NEW YORK STATE BAR EXAMINATION
JULY 2014 QUESTIONS AND ANSWERS

QUESTION-ONE

While Dan and Larry were drinking beer in Dan's apartment, Dan bragged to Larry that he had committed several burglaries in the neighborhood, including the theft of a computer from an apartment down the hall. Dan took Larry into his bedroom and showed Larry the computer that Dan said he had stolen.

Larry went to the local police precinct and reported to Detective the conversation he had with Dan and his observation of the stolen computer in Dan's bedroom. Larry then signed an affidavit repeating the above-stated facts and stating his name, address and telephone number. After verifying Larry's identity, Detective applied to the court for a search warrant, submitting Larry's affidavit in support of the application. Detective was granted a search warrant to search Dan's apartment for the computer.

The next day, Detective went to Dan's apartment, executed the search warrant, found the stolen computer, and arrested Dan. Dan was later indicted on the charges of burglary and criminal possession of stolen property.

Stu, a friend of Dan's, is a law student who works as a paralegal for Attorney. Stu referred Dan to Attorney to represent him in the criminal case. Stu often refers clients to Attorney, who in return pays Stu a bonus. The payment and amount of the bonus are solely in Attorney's discretion, and the parties have no express agreement concerning the bonuses. After Dan paid Attorney a retainer of $12,000, Attorney paid Stu a $500 bonus from Dan's fee.

Attorney moved to suppress the computer on the ground that the search warrant was invalid for lack of probable cause, because Larry's reliability was not independently verified by Detective. The court granted the motion, and the indictment was thereafter dismissed.

Some months later, in the middle of the afternoon, while walking home from a bar where he had been drinking heavily, Dan saw a double-parked truck facing downhill on a busy street. Suddenly, the truck started to move. Dan ran between two parked cars, opened the door of the truck, and jumped inside. Dan applied the brakes, but the truck would not stop. The truck continued down the hill and struck a pedestrian. When the police arrived at the scene, Dan was administered a blood alcohol test that revealed that Dan's blood alcohol content was .15 of one percent. Dan was arrested and charged with operating a motor vehicle while intoxicated.

At trial, the foregoing pertinent facts were established. At the close of the proof, Dan's attorney has requested that the court charge the jury on the defense of justification.

(1) Was Attorney's payment of the bonus to Stu proper?

(2) Did the court correctly decide the motion to suppress the computer?

(3) (a) Should the court instruct the jury on the defense of justification?

(b) Assuming the court instructs the jury as to the defense of justification, what instruction should the court give as to the burden of proof?

First Answer to Question One

1. The issue is whether an attorney may share fees with a nonlawyer.

Under the New York Rules of Professional Conduct (NYRPC), a lawyer is permitted to share fees with a referring attorney and they may decide whether to split the fees in proportion to the amount of work performed or to take joint responsibility and split the fees evenly. However, under the NYRPC, attorneys may not share fees with a nonlawyer, whether based on a referral of cases or otherwise. This is true even if the nonlawyer is an employee in the law firm, such as a paralegal. However, such paralegals may be paid salaries and bonuses unrelated to fees from a specific case.

Here, Stu is a nonlawyer and Attorney is a lawyer. Stu referred Dan to Attorney and Attorney paid Stu a bonus for the referral. This bonus of $500 was paid directly out of the $12,000 retainer Attorney received for representing Dan. This was a clear violation of the NYRPC and, thus, was improper. Attorney should therefore be disciplined by the grievance committee of the respective Appellate Division.

2. The issue is whether a Detective must conduct an independent verification of the reliability of a nonanonymous informant in order to secure a search warrant based on that informant's information.

The 4th Amendment to the US Constitution protects against unreasonable searches and seizures of persons, houses, papers, and effects. If government conduct falls within the purview of the 4th amendment as a search of a constitutionally protected area or areas in which one has a reasonable expectation of privacy, generally, a warrant is required to conduct the search. Under New York law, in order to secure a search warrant, the government must present probable cause to the magistrate to support the validity of the search. Such probable cause may be based off information provided by an informant, including an anonymous informant. New York employs the Aguilar-Spinelli test in deciding whether the information provided by an informant is sufficient for probable cause. Under Aguilar-Spinelli, the government must determine the reliability and veracity of the informant and the basis of the informant's knowledge. If the information does not supply a basis for his knowledge, the government must obtain corroborating evidence of the specific criminal conduct the informant provided information about. However, the reliability of the informant is generally more of an issue when the informant is anonymous, where the government must look to whether they have received credible information from the informant before and other information reflecting his reliability. If the information is not anonymous and provides his identifying information in sworn testimony, the need for a deep inquiry into the reliability of the informant is not as necessary.

Here, Detective was given information from Larry regarding Dan's criminal conduct. Larry not only provided the Detective with his name, address, and telephone number, but also signed an affidavit repeating the facts of Dan's conduct. Detective verified Larry's identity. Larry's

reliability is not questionable based on the fact that his was not anonymous and he signed an affidavit. Furthermore, his basis of evidence was direct observation of the laptop, the stolen contraband that Dan confessed stealing to him. Thus, based on the fact that Larry was not anonymous and signed an affidavit, there was no need for him to independently investigate Larry's reliability. Therefore, the motion to suppress was improperly granted.

3. a) The issue is whether justification is a valid defense to operating a motor vehicle while intoxicated.

The defense of justification, otherwise known as self-defense is a defense under the New York criminal law. Justification is appropriate when a defendant has allegedly acted in defense of himself, defense of others, or defense of property. A defendant may use nondeadly force in defense of himself or others when they are in fear of imminent nondeadly force. Furthermore, a defendant may use deadly force against another if he is in fear of imminent serious bodily injury or death from the other person. He may use deadly force in defense of others as well if they are in fear of serious bodily injury or death. Deadly force may not be used in defense of property. There is also a defense of necessity in which a defendant may trespass on another's property in order to prevent a serious breach of the peace or seriously bodily injury or death to others.

Here, Dan saw a double-parked car begin to roll down a hill. It is very reasonable for one who sees such a thing to believe that this could cause serious injury or death to others. While Dan had no affirmative duty to act in this situation, Dan was arguably justified in thinking that this truck was going to cause serious harm or injury to others. While Dan jumped in the car to stop it from moving and was unsuccessful, Dan was faced with a choice of preventing serious injury or death to others or not doing so because he was intoxicated. However, justification is arguably not the correct jury instruction here as he is not being charged with assault or another crime regarding causing physical harm to another. Dan did not intentionally harm another person in order to defend himself or others. Rather, Dan jumped in and drove the car, personal property of another, out of necessity in order to prevent harm to others. Therefore, justification does not seem like the correct defense to instruct the jury with. The judge should instruct the jury on the necessity defense.

3. b) The issue is whether the burden of proof for the defense of justification rests on the defendant or the prosecution.

Certain defenses under New York criminal law are affirmative defenses and, thus, the defendant has the burden of proving them by a preponderance of the evidence. However, other defenses, which are not affirmative defenses, must be disproven by the prosecution beyond a reasonable doubt. Examples of affirmative defenses are Extreme Emotional Disturbance as an affirmative defense to second degree murder and that a gun was not loaded, as an affirmative defense to third degree robbery.

Here, justification is not an affirmative defense. Rather, it is a regular defense and thus the prosecution has the burden of disproving it beyond a reasonable doubt. Therefore, assuming the court instructs the jury on justification, the court should instruct the jury that the prosecution has

the burden of proving that the defendant was not justified in his actions beyond a reasonable doubt.

Second Answer to Question One

1. The issue is whether a referral fee agreement between an attorney and a non-attorney is prohibited under the NY Rules of Professional Conduct

Under the NY Rules of Professional Conduct, an attorney shall not enter into a referral fee arrangement with a non-attorney, such agreements are strictly prohibited. A referral fee arrangement arises where the party providing the referral accepts a benefit for the referral to the attorney. However, an attorney is permitted to enter into a reciprocal referral fee arrangement with another attorney outside his or her firm, so long as the agreement is in writing, with the consent of the client, and stipulates the amount of compensation each attorney is to receive and it is proportional to the amount of work completed.

Here, Stu was merely a paralegal, and is therefore not an attorney. Stu referred Dan to Attorney and accepted $500 as a result of the referral. Moreover, the facts state that Stu and Attorney often enter into this type of arrangement, thus the fact that the agreement is not in writing does not serve as a defense to its prohibited nature under the Professional Rules. Additionally, taking the $500 to pay Stu, notwithstanding the fact that the agreement was improper, was also improper because Attorney was paid in a retainer and can only remove money from the retainer payment for work already performed.

Thus, Attorney's payment to Stu of $500 for referring Dan as a client is improper.

2. The issue is whether a search warrant has sufficient probable cause when the probable cause is based on the information of an informant under the Aguillar-Spinelli test.

Under NY law, a valid warrant requires probable cause, particularity, and must be signed by a neutral and detached magistrate. Probable cause arises where there is a fair probability based on the facts that a crime has occurred. Particularity requires that the warrant state the items to be seized and the places to be searched. A warrant will be valid if signed by a neutral and detached magistrate, which occurs when there are no facts to suggest that the magistrate is bias in favor of the prosecution. The probable cause requirement may be satisfied based on the knowledge of an informant. Under the Aguillar-Spinelli test, the NY Court of Appeals has stated that the information provided by an informant can be used as a sufficient basis for probable cause, if (1) the reliability or veracity of the information can be established, and (2) the police obtain the informant's basis of knowledge for the information. Additionally, if the police are unable to obtain the informant's basis of knowledge, then there must be independent verification by the police, such as the informant has been used previously and established a reliable track record with the police for supplying reliable information.

Here, the testimony of Larry would likely be sufficient to demonstrate probable cause under the Aguillar-Spinelli test. Larry established the basis of knowledge of the information because he went to the police station, signed an affidavit stating specific facts as to the location of the stolen

computer, the person who stole the computer, and how the person stole the computer, in addition to seeing the stolen computer himself. Moreover, Larry provided his name, address, and telephone number which tends to suggest that he is truthful, as well as reliable because he is making himself available to the police. Because the police were able to obtain Larry's basis of knowledge it is unnecessary under the Aguillar-Spinelli test for the police to independently verify Larry's information.

Thus, the warrant was valid because it possessed sufficient probable cause due to Larry's information, possessed particularity because it stated that the police were looking for the computer, and based on the facts it can be assumed it was properly signed by a neutral and detached magistrate.

3. a) The issue is whether justification may serve as a defense to a strict liability crime.

Under NY law, justification (necessity at common law) serves as a defense where the defendant engages in conduct that is otherwise unlawful/criminal, but such conduct is justified because it was reasonably necessary to protect against a greater harm. However, justification not an available defense when the defendant has either (1) created the peril himself, such that he created a situation of a choice of two evils, or (2) the defendant's conduct caused the death of another in order to protect property.

A person is guilty of driving while intoxicated, if they are operating a motor vehicle and the blood alcohol of the person is .08 or higher.

Here, Dan was arrested for driving while intoxicated because his blood alcohol content was .15, which is over the legal limit in NY, and such conduct is unlawful. However, the defense of justification may be available to Dan because although his conduct was otherwise unlawful, he engaged in such conduct in order to prevent against a greater harm. The greater harm would have been the car rolling down hill on a busy street, which could have potentially injured other people. Additionally, although Dan's conduct probably caused him to hit the pedestrian, he did not kill the pedestrian and thus justification can still serve as a defense.

b) The issue is whether justification is an ordinary defense under NY law such that the prosecution possesses the burden of proof.

Under NY law, both affirmative defenses and ordinary defenses are available to a defendant. An affirmative defense places the burden of proof on the defendant to show by a preponderance of the evidence the existence of the elements of the defense. In contrast, an ordinary defense places the burden of proof on the prosecution to disprove the defense beyond a reasonable doubt. Moreover, the prosecution must not only disprove the existence of the affirmative defense raised by the defendant, but must also prove each element of the crime beyond a reasonable doubt. Justification is an ordinary defense in NY. Driving while intoxicated is a misdemeanor in NY and thus criminal.

Here, the prosecution must disprove that Dan's conduct (driving while intoxicated) was necessary to prevent against a greater harm. Additionally, the prosecution must prove beyond a

reasonable doubt that Dan was operating a motor vehicle and had a blood alcohol content of .08 or higher.

Thus, the prosecution must both disprove Dan's justification defense and prove he was DWI by a preponderance of the evidence.

QUESTION-TWO

Abe was the owner of Blackacre, commercial real estate in New York City. Abe, Bill and Cal decided to form a limited liability company for the purpose of conducting a catering business. On May 1, 2013, they executed articles of organization to form ABC LLC (ABC). They also signed an operating agreement providing that they would be the sole members of ABC, that Abe would own a 60% interest, and that Bill and Cal would each own a 20% interest. Bill and Cal each contributed $100,000 to the formation of ABC, and Abe agreed to contribute Blackacre to ABC.

On May 15, Abe mailed the articles of organization along with the appropriate fee to the New York Department of State for filing. ABC then commenced operations by purchasing equipment and supplies. On May 30, Abe executed a deed transferring Blackacre to ABC and immediately recorded the deed. After subsequently learning that the articles of organization had never reached the Department of State, on June 17 Abe executed a second deed purporting to transfer Blackacre from Abe to Nancy. Abe received $500,000 from Nancy for the transfer. On July 1, having discovered that the articles of organization had not been filed, Bill personally filed them with the Department of State, paying the required fee.

Upon learning of the second deed, Bill and Cal commenced a derivative action on behalf of ABC against Abe alleging breach of fiduciary duty.

Abe moved to dismiss the action on the grounds that (a) members of a limited liability company have no standing to bring a derivative action on behalf of the limited liability company, and (b) the deed to ABC was void because at the time the deed was recorded ABC had not yet been formed. In opposing Abe's motion on ground (b), Bill and Cal argued that the court should recognize ABC's de facto existence.

On July 25, ABC agreed to cater Dan's 50th birthday party to be held on August 15. That same day, ABC's catering manager telephoned Betty, the president of Meat Supply, Inc., and agreed to pay Meat Supply $7,500 for Meat Supply to provide all of the meat for the party. Immediately thereafter, Betty sent ABC an email confirming the date, price, and quantity of meat to be supplied to ABC. On August 14, Dan called ABC and told ABC that the birthday party had been cancelled. On August 15, Meat Supply delivered the meat to ABC, but ABC refused to pay.

Meat Supply commenced an action against ABC for breach of contract. ABC answered and raised the statute of frauds as a defense.

Prior to the trial, Betty, as president of Meat Supply, was deposed by ABC's attorney. At trial, without calling her as a witness, ABC's attorney sought to read Betty's deposition testimony into

evidence. Meat Supply's attorney objected on the ground that, because Betty was available to testify, the reading of her deposition testimony into evidence was improper. The court overruled the objection and allowed ABC's attorney to read Betty's deposition testimony into evidence.

(1) How should the court rule on Abe's motion to dismiss the derivative action on grounds (a) and (b)?

(2) Did the agreement between ABC and Meat Supply violate the statute of frauds?

(3) Can ABC's attorney read Betty's deposition transcript into evidence at trial?

First Answer to Question Two

1. a) The issue presented is whether shareholders of an LLC may bring a derivative action against an LLC, and, if so, if Bill and Cal have properly brought a derivative action suit in the instant case.

The laws governing LLCs in New York are found in the New York Business and Corporations Law (BCL). Under New York BCL, an LLC has the same formation requirements as a corporation, and shareholders possess the same limited liability as a corporation, but the two are different in some aspects (e.g., there is limited liquidity of ownership in an LLC, while there is generally free transferability within a corporation). In regard to the ability to bring derivative actions, corporations and LLCs have similar requirements. Thus, Bill and Cal, as shareholders of an LLC, are not blocked from having standing to bring a derivative action on behalf of the LLC.

There remains the issue of whether Bill and Cal have properly brought a derivative action under the circumstances. A derivative action is an action brought on behalf of the corporation by shareholders for corporate wrongdoing. Under the BCL, a derivative action is proper by shareholders if (1) the shareholders owns shares at the time the claim arose and throughout the litigation; (2) the shareholder will adequately represent the interests of other shareholders in the suit; (3) in certain cases, a bond must be given to indemnify the defending corporation, but this requirement does not exist if the shareholder has over 5% of shares or $50,000 in shares; (4) demand must be made on the directors, unless demand would be futile due to the fact that too many directors are interested, there was inadequate investigation of the transaction, or the claim on its face shows an egregious violation of business judgment; (5) specifically plead demand in the pleadings; and (6) join the corporation as a defendant.

Here, Bill and Cal have met all six elements. They are bringing a derivative suit alleging breach of fiduciary duty on the basis that Abe's second deed was a breach. They owned shares at the time of the second deed, and they own shares now. As the only two other members of the LLC, they will adequately represent the interests of the class. There is no need for a bond, as they each own over 5% of the shares (each has 20%). They did not make a demand, but demand is clearly futile here. The only person they need to make a demand to is Abe, the controlling shareholder, and he will not accept a suit against himself. Assuming they specifically plead why demand is futile in their complaint and join the corporation as a defendant, they have properly brought a derivative action.

In sum, Bill and Cal, as shareholders in an LLC, may bring a derivative action against the LLC and have properly done so here.

b) The issue presented is whether ABC can be treated as a de facto corporation at the time the second deed was made.

Under New York BCL, a validly created corporation of LLC is known as a de jure corporation/LLC, and they are able to make property transactions and contracts to the same extent as individual persons. However, if a corporation is not formed, then they are not able to make these sorts of transactions unless they can prove that they should be treated as a de facto corporation. To prove a de facto existence, a corporation or LLC must prove (1) that they followed all the proper procedures to form a corporation or LLC and, but for the mistake of the state or a third party, would in fact be such; and (2) that they have held themselves out to third parties as a corporation and conducted business as such. If both of these are proved, then the corporation will be given de facto existence and be treated the same as a de jure corporation. It should be noted that there is some case law which may make the de facto defense no longer valid, but for this question, I will assume that it is a valid defense.

Here, due to the failure of the Department of State to file their Articles of Organization, the ABC LLC never became a de jure corporation. Without de jure status, the property transactions they made before incorporation---including the first deed---can be claimed as legally invalid. However, on the facts, Bill and Cal likely have a compelling case to be treated as a de facto corporation. ABC followed all proper formalities---mailing the articles of organization and filing the appropriate fee---with the New York Department of State, but then the forms never reached the Department, through no fault of ABC. This likely will meet the first requirement of a de facto claim. Second, they held themselves out as an LLC. They purchased equipment and supplies under the name of ABC, and Abe executed a deed transferring Blackacre to the ABC LLC. These transaction show continued efforts to do business under the LLC's name, rather than Bill, Cal, and Abe's personal names, and thus should be sufficient to meet the second requirement of a de facto claim.

Having shown (1) that they follow the proper procedures of becoming a de jure LLC and failed through no fault of their own and (2) that they did business with third parties as the ABC LLC, Bill and Cal have sufficiently presented evidence for the court to recognize ABC's de facto existence.

2. The issue presented is whether an oral contract between two merchants for the supply of goods, confirmed only by an emailed memo, violates the Statute of Frauds.

A valid contract requires (1) an offer, (2) an acceptance, (3) consideration, and (4) that no valid defenses to formation exist. For certain contracts, one such defense to formation is that the contract violates the Statute of Frauds. The Statute of Frauds requires that certain contracts, to be valid, be in writing and signed by the defending party.

Contracts for the sale of goods are governed by Article 2 of the Uniform Commercial Code (UCC). Under the UCC, contracts for the sale of goods that are over $500 fall within the Statute of Frauds. This rule is limited to certain exceptions. These include (1) payment by the buyer or acceptance of the goods by the buyer and (2) when a merchant, in a transaction with a fellow merchant, sends a confirmatory memo with no objection. The second exception requires (1) a transaction between merchants; (2) a signed memo which gives a sufficient understanding of the agreement between the parties; and (3) that the other merchant provide no objection to the memo within 10 days of receipt. If all three are met, then the Statute of Frauds does not apply to the contract.

Here, ABC agreed with Meat Supply for Meat Supply to provide $7,500 worth of meat for a birthday party. There was an offer and an agreement, as well as consideration on both sides---Meat Supply supplies meat, ABC provides money. Therefore, the only way for the contract to be invalidated is for a defense to formation. The particular defense pleaded by ABC here is the statute of frauds.

There is a contract for the sale of goods, and it is well over $500, so it would seem that the statute of frauds does apply. However, the confirmatory memo exception applies here. ABC is a caterer and Meat Supply is a supplier of meat; under the lax definition of "merchant" in the UCC, both would be classified as merchants. Meat Supply then sent an email—for a merchant, this will suffice as a signed memorandum---with the date, price, and quantity of meat to be supplied. These terms, encompassing all the essential terms of the contract, are sufficient to provide an understanding of the agreement to both parties. Finally, ABC never objected, and so they do not fall within the 10-day window for objection.

Thus, the confirmatory memo exception applies, and the contract does not violate the statute of frauds. ABC's defense should be thrown out.

3. The issue presented is whether the former testimony of a currently available witness is admissible at trial as an exception to the evidentiary hearsay rules.

Hearsay is an out-of-court statement, being presented to the court, that is being asserted for its truth. Hearsay is generally not allowed under New York law, subject to certain exceptions. One such exception is for statements that constitute former testimony of the declarant (i.e., the person who said the statement). To fall within the former testimony exception, the testimony must be provided by an unavailable declarant, and the opposing party must have had a chance to cross-examine the declarant at the former proceeding. Unlike the Federal Rules of Evidence, New York does not find a declarant unavailable simply because they stubbornly refuse to testify or they have forgotten the events. New York does add, as grounds for unavailability, living 100 miles away from the courthouse or being a working physician. Otherwise, the only grounds of unavailability are failure to find the declarant with due diligence or legal inability to serve the declarant.

Here, ABC's attorney wants to read in Betty's deposition transcript into evidence. This is a statement made out of court, and the only plausible reason that the attorney will want to admit it is to assert the truth of the statements. The testimony from the deposition could count as former

testimony. It occurred at an earlier proceeding under oath, and Meat Supply's attorney, representing the corporation, would have been at the deposition as opposing counsel. There may be an issue as to whether the attorney had a full and fair opportunity to cross-examine Betty at the deposition, but it is of no consequence, as there is a clear reason why Betty's deposition will not fall under the hearsay exception. Betty is available to testify at the trial, and the former testimony exceptions require the unavailability of the declarant.

Thus, due to her availability, Betty's statements will not be allowed in as former testimony.

However, Betty's statements may be admissible under the "party admission" exception. This exception allows for statements made by the opposing party, being brought in against the opposing party, to be allowed in as hearsay evidence. For corporate entities, any person with "the authority to speak" who makes statements within the scope of that speaking authority will constitute party admissions.

Here, Betty, as president of Meat Supply, most likely had speaking authority as to all corporate issues. Therefore, her statements will be deemed party admissions, so long as they are brought in by the opposing party. Here, ABC's attorney looks to do just that, using her statement against Meat Supply.

Therefore, while not allowable as former testimony, the statement should be allowed in as a "party admission" hearsay exception.

Second Answer to Question Two

1. a) The issue is whether members of an LLC have standing to bring a derivative action suit on behalf of the LLC, when a member has breached his fiduciary duty to the LLC.

In NY the BCL supplies the laws for businesses and corporations. The BCL holds that a derivative action can be brought by shareholders of a corporation, on behalf of the corporation, when the corporation is not acting on its own behalf to save itself from harm. To have standing to bring a derivative action, one must be a shareholder of the corporation at the time of the alleged wrongdoing and at the time of commencement of the action. Further, if the shareholder holds 5% or more interest in the corporation then he does not need to post a bond before commencing the action. However, he must make demand on the corporation to bring the suit itself, unless demand will be futile, due to such circumstances as the majority of the board of the corporation being "interested" in the wrongdoing. If demand is futile, the shareholder must plead so in its complaint. Further, a Limited Liability Corporation ("LLC") is not exactly the same as a regular corporation. However, it is afforded many of the same protections and benefits of a corporation, including limited liability to its members, and is incorporated in the same way as a corporation, by filing with the NY Secretary of State. A LLC can be subject of a derivative suit brought by its members.

Here, ABC is a LLC. Abe ("A"), Bill ("B"), and Cal ("C"), are the sole members of the LLC. B and C each have a 20% interest in the LLC, while A has a 60% interest. Due to this ownership interest in the LLC, each of the members would have standing to bring a derivative suit on behalf

of the LLC if any other member breached a fiduciary duty to the LLC. B and C were both members at the time of A's fraudulent conveyance of Blackacre, breaching the fiduciary duties of loyalty and good faith he owes to the company. They were also members at the time of commencement of the suit. Therefore, B and C have standing to bring suit on behalf of ABC. Further, a demand on ABC to bring suit on its own behalf would be futile, because A is the one who breached the fiduciary duty, and he has majority ownership of ABC. Therefore B and C must plead this in their complaint.

The court should therefore deny A's motion to dismiss the derivative action on the ground that B and C do not have standing.

b) The issue is whether the steps taken by A, B, and C, to form an LLC were enough so that ABC can be recognized "de facto", despite the lack of filing, so that the deed of Blackacre to ABC was valid at the time it was recorded.

De facto corporations are recognized in NY in very limited circumstances. To have a de facto corporation, means that the corporation will be afforded all of the rights of a properly filed "de jure" corporation, despite its improper commencement. There are three things that must be proven to have a de facto corporation: 1) there has to be a governing statute, 2) the incorporator must have acted diligently in attempting to form the corporation, and 3) the corporation must then hold itself out as a corporation, having no reason to know of the defect. If these three things are proven, then the corporation is given de facto status, and is afforded all of the rights of a properly filed corporation.

Here, the first element of having a governing statute is always fulfilled; the governing statute is the NY BCL. Next, the second factor of acting diligently in attempting to form the corporation is also fulfilled. This is seen by the fact that A mailed the articles of organization and the appropriate fee to the NY Dep't of State for filing, Although it could be preferable to hand deliver this to the Secretary of State, by mailing it, it is shown that A acted diligently in attempting to file properly and become a valid LLC. Next, ABC has been holding itself out as a LLC in its dealings. A held it out as an LLC when he transferred Blackacre to the LLC. At the time of the transfer, A, B, and C had no reason to know that the articles of organization were not properly filed, and therefore they were not given de jure status. However, because all 3 elements were met, and the corporation itself did not perform improperly, rather it seems as though it was simply a filing error with the Department of State, it is likely that ABC LLC will be given de facto status.

Therefore, the court should dismiss A's motion to dismiss the derivative action on the grounds that the deed was void because the corporation had not yet been formed at the time of recording. This is because ABC will be considered de facto in existence at that time.

2. The Issue is whether the agreement between ABC and Meat Supply ("MS") violated the statute of frauds.

UCC article 2 applies to all contracts for the sale of goods. Goods under the UCC can be nearly any tangible item or personal property that is for sale. The UCC provides that for any sale of

goods over $500, the contract must comply with the statute of frauds. The statute of frauds requires that these contracts be in writing, and signed by the party to be bound, or his agent, in order to be valid. However, the UCC does provide an exception for this rule when dealing with merchants. Merchants are people who deal in goods of the kind they are dealing with in the contract in question. This exception provides that if a contract for goods over $500 was orally made, but then followed up by a written memo by a merchant, confirming the oral contract, and signed by that merchant, the contract will be saved, and will not violate the statute of frauds. The memo must be sent to the other party of the contract. If the other party to the contract is presumed to have knowledge of the confirmatory writing, and does not object to it within 10 days, then the writing is effective to save the contract completely from violating the statute of frauds.

Here, both ABC and MS are merchants, ABC provides catering goods and services, and MS supplies meat. ABC and MS entered into an oral agreement on July 25, in which ABC agreed to pay meat supply $7,500 in exchange for a supply of meat for a party ABC was catering. This contract is for a sale of goods, meat, and is over $500, therefore, it must be in writing, or fit within the exception, in order to be valid and not violate the statute of frauds. After the oral agreement, a representative of MS sent ABC an email which confirmed the date, price, and oral agreement. ABC would be presumed to have knowledge of the contents of this confirmatory email as it was sent directly to them, and reflected the oral agreement. Further, ABC never objected to the contents of the email. Therefore, the confirmatory memo saved the contract from violating the statute of frauds.

It should also be noted that although the confirmatory email did not contain a price term, a price term is not necessary in a UCC Article 2 contract. All that is necessary is a quantity term. A price term can be read into the contract later based on a reasonable price at the time of delivery.

Therefore, the agreement between ABC and MS did not violate the statute of frauds.

3. The issue is whether ABC's attorney can read Betty's deposition transcript into evidence at trial, even though Betty was available to testify.

Under the NY Rules of Evidence, all evidence admitted in trial must be relevant. To be relevant the evidence should have the tendency to prove or disprove an element of the case. Further, hearsay that does not fall into an exception must be excluded. Hearsay is any out of court statement made by a declarant other than the one testifying, offered to prove the contents of the statement. There are numerous hearsay exceptions. One hearsay exception is for former testimony. Former testimony is allowed to be submitted into evidence, even though it is normally hearsay, if it is sworn testimony that was subject to cross-examination, and the party is unavailable to testify. Another nonhearsay element is statement by an opposing party. However, statements of an opposing party are admissible against that party at any point in trial, even if the party is available to testify.

Here, Betty is the president of MS. She was deposed by ABC's attorney in the action of MS v. ABC. The deposition testimony is most likely relevant, as it was conducted leading up to the trial. It is also hearsay, since it is an out of court statement of Betty's, being offered to prove its

contents. ABC's attorney is seeking to read Betty's deposition testimony into evidence. It therefore must qualify as nonhearsay or fall into a hearsay exception to be read into evidence. It would not fall into the hearsay exception of former testimony. This is because Betty is available to testify. However, it will fall into the "nonhearsay" category of statement of an opposing party. This is because Betty is the president of MS, which is the party to the suit. ABC is offering this evidence into the evidence, and because it is a statement of an opposing party, the deposition will be allowed regardless of whether Betty is available to testify or not.

Therefore, ABC's attorney can read Betty's deposition transcript into evidence, since it is nonhearsay, statement of an opposing party.

QUESTION-THREE
Grant, a widower, had two children, Jill and Jeff, twins born in 1990.

In 2005, Grant duly created an inter vivos trust, reserving to himself the power to amend or revoke the trust. The trust agreement designated Grant's attorney, Ann, as trustee. It was duly executed by both Grant and Ann. The trust agreement provided that the income would be paid to Jill and Jeff according to their needs for their support and education until they reached the age of 30, at which time the corpus of the trust would be paid to them outright, in equal shares. Grant delivered $500,000 in cash and securities to Ann to fund the trust. The trust agreement was silent regarding the right of the beneficiaries to assign their interests in the trust.

Grant suffered substantial business losses in 2009, and he defaulted on a loan he had obtained from B Bank. B Bank obtained a judgment against Grant. In a special proceeding to determine B Bank's right to enforce its judgment against the assets of the trust, the court ruled that the assets of the trust could not be applied to the satisfaction of B Bank's judgment.

Each summer when they were children, Grant had taken Jill and Jeff for a long vacation to his lake house. Jill disliked being at the lake, but Jeff loved the lake house and enjoyed swimming, boating and fishing in the lake with Grant.

In May 2012, Jeff asked Grant for $100,000 to buy a boat, and Grant gave him the money. On December 2, 2012, Grant sent a letter to Jill and Jeff stating:

"I am considering my estate plan. I love you equally, but I intend to leave the lake house to Jeff. Jill never liked it anyway. I will take good care of Jill. The money I gave Jeff to buy his boat will be an advance on his inheritance from my estate. [signed] Your father, Grant."

Jill owed $12,000 to Bella, the owner of a boutique at which Jill purchased designer clothes and accessories on credit. In 2013, Jill, then a law student, executed an assignment of her income interest in the trust to satisfy her debt to Bella. Bella presented the assignment to Ann, who thereafter began paying Jill's share of the trust income to Bella.

NEW YORK STATE BAR EXAMINATION
JULY 2014 QUESTIONS AND ANSWERS

Grant died on March 1, 2014. Grant's will, duly executed on October 2, 2013, has been admitted to probate. The will contains the following provisions:

FIRST: I leave my lake house to my daughter, Jill.

SECOND: I leave the remainder of my estate to my children, Jill and Jeff, in equal shares.

THIRD: I name my attorney, Ann, as my executor.

Grant was survived by Jill and Jeff. His net estate totaled $1,200,000.

Jeff is seeking construction of the FIRST provision of the will, claiming that the provision is a mistake and that the will does not represent Grant's intent to leave the lake house to Jeff. Jeff seeks to offer as evidence Grant's letter of December 2, 2012. Jill claims that she is entitled to the lake house and that Jeff's share in the estate should be reduced by the $100,000 Grant gave him to buy his boat.

(1) Was the court correct in ruling that the assets of the trust could not be applied to the satisfaction of B Bank's judgment against Grant?

(2) Did Ann act properly in paying Jill's share of the income of the trust to Bella?

(3) How should the court rule as to the admissibility of Grant's December 2, 2012 letter with respect to the construction of the FIRST provision of the will?

(4) Should Jeff's share of the estate be reduced by the $100,000 Grant advanced him to buy his boat?

First Answer to Question Three
1. The issue is whether creditors may reach assets held in a revocable trust.

Under the NY EPTL, trusts are irrevocable by default. However, a settlor may reserve the power to amend or revoke the trust at any time. If such power is reserved, then the settlor essentially holds a general, presently exercisable power of appointment over the trust. That is, the settlor can add or remove assets to or from the trust at will, with no restrictions on the use of trust assets; he may even revoke the trust entirely, returning the entire corpus of the trust to himself. Unlike a testamentary power of appointment, a presently exercisable power of appointment maybe exercised at any time, not just in a will. Thus, a settlor who retains the power to amend or revoke a trust effectively has full control over the funds. He does not owe any duty to the beneficiaries of the trust to keep the trust funded or even in existence.

Under New York law, creditors may reach assets over which a person holds a general, presently exercisable power of appointment. This includes revocable trusts. For the law to be otherwise would lead to inequitable results, since debtors could shuffle their assets into and out of trusts to frustrate the valid claims of creditors.

Here, the court was wrong to hold that assets of the trust could not be applied to B Bank's judgment against Grant. Because Grant reserved the power to amend or revoke the trust, he has a general, presently exercisable power of appointment over the trust assets. In effect, he has complete control of them. As such, his creditors may reach the trust corpus in order to satisfy their judgment.

2. The issue is whether an income interest in a trust with spendthrift protection may be assigned.

Under the NY EPTL, all trusts by default contain spendthrift protections unless the trust documents specifically disclaim it. Spendthrift protections prevent trust beneficiaries from assigning their income interests to third parties or creditors. In effect, this protects against unwise decision making by trust beneficiaries who play fast and loose with their money. Creditors of beneficiaries of trusts subject to spendthrift protection can only reach the debtor's income interest in certain circumstances provided for by statute. These circumstances include if a debt relates to unpaid alimony or child support; any income interest above and beyond that needed to provide for the beneficiaries "necessaries" (housing, food, basic items, etc.); and an automatic 10% levy on the income interest, regardless of purpose. If the creditor's interest cannot be satisfied by resort to one of these exceptions, then they have no other remedy except to wait for the eventual distribution of the trust corpus. At that point, the trust assets become the beneficiary-debtor's assets and may be reached by creditors as per usual.

Under the NY Fiduciary Powers Act, trustees are automatically liable for any improper diminution of the trust corpus or improper assignment of an income interest.

Here, the trust was silent as to the right of beneficiaries to assign their income interest. Thus, it automatically contains spendthrift protection, and Jill may not assign her income interest. Bella can take advantage of the 10% levy on the income interest. She can also reach any income above that which Jill needs to provide for necessaries, though it is unclear how much that would be. Bella's only remedy is to wait for distribution of the corpus. Additionally since Ann acted improperly in conveying Jill's income interest to Bella, she will be liable to Jill under the FPA.

3. The issue is whether a prior writing may be admitted to aid in the construction of a will.

Under the NY EPTL, external documents are generally inadmissible to aid in the construction of a will during probate. Wills may not incorporate extrinsic documents by reference, but are instead considered to be the final, completely integrated expression of the testator's intent with regards to the distribution of his property. Extrinsic evidence may only be admitted if there is ambiguity in the will. If there is a latent ambiguity - that is, an ambiguity that is not immediately apparent -then any extrinsic evidence may be admitted, including statements made by the testator to his attorney and statements made to third parties. If there is a patent ambiguity - that is, an ambiguity apparent on the face of the will - then only extrinsic evidence of statements to third parties may be admitted; statements to the drafting attorney are not admissible. The ambiguity must be within the will itself; mere inconsistency with extrinsic evidence is not enough to produce ambiguity. If there is no ambiguity, then no extrinsic evidence is admissible.

Here, there is no patent ambiguity on the face of the will. Similarly, there is no latent ambiguity. While the will is inconsistent with Grant's earlier letter, this does not render the provisions of the will itself ambiguous. It would be hard to find any ambiguity in the phrase "I leave my lake house to my daughter, Jill." Potentially significant is that the letter was written in 2012, while the will was executed in 2013. Grant may have simply changed his mind. Without any ambiguity, the court should rule that Grant's December 2, 2012 letter is inadmissible.

4. The issue is whether a satisfaction of legacy is valid if indicated in a non-contemporaneous letter signed by the donor.

Under the EPTL, an advancement or satisfaction of legacy operates as a pre¬payment of inherited assets that would otherwise be distributed by a will or in intestacy. For example, if a donee would receive $500,000 in a will, but before the death of the testator received a gift of $100,000 constituting a valid satisfaction of legacy, that donee would only receive an inheritance of only $400,000 during the distribution of the estate. For a satisfaction of legacy to be valid, three requirements must be met. First, it must be in writing. Second, it must be signed by either the donor or the donee. Third, the writing evidencing the satisfaction of legacy must be made prior or contemporaneous to the gift itself. If all three requirements are not met, then the purported satisfaction of legacy will operate as a gift and will not reduce the amount that the donee will receive from a will or through intestacy.

Here, Grant gave Jeff $100,000 in May 2012. In December 2012, Grant sent a letter to Jill and Jeff indicating that this gift was a satisfaction of legacy. Because the letter was in writing and was signed by Grant, the donor, it meets the first two requirements for a valid satisfaction of legacy. However, because the writing was not contemporaneous with the gift, but instead was signed and delivered over six months later, the gift will not operate as a satisfaction of legacy. Thus, Jeff's share will not be reduced by the $100,000 advanced to him to buy the boat. Under Grant's will, Jeff will take his equal share with Jill of the $1,200,000 net estate, or in other words, $600,000.

Second Answer to Question Three

1. The issue is whether a revocable trust is accessible by the settlor's creditors.

Under New York EPTL, a trust is irrevocable unless the trust instrument otherwise provides. The EPTL also provides statutory spendthrift protection for income beneficiaries of a trust which prohibits the voluntary and involuntary transfer of the beneficiaries' income interests. However, the spendthrift protection does not apply to any interest retained by a settlor of a trust or a revocable trust. Under the EPTL, a revocable trust is treated like settlor's own property, over which he has full control, as the settlor has the power to revoke, terminate, or amend the trust in his own favor at any time. The law will not allow settlors to evade creditors by simply moving his assets into a trust over which he retains substantial control. Therefore, a revocable trust is fully accessible by a settlor's creditors.

Here, Grant (G) created a revocable trust by reserving to himself the power to amend or revoke in the trust instrument. Therefore, the assets in the trust will be treated by the court as G's own

personal assets and fully accessible to any of G's creditors. Even though G has already delivered the $500,000 in cash and stocks to the trustee, they remain accessible by his creditors.

Therefore, the court ruled incorrectly that the assets of the trust could not be applied to the satisfaction of B Bank's judgment.

2. The issue is whether an income beneficiary of a trust can assign her income interest when the trust instrument is silent on the matter.

Under the EPTL, spendthrift protection is applied to all income interests from trusts as a default. Spendthrift protection prevents the voluntary and involuntary transfer of a beneficiary's income interests, but does not apply to the principal or corpus of the trust without provision in the trust instrument. Under the statute, a beneficiary's creditors can only access the beneficiary's income interest when the money is actually paid out to the beneficiary debtor and before the beneficiary spends the money. However, the beneficiary's creditor may be able to levy upon ten percent of the income from the trust under a judgment by the court according to the CPLR and then apply to the court for access to the income interest amounts in excess of what the beneficiary requires for support and education.

Here, the statutory spendthrift protection applies to both Jill and Jeff's income interests in the trust and Jill's assignment of her income interest to Bella was void. Since the trust instrument was silent on the matter, the statutory default applies and the assignment was void. Therefore Ann did not act properly in paying Bella.

Under NY fiduciary law, the trustee of a trust is held to the duty of loyalty and good faith in regards to the trust. The trustee is charged with managing the trust assets as a prudent investor under the circumstances and is required to conserve the assets of the trust in order to meet the trust's purposes.

Here, Ann's payment to Bella clearly violated her fiduciary duties to the trust as it was in violation of the statutory spendthrift rule. As such, Jeff and Jill have a cause of action against Ann as for a breach of the duty and may petition for an accounting of the trust assets or even damages from Ann.

Therefore, Ann did not act properly in paying Jill's share of the trust income to Bella because the assignment was in violation of the statutory spendthrift rule and she was in breach of her fiduciary duties as trustee for doing so.

3. The issue is whether extrinsic evidence should be allowed in the construction of a will in the absence of ambiguity

Under the EPTL, the testator is presumed to have read his last will and testament and intended the consequences of its provisions in the absence of ambiguity. In order to challenge a specific provision of an otherwise valid will, the challenger must present evidence of ambiguity, undue influence, fraud, or the like. There is latent ambiguity where the provision appears operative and clear on its face but turns out to contain some ambiguity when it is construed. There is a patent

ambiguity where the provision contains a mistake or error on its face and the intention is unclear from a reading of the provision. In both instances, the court will allow extrinsic evidence to aid in the construction of the provision in the form of evidence regarding the testator's relationship with the beneficiaries and statements that the testator had made to his attorney or will preparer. Extrinsic evidence in the form of the testator's statements to third parties will also be admissible in the construction of latent ambiguities but such statements are not admissible to prove patent ambiguities. Without such ambiguities, the court will give the will provisions their plain meaning and proceed accordingly.

Here, there is no latent or patent ambiguity in the first provision. The will very clearly states that Grant wished his lake house to go to his daughter Jill. The will was executed after the letter so the will may simply reflect Grant's change of mind after the letter was sent to his children.

Even though the earlier letter stated otherwise, it will not be admissible in the construction of the first provision of the will because there is no ambiguity in the provision.

4. The issue is whether an inter vivos gift by the testator to a beneficiary is considered as an advancement of the beneficiary's legacy.

Under the EPTL, a testator's will is given effect according to the state of his assets at the time of death and when the will is admitted to probate. Any actions the testator took in regards to his property before death is given full effect with a few exceptions. Generally, an inter vivos gift to a beneficiary will not be considered an advancement of his legacy unless there is a writing contemporaneous to the gift reciting such an intention and signed by the testator or the beneficiary.

Here, the $100,000 that Grant gave to Jeff will not be considered by the court to be an advancement of Jeff's legacy because there was no contemporaneous writing at the time of the gift. Even though the later letter noted Grant's intention for the amount to be an advancement on Jeff's inheritance and was signed by Grant, it does not make the earlier payment an advancement because the letter came six months after the gift. In order for the $100,000 to be considered an advancement, the writing must have been made contemporaneous with the gift. A six month delay is clearly not contemporaneous.

Therefore, Jeff's legacy under Grant's will will not be reduced by $100,000 because the earlier gift did not qualify as an advancement of his legacy.

QUESTION-FOUR

Husband and Wife were married in 1995 and have two children, Son, who is 17 years old, and Daughter, who is 19 years old. Last year, Husband commenced an action for divorce on the ground of irreconcilable differences, and Wife counterclaimed for divorce on the ground of cruel and inhuman treatment.

At trial, the parties stipulated to proof of their income and assets, and the following additional facts were established: (1) Husband openly engaged in several extramarital affairs during the marriage, causing Wife to suffer embarrassment and emotional distress; and (2) Husband amassed significant gambling debt during the marriage and, in advance of filing for divorce, he withdrew $50,000 from a joint bank account to pay the debt.

The court granted the parties a mutual judgment of divorce and awarded Wife custody of the children. The judgment provided for visitation rights to Husband and for child support. It granted Wife spousal maintenance and divided the marital assets 65% to Wife and 35% to Husband. In support of its decision, the court cited Husband's infidelities, gambling losses and withdrawal of funds from the joint account.

Husband has appealed on the grounds that, as a matter of law, the court improperly considered Husband's marital and economic fault in making its determination of equitable distribution.

Husband had always enjoyed a close relationship with his children until the divorce proceedings, when they learned about Husband's infidelities. They became hostile towards him, and their relationship with him deteriorated. In the past year, Daughter has unilaterally refused to visit, communicate, or have anything at all to do with her father. She openly declares her hatred of and lack of respect for him because of his infidelities, and she has refused his repeated attempts to mend their relationship. Wife has not openly supported Daughter in her decision to reject her father and refuses to become involved in their conflict.

Wife is bitter over the divorce and has a strained relationship with Husband. She is not forthcoming to him with information about their children's personal lives. Son arranges his own work schedule, his after-school activities, and his social calendar, which often conflict with Husband's visits. Wife leaves it up to Son to communicate with his father, which Son fails to do. As a result, Husband has had sporadic visits with Son in the past year, despite Husband's ongoing efforts to maintain a relationship. Son has made no effort to foster a relationship with his father.

Six months ago, Husband ceased making his child support and maintenance payments. Last week, he filed a motion to modify the parties' judgment of divorce seeking to suspend or terminate child support and maintenance on the ground that Wife has not encouraged, and has therefore interfered with, his visitation rights. Alternatively, Husband seeks to terminate child support for Daughter on the ground that she is constructively emancipated. Wife has opposed the motion and has filed a cross-motion seeking a judgment for the accumulated child support and maintenance arrears.

(1) Is Husband likely to succeed in his appeal on the ground that the court improperly:

(a) considered Husband's marital fault in determining equitable distribution?

(b) considered Husband's economic fault in determining equitable distribution?

(2) How should the court rule on Husband's motion:

(a) to suspend or terminate child support and maintenance on the ground that Wife wrongfully interfered with his visitation rights?

(b) alternatively, to terminate child support for Daughter on the ground that she is constructively emancipated?

(3) Assuming that Husband is successful in terminating child support and maintenance based on Wife's wrongful interference, may the court cancel the child support and maintenance arrears?

First Answer to Question Four
1. a) Husband's marital fault

The issue is whether a spouse's marital fault can be considered by the court when making an equitable distribution.

Under the NY DRL, the courts follow the equitable distribution approach when distributing marital assets after a divorce. The court must first find the separate property and convey this property to the respective spouse it belongs to. After, the court must make an equitable distribution of the marital property, which is any property acquired by either spouse during the marriage that was not given to them as a gift or specific testamentary bequest. When making an equitable distribution, the court can consider all equitable factors, including: (1) the age of the spouses; (2) the length of the marriage; (3) the earning capacity of each spouse; (4) who was granted custody of the children; (5) how much separate property each spouse received; (6) active appreciation of assets; and (7) any factor that the court deems necessary and just to consider. However, the court cannot consider marital fault when making an equitable distribution of assets. The court may only do so if the marital fault "shocks the conscience." Finally, the court is not bound to split the marital assets equally among the spouses, but rather aims to split the distribution in an equitable manner.

In this case, Husband openly engaged in several extramarital affairs during the marriage which suffered the Wife to suffer embarrassment and emotional distress. The court cited to Husbands infidelities as one of the reasons for dividing the marital assets 65% to Wife and 35% to Husband. However, the court incorrectly considered Husband's infidelities in dividing the marital assets because marital fault is generally not considered by the court in making an equitable distribution. Several extramarital affairs may not be appropriate behavior for Husband, but this behavior should not "shock the conscience" of the court, even if the wife did suffer embarrassment and emotional distress due to Husband's infidelities. These activities would not warrant favoring the division 65% to 35% in favor of Wife.

Therefore Husband is likely to succeed on his appeal on the ground that marital fault should not be considered.

It should be noted that marital fault can be considered in determining maintenance payments.

b) Husband's economic fault

The issue is whether the court can consider a spouse's economic fault in determining equitable distribution.

Under NY DRL, the court can consider the above mentioned factors in 1(b) when making an equitable distribution; including any factor it deems necessary and just and wrongful or illegal actions that a spouse has taken to diminish the value of the marital property. A spouse cannot remove or conceal marital assets with the intent to deceive creditors or frustrate a future judgment in favor of his ex-spouse. The court may consider these actions when deciding an equitable distribution issue. Generally, a joint bank account has a right of survivorship that each spouse is entitled to 50% of, regardless of what contributions were made during the marriage. If any spouse withdraws more than 50% of the account, the joint bank account is severed and is now held as a tenancy in common.

In this case, Husband decreased the value of the marital assets by amassing significant gambling debt during the marriage. Husband also withdrew $50,000 from a joint bank account to pay the debt. The court will have to consider whether Husband was entitled to this $50,000 as his share of the joint account. However, the court can consider that the money was paid to pay off gambling debts, which certainly decreased the value of the marital assets.

Therefore, Husband is likely not going to succeed in his appeal based on the grounds that the court incorrectly considered his economic fault.

2. a) Terminate child support

The next issue is whether a person has wrongfully interfered with an ex-spouse's visitation rights by not attempting to foster a relationship between the children and the ex- spouse.

Under NY DRL, spouses must follow a court's divorce decree or can be held in contempt of court, including for failing to make maintenance payments, child support payments, or failing to let another parent visit the children. A parent has the rights to visit his children even if he is behind on maintenance payments; visitation is a highly protected right in New York. However, a spouse only wrongfully interferes with visitation when she proactively prohibits or is an obstacle to the ex-spouse's visitations rights. The children have a right to refuse to visit with one parent, especially when the children have reached an age of sound mind and full capacity in the eyes of the law. The court will always consider the best interests of the children in these matters. Lastly, child support and maintenance awards can only be changed in the proponent spouse proves there has been a substantial change in circumstances.

In this case, Husband's children Son and Daughter have grown hostile towards Husband because of his infidelities. Additionally, Wife is not acting as a barrier or prohibiting Husband from visiting with Daughter because Wife refuses to become involved in their conflict. Wife has also not openly supported Daughter's decision, so Daughter is still free to visit with Husband if she wants. Daughter is also 19 years old, and can make these decisions for herself because she is a

legal adult with the capacity to decide she does not want to visit her father because of her hatred and lack of respect for him.

In the Son's case, Wife has more of a duty to ensure that Son continues his relationship with his father because Son is only 17. However, Son also has shown that he is very independent because he arranges his own work schedule, after-school activities, and social calendar. Son chooses to schedule these events, which conflict with Husband's visits. Wife has not actively prohibited Husband to visit because she leaves it up to Son to communicate with his father, but Son chooses not to. This is not Wife's fault, as her children are now grown and can make independent decisions on the matter.

Therefore, Husband's motion to terminate child support and maintenance on the ground that Wife wrongfully terminated his visitations rights should be denied.

b) Daughter's support

The next issue is whether a child has constructively emancipated from her parent when the child has cut off all communication with the parent.

Under the NY DRL, a parent is obligated to provide economic support for their children until the children turn the age of 21. Support can last beyond the age of 21 when the child is continuing education. A child is no longer entitled to support when the child has emancipated from the parent's house, either by marrying and moving out of the home or leaving the home and declaring the intent to emancipate from the parents. A child can constructively emancipate from a parent by cutting off all communication with a parent and severing all ties with the parent, as long as the parent shows a willingness to be involved in the child's life. The court will also consider the best interests of the child in this matter.

In this case, Daughter is still 19 and therefore entitled to support from Husband for another 2 years. However, Daughter has now refused to visit, communicate, or have anything at all to do with Husband. Husband has tried to mend the relationship, but Daughter has refused his repeated attempts. Thus, Husband has shown a willingness to be involved in Daughter's life, which she has refused.

Therefore, Husband's motion should be granted because Daughter has constructively emancipated.

3. Child support and maintenance

The issue is whether child support and maintenance in arrears can be cancelled if future payments are cut off.

Under the NY DRL, a spouse must pay child support and maintenance payments, and if he does not do so, the court can order a lien on his property. If the court does cancel future payments, this does not relieve the spouse's duty to pay any child support and maintenance payments that are past due or in arrears.

In this case, Husband owes child support and maintenance stemming from the court's final divorce decree. If Husband is behind on his payments, he must make these payments regardless of whether his future payments are cancelled by the court.

Therefore, the court cannot cancel the child support and maintenance payments in arrears.

Second Answer to Question Four

1. a) The issue is whether a court may consider the fault of the parties in determining the equitable distribution of marital property subsequent to a divorce.

Under the New York Domestic Relations Law, courts have broad discretion in determining the equitable distribution of marital property (i.e., property acquired during the marriage that is not subject to an exception to the general rule that all property acquired by spouses during the course of the marriage constitutes marital property subject to equitable distribution by a court). Courts may consider the age and wealth of the parties, the parties' prospects for financial success, the duration of the marriage, the dependency of one of the spouses on the other, whether a party is receiving custody of children, and anything else the court deems "just and appropriate" under the circumstances. However, courts may not consider marital fault in determining equitable distribution of marital property unless the spouse's conduct "shocks the conscience of the court," an exceedingly high standard that is seldom satisfied. For instance, one spouse's adultery is not a valid consideration in a court's equitable division of marital property.

In this case, the court considered Husband's marital fault in determining the equitable distribution of the marital property because it cited his infidelities as a ground for its division of marital assets. While Husband "openly engaged in several extramarital affairs," causing the wife to suffer "embarrassment and emotional distress," it is unlikely that a court would find that this behavior "shocks the conscience" such that consideration of marital fault would be appropriate in an equitable division of marital property.

Thus, Husband is likely to succeed in his appeal on the ground that the court improperly considered Husband's marital fault in equitably dividing the marital property.

b) The issue is whether a court may consider the economic fault of the parties in determining the equitable distribution of marital property subsequent to a divorce.

As stated above, under the New York Domestic Relations Law, courts may not consider marital fault in determining the equitable distribution of marital property. However, courts may consider the economic fault of the parties in equitably dividing marital property. Economic fault of the parties is one of a wide range of considerations (see above) that a court may take into account when equitably dividing marital property (with the exception, as stated, of marital fault)-- a range that includes anything the court deems "just and appropriate."

In this case, Husband's accumulation of gambling debts and his emptying of a bank account owned jointly with Wife were proper considerations in allocating marital property between the

parties. Under these circumstances, it would be "just and appropriate" for the court to favor Wife in the distribution of the marital property, given the Husband's squandering of their marital assets.

Thus, Husband is unlikely to succeed in his appeal on the ground that the court improperly considered Husband's economic fault in determining equitable distribution.

2. a) The issue is whether a custodial spouse interferes with a visiting spouse's visitation rights by failing to apprise the other former spouse of the children's schedules and failing to encourage a relationship between the visiting spouse and the spouses' children. An additional issue is whether such interference constitutes a substantial change in circumstances warranting the suspension or termination of child support and maintenance awards.

Under the New York Domestic Relations Law, visitation rights are granted in the vast majority of cases, save in the rare case where visitation rights would pose a substantial risk to the child or children. To give such rights effect, the New York Domestic Relations Law requires that former spouses not unduly interfere with visitation by actively attempting to thwart attempts to spend time with the spouses' children. The custodial spouse is expected to take reasonable efforts to make the children available for visitation (e.g., by generally keeping the visiting spouse abreast of the children's schedules) and to avoid erecting undue barriers to visitation. However, the custodial spouse is not obligated to encourage her children to cultivate a relationship with the visiting spouse, nor is she required to micromanage her children's lives so as to make them available to the visiting spouse. Mere failure to facilitate is not sufficient for interference. The custodial spouse is not responsible for the independent decisions of her children, particularly of children old enough to make responsible, well-informed decisions.

In this case, Wife has merely failed to facilitate relationships between the children and Husband. While Wife has an obligation not to interfere with the husband's ability to visit with Son and Daughter, Son and Daughter were free to arrange their own schedules as they wished. That they arranged their schedules without including their father does not imply that Wife wrongfully interfered with Father's visitation rights. The Wife has done nothing to stoke her daughter's hatred for her father; in fact, she has refused to involve herself in her daughter's relationship with her father. Nor has Wife arranged her son's schedule so as to erect undue barriers to visitation. Rather, the son arranged his schedule of his own accord. While the Wife may have some obligation to inform the father of Son's schedule and to disclose major events in the children's lives, both children are old enough to make responsible decisions regarding communication with Husband free from Wife's influence. Indeed, Daughter has passed the age of majority, which in New York is 18 years of age, and while Son is a year shy, he remains old enough to be responsible for his estrangement from his father--that is, Wife does not bear responsibility such that she can be charged with interfering with visitation rights. Accordingly, Wife has not wrongfully interfered with Husband's visitation rights.

An additional issue is whether, where an interference with visitation rights to be found, such interference would constitute a substantial change in circumstances warranting a suspension or termination of child support and maintenance. Under the New York Domestic Relations Law, child support orders will be modified only in extreme circumstances. Such modifications are

very rare and require a showing of extreme hardship. For maintenance awards, a showing of a substantial change in circumstances is necessary for a modification.

As stated above, Wife's conduct was not enough to qualify as a "wrongful interference" with Husband's termination rights. Were the court to find such an interference, however, it would likely conclude that the interference did not rise to the level of extreme or unusual hardship necessary to modify--let alone to suspend or terminate, as the husband here seeks-- an award of child support. However, it may find that such an interference constituted a "substantial change in circumstances" warranting a modification--even, perhaps, a suspension or termination--of a maintenance award.

In conclusion, the court should deny Husband's motion to suspend or terminate child support and maintenance on the ground that Wife wrongfully interfered with his visitation rights.

b) The issue is whether a child who has reached the age of majority is "constructively emancipated" when she severs all ties with a parent despite the parent's attempts to cultivate a relationship and openly declares her hatred for the parent.

Under the New York Domestic Relations Law, a parent is obligated to pay child support until the child reaches the age of 21. In its discretion, the court may extend this window if the circumstances indicate a relationship of dependence between the child and the parent. A parent is not relieved of his child support duties merely because the child has reached the age of majority. However, in certain circumstances, a child may be deemed "constructively emancipated" where the child has completely severed all ties for a sufficient period of time, and there is no indication that an amicable relationship could resume between the child and the parent in the near future. A court will consider the period of estrangement, the child's age, and any acrimony between the parent and child in determining whether a child has been constructively emancipated. On a finding of constructive abandonment, a court may, in its discretion, terminate child support payments.

In this case, Daughter has apparently severed all ties with Husband by unilaterally refusing to "have anything at all to do with her father." She has openly declared her hatred and lack of respect for her father, and she has repeatedly rebuffed his attempts to cultivate a relationship with her, thus indicating a very high level of acrimony in the relationship and hostility toward Husband. Moreover, Daughter is 19 years old, past the age of majority, giving further support for a conclusion that a finding of constructive abandonment is warranted. While the facts do not indicate how long the period of estrangement has lasted, they appear to provide sufficient grounds for a finding of constructive abandonment, assuming the estrangement has endured for a significant period of time.

Thus, the court should grant Husband's motion that Daughter has been constructively emancipated and terminate Husband's child support payments.

3. The issue is whether an order terminating child support and maintenance relieves support and maintenance payments that are in arrears, or whether it operates only prospectively.

Under the New York Domestic Relations Law, a court may terminate child support or maintenance payments to be paid in the future. However, any child support or maintenance payments that have already accrued or that are past due may not be terminated. A court's termination of a child support or maintenance payment operates only prospectively. There is no retroactive negation of already liquidated debts.

In this case, Husband's child support and maintenance payments have been in arrears for six months. These debts would already have accrued (i.e., they would have been already liquidated debts) at the time the court issued the order terminating the child support and maintenance payments.

Thus, the court may not cancel the child support and maintenance payments in arrears.

QUESTION-FIVE

Ed and Deb are separated, and their only child, Scott, who is 17 years old, resides with Deb. In order for Ed to take Scott to a ball game after school, Deb loaned Ed her car, on which she maintained an insurance policy with all provisions required and all exclusions permitted by New York law. Prior to arriving at the school to pick up Scott, Ed had become intoxicated at a tavern owned and operated by Bill. Ed was visibly intoxicated when Bill served him his last drink.

After picking up Scott, while driving on a residential street, Ed failed to see a stop sign at an intersection. At that time, Lynn had just left the house of her mother, Meg, and was crossing the street using a crosswalk at the intersection. Ed slammed on his brakes but struck Lynn. Meg was standing in her front yard near the intersection and witnessed the accident. Lynn was seriously injured with multiple fractures and internal injuries and was transported to the local hospital. Ed was charged with, and subsequently convicted of, driving while intoxicated.

Lynn duly commenced an action against Ed, Deb and Bill to recover damages for the pain and suffering caused by her injuries. Meg duly commenced an action against Ed to recover damages for the serious emotional injuries she suffered when she witnessed the accident.

As a result of the accident, Scott suffered a mild concussion and a broken bone in one of his fingers, while Ed suffered lacerations and bruises. Both Scott and Ed seek to have their medical expenses paid by Deb's automobile insurance company. In addition, Scott duly commenced an action against Ed seeking to recover damages for his pain and suffering. The complaints of Lynn, Meg and Scott each allege all of the relevant foregoing facts.

Ed, Deb and Bill have each moved to dismiss Lynn's complaint for failure to state a cause of action.

Ed has moved to dismiss Meg's complaint for failure to state a cause of action on the ground that he breached no duty of care owed to her.

Ed has also moved to dismiss Scott's complaint for failure to state a cause of action on the ground that it is an intra-family suit.

(1) Are Scott and Ed entitled to have their medical expenses paid by Deb's insurance company?

(2) How should the court rule on the motions to dismiss Lynn's complaint made by (a) Ed, (b) Deb and (c) Bill?

(3) Can Meg recover against Ed for her emotional injuries?

(4) How should the court rule on Ed's motion to dismiss Scott's complaint?

First Answer to Question Five

1. The issue is whether an intoxicated driver and his passenger are entitled to recover from the car owner's insurance for damages incurred during an accident the intoxicated driver caused.

Under the New York Insurance law, the owner of a vehicle must obtain both liability and no-fault insurance. No-fault insurance covers accidents between different vehicles and with pedestrians. A person entitled to coverage under no-fault insurance may recover all medical expenses, up to $2000 in lost wages per month (or 80% of the monthly wage if that amount is less than $2000) for up to three years and a miscellaneous benefit of $25 per day for up to three years. Certain groups are exempt from no-fault insurance coverage. These are, inter alia, (i) intoxicated drivers, (ii) fleeing felons and car thieves, and (iii) drag racers. The owner's no- fault insurance is available to all occupants of a vehicle. Each injured occupant in an accident may recover from the insurance covering that vehicle without regard to negligence on the part of any person involved.

Here, Deb had insured her car in accordance with NY law and therefore had obtained no fault insurance. Because Ed is using the car with Deb's permission, he is generally entitled to recover for his medical expenses. However, Ed drove while being intoxicated. He is therefore excluded from coverage as he falls within one of the groups of persons expressly states as exempt from no-fault coverage.

Scott, however, is not subject to this exclusion because he was not an intoxicated driver and no other exclusion is applicable to him. The fact that the driver was intoxicated does not take away coverage from all other occupants in the vehicle. For his claim to be recoverable he need only show his medical expenses because the no-fault insurance scheme does not require a showing of negligence of any person.

Therefore, Ed may not recover under Deb's insurance policy. Scott, however, may recover.

2. a) The issue is whether Lynn may recover from Ed for her pain and suffering.

In New York, a plaintiff may recover for her pain and suffering caused by the negligence of another person if the plaintiff can show that (i) the defendant owed her a duty of care, (ii) that

duty was breached, which was the (iii) actual and proximate cause of (iv) damages. The duty of care owed to foreseeable plaintiffs is the care of a reasonably prudent person. Where a state law exists that aims at preventing a certain kind of injury to a certain group of persons and the Plaintiff can show that his injury qualifies and he is among the protected group, a violation of the law by the defendant is sufficient to establish negligence per se. This means that the trier of fact does not have to decide whether a duty was owed and a breach occurred. Rather, it the plaintiff can establish that the defendant's act violated the law protecting the plaintiff from his injuries and the trier of fact finds that the defendant so acted, the duty and breach thereof are conclusively established. In New York, only the violation of state laws may give rise to a finding of negligence per se; the violation of municipal regulations is only some evidence of negligence. Pain and suffering can be recovered under a negligence claim.

Here, Lynn may show that the violation of the laws prohibiting drunk driving by Ed establish negligence per se, because she was both in the group of persons to be protected by these laws (other participants in traffic and pedestrians) and she incurred an injury to be prevented by this statute (injury from car accidents). She may use Ed's conviction for drunk driving as evidence that his conduct violated the statute.

Alternatively, Lynn can also show that Ed owed her a duty because as a pedestrian she is a foreseeable plaintiff regarding accidents occurring from the use of the car Ed drove on the road. Lynn was a foreseeable plaintiff because she was crossing the road and was thus in the zone of danger of Ed's driving. Ed owed her a duty to drive like a reasonably prudent person under the circumstances. This duty was breached because Ed was driving while intoxicated and a reasonably prudent person would not do this.

Ed's driving was the actual cause of her injury because but for his failure to break in time she would not have been injured. Ed's driving is also the proximate cause for her injury because it was foreseeable that a person would step out onto the crosswalk and would be injured if Ed did not break in time. Lynn can also establish her damages since she has suffered injury and pain from the accident.

Therefore, Ed's motion to dismiss Lynn's complaint should be denied.

b) The issue is whether an injured third person can recover from a car owner for an injury inflicted by an authorized driver.

Under the common law, a car owner is not vicariously liable for injuries inflicted by the driver of a vehicle. However, in New York, a vehicle owner is liable for the injuries caused by the driver of the car if the driver acted with permission and did not intentionally inflict the injury. There is a presumption that a person driving another's car acted with permission.

Here, Lynn may recover from Deb because Deb is the owner of the car with which Ed injured Lynn because Deb authorized Ed to use the vehicle and Ed did not commit an intentional tort. The fact that Deb did not permit Ed to drive drunk does not change Lynn's possibility to recover. It is sufficient that Deb gave Ed general permission to use her vehicle.

Therefore, Deb's motion to dismiss Lynn's complaint should be denied. If Deb is found liable and Lynn recovers from her, Deb has an indemnity claim against Ed.

c) The issue is whether a plaintiff can recover against a tavern owner who served alcohol to the person who later negligently injured the Plaintiff due to intoxication.

New York has enacted a Dram Shop Act. Under this act, a person is liable for the damages knew or should have known that the other person was intoxicated.

Here, Bill is a tavern owner who served drinks to Ed. Lynn can recover from her injuries because when Bill continued to serve alcohol, he knew or at least should have known that Ed was intoxicated because Ed's intoxication had risen to a level where it was visible. Bill should not have served alcohol to Ed as he was getting intoxicated; his failure to stop serving makes him liable to Lynn.

Therefore, Bill's motion to dismiss Lynn's complaint should be denied

3. The issue is whether a bystander who observed a tort against a close relative from a distance can recover for emotional distress from the tortfeasor.

In New York, a person is entitled to recover for emotional distress suffered in a bystander situation if the person is (i) a close relative of the person actually injured (parent, child or spouse), (ii) the person was at the scene of the accident, (iii) the person was a contemporaneous observer of the accident and (iv) person was himself in the zone of danger and (v) the person suffered physical manifestations due to the distress.

Here, Meg is generally among the group of persons entitled to recover for emotional distress for Lynn's injury because Lynn is her daughter and they therefore have the requisite close relationship. Meg was also at the scene of the accident because she was standing in her front yard which is right close to the intersection where the accident happened. She furthermore saw the accident happen. However, Meg was not in the zone of danger herself because she was standing in her front yard and the car Ed was driving did not come close to her. Furthermore, Meg may not recover because she has not suffered any physical manifestations of her emotional distress.

Therefore, Meg cannot recover against Ed for her emotional distress.

4. The issue is whether a tort claim can be brought by one family member against another family member.

At common law, family members were immune from tort suits brought against them by other family members. Intra family immunity has been abolished in New York. Family members can assert tort claims against one another in the same way non-family members can.

Here, Ed moved to dismiss solely on the ground that Scott is his family member alleging intra-family immunity. His motion may not be granted because such immunity does not exist in NY anymore.

Therefore, Ed's motion to dismiss Scott's claim should be denied.

Second Answer to Question Five

1. The issue is whether an intoxicated driver and his passenger are covered under the no-fault insurance policy of the car's owner.

In New York, every driver is required to purchase no-fault insurance. That insurer is required to pay for injuries sustained by the owner, any driver authorized by the owner, passenger and bystander injured as a result of the operation of use of the insured automobile. Fault does not matter and does not in any way influence the amount that will be paid for injuries. However, certain individuals are excluded from coverage under the no-fault insurance scheme, and cannot recover from the insurer. These non-covered individuals include an intoxicated driver. Covered individuals are entitled to have their medical expenses paid and a $2,000 a week stipend (which should be no more than 80% of wages), but cannot recover pain and suffering.

Here, Deb presumably has no-fault insurance since it is required under New York law. While she gave Ed permission to drive her car and thus he would ordinarily be covered, Ed was intoxicated while he operated the car. He is therefore not covered and Deb's insurance cannot be required to pay for his medical expenses. Scott, however, was a passenger in the car. He was not intoxicated. Therefore, his medical expenses will be paid by Deb's insurance company.

Therefore, Ed is not entitled to have his medical expenses paid by Deb's insurance company but Scott is.

2. a) Ed's motion to dismiss

The issue is whether an individual, here Lynn, who can recover under a no-fault insurance policy, can also sue that individual in tort

Procedurally, in ruling on motion to dismiss for failure to state a cause of action should only be granted, the court should give every favorable inference of fact to the nonmoving party, and should grant the motion only if there is no basis in law on which the nonmoving party could prevail. A suit for negligence requires the plaintiff to plead that the defendant owed the plaintiff a duty of care, that the defendant breached that duty, that defendant's breach was the actual and proximate cause of plaintiff's damages, and that the plaintiff did in fact sustain damages. Under New York's no-fault insurance scheme, a bystander who is hit by a car with no-fault insurance is entitled to have that insurer pay his or her medical expenses. Someone who is injured by another covered person is barred from bringing a tort claim on that same accident. However, if the individual sustained serious injuries, they can still bring a separate tort action and recover medical expenses and also pain and suffering. Serious injuries include death, dismemberment, loss of an organ or it's functioning, and fractures.

Here, Lynn would be covered by the no-fault insurance on Deb's car since she was a bystander hit by Ed while driving the car. Ordinarily, she would be barred from bringing a tort claim on the same accident, but she sustained serious injuries from the accident. Specifically, she sustained multiple fractures. Therefore, she is not barred from bringing a tort claim. Moreover, she has sufficiently pleaded a cause of action for negligence by Ed. Ed, as driver, owes a duty to foreseeable plaintiffs, which would include pedestrians like Lynn. Ed breached his duty of care to Lynn by operating his vehicle while drunk, and likely as a result, by failing to see or stop at a stop sign at an intersection where Lynn was crossing in the crosswalk. A reasonably prudent person would not operate a car while drunk, and would obey all stop signs. Ed's breach was the actual and proximate cause of Lynn's injuries. By failing to stop at the stop sign, he struck Lynn. And Lynn suffered damages as a result - multiple fractures and internal injuries. Therefore, the court should deny Ed's motion to dismiss for failure to state a cause of action.

b) Deb's motion to dismiss

The issue is whether the owner of a car can be held vicariously liable for the torts committed by someone to whom they lent the car.

Under New York law, an owner is vicariously liable for the torts committed by an individual to whom they grant permission to use their car. An owner will be held vicariously liable even if the individual to whom they granted permission does not drive, so long as that individual is present when the vehicle is operated. The only exception is when the individual to whom the driver gave permission to drive commits an intentional tort. Then the owner will not be vicariously liable.

Here, Deb gave Ed permission to drive her car. He negligently struck Lynn while driving Deb's car with her permission. He did not commit an intentional tort.

Thus, Deb is vicariously liable for Ed's tort while driving her car. And as detailed above, Lynn can sufficiently plead all four elements necessary to establish that Ed negligently injured her.

Therefore, the court should deny Deb's motion to dismiss Lynn's complaint for failure to state a cause of action.

c) Bill's motion to dismiss

The issue is whether a tavern owner can be held liable for the torts of an individual to whom he or she served alcohol.

Under New York's Dram Shop Act, plaintiffs who have been injured by an intoxicated person have a cause of action against tavern owners. The plaintiff must establish two things. First, that the tavern owner served the intoxicated individual. And second, that the intoxicated individual whom the tavern owner served was visibly intoxicated at the time the tavern owner.

Here, Lynn is an individual who was negligently injured by an intoxicated person, Ed. Bill is a tavern owner. Bill served Ed, and Ed was visibly intoxicated when Bill served him. Therefore,

Bill can be held liable for torts subsequently committed by Ed while intoxicated. As previously established, Lynn can sufficiently plead a cause of action for negligence by Ed.

Therefore, the court should deny Bill's motion to dismiss Lynn's complaint for failure to state a cause of action.

3. The issue is whether a bystander can recover for negligent infliction of emotional distress when she sees her daughter struck by a car but is only standing on the front yard when the accident occurs.

Under New York law, individuals owe a duty to not cause negligent infliction of emotional distress to individuals who meet three criteria. First, the individual must either be the parent, child, or spouse of the person who is actually injured. Second, the individual must witness the accident as it happens. And third, they must be in the "zone of danger" themselves when the accident occurs. In addition to showing a breach of this duty and actual and proximate causation, an individual must suffer physical manifestations of their distress in order to recover for negligent infliction of emotional distress.

Here, Meg only meets two of the three criteria in order to be a foreseeable plaintiff to whom Ed owed a duty of care not to negligently inflict emotional distress. She meets the first criteria since she is Lynn's mom. Second, she witnessed the action as it happened. However, she does not meet the third criteria. She was not in the zone of danger when the accident occurred - in this case, likely the crosswalk itself. Instead, she was standing in her front yard near the intersection. Moreover, it is not clear from the facts whether she suffered any physical manifestations of her emotional distress, which is required.

Therefore, Meg cannot recover against Ed for her emotional injuries.

4. The issue is whether a child can sue a parent for pain and suffering sustained as a result of the parent's negligent driving.

Unlike some states, New York has abolished intra-family immunity. Parents can sue children and children can sue parents.

Here, Ed has moved to dismiss Scott's complaint for failure to state a cause of action on the ground that it is an intra-family suit. However, there is no such thing as intra-family immunity in New York. Therefore, this is an invalid ground on which to seek dismissal. Moreover, Scott can adequately make out a prima facie case for negligence on the part of Ed. Ed, as driver, owes a duty to foreseeable plaintiffs, which would include his passengers, like Scott. Ed breached his duty of care to Scott by operating his vehicle while drunk. A reasonably prudent person would not operate a car while drunk, and would obey all stop signs. Ed's breach was the actual and proximate cause of Scott's injuries. By failing to stop at the stop sign, he struck Lynn, and in the accident Scott also suffered damages. And Scott suffered damages as a result - a mild concussion and a broken bone in one of his fingers.

Therefore, the court should deny Ed's motion to dismiss Scott's complaint for failure to state a cause of action on the ground that it is an intra-family suit.

MPT-ONE
MPT - In re Linda Duram

Examinees' law firm represents Linda Duram, whose request for leave under the Family and Medical Leave Act (FMLA) was denied by her employer, Signs Inc. Duram had requested five days' leave to accompany her grandmother, who suffers from severe health issues, to an out-of-town funeral. Signs Inc. denied the request, asserting that the FMLA did not entitle an employee to leave to care for a grandparent; applied only to caring for someone in the person's home or a hospital, not to travel; did not apply to funeral leave; and required 30 days' notice. When Duram returned from the funeral, Signs Inc. told her that it would dock her pay for the three days of unauthorized leave and that any future unapproved absences would result in termination. Examinees' task is to draft a demand letter to Signs Inc. persuading it to reverse its denial of leave and retract the threat of termination. In doing so, examinees must set forth the case for why Duram was entitled to FMLA leave and address Signs Inc's specific objections. The File contains the instructional memorandum, the firm's guidelines for drafting demand letters, email correspondence between Duram and Signs Inc., an affidavit by Duram, and a letter from the physician treating her grandmother. The Library contains excerpts from the FMLA, excerpts from the Code of Federal Regulations, and two cases.

First Answer to MPT
BURTON AND FINES LLC
Attorneys at Law
963 N. Oak Street
Swansea, Franklin 33594

July 31, 2014

Mr. Steven Glenn
Vice President, Human Resources
Signs Inc.

Dear Mr. Glenn:

My name is Henry Fines. I am an attorney-at-law licensed in Franklin. Ms. Linda Duram, an employee of yours, has sought legal counsel from our firm with regard to a matter arising under the Family and Medical Leave Act ("FMLA"). The purpose of this letter is to advise you of Ms. Duram's potential claims under the FMLA and to seek a prompt resolution of this claim mutually satisfactory both to Ms. Duram and to Signs.

The facts that we understand them are as follows. On July 7, 2014, Ms. Duram requested five days' leave under the FMLA to accompany her grandmother, Emma Baston, to the funeral of Ms. Duram's sister, so that Ms. Duram could assist Ms. Baston in traveling to the funeral, and so that Ms. Duram could provide Ms. Baston with the medical assistance Ms. Baston would need during that time. Ms. Duram further noted that her grandparent "raised" her. Ms. Duram's request was denied by Signs Inc. on four bases: (1) that the FMLA does not apply to the care of grandparents; (2) that the FMLA only applies to care provided in a home or a medical facility and not during accompaniment in traveling; (3) that the FMLA does not apply in the case of funerals; and, (4) that Ms. Duram did not give the 30 days' notice required under the FMLA.

For the reasons set out below, it is our belief that Ms. Duram's request under the FMLA was wrongly denied, and furthermore that as a result Ms. Duram meets the requirements for a legal claim of interference with FMLA leave. Specifically, contrary to Signs Inc.'s assertions, Ms. Duram "was entitled to take leave under the [FMLA]," and she "provided sufficient notice of [her] intent to take leave." Shaw v. BG Enterprises (15th Cir. 2011).

I. MS. DURAM'S GRANDMOTHER WAS A QUALIFYING RELATIVE FOR FMLA PURPOSES

Under 29 U.S.C. § 2612(a)(1)(C), FMLA-covered employees are allowed to take FMLA leave "[i]n order to care for the . . . parent[] of the employee, if such . . . parent has a serious health condition." 29 U.S.C. § 2611(7) defines "parent" for FMLA purposes as a "biological parent" or "an individual who stood in loco parentis to an employee when the employee was a son or daughter." In Carson v. Houser Manufacturing (15th Cir. 2013) the Fifteenth Circuit noted that in loco parentis is "a term typically defined by state law." The Carson case also noted that in loco parentis in the state of Franklin "refers to a person who intends to and does put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation," regardless of whether this arrangement is legally formalized.

As Ms. Duram advised in her initial FMLA request, Ms. Duram's grandmother "raised [her]." Enclosed please find an affidavit from Ms. Duram in which she describes her relationship with her grandmother. Based on Ms. Duram's original email to you and this affidavit, we believe it is apparent that Ms. Duram's grandmother is a qualifying relative for FMLA purposes based on their in loco parentis relationship pursuant to 29 U.S.C. § 2611(7). The Carson case notes that in determining whether an in loco parentis relationship exists, Franklin courts may consider "the child's age, the child's degree of dependence, or the amount of support provided by the person claiming to be in loco parentis." Carson noted that an earlier Franklin case, Phillips v. Franklin City Park District (Fr. Ct. App. 2006) had held that an in loco parentis relationship existed where a grandmother had enrolled a child in school, saw to his medical care, provided day-to-day financial support, and participated in the child's school and community activities, even where the child's mother had never formally given up parental rights. The Carson court contrasted the actions of the grandmother in Phillips with a grandmother whose actions were "not that dissimilar from what many grandparents do without assuming a parental role," such as giving advice and attending a college graduation.

Here, Ms. Duram's relationship with her grandmother is remarkably similar to that between the plaintiff and his grandmother in the Phillips case, cited with approval in Carson. According to Ms. Duram's affidavit (again, enclosed), Ms. Duram's grandmother, with her grandfather provided day-to-day food and clothing, took Ms. Duram and her siblings to medical appointments, and supported them in their schoolwork and school activities during the lengthy periods that Ms. Duram's parents were absent from her life. Thus, it is clear that under Franklin law, Ms. Duram's grandmother, Ms. Baston, stood in loco parentis to her and is thus a qualifying relative for FMLA purposes under 29 U.S.C. § 2611(7), in direct contrast to the first ground given by Signs, Inc. for denying Ms. Duram's FMLA leave.

II. MS. DURAM WAS ENTITLED TO TAKE LEAVE TO PROVIDE MEDICAL CARE FOR HER GRANDMOTHER WHILE TRAVELING TO A FUNERAL

29 U.S.C. § 2611(B) states that a "serious health condition" of a qualifying relative which entitles an FMLA employee to leave may include "continuing treatment by a health care provider." Thus, in direct contradiction to the second ground given by Signs Inc. for denying FMLA leave, FMLA leave may be given for care that does occur outside the residential or inpatient context contemplated in 29 U.S.C. § 2611(A). Signs Inc. did assert, however, that in any event FMLA leave is prohibited to assist in medical care needed for the travel of a relative. This assertion is incorrect for the reasons set out below.

29 C.F.R. § 825.112 restates 29 U.S.C. § 2611(B) and provides that a "serious health condition" of a qualifying relative may justify FMLA leave. 29 C.F.R. § 825.113 defines "serious health condition" as including "continuing treatment by a health care provider as defined in §825.115." § 825.115(3) defines the complete phrase "serious health condition involving continuing treatment by a health care provider," derived from these previously-stated regulations, as including "any period of incapacity or treatment for such incapacity due to a chronic serious health condition" (emphasis added), which includes a health condition "requiring periodic visits . . . for treatment" or a health condition "continuing over an extended period of time." "Treatment" is defined as including "examinations" and "evaluations" of the condition" in § 825.113.

Enclosed please find a letter from Dr. Maria Oliver, in which she sets forth sufficient details to establish that Ms. Baston, Ms. Duram's grandmother, has a "serious health condition involving continuing treatment by a health care provider." Dr. Oliver explains that Ms. Baston's end-stage congestive heart failure requires "weekly" monitoring by Dr. Oliver as part of a course of treatment which has continued over ten years. Dr. Oliver further describes Ms. Baston's "incapacity . . . due to [this] chronic serious health condition" in noting that Ms. Baston uses a wheelchair and oxygen, and regularly has fluids pumped from her heart. Thus, Ms. Baston has a "serious health condition involving continuing treatment by a health care provider" such that care for this condition provided by an FMLA-covered relative may justify FMLA leave under 29 C.F.R. § 825.112 and 29 U.S.C. § 2611(B).

The remaining question is presented in Signs Inc.'s third ground for denying FMLA leave, in that the FMLA leave would not cover medical care given in the course of travel to a funeral. The Fifteenth Circuit considered a similar question in the Shaw case, cited above, and held that "care for," in the sense of 29 U.S.C. § 2612(a)(1)(C), requires an employee seeking FMLA leave to

"be in close and continuing proximity to the person being cared for" and that the employee "offer some actual care to the person with a serious health condition," in observance of the

Congressional purpose of "entit[ling] employees to take reasonable leave to care for the serious conditions of specified family members" exemplified in the FMLA. The Shaw court held that the plaintiff was not entitled to use FMLA leave to attend a funeral only because this test set out by the court had not been met.

Here, the enclosed letter of Dr. Oliver states that Ms. Duram has been trained in transporting Ms. Baston to and from her wheelchair, administering medication and oxygen, and providing the other "personal care" Ms. Baston requires. In direct contrast to the unsuccessful plaintiff in Shaw, Ms. Duram will be providing "actual" care to Ms. Baston, whose "serious health condition" is established above as a "chronic" one. Shaw did not stand for the proposition that medical care to attend a funeral was never an appropriate use of FMLA leave, but rather for the limited proposition that where no medical care would be provided at a funeral, FMLA leave could not be taken. Ms. Duran's case is the exact opposite of that presented in Shaw, and thus her leave should have been permitted.

III. MS. DURAM GAVE THE REQUISITE NOTICE UNDER THE FMLA

Here, 29 C.F.R. § 825.203 plainly resolves the last ground for denial of FMLA leave which Signs provided, that 30 days' notice was required before leave was taken. § 825.203 notes that where requests for FMLA leave are "unforeseeable," an employee must merely provide "notice to the employer as soon as practicable under the facts and circumstances of the particular case," not categorically within 30 days' notice as Signs stated. Furthermore, the regulation requires that the content of the employee's notice merely provide "sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request," which may include information showing that "The employee's family member is under the continuing care of a health care provider." Ms. Duram provided this in her initial email to you in noting that Ms. Baston "needs me to care for her and to give her medications and therapies."

* * *

To restate, based on the above facts, we believe that Ms. Duram's request under the FMLA was wrongly denied and that she has a claim for interference with her leave under the FMLA. At this time, Ms. Duram seeks revocation of her probationary status as well as reinstatement of the two vacation days she was forced to take when her FMLA leave was unlawfully denied.

I look forward to receiving your response to this letter within two weeks. If I do not receive a response from you after two weeks, please note that our intent will be to seek all remedies for Ms. Duram to which she is legally entitled, including but not limited to remedies in a lawsuit under the FMLA.

Yours very truly,
Henry Fines, Esq.

NEW YORK STATE BAR EXAMINATION
JULY 2014 QUESTIONS AND ANSWERS

Second Answer to MPT

BURTON AND FINES LLC
Attorneys at Law
963 N. Oak Street
Swansea, Franklin 33594

July 29, 2014

Steven Glenn, VP of Human Resources Signs Inc.

Dear Mr. Glenn:

I am an attorney and I have been retained by Ms. Linda Duram, on whose behalf I write to you today. I am writing to request that Signs Inc. reverse its decision denying Ms. Duram leave pursuant to the Family and Medical Leave Act (FMLA) and retract its decision to place Ms. Duram on probation and the threat of termination. I am confident that this letter will persuade you that Ms. Duram was entitled to FMLA leave because her grandmother qualifies as a parent with a serious medical condition and Ms. Duram actually cared for her during the 5 day trip and provided the requisite notice to Signs Inc.

Congress enacted the FMLA in order to balance the demands of the workplace and with the needs of families by creating a right for employees to take unpaid leave to care for a parent who has a serious health condition. As you know, Ms. Duram is a full time employee as required by the FMLA and pursuant to which Ms. Duram requested leave on July 7, 2014 so as to care for her grandmother while traveling to her sister's funeral. Ms. Duram notified you immediately upon learning that she would require a 5 day leave which was necessary because Ms. Duram cares for her grandmother who is too ill to care for herself. Ms. Duram had no choice but to take the 5 day leave despite Signs Inc.'s improper denial of July 7, 2014.

1. The FMLA Applies to Ms. Duram's Grandmother

The FMLA applies to Ms. Duram's grandmother in this situation because her grandmother stood in loco parentis to Ms. Duram. (29 U.S.C. § 2611). Although the FMLA does not define the term "in loco parentis," pursuant to the laws of the State of Franklin, the term refers to a person who holds himself out as a lawful parent by assuming typical parental obligations with respect to the child, but does not formalize the relationship through legal proceedings such as adoption or custody. (Carson v. Houser Manufacturing, Inc. (15th Cir. 2013)). In determining whether someone stands in loco parentis, the court may consider the child's age, degree of dependence, or the amount of support provided to her. For example, in Phillips v.

Franklin City Park District (Fr. Ct. App. 2006) the court found that a grandfather stood in loco parentis to his grandson for whom the grandfather had provided a home from the age of four as well as financial support, attending school conferences and the like. This was sufficient even though the grandson's mother was alive and did not relinquish her parental rights.

Ms. Duram's grandmother, Emma Batson, along with her husband, raised Ms. Duram and her brother since the age of six due to their parents' substance abuse problem. Ms. Duram's parents were in and out of jail and rehab during which time she and her brother lives with the Batsons. When Ms. Duram's parents were present, they lived with Ms. Duram and her brother in the Batson's home and the Batsons were the primary caregivers. The Batsons provided Ms. Duram with food, clothing, shelter, drove her to doctor's appointments, helped her with her homework after school, attended after school activities and loaned her money for a car to travel to and from college. Emma Batson was more than a grandmother; she took on the role of a mother and therefore qualifies as a parent even though she did formalize the relationship through adoption of custody proceedings. This is unlike the case of Carson v. Houser Manufacturing, Inc. where the grandson never lived with the grandfather and the grandfather's support amounted to that of a typical grandparent -attending graduation and providing moral support and financial support during college.

Therefore, Emma Batson is Ms. Duram's "Parent" for purposes of the FMLA. 2. Travel and Funeral

The FMLA allows for leave to care for a parent who has a serious health condition. The Court of Appeals has defined "care for" to require (1) close and continuing proximity to the person being cared for and (2) offer some actual care to the person with a serious health condition. (Shaw v. BG Enterprises 2011). The FMLA defines a "serious health condition" as one that requires continuing "treatment" by a health care provider. Such treatment includes a regimen of continuing treatment such as a course of prescription medication or therapy requiring special equipment such as an oxygen tank. (CFR 852.112-13).

Ms. Duram was in close and continuing proximity to her grandmother during the 5 day leave. This is unlike the case in Shaw v. BG Enterprises where the employee had requested leave to take care of his daughter while she was in the hospital, but during the leave, the employee returned home to make arrangements and was not continually at the hospital. The act does not specify where the care must take place, as long as the employee is in close and continuing proximity to the person receiving care. Therefore, the FMLA includes caring for a parent while traveling. Furthermore, Ms. Duram's grandmother has a serious medical condition as evidences by the attached letter from her doctor, Maria Oliver. Ms. Duram is familiar with how to use the oxygen tank, heart pump and wheelchair that her grandmother requires and knows how to administer her medications. This certainly qualifies as "actual care" and is unlike the case of Roberts v. Ten Pen Bowl (12th Cir. 2006) where an employee requested leave to provide psychological support for her son.

Additionally, while the act does not apply to an employee seeking leave to attend the parent's funeral, it does cover caring for a parent while attending a funeral. For example, in Shaw, the employee's requested leave to care for his daughter included leave to attend her funeral after she passed away. That is not the case here; Ms. Duram cared for her grandmother while attending a funeral and thus is covered by the FMLA.

Therefore, Ms. Duram provided care for her grandmother as required by the FMLA.

3. Requisite Notice

Ms. Duram provided Signs Inc. with the requisite notice because she informed Signs Inc. of her need as soon as practicable. The FMLA requires an employee to provide 30 day notice only where the need for the leave is foreseeable such as a birth. However, where the leave is due to unforeseeable circumstances, the notice must be made as soon as practicable under the circumstances. (CFR 825.303). Here, Ms. Duram could not anticipate that her great aunt would pass away. Ms. Duram notified Signs Inc. the morning after learning of the tragic news and as such provided Signs Inc. with the notice required under the FMLA.

In light of the foregoing, we respectfully request that Signs Inc. immediately reverse its decision denying Ms. Duram FMLA leave and retract its decision to place Ms. Duram on probation with the threat of termination.

Very truly yours,
Henry Fines