracked snow inside the coffee store, then Tenant was not at fault because he did not breach his duty of care to her. Thus, this statement constitutes hearsay. However, because it is a statement made by Pam, who is a party opponent, Tenant will be able to admit this statement in court against Pam for the truth of the matter asserted.

Thus, the court was correct to permit Tenant to testify as to Pam's statement over her objections.

3. The issue is which state's law should apply to an award for pain and suffering in a suit for negligence.

When there is a conflict of laws issue, New York will apply its interest-based approach to determine which state's law will govern the case. This means that the law of the state that is most interested in the proceeding will govern. Where New York does not have an interest in a litigation proceeding, it will apply another state's law even though the case is brought in New York. However, where New York does have an interest in the proceeding, New York is free to apply its own law to the case. Where no state has an interest in the case, New York may also apply its own law to the case. In tort cases, the Neumeier rules tell us that the law to be applied in a tort case is (1) the law where both parties reside, or (2) if the parties are from different states, the law of the state where the injury occurred will apply.

Here, Pam is a domiciliary of State X. Defendant is a domiciliary of New York. The tort occurred in New York. Under the interest-based approach, New York does have an interest in the case, since one of the parties is from New York and the injury occurred here. Additionally, under the Neumeier rules for conflicts of laws issues in tort cases, the law of the state where the injury occurred (here, New York) will apply since the parties are from different states.

Thus, New York law will govern, and so the recovery of damages for pain and suffering in Pam's negligence action will not be limited to $250,000.

Second Answer to Question Four

1. a. At issue is whether the owner/lessor of leased premises may be held liable in a negligence action by a patron when the lessee has expressly agreed to be solely responsible for maintenance and repair of the leased premises.

With a motion for summary judgment, the moving party asserts that the case presents no genuine issues of material fact and that such party is entitled to judgment as a matter of law. Parties can use affidavits of those with personal knowledge in supporting, and defending against, a motion for summary judgment. To overcome a motion for summary judgment in response to a negligence cause of action, the plaintiff must assert: (1) that the defendant owed her a duty, (2) that the defendant breached that duty, and (3) that the defendant's breach was the actual and proximate cause of the resulting injury (damages and causation). In negligence actions based on incidents that occur on the premises of a landowner, NY has disregarded the distinctions based upon the plaintiff's status (e.g. licensee, invitee), and instead imposes a reasonable standard of care under the circumstances.

When a tenant expressly agrees to be solely responsible for maintenance and repair of leased premises in NY, the tenant will be responsible for any negligence actions that occur inside the premises. A right of an owner to enter and inspect the building is of no relevance; the tenant remains solely responsible if she so agrees. An exception to this rule is that the landlord remains liable for injuries in all common areas in the leased premises (e.g. sidewalks, stairways). Further, landlords remain liable for the condition of leased premises when they voluntarily agree to repair the premises and then do so negligently.

Here, Pam is trying to overcome Owner's motion for summary judgment. Tenant expressly agreed to be solely responsible for the repair and maintenance of the premises. Further, Pam's slip and fall occurred inside the rented space (the coffee shop), and not in any common area that the landlord maintained a duty to repair. Neither are there any facts that Owner agreed to repair or maintain the tile floor and that he did so negligently.

Thus, Pam may not maintain a negligence action against Owner and the court properly granted his motion for summary judgment.

b. At issue is whether Pam's case can withstand a motion for judgment as a matter of law.

A motion for judgment as a matter of law may be made by either party after the party's opponent rests its case. With the motion, the party argues that reasonable persons could not find for the opponent as a matter of law, and that the case should thus be decided in its favor. As noted above, the elements of a negligence claim are the existence of a duty, breach of that duty, actual and proximate causation, and damages.

Here, Tenant, as an owner of a business, owes Pam - a customer (and thus a foreseeable plaintiff) - a reasonable duty of care to maintain the premises in a safe condition so as to avoid injuries. Pam, however, has not presented sufficient evidence of Tenant's breach of that duty. Tenant would have breached his duty if he was aware of water on the tile floor and had failed to

immediately dry the spot so as to prevent slips. But Pam herself testified that she did not see any water on Tenant's floor before she fell, and Ernie (Pam's only other witness) testified that, even though he had been sitting in the coffee shop for thirty minutes, he also did not see any water on the floor until after Pam fell. Thus, no evidence was presented that Pam's injury was the result of a dangerous condition in the coffee shop which Tenant failed to fix or warn about. As such, no reasonable person could find Tenant liable for Pam's slip and fall, and Tenant's motion for judgment as a matter of law should be granted.

2. At issue is whether Pam's out-of-court statement was properly admissible.

An out-of-court statement of a person offered to prove the truth of the matter asserted therein is hearsay. Due to concerns with the reliability of hearsay evidence, such statements are not admissible unless they are relevant (probative to proving an issue in the case) and fall within some recognized hearsay exception. In NY, a party admission is one such exception to the exclusion of hearsay. A party admission is any statement made by an opposing party, whether against that person's interest or not. Such statements may be used against the party at trial, and may represent substantive evidence of the information in the statement.

Here, Pam's statement to Tenant that "she was sorry to have tracked snow into the coffee shop" is a party admission because it was a statement made by an opposing party. Further, the statement is relevant because it is probative as to whether Tenant breached its duty to Pam, as it tends to show that Pam was herself responsible for creating the unsafe condition that caused her accident.

Thus, the statement was properly admitted over Pam's objection.

3. At issue is whether the law of State X or the law of NY should apply to rules concerning pain and suffering damages associated with a tort that occurred in NY.

When dealing with a conflict of law, NY courts have abandoned the old vested rights approach (which was concerned with the situs of the accident or property at issue in the case) and have instead adopted an interest analysis approach. Under the interest analysis, NY courts will apply the law of the state with the greatest interest in the outcome of the particular litigation. In torts cases, this approach was modified by the Neumeier decision. The Neumeier rules are as follows: (1) If both parties are domiciliaries of the same location, that state's law applies and (2) If the parties are domiciliaries of different states, then the law of the situs of the tort applies, unless that State has no legitimate interest in the outcome of the litigation (e.g. neither party is domiciled there and it was merely fortuitous that the event occurred there). A person's domicile is the place in which they presently reside and in which they intend to permanently remain.

Here, a tort occurred in NY and we are told that Tenant is a NY domiciliary and Pam is a domiciliary of State X. Thus, the second Neumeier rule applies. Since the tort occurred in NY, and because NY has a legitimate interest in the outcome of the litigation (as it affects the rights of a NY domiciliary and it arises out of the leasing of property in NY), NY will apply its own law regarding damage awards for pain and suffering.

NEW YORK STATE BAR EXAMINATION
JULY 2012 QUESTIONS AND ANSWERS

QUESTION-FIVE
Adam, a successful investment banker, was a life-long friend of Ben. Adam never married and had no children, but had one brother, Cal, with whom he constantly feuded.

In October 2011, Adam was involved in a serious car accident that required him to be hospitalized. While in the hospital, Adam asked his long-time attorney, Counsel, to draft a will for him. Thereafter, Counsel drafted a will that included in pertinent part the following provisions as requested by Adam:

(1) I give to my brother, Cal, the sum of $50,000.

(2) I give to my attorney, Counsel, the sum of $100,000.

(3) I give the rest and residue of my estate to my friend, Ben.

(4) I nominate my friend, Ben, as Executor of my estate.

(5) Anyone who shall contest this will for any reason whatsoever shall forfeit any right that may have accrued to him or her under the provisions of this will.

Counsel then brought the will to Adam's bedside where Adam asked Ben and two hospital employees, Dan and Fran, to witness his will. Adam read the will, told Counsel it was exactly what he wanted, and declared to Ben, Dan and Fran that it was his will and he wanted them to act as witnesses. Ben, Dan and Fran watched while Counsel, at Adam's direction, signed Adam's name and his own name to the will. Then Ben, Dan and Fran all signed the will as witnesses.

Thereafter, Adam died. At the time of his death, Adam's estate was worth $10 million. Counsel duly filed Adam's will for probate. On receipt of a copy of the will, Cal, who was familiar with Adam's handwriting, noted that Adam's signature on the will did not appear to be that of Adam, leading him to believe that the signature was a forgery. Cal timely filed an objection claiming that the will was not properly executed because Adam's signature on the will was a forgery.

1. How should the court rule with respect to Cal's objection?

2. What effect, if any, does Cal's objection have on Cal's ability to receive his bequest under the will?

3. What is the effect, if any, of Ben's having witnessed the execution of the will?

4. Were Counsel's actions in drafting the will and providing for a bequest to himself proper?

First Answer to Question Five
1. The issue is whether a will is properly executed when it is signed by the testator's attorney, at the direction of the testator.

Under the Estates, Powers and Trust Law (EPTL), there are seven requirements for a valid will: (1) the testator is eighteen or older, (2) the testator signs, (3) "at the end thereof," (4) in front of two attesting witnesses, or by later acknowledgment of his signature to an attesting witness, (5) publication (stating to the witnesses: "this is my last will and testament"), (6) two or more attesting witnesses who sign after the testator signs, and (7) a completed ceremony within thirty days, meaning the attesting witnesses sign within thirty days of each other. A testator need not sign himself if he is unable. Another can sign on behalf of the testator so long as the signature is at the behest of the testator.

Here, all seven elements of a valid will are present. Although Adam did not sign the will himself, he asked Counsel to draft his will, reviewed the will himself, and then told Counsel to sign it on his behalf. Counsel did so in front of Ben, Dan, and Fran, who all signed themselves as attesting witnesses. In addition, Adam properly published the will to the witnesses, because he told them all that it was his will. The will ceremony was completed within thirty days, because all witnesses signed on the same day.

Therefore, the court should rule that Adam's will was properly executed.

2. The issue is whether an in terrorem clause will prohibit a beneficiary from inheriting, when the beneficiary contested the will's validity on grounds of forgery.

Under the EPTL, a "no contest"--or "in terrorem"--clause is valid and given full effect during probate. An in terrorem clause is a clause in a will preventing any beneficiary from contesting the will's validity. When the clause is written into a will, the beneficiary forfeits his inheritance under the will if he contests the validity of the will and fails. Moreover, under New York law, the beneficiary cannot usually claim in his defense that he had probable cause to contest the will; he forfeits his interest just the same. There is an exception, however, when the beneficiary contests the will on grounds of forgery or revocation by a later instrument. In either case, if the beneficiary demonstrates probable cause for his challenge, he will not forfeit his inheritance.

Here, Cal was a beneficiary of Adam's gift of $50,000. Adam's will also contained an in terrorem clause, because it explicitly stated that anyone contesting the will's validity forfeits his inheritance. Thus, under the general application of the rule that in terrorem clauses are enforceable, Cal would have forfeited his inheritance by contesting the will's validity. Here, however, Cal had probable cause to believe Adam's signature was forged, because he did not recognize Adam's signature. In fact, Cal was correct that Adam did not sign his own will. Because Cal had probable cause to contest the validity of Adam's will, Cal can still inherit even though his challenge to the will fails.

Therefore, Cal's objection does not have an effect to receive his bequest of $50,000 under Adam's will.

3. The issue is whether an interested witness can inherit under a will, when he is one of three attesting witnesses to the will.

Under the EPTL, an interested witness is one who serves as an attesting witness to the will, and who is also a beneficiary under that will. An interested witness does not prevent a will from being duly executed. However, under the EPTL's Interest Witness Statute, an interested witness may not inherit under the will. There is an exception for an interested witness who would have been an intestate distributee of the testator, but even then, the interested witness can take only the lesser of his intestate share or his bequest under the will (the "whichever is least" rule). Importantly, the interested witness statute does not apply when there are more than two attesting witnesses to a will. This is sometimes known as the supernumerary rule. Thus, an interested witness may take his specific bequest under a will, if there are at least two additional, disinterested witnesses.

Here, Ben is an interested witness, because Adam's will leaves to him the residuary of Adam's estate, and because Ben also served as an attesting witness to Adam's will. Moreover, Ben would not have been one of Adam's intestate heirs, because he was only a close friend to Adam. Therefore, under the Interested Witness Statute, Ben would ordinarily be prevented from inheriting the residuary of Adam's estate. Here, however, Dan and Fran also witnessed Adam's will. Ben can therefore inherit the residuary of Adam's estate, because there were at least two other, disinterested witnesses attesting to Adam's will.

Thus, Ben's having witnessed the execution of Adam's will has no effect on his ability to inherit the residuary of Adam's estate.

4. The issue is whether an attorney acts properly by assisting with the preparation of a will that provides a bequest for that attorney.

Under the NY Rules of Professional Conduct (RPC), an attorney must avoid conflicts of interest. Thus, an attorney may not undertake a representation whenever it will create a substantial risk that the attorney's professional judgment will be adversely affected by his personal interests. As a specific variation of the RPC's general rule against conflict, an attorney may not assist a client in preparing a gift from the client to the attorney. An exception is made only when the attorney and client are close relatives.

Here, Counsel and Adam were not related; Counsel was only Adam's long-time lawyer. Therefore, Counsel acted improperly by preparing a gift from Adam to himself under Adam's will. Counsel's actions may, therefore, subject him to discipline for violating the RPC.

In addition, under the EPTL, a bequest in a will to the drafting attorney is presumptively suspect. As a general rule, a will may not be probated if its creation was the product of undue influence. Undue influence occurs when an external influence operates to overpower the mind of the testator, resulting in a bequest or entire will that would not have been made absent the external influence. An inference of undue influence arises whenever a person who assisted the testator in preparing the will also inherits under the will. Moreover, under the Putnam doctrine, the Surrogate's Court must automatically inquire into undue influence when the drafting attorney inherits under the will.

Here, the Surrogate's Court must automatically inquire into the undue influence of Counsel, because Counsel was Adam's drafting attorney and also inherits a substantial bequest of $100,000 under Adam's will. Upon this inquiry, the court will observe that Counsel helped Adam draft a will while Adam was hospitalized. Although Adam was physically incapacitated, however, he appears to have understood the contests of the will, telling Counsel that it was what he wanted. Moreover, the bequest could have been made absent Adam's hospitalization, given that Counsel was Adam's longtime counsel. Finally, although the bequest is substantial ($100,000), it pales in comparison to the size of Adam's overall estate. Thus, a court would likely uphold the bequest to Counsel, but only after conducting a serious inquiry into undue influence.

Thus, in conclusion, Counsel's actions were improper under the RPC. His actions also jeopardized his ability to inherit under Adam's will, although a court would probably allow him to inherit under the circumstances.

Second Answer to Question Five

1. The issue is whether a will can be validly admitted to probate when it is signed by an individual who is not the testator, but is signed at the testator's direction.

Under the New York Estates, Powers, and Trusts Law (EPTL), to be admitted to probate a will must contain certain provisions. Specifically, it must be written, signed by a testator over the age of 18 with testamentary capacity, signed at the end thereof, with the signature either in the presence of witnesses or acknowledged by the testator to the witnesses, published as a will to at least two attesting witnesses, and signed by those witnesses, with the ceremony completed within 30 days. A signature is still valid if a testator does not sign himself, but asks someone to sign on his behalf, so long as the person who signed on the testator's behalf (a) also signs his or her own name and (b) is not also one of the two attesting witnesses.

Here, there is no evidence Adam lacked testamentary capacity, and as an investment banker who has had a successful career, he is almost certainly over the age of 18. The will is written, and the signature is likely at the end thereof. There are three attesting witnesses who signed the will - Ben, Dan, and Fran - more than the minimum required, and the ceremony was completed the same day. Adam published the will by declaring to Ben, Dan, and Fran that the document was his will.

Adam directed Counsel to sign the will on Adam's behalf, which Counsel did. Counsel was not one of the two attesting witnesses, and he signed his own name alongside Adam's name. Therefore, even though Adam didn't sign the will himself, Counsel satisfies the requirements to be able to sign on Adam's behalf. Ben, Dan, and Fran can testify as to all the elements being satisfied, and the three of them and Counsel can testify that Adam requested Counsel to sign on his behalf.

Therefore, the court should rule after hearing the testimony of the attesting witnesses that Adam's will should be duly admitted to probate.

2. The issue is whether a clause prohibiting a beneficiary who challenges the validity of a will from taking his bequest is enforceable when the beneficiary challenges on the grounds of fraudulent execution.

Under the New York EPTL, clauses prohibiting beneficiaries from contesting a will (contestation clauses) are enforceable against beneficiaries who challenge a will's being admitted to probate. This rule exists to allow testators to guard against in-fighting and prolonged waits before distribution of their estate. However, when a beneficiary challenges on the basis of a good faith claim of forgery, contestation clauses will be deemed to not apply. This is considered essentially a preliminary challenge to the will as a document, not to the will's provisions.

Here, Cal is challenging the will as a valid document, since he is challenging the execution on the basis of forgery. Since he does not have knowledge of how Adam directed Counsel to sign Adam's signature, Cal has a good faith belief that since the signature does not match his brother's handwriting, it may be forged. Cal might feel particularly suspicious given that the largest gift is bequested to Counsel, the attorney who drafted the will and whose handwriting appears in the place of Adam's signature.

Therefore, Cal's challenge on the basis of forgery will not bar him from taking his bequest once the signature is deemed valid and not forged.

3. The issue is whether an interested witness may take his bequest when there are two other attesting witnesses to a will.

Under the EPTL, an interested witness is one who serves as an attesting witness to a will but is named as a beneficiary in that will. While the presence of an interested witness will not deny the will probate, it does affect the interested witness's ability to take the bequest. An interested witness will not be permitted to take his or her bequest unless either (a) the supernumerary rule applies or (b) the interested witness is also one who would take under the laws of intestacy, in which case he or she receives the lesser of the bequest or the intestate share. The supernumerary rule applies when there are more than the required number of attesting witnesses to a will (i.e., there are three or more proper attesting witnesses), such that the interested witness's testimony is no longer necessary to admit the will to probate. An interested witness may take his full bequest if the supernumerary rule is satisfied.

Here, Ben is a close friend, not a relative, so he would not be eligible under the New York intestacy laws to any part of Adam's estate. However, there are three total attesting witnesses to the will: Ben, Dan, and Fran. Under the EPTL, only two witnesses are needed to admit a will to probate. Therefore, since Ben's testimony is not necessary and the will can be admitted based on the testimony of Dan and Fran alone, the supernumerary rule applies and saves Ben's bequest.

Therefore, even though signed the will as an interested witness, Ben may take the rest and residue of the estate per Adam's bequest to him.

4. The issue is whether an attorney may draft a will that provides for a bequest on his behalf.

Under the New York Rules of Professional Conduct (RPC), an attorney may not draft a will that contains a bequest to himself, unless the testator is a relative of the attorney. The rationale of this rule is to avoid an attorney exerting undue influence on a testator, and to avoid fraud. If an attorney violates this rule, he is subject to discipline from the New York bar and the court will strike the bequest from the will.

Here, we know Counsel was not a relative of Adam, since Adam was only survived by a brother. Even though he was Adam's long-time attorney, this relationship does not qualify as an exception to the RPC rule. Therefore, Counsel's conduct was not proper and constitutes an RPC violation, for which he may be subject to discipline. The $100,000 bequest to Counsel will fall into the residuary of Adam's estate and will therefore go to Ben (see above).

MPT-ONE
Ashton v. Indigo Construction Co.

Examinees' law firm represents Margaret Ashton, a homeowner, in her dispute with Indigo Construction Co. A few months ago, Indigo bought a vacant lot behind Ashton's home and began storing dirt on the lot to use later in its construction and landscaping business. Although Indigo's use of the vacant lot is in compliance with the relevant zoning ordinances, its activities have negatively affected Mrs. Ashton—she is disturbed by noise from the trucks going to and from the vacant lot, and the huge dirt pile has caused substantial amounts of dust and mud to accumulate in her yard. Examinees are asked to draft the argument section of the brief in support of a preliminary injunction against Indigo. The File contains a memorandum from a firm partner asking the examinee to prepare the legal argument, a “format memo” that lays out the format for persuasive writing of trial briefs, two affidavits (from Margaret Ashton and from a firm investigator), and an article about the dirt pile from a local newspaper. The Library contains two cases from the Franklin Supreme Court: Parker v. Blue Ridge Farms, Inc. (dealing with the elements of the common law action of private nuisance) and Timo Corp. v. Josie's Disco Inc. (dealing with the standards for granting injunctive relief for a private nuisance).

First Answer to MPT
Argument

The court should grant a preliminary injunction to the plaintiff to prevent the defendant from continuing to make a historic residential community uninhabitable. Graham District in Appling is a neighborhood of peaceful homes and shady trees. See Appling Gazette article. "The Graham District is one of the largest residential communities in Appling without a single business located within its borders." Id.

In April, 2012, however, Indigo Construction Company bought a lot beside the neighborhood and began using it to dump piles on dirt into. The company drives large trucks, including large dump trucks, 17 times a day, from 6 a.m. to 8 p.m., to the site to dump dirt. This causes loud

noises of roaring engines, pervasive screeching brakes, crashing and grinding unloading of dirt, and loud beeping of dump trucks. This prevents plaintiff from enjoying use and enjoyment of her home - she cannot sit outside for periods longer than an hour without hearing trucks driving by loudly, and she cannot read, garden, or talk with her neighbors in peace.

The dirt has already been piled to 20 feet high. This causes problems in dry weather and in wet weather for residents of Graham District. In dry weather, even a slight breeze will blow dust and dirt onto plaintiff's property, preventing plaintiff from enjoying her flowers in her garden and forcing her to spend additional sums to clean the outside of the house, especially the windows, and to do so more frequently than before. In the wet weather, runoff from the dirt pile flows into plaintiff's backyard. Plaintiff is not the only one suffering - "[o]ther neighbors complain about the runoff during rainstorms, which often flood their yards." Appling Gazette article.

Indigo is using a 1-acre lot to do this interfering work. It has, however, a 50-acre tract of undeveloped land on the outskirts of Appling. Even though Indigo has brought jobs and opportunities to young families, it could do the same, or even more, by using this undeveloped lot, without interfering with residents' use and enjoyment of their land. The standard for granting a preliminary injunction against nuisance is the likelihood of ultimate success on the merits, the prospect of irreparable injury if the provisional relief is withheld, and that the balance of equities tips in the plaintiff's favor. Timo Corp. v. Josie's Disco.

The plaintiff has a high likelihood of ultimate success on the merits because the defendant's intentionally driving loud trucks and dumping piles of dirt throughout the day and night beside a large residential-only community causes unreasonable interference with residents' use of their homes.

Common-law private nuisance is a non-trespassory invasion of another's interest in land. Parker v. Blue Ridge Farms. The focus of the inquiry is on the interference with plaintiff's use and enjoyment of her land. "Interference with plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable." Id. Thus, even a business that serves society well can still be found liable for nuisance.

A plaintiff will win a claim for nuisance if (1) the defendant's conduct was the proximate cause (2) of an unreasonable interference with the plaintiff's use and enjoyment of his or her property, and (3) the interference was intentional or negligent.

The defendant's driving of trucks and dumping of dirt proximately cause unreasonable interference with residents' use of their homes.

Before Indigo started working right beside Graham District, it was a peaceful residential-only neighborhood. Only because of Indigo's work, plaintiff and other residents have suffered constant noxious noises and have had dirt go onto their property.

Defendant's conduct unreasonably interferes with plaintiff's ability to use and enjoy her property, such as for gardening, reading, and talking with neighbors.

The noise from defendant's trucks is constant, going from the early morning, through the evening. Plaintiff cannot sit outside her home for more than an hour without hearing trucks roll by, screeching, grinding, roaring their engines, and making other noxious noises. She has to pay more and more frequently to have her home cleaned from dirt and she cannot enjoy the flowers in her garden. The standard for finding unreasonableness is objective. Parker. Plaintiff does not have a special sensitivity to the noise and the dirt. Instead, she wishes to use her home for purposes for which most homeowners do - talking with neighbors, gardening, etc. As the Appling Gazette article shows, many of Plaintiff's neighbors have experienced the same problems.

While defendant's use of the property is legal - the area is zoned for mixed use -even a reasonable, legal, or even desirable uses can cause unreasonable interference. The unreasonableness of the interference is the key factor, not the reasonableness of the use. Parker. A court will look at the following factors to determine unreasonableness of the interference (Parker):

1. The nature of the interfering use and the use and enjoyment invaded.

Here, the nature of the interfering use is legal but it is industrial, beside a large residential neighborhood that does not contain a single business. The use and enjoyment invaded are the residents' rights to use their homes in a normal fashion and be free of noxious noises and dirt they have to clean up constantly. Plaintiff has resided at her address for 32 years and has never before had to endure such interferences.

2. The nature, extent, and duration of the interference.

The defendant's interfering conduct is constant. Trucks come by more than once an hour, dumping dirt and making noxious noises. The trucks come by 17 times a day, from early in the morning (as early as 6 a.m.) to late at night (as late as 8 p.m.). The sound of roaring engines is pervasive; the dirt coming onto Plaintiff's home is constant.

3. The suitability for the locality of both the interfering conduct and the particular use and enjoyment invaded.

While Defendant is operating on land that is zoned for mixed use, that is not the end of the inquiry. Parker. Defendant has chosen to start dumping dirt on a 1-acre plot right beside an eight-square-block area consisting entirely of single-family homes. This residential neighborhood does not even contain a single business. This is clearly not an appropriate location for dump trucks to dump 20-foot-high piles of dirt. The plot is also directly behind Plaintiff's home. See report of Investigator William Porter.

4. Whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the plaintiff's use and enjoyment of his or her property.

The defendant met with members of the neighborhood, but only agreed to stop dumping dirt after 8 p.m. It could limit its use to during the day, when homeowners could be at work. It could also

build a high fence around its plot of land to prevent dirt from escaping from it and interfering with others' land. Better yet, it has a 50-acre tract of undeveloped land on the outskirts of Appling. See report of Investigator Porter. It could use this land just as easily as the much smaller plot it is using now, without causing the interference it is now causing to the residents of Graham District.

Defendant's interference is intentional because it is aware of the intrusion it is causing and is continuing to intrude.

Even if a plaintiff cannot prove that a defendant intended to cause discomfort to its neighbors, it is sufficient to show that Defendant is aware of the intrusion and chooses to continue its behavior. Timo Corp. v. Josie's Disco. Inc. Here, Defendant met with the residents of Graham District, showing its awareness that it was causing them discomfort. Furthermore, to limit the discomfort it promised to stop dumping dirt after 8 p.m. That shows the Defendant's awareness. From that awareness, its mental state can be inferred. Timo.

Defendant's behavior seriously impairs Plaintiff's ability to use her land by causing constant noise and dirt on it, so she will suffer irreparable injury if a preliminary injunction is not granted.

The prospect of irreparable injury if the provisional relief is withheld is high. Under Timo, land is unique and there is no adequate remedy at law for any severe or serious impairment of the use of land. For example, in Timo, residents were experiencing nightly intrusions of noise from a nearby neighbor, a bar playing music at extremely loud levels. The court found that this noise, which often continued until 3 a.m. was a serious interference and there was no adequate remedy at law for the plaintiffs. Similarly, here, Defendant's trucks roll by until 8 p.m., and also start as early as 6 a.m. They create loud, constant noise. In addition, they cause dirt to fly onto Plaintiff's property on a regular basis, requiring constant cleaning. This is a serious impairment of the use of land and Plaintiff will suffer irreparable injury if a preliminary injunction is not granted.

The balance of equities tips in plaintiff's favor because Defendant would suffer little harm if it moved its operations to its larger plot of land on the outskirts of town.

In determining the balance of the equities, a "court must necessarily distinguish between those uses which should continue while absorbing the relevant costs, and those which are so unreasonable or undesirable that they should be stopped completely." Timo. "Courts must thus balance social value, legitimacy, and indeed the reasonableness of the defendant's use against ongoing harm to the plaintiff." The factors that courts use in making that determination are set out in Timo:

1. The respective hardships to the parties from granting or denying the injunction.

The Plaintiff is a widow who has lived in her home for 32 years, and lives in a neighborhood that is entirely residential. It would cause her significant harm if she had to move so that she could enjoy her garden, speak with her neighbors, and read books outside. Her friends for decades come from this neighborhood and it would be hard for her to uproot herself and establish a new home in a different neighborhood.

On the other hand, Defendant is a company that has no sentimental attachment to the property. It bought the property only a few months ago to dump dirt into. It owns another plot of land that is much larger (50 acres instead of 1 acre) at the outskirts of town that is paved, so its trucks could drive there. The plot is undeveloped and away from residential property. Therefore, it would suffer little if it had to move its operations elsewhere.

2. The good faith or intentional misconduct of each party.

The Defendant has not acted in good faith. It knows the nature of the property around the plot of land into which it is dumping dirt, as shown by the meeting it held with residents. When they complained, it agreed to stop dumping dirt after 8 p.m., a very mild, insignificant change. This was more of a show of compromise rather than a good-faith attempt to prevent the harm it is causing.

3. The interest of the general public in continuing the defendant's activity.

It is undisputed that Defendant's activities are lawful and even beneficial. It brings jobs to Appling, and opportunities to young families, according to City Manager Kayleen Gibbons. However, the general public will be served just as well if Defendant moves its conduct to the other location it owns. In fact the public will be served better, both because residents of the city will no longer suffer, and thus be able to be more productive members of society, and because the Defendant's other plot of land is larger, so it could bring in more dirt and therefore hire more employees, bringing even more jobs to the city.

4. The degree to which the defendant's activity complies with or violates applicable laws. The defendant's activity is lawful, as the land is zoned for mixed use.

However, as the Franklin Supreme Court has made clear in Parker, this is not dispositive.

Furthermore, this is just one factor.

Therefore, the Plaintiff's common law claim of nuisance is likely to succeed on the merits, Plaintiff would suffer irreparable injury to the use and enjoyment of her land if the court did not grant a preliminary injunction, and the balance of equities tips in the favor of plaintiff, who has a unique need to use the land, rather than Defendant, who has other -and better - choices.

Second Answer to MPT
Argument

The standard for granting a preliminary injunction requires that a plaintiff demonstrate a likelihood of ultimate success on the merits, the prospect of irreparable injury if the provisional relief is withheld, and that the balance of equities tips in the plaintiff's favor. Otto Records Inc. v. Nelson, (Fr. Sup. Ct. 1984). To show a likelihood of ultimate of success on the merits, a plaintiff must show that all the elements of the underlying claim for relief are met. See Timo Corp. v.

Josie's Disco, Inc. (Fr. Sup. Ct. 2007). When the claim for relief involves any "severe or serious impairment of the use of land," money damages are not sufficient to compensate because the law considers land unique. Thus no adequate remedy at law can exist for the plaintiff. Finally, the determination that the balance of equities tips in the plaintiff's favor is a fact-driven determination. Id.

A. Indigo Construction Corp's dumping on the vacant lot at 154 Winston Drive is a common law nuisance.

A common law nuisance occurs when "the defendant's conduct was the proximate cause of an unreasonable interference with the use and enjoyment of his or her property, and the interference was intentional or negligent" 4 Rest. (2d.) Torts Sec. § 822. "A private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land." Id. § 821D. Franklin has adopted the basic principles of the Restatement (Second) of Torts. Parker v. Blue Ridge Farms, Inc. (Fr. Sup. Ct. 2002).

i. Indigo's dumping on the vacant lot from 6 AM to 8 PM is the proximate cause of the interference with Margaret Ashton's property.

Indigo Construction Company's dumping of dirt on the vacant lot behind Margaret Ashton's property is the reason Mrs. Ashton can no longer enjoy her property. Margaret Ashton has lived at 151 Haywood St., Appling, Franklin for 32 years. In April 2012, she began noticing that Indigo Construction Company was dumping dirt on the vacant lot which abutted the rear of her property.

The trucks and other machinery make constant noise during their visits, which average 17 visits a day. The truck noise prevents Mrs. Ashton from enjoying the outside areas of her property. Additionally, wind will cover her rose garden with dust because of the dirt carried from the vacant lot. The dirt also results in higher cleaning costs on the interior of her house. Rain results in muddy runoff from the vacant lot to her property.

Prior to Indigo Construction Company's use of the vacant lot, Mrs. Ashton had full enjoyment of her property. Her enjoyment of the property is now impaired and the proximate cause of that impairment is the initiation of dumping by Indigo. ii. Indigo's dumping at 154 Winston Drive in an overwhelmingly residential area from 6 AM to 8 PM without any other precautions is an unreasonable interference with Mrs. Ashton's use and enjoyment of her property.

When considering the reasonableness of the interference with the plaintiff's use, the court should consider "all relevant factors including the nature of both the interfering use and the use and enjoyment invaded; the nature, extent, and duration of the interference; the suitability for the locality of both the interfering conduct and the particular use and enjoyment invaded; and whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the plaintiff's use and enjoyment of his or her property." Parker. The standard applied to these considerations is objective, what a reasonable person would conclude after considering all the facts and circumstances. Interference with the plaintiff's land can be unreasonable even if the defendant's conduct is lawful. "A business enterprise that exercises utmost care to minimize the

harm from noxious smoke, dust, and gas-even one that serves society well, such as a sewage treatment plant or an electric power utility-may still be required to pay for the harm it causes to its neighbors." W. Prosser & Keeton, Torts § 88.

Here, Indigo is sending large pieces of heavy equipment multiple times a day into an overwhelmingly residential neighborhood to pile excess dirt on a lot it owns. The dirt pile blows dust onto the land and into the houses of neighbors. The dirt pile sends mud into neighboring lands when it rains. Indigo's only concession to neighborhood complaints regarding the dirt pile and the noise has been to stop delivering dirt after 8 PM. Deliveries take place from 6 AM to 8 PM. Thus from sunup to sundown, the neighborhood expects the attendant noises of heavy equipment at work and suffers from the blowing and flowing of dirt. Residents cannot sit outside and enjoy the full extent of their property without being subjected to Indigo's use of 154 Winston Drive.

Indigo's use of the property is an unreasonable interference with the residential uses of the surrounding community. It is grossly out of character for the neighborhood. iii. Indigo was aware of the neighbor's complaints and negligently chose to continue their behavior.

Indigo was aware of the neighbors' complaints regarding 154 Winston Drive. It met with members of the neighborhood at one point. Additionally, the Appling Gazette has published stories regarding the unhappiness surrounding the use of 154 Winston Drive. The only concession to these concerns has been a curtailment of dirt deliveries after 8 PM. This curtailment does not materially lessen Indigo's interference on Mrs. Ashton's use and enjoyment of her property. The fact that Indigo responded to the complaints at all demonstrates that it is aware of the problem and thus negligence can be inferred from its actions.

B. Mrs. Ashton faces irreparable injury because the nuisance impacts her land.

While damages may be recoverable in an action for nuisance, land is unique and thus any severe or serious impairment of the use of land has no adequate remedy at law. Davidson v. Red Devil Arenas (Fr. Sup. Ct. 1992). Thus, the blowing and flowing of dirt and the sounds of working heavy equipment are intrusions without remedy at law and thus Mrs. Ashton is faced with an irreparable injury.

C. An injunction is not a stop-work order for Indigo and thus the balance of hardships tips in Mrs. Ashton's favor.

To determine whether to grant a preliminary injunction, courts must recognize that "enjoining a reasonable use of property goes beyond imposing an added cost of doing business." Timo Corp. Instead, the injunction may "stifle legitimate activity, which could continue while the business pays for the consequences of its actions." Id. In these situations, courts must balance the social value, legitimacy, and reasonableness of the defendant's use against ongoing harm to the plaintiff. Factors which a court should consider to aid its deliberations include the respective hardships to the parties from granting or denying the injunction; the good faith or intentional misconduct of the party; the interest of the general public in continuing the defendant's activity, and the degree to which the defendant's activity complies with or violates applicable laws. Id.

Here, should the court enjoin the dumping of dirt at 154 Winston Drive, Indigo Construction would not face substantial hardship. Indigo Construction owns an undeveloped unzoned 50 acre lot on the outskirts of Appling with regular road access. The dirt which is currently at 154 Winston Drive does not need to be where it is. An injunction means only that Indigo switch the locale of its dumping operations, not permanently stop all of its dumping whereas a failure to provide the injunction means that Mrs. Ashton cannot enjoy her home of 32 years as she has in the past.

Indigo has barely acted in good faith at all. Its only concession to neighborhood complaints was to stop the dumping of dirt from 8PM to 6AM. While Indigo may be operating in good faith, it may not be particularly responsive to its neighbors' complaints. This lack of responsiveness will weigh in the balance of hardships.

The general public does have an interest in Indigo continuing its operations. As noted in the Appling Gazette, Indigo pushed through some affordable housing projects which benefitted the City, it is a noted employer in the community, and it has a good environmental record. The general public certainly has an interest in Indigo continuing its operations but the enjoinment of dumping at 154 Winston Drive does not necessarily equate to a stop-work order for Indigo. As previously noted, Indigo can merely switch to one of its fifty acres on the outskirts of Appling.

While it is true that Indigo is in compliance with zoning regulations because 154 Winston Drive is zoned for mixed use, strict compliance with zoning regulations should not weigh heavily on the court's deliberation. The lot which is mixed use has been vacant for over 30 years. The neighborhood around it has become known as one of the largest residential communities in Appling. The spirit of the neighborhood is residential and not mixed use. Thus Indigo's compliance with zoning regulations should weigh only so far as its activities are lawful but the nature of its interference is unreasonable.

The balance of hardships weighs in favor of Mrs. Ashton and the residents of the Graham District. Because enjoining Indigo's use of 154 Winston St. will not result in Indigo being unable to conduct its business and because the cost to the neighborhood and Mrs. Ashton is so high, the court should find Mrs. Ashton would suffer more from Indigo's continuing use of 154 Winston Dr. than Indigo would should Indigo be forced to dump elsewhere.