

July 2014 NY BAR EXAM ESSAY QUESTION  
 PROF-RES: Solicitation/Referral Fees (Seperac Est. score of 2/10)  
 CRIMLAW: Search and Seizure--Warrant (Seperac Est. score of 1/10)  
 CRIMLAW: Justification (Seperac Est. score of 0/10)  
 CRIMLAW: Burden of Proof (Seperac Est. score of 2/10)

Seperac Estimated Score of 26.4 (versus actual score of 25.66)

Lowest scoring essay in the Seperac Essay database  
 Jul2014-Essay-001-ID 013-Wrote-Score 25.66

July 2014 NY BAR EXAM ESSAY QUESTION  
 PROF-RES: Solicitation/Referral Fees (Seperac Est. score of 5/10)  
 CRIMLAW: Search and Seizure--Warrant (Seperac Est. score of 4/10)  
 CRIMLAW: Justification (Seperac Est. score of 3/10)  
 CRIMLAW: Burden of Proof (Seperac Est. score of 2/10)

Seperac Estimated Score of 37.2 (versus actual score of 34.62)

Examinee HL  
 Jul2014-Essay-001-ID 056-Typed-Score 34.62

July 2014 NY BAR EXAM ESSAY QUESTION  
 PROF-RES: Solicitation/Referral Fees (Seperac Est. score of 3/10)  
 CRIMLAW: Search and Seizure--Warrant (Seperac Est. score of 4/10)  
 CRIMLAW: Justification (Seperac Est. score of 5/10)  
 CRIMLAW: Burden of Proof (Seperac Est. score of 2/10)

Seperac Estimated Score of 38.6 (versus actual score of 38.66)

Jul2014-Essay-001-ID 014-Typed-Score 38.66

July 2014 NY BAR EXAM ESSAY QUESTION  
 PROF-RES: Solicitation/Referral Fees (Seperac Est. score of 8/10)  
 CRIMLAW: Search and Seizure--Warrant (Seperac Est. score of 7/10)  
 CRIMLAW: Justification (Seperac Est. score of 5/10)  
 CRIMLAW: Burden of Proof (Seperac Est. score of 2/10)

Seperac Estimated Score of 54.2 (versus actual score of 38.66)

Jul2014-Essay-001-ID 038-Typed-Score 38.66

July 2014 NY BAR EXAM ESSAY QUESTION  
 PROF-RES: Solicitation/Referral Fees (Seperac Est. score of 7/10)  
 CRIMLAW: Search and Seizure--Warrant (Seperac Est. score of 8/10)  
 CRIMLAW: Justification (Seperac Est. score of 7/10)  
 CRIMLAW: Burden of Proof (Seperac Est. score of 2/10)

Seperac Estimated Score of 58.6 (versus actual score of 38.66)

Examinee J  
 Jul2014-Essay-001-ID 002-Typed-Score 38.66

WORD COUNT: 492	WORD COUNT: 762	WORD COUNT: 705	WORD COUNT: 666	WORD COUNT: 1141
<p>(1) Attorney's payment of bonus to Stu</p> <p>Under the rules of Professional Conduct (RPC), an Attorney may not unduly solicit clients. Clients have to be identified and Attorneys are responsible. To this end, in stating how the client came to him -- the source of the client. Furthermore, such referral fees are not permitted in general. The issue here concerns precisely whether the bonus payment of \$500 constitutes such a bonus or referral fee that is against the RPC.</p> <p>Assuming that Dan approached Stu, and that neither Stu nor Attorney separately approached Dan to solicit or pressure him into Attorney's service, prima facie the bonus payment is proper. This is particularly emphasized by the fact that parties did not have an express agreement. This may be similar to the allowed quid quo pro arrangement which law firms may have with one another. Such arrangements constitute friendly and frequent referrals which are entirely permissible under the RPC.</p> <p>(2) Motion to suppress computer</p> <p>The issue is whether the court correctly decided its motion to suppress the computer on the basis that the search warrant was invalid for lack of probable cause.</p> <p>The search warrant granted by the court to Detective was on the basis of Detective's submission of Larry's affidavit. An affidavit made in good faith, and with the necessary facts and identification information, is valid and sufficient for the purposes of showing probable cause, in which the Detective will be deemed to have. Detective, based on Larry's affidavit, had probable cause independent of independent verification. Therefore, the court was incorrect in its motion to suppress the computer. Dan's rights under the due process clause, applicable to the states via the 14th Amendment, have not been violated.</p> <p>(3) (a) Court instruction of jury on defense of justification</p> <p>The question is whether it is appropriate for the court to instruct the jury on the defense of justification. The defense involves a question of laws rather than a question of fact, and so is not appropriate for the jury to decide, without proper instruction.</p> <p>Therefore, the court should instruct the jury clearly since it involves a technicality of the law.</p> <p>(b) Content of Jury instruction</p> <p>Assuming the court instruct the jury as to the defense of justification, it should alert the jury that the default position on burden of proof, is for prosecution to prove all elements of the crime beyond a reasonable doubt. If there is any doubt, then judgment must be for the defendant.</p> <p>Since the defendant seeks to raise the defense of justification, he should do so based on the standard of a preponderance of evidence. It is then for prosecution to disprove beyond a reasonable doubt the defense. Moreover, justification is a defense rather than an element of the crime which prosecution must establish. If the jury finds that the defense of justification applies, then they must find the Defendant not guilty as he is excluded due to a reason exculpating him.</p>	<p>Question #1:</p> <p>The first issue is whether an attorney can pay a non-attorney a referral fee based on a retainer from a client. Under New York Professional Responsibility law, an attorney generally may not share in his client fees with a nonlawyer unless the non-attorney is paid by the law firm through salary payments or regular bonuses. In this case, the Dan's retainer fee was paid to Attorney as part of the client fees to obtain Attorneys services and the bonus to Stu was paid directly from that retainer. Therefore, the exception to when non-attorneys can receive money relating to client's fees does not apply. Although the payment to Stu was technically called "a bonus", it does not fall under the regular payment of bonuses to non-attorney employees under an employment agreement (there was no agreement between the parties) and does not change the fact that the money was paid directly out of the retainer fees.</p> <p>Question #2:</p> <p>The second question is whether the court granted a motion to suppress evidence recovered from this warrant search by finding the warrant was defect. The motion was correctly granted to suppress the computer because it was evidence obtained a search under the 4th Amendment with a defective warrant under requirements of New York law, the situation does not meet the requirements of a search without a warrant, and New York does not recognize "good faith" efforts of policemen that are acting under a defective warrant. Under the 4th Amendment of the Constitution and New York statutory law, a search falls under the 4th Amendment if it is done by a government official and is trespassing where a person has a reasonable expectation of privacy. Any search that falls under the 4th Amendment should be carried out with a valid warrant based on probable cause and particularity. In this case, the search of Dan's apartment fell under the 4th amendment because a dwelling is a place where a person has a reasonable expectation of privacy and the search was carried out by Detective, who worked for the local precinct.</p> <p>Since the search falls under the 4th amendment, there should be a valid search warrant to search the apartment. Any search that falls under the 4th Amendment should be carried out with a valid warrant based on probable cause and particularity. For the element of probable cause, New York law requires that an element that is based on an informant must be independently verified by an officer in order to meet the requirement of probable cause. The information from Larry was not independently verified, so this warrant is defective for lack of probable cause.</p> <p>Furthermore, any evidence obtained under an illegal search under the 4th amendment is inadmissible in court unless the search was done on without a warrant or with a good faith basis by the officers relying on a defective warrant. In this case, there were no circumstances that suggested the search could be done without a warrant and New York law does not recognize the good faith exception to officers using a defective warrant.</p> <p>Therefore, the motion was correctly granted to suppress the computer because it was inadmissible evidence obtained through search under the 4th Amendment with a defective warrant, the situation does not meet the requirements of a search without a warrant, and New York does not recognize "good faith" efforts of policemen that are acting under a defective warrant.</p> <p>Question 3</p> <p>(a) The first part of the third question is whether the court should instruct the jury on Dan's defense of justification. Under the New York Penal Law, a court can instruct a jury on any defenses that the Defendant raises in an action because it is up to the jury to decide whether the Defendant met its burden of proof for that defense. Therefore, since Dan's attorney brought up the defense, the court should instruct the jury on the elements of the defense and allow the jury to make the final decision of fact.</p> <p>(b) The second part of the third question is regarding the kind of burden of proof the Defendant has for the defense of justification in New York. Under New York Penal Law, a defense for justification is an affirmative defense that must be shown by a preponderance of the evidence by the Defendant. Therefore, since the Defendant is asserting this defense, the jury must look at the facts of the case, including Dan's reasons for his actions and the fact that a pedestrian was killed to decide if the burden of proof showing justification is met.</p>	<p>1. The issue is whether the payment of referral bonus to a paralegal was proper. Under NY's Rules of Professional Conduct referrals for business are proper if the following steps are taken: 1) the client who was referred is informed that the bonus is being paid 2) the bonus does not come from the client's funds but from the attorney's general operating revenues. 3) if the payment is to another attorney the referral fees is fair and reasonable as viewed by another attorney independently.</p> <p>Here Stu is a paralegal so the NY Rules for professional conduct don't apply to Stu, but to the Attorney. The facts here are unclear whether the attorney informed Dan of the arrangement the attorney had with Dan. However, the facts indicate that attorney paid Stu from Dan's retainer, which can only be applied to costs arising from the case.</p> <p>Therefore, even though Stu is not a licensed attorney, the attorney he received the referral fee from did it improperly because it was given as part of the retainer.</p> <p>2. The issue is whether the evidence should be suppressed because the search warrant was improper.</p> <p>Under the 6th amendment individuals are constitutional granted the right to be free from search and seizure. This especially applies to searches and seizures in places where one has the expectation of privacy, as one does in one's home. Therefore the grounds under which a search warrant is to be granted are strict. There must be demonstrated probably cause that is reviewed by a impartial magistrate. The terms of the search warrant must be specific and besides the specific item or items listed on the warrant, only evidence that is out in the open in clear view can be seized. Probable cause of the warrant can be based on any variety of facts or statements.</p> <p>Here, the probable cause was based on a statement which was then made into an affidavit which was sworn to. Larry's identity was verified prior to the Detective applying to the court for a search warrant. The magistrate used the sworn affidavit as evidence of the probable cause to properly issue the search warrant to search the apartment of the computer. The search was properly conducted and only the computer was seized. The claim that Larry's reliability was not independently verified is not supported by the facts given, which indicated that his identity was verified.</p> <p>Therefore the court should not have granted the motion to suppress the evidence of the burglary and criminal possession of stolen property.</p> <p>3. a) The issue is whether the court can instruct the jury on the defense of justification.</p> <p>The reasonableness of the excuse for the actions will be judged by the trier of fact. The judge is required to inform the jury of any defenses to the accused crime. Here Dan was intoxicated based on the blood alcohol test. It will be up to the jury to determine whether or not Dan was justified in jumping into a moving vehicle to reportedly keep an unmanned vehicle from causing any injury or destruction to the public.</p> <p>Therefore, it is proper for the court to instruct the jury on the defense of justification.</p> <p>b) The issue is how the court should instruct the jury as the burden of proof for the defense of justification.</p> <p>Under NY Penal Law the defense of justification must be proven by the defendant by the preponderance of the evidence, unlike an affirmative defense where the prosecution has the burden to prove beyond a reasonable doubt. The defense of justification is used when there is a reasonable explanation for the criminal actions which would negate the elements of the crime of which the defendant is accused.</p> <p>Here Dan was arrested and charged with operating a motor vehicle while intoxicated. It will be upon Dan to show by the preponderance of the evidence that although there was a blood alcohol test that showed he was intoxicated the public service he attempted to render out weighed the facts of his operating the motor vehicle while intoxicated.</p> <p>Therefore, the jury should be instructed to weigh the facts and evidence of the crime against the preponderance of evidence submitted by Dan for his justification of his actions.</p>	<p>1) Attorney's payment of the bonus to Stu was not proper.</p> <p>The first issue is whether the Attorney's payment of the bonus to Stu was proper. Under NY Rules of Professional Conduct, a lawyer is not allowed to pay referral fees to another in order to solicit clients. A person may refer someone to a lawyer, but the lawyer is not allowed to pay him for the reference. In case of payment of referral fees, a lawyer may be subject to disciplinary proceedings. In our fact pattern, Stu referred Dan to Attorney to represent him in a criminal case. Stu and Attorney did not have an express agreement, but Attorney paid Stu a \$500 bonus as a referral fee from Dan's retainer. Since the payment of referral fees is not allowed, Attorney may be subject to disciplinary proceedings. Therefore, Attorney's payment of the bonus to Stu constituted a referral fee, and it was not proper.</p> <p>2) The court did not decide correctly the motion to suppress the computer</p> <p>The second issue is whether the court decided properly on the motion to suppress the computer on the ground that the search warrant was invalid for lack of probable cause.</p> <p>The Fourth Amendment protects individuals from unreasonable searches and seizures. As a general rule, searches should not interfere with the reasonable expectation of privacy that an individual has at his own home. Therefore, a search is legal only if it is executed pursuant to a warrant issued by an independent and neutral magistrate and on the basis of probable cause. Specifically, probable cause may be represented by third parties' tips and observations. In NY, an anonymous tip needs further corroboration to establish probable cause.</p> <p>Here, Detective found the stolen computer at Dan's apartment while executing a valid search warrant. The search warrant was granted on the basis of Larry's affidavit, and by submitting a proper application to the court. Larry's observations constituted probable cause for a search warrant. Indeed, the observations did not come from an anonymous tipper, but Larry's identity was identified at the police station and he submitted an affidavit.</p> <p>In conclusion, the search warrant was issued on the basis of probable cause and, therefore, it was valid. Court incorrectly granted the motion to suppress the computer.</p> <p>3a) The court should instruct the jury on the defense of justification</p> <p>The next issue is whether the court should instruct the jury on the defense of justification. Operating a motor vehicle while intoxicating is a crime punishing an individual who drives a motor vehicle under the effects of illegal substances. A justification may be a defense, if the motor vehicle was not working properly, and the injury would have occurred in any case.</p> <p>The facts indicate that Dan, after drinking heavily, saw a truck started to move downhill. He ran inside, and failed to stop it because the brakes did not work. The truck struck a pedestrian. Therefore, the elements of the crime of operating a motor vehicle while intoxicated are met. However, Dan may raise the defense of justification: indeed, the motor vehicle did not work properly and, in despite of Dan's efforts, the pedestrian would have been injured in any case. In conclusion, the court should instruct the jury on the defense of justification.</p> <p>3b) The jury should be instructed that defendant should prove his defense by preponderance of the evidence.</p> <p>The last issue is how the jury should be instructed as the burden of proof for the defense of justification.</p> <p>In a criminal trial, the prosecutor has to prove all the elements of the charge beyond any reasonable doubt. The defendant may raise a defense to be proved by preponderance of the evidence.</p> <p>Here, the prosecutor should prove the crime of operating a motor vehicle while intoxicated beyond any reasonable doubt. However, the burden of proof as to a defense of justification is preponderance of the evidence.</p> <p>Therefore, the court should instruct the jury that defendant should prove his defense by preponderance of the evidence.</p>	<p>(1) The issue whether an attorney may properly enter into a fee referral arrangement with a non-attorney.</p> <p>In New York, Lawyers are responsible for abiding by the New York Rules of Professional Conduct. Attorneys are strictly prohibited from entering into fee referral arrangements with non-attorneys. In the instant case, "Attorney" has entered into a fee arrangement with a non-attorney in his office. Stu. Attorney pays Stu a "bonus" everytime Stu refers attorney a new client. Attorney has sole discretion in the payment and amount of the bonus. In addition, the parties have no express agreement. This type of arrangement is the exact type of situation that is strictly prohibited by the NY Rules of Professional Conduct. Not only does Attorney have a professional duty to abide by the Rules of Professional Conduct, but the arrangement is inherently inappropriate because Attorney has superior bargaining power. Without an express agreement and without specific terms regarding the payment and amount of bonus to be paid, Attorney has given himself superior power in his arrangement with Stu.</p> <p>In addition, Attorney may be subject to discipline by an ethics board for entering into such an improper fee arrangement with a non-attorney.</p> <p>In conclusion, Attorney's payment of the bonus to Stu was improper because it is strictly prohibited by the New York Professional Rules of Conduct.</p> <p>(2) The issue is whether the court properly granted Attorney's motion to suppress the computer on the grounds that the search warrant obtained by the police lacked probable cause.</p> <p>The 4th Amendment of the Constitution protects individuals from unreasonable searches and seizures. Unless a specific exception applies, the 4th Amendment requires that the government/policia must obtain a search warrant before searching an individual's person or home. It is well established that one's home is highly protected by the 4th Amendment and absent exigent circumstances (i.e. destruction of evidence or hot pursuit), rarely will a warrantless of a home be upheld. A valid search warrant must contain (i) probable cause with sufficient facts or affidavits testifying to the facts; (ii) particularity; and (iii) it must be authorized by a neutral magistrate. A search warrant not meeting such requirements will not be deemed valid, unless the officer relied on such facts with good faith.</p> <p>In the instant case, Larry provided the local police with information that his friend Dan admitted to Larry that he had committed several burglaries in the neighborhood and had even showed him where he was holding the stolen goods. Larry provided this information to the police immediately after receiving it and the police asked Larry to sign an affidavit to those facts. Upon receiving the affidavit, the police then verified Larry's identity and applied to the court for a search warrant. Here, the police properly obtained the search warrant because they had sufficient probable cause that Dan had committed the burglaries. In addition, the police had a signed affidavit from Larry stating that Dan admitted to such burglaries and Larry was able to properly direct the police to the location of the stolen goods (i.e. the computer). All such facts contained in the search warrant constituted sufficient probable cause that would allow a neutral magistrate to make a determination that the police were applying for a valid search warrant under the 4th Amendment. In addition, the search warrant was sufficiently particular because Dan was friend's with Larry and Dan knew where Larry lived and knew the exact location of the stolen goods. With such information in the search warrant, it could be validly executed. It is important to note that prior to the application for the search warrant, the police took steps to verify Larry's identity. Verification of Larry's identity coupled with a signed affidavit is sufficient for a neutral magistrate to determine that the search warrant contained probable cause and particularity. In conclusion, the court improperly granted Attorney's motion to suppress the computer because the search warrant obtained by the police contained sufficient probable cause and met the search warrant requirements under the 4th Amendment.</p> <p>(3a) The issue is whether the court should instruct the jury on Dan's defense that he was justified in operating a vehicle while intoxicated.</p> <p>In New York, it is a crime if a person operates a motor vehicle while intoxicated with a blood alcohol content (BAC) of .08 or higher. A defendant operating a vehicle with a BAC of .08 or higher will be liable for injuries to any victims. Operation of a motor vehicle has been held to even constitute steering a vehicle while it is being and while the vehicle is in a neutral position. In the instant case, Dan observed a double parked vehicle moving down a hill on a busy street after he was leaving a bar. Dan attempted to stop the vehicle, but the vehicle's brakes did not work, the car instead hit a pedestrian. Here, Dan clearly entered the vehicle for the purpose of stopping it from causing damage or hitting another person. Despite being intoxicated, Dan's intent was to apply the brakes and stop the vehicle from moving. It may be argued that Dan was not operating the vehicle because he had no control over the vehicle due to it's failed brakes system. This may even be distinguished from a situation where a person is steering a vehicle that is being pushed while in a neutral position because that person would still have sufficient control over the steering and brakes. Here, a trier of fact may find that Dan did not have sufficient control over the vehicle to constitute operation of it.</p> <p>Therefore, a court may submit a defense of justification to the jury to determine whether Dan had sufficient control over the vehicle to constitute operation of the vehicle</p> <p>(3b) The issue is what burden of proof should the court instruct the jury on as to Dan's defense of justification.</p> <p>In a criminal trial, the prosecution always has the burden of proof to prove each and every element of the case by beyond a reasonable doubt. A judge may not instruct a jury to consider a defendant's burden in proving an element of the crime, such an instruction would be considered burden shifting and inherently prejudicial to the defendant which is grounds for a mistrial. Here, the judge may instruct the jury that Dan has a burden of proof of preponderance of the evidence solely for his defense of justification. The judge must include that whether Dan sufficiently proves his defense or not the prosecution must still prove each and every element of the case beyond a reasonable doubt.</p> <p>Therefore, if the court instructs the jury on Dan's defense of justification they may instruct the jury that it is Dan's burden to prove his defense by a preponderance of the evidence but that the prosecution still must prove their case beyond a reasonable doubt.</p>

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Seperac Estimated Score of 38.6 (versus actual score of 38.66)

July 2014 NY BAR EXAM ESSAY QUESTION  
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 CRIMLAW: Search and Seizure-Warrant (Seperac Est. score of 6/10)  
 CRIMLAW: Justification (Seperac Est. score of 8/10)  
 CRIMLAW: Burden of Proof (Seperac Est. score of 2/10)

Seperac Estimated Score of 48.8 (versus actual score of 43.52)

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 CRIMLAW: Justification (Seperac Est. score of 4/10)  
 CRIMLAW: Burden of Proof (Seperac Est. score of 2/10)

Seperac Estimated Score of 46.8 (versus actual score of 43.52)

July 2014 NY BAR EXAM ESSAY QUESTION  
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 CRIMLAW: Justification (Seperac Est. score of 3/10)  
 CRIMLAW: Burden of Proof (Seperac Est. score of 1/10)

Seperac Estimated Score of 41.4 (versus actual score of 46.45)

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 CRIMLAW: Justification (Seperac Est. score of 5/10)  
 CRIMLAW: Burden of Proof (Seperac Est. score of 3/10)

Seperac Estimated Score of 41.4 (versus actual score of 46.45)

Examinee M Jul2014-Essay-001-ID 006-Typed-Score 38.66	Jul2014-Essay-001-ID 046-Typed-Score 43.31	Jul2014-Essay-001-ID 043-Typed-Score 43.52	Close to passing TYPED essay in the Seperac Essay database Jul2014-Essay-001-ID 008-Typed-Score 46.45	Jul2014-Essay-001-ID 026-Typed-Score 46.45
WORD COUNT: 878	WORD COUNT: 645	WORD COUNT: 917	WORD COUNT: 804	WORD COUNT: 745
<p>(1) The issue is whether the Attorney's payment to Stu Paralegal was proper. According to the Professional Rules a conduct, an attorney may not pay others to solicit referrals for work. Moreover, an attorney must not commingle funds for the funds provided by a client, including funds used to pay employees. In this case, Stu is a friend of Dan so it is very likely that Stu would refer Dan to Attorney, in general, rather than specifically for commission. However, the facts also note that Attorney often returns pay for Stu's referrals. Additionally, the payment is solely whenever Attorney decides, without any bonus agreement or the like. Since Attorney solicitation's through Stu are improper and unethical, Attorney's payment to Stu through the retainer obtained by Dan was improper.</p> <p>(2) The issue is whether the Court correctly granted the motion to suppress the computer.</p> <p>Pursuant to the 4th Amendment Constitutional right against unlawful search and seizure, as incorporated into the 14th Amendment and applied to the States, a state actor may not subject an individual to an unlawful search and seizure. While there are exceptions where a warrant, based on probable cause, with requires more than a reasonable suspicion, is used to obtain particularized items, the warrant must be based on specific facts of reliability, regardless of a neutral magistrate. Moreover, New York does not allow evidence merely on a finding of an officer's good faith in executing a facially valid warrant. Where an illegal search or seizure has occurred, the Court may use the judicially created 4th Amendment protection device known as the Exclusionary Rule in order to suppress unlawfully obtained evidence.</p> <p>In this case, Larry had personal knowledge as to Dan's unlawful conduct. Dan specifically bragged to Larry about the computer, several burglaries and then went even further to show Larry the stolen computer. Larry's decision to report to the police Dan's unlawful conduct and theft of the computer did not involve any state action and will not be an issue as to admissibility during Dan's trial. However, the warrant obtained by Detective, while having been supported by Larry's affidavit, lacks the corroboration necessary in order to show the reliability of Detective's facts. Since Detective has no prior relationship with Larry and because there is nothing in the facts to show Detective had done anything to verify the information other than Larry's identity, the Court can exclude such evidence on Detective's failure to corroborate Larry's story. Since there may be a question of reliability and trustworthiness, the warrant's lack of probable cause should subject Detective's findings to the Exclusionary Rule. Thus, the Court properly suppressed the evidence.</p> <p>(3) In this case, the Court should instruct the jury as to the defense of justification, which Defendant must show by a preponderance of the evidence.</p> <p>(a) The issue is whether the court should instruct this jury as to the defense of justification.</p> <p>In a jury trial, a judge maintains the power to decide decisions based in law. However, it is up to the jury, or trier-of-fact, to decide factual questions. While Defendant, who is liable for a Vehicular crime based upon Defendant's operation of such vehicle while under the influence, is highly scrutinized as strongly against public policy, it is a question of fact as to whether Defendant's actions were justified.</p> <p>In this case, Defendant has claimed to have a defense based on a decision that allows Defendant to choose between two different courses of conduct, both leading to an improper result. While getting into a car under the influence of alcohol is highly prohibitive, there may also be an argument that a person's ability to keep a truck from rolling down a very busy, heavily populated street, may be justified under the circumstances. Moreover, where a person tries to prevent harm to others but is prevented from doing so due to no fault of his own, the court should allow the jury to decide whether or not to consider defendant's story as true' or not.</p> <p>Therefore, the court should instruct the jury as to Defendant's defense.</p> <p>(b) The issue is what burden of proof the defendant must show in asserting a defense of justification.</p> <p>Where a Defendant raises a defense, the burden of proof depends on whether the Defendant is asserting an ordinary or affirmative defense. When showing an ordinary defense, Defendant must provide such evidence by a preponderance of the evidence. An affirmative defense is to be shown by clear and convincing evidence. Additionally, voluntary intoxication is not an excuse to a general intent crime.</p> <p>In this case, Defendant claims that he jumped into a car, which didn't belong to him, in order to prevent it from driving down a hill into a busy street. Although Defendant was drinking heavily and clearly lacked the ability to operate a motorized vehicle, there may be an issue as to whether Defendant did in fact believe it was necessary to jump into a moving vehicle in order to keep it from injuring others. Additionally, Defendant may be able to show that the vehicle in question did fail to stop despite Defendant's efforts to apply the brake, which should be decided by the jury.</p> <p>Pursuant Defendant's charge, the Defendant must show that his actions were justified by clear and convincing evidence.</p>	<p>1) The issue is whether or not the Attorney's payment of the bonus to Stu for referring Dan to the Attorney was proper.</p> <p>Under the professional rules of responsibility, a lawyer shall not solicit services. Referrals made by others are a proper means of obtaining clients. In doing so, however, the lawyer cannot pay for such referrals. In this case, the Attorney did not solicit the client nor did he pay Stu to refer Dan to him. As a gift, the Attorney gave Dan a \$500 bonus. As such the payment of the bonus to Stu although reasonably could have been perceived as being payment for referrals, was proper in that it was not given in consideration of Stu finding clients but as a gift after he was able to do so.</p> <p>2) The issue is whether or not the court correctly granted the motion to suppress the computer.</p> <p>Under the 4th amendment, an individual has the right to be protected against unreasonable searches and seizures absent a warrant. In order to obtain a warrant, an officer must present evidence of probable cause to a neutral magistrate and receive a copy of the warrant in writing with specific detail. The testimony of an informant must be evidence in an affidavit accompanied by the officer's corroborating statement of the reliability of the informant. In this case, the officer's were able to verify who Larry was and could easily identify him as the friend of Dan giving weight to the credibility of his story. This gave rise to probable cause sufficient to execute a search warrant of the house. Regardless of whether or not the officers had sufficient probable cause to be issued a search warrant, where they were issued one, and relied on the warrant in good faith that it was valid, the officers were allowed to search Dan's house for the stolen computer. As a result, the court was incorrect in deciding to grant the motion to suppress the computer.</p> <p>3) A) The issue is whether or not the court should instruct the jury on the defense of justification in Dan's charge for operating a motor vehicle while intoxicated.</p> <p>Under the penal law, a defense of justification is applicable whether the defendant out of a necessity or where the lesser of two evils is weighed in the commission of a criminal act. An instruction for a defense of justification can be given to the jury where there is like</p> <p>In this case, although the man had been drinking heavily and was clearly intoxicated, he reasonably appreciated the risk of letting the truck roll down the hill in which case it could have caused a greater danger to others on the road including bystanders in the path of the unattended rolling truck. By jumping into the truck to attempt to stop the vehicle from continuing to roll, Dan by way of necessity and in appreciating the risk of the lesser of two evils, jumped into the truck although drunk with the intention of preventing the truck from hurting anyone on the road.</p> <p>As such, the jury should be instructed on the defense of justification.</p> <p>B) The issue is what burden of proof should the court give the jury along with instructing the jury on the defense of justification.</p> <p>Where there court gives a jury instruction for a particular defense such as justification, the defendant must prove this defense by clear and convincing evidence where there is doubt place on the prosecutions burden of proof of all the elements of the charged crime. As such, the defendant has the burden of proving by clear and convincing evidence that he was justified in operating a motor vehicle while intoxicated when he, after heavily drinking, jumped into a parked and was charged with operating a motor vehicle while intoxicated. The defense must be proven by clear and convincing evidence.</p>	<p>1) The issue is whether a person to be paid to a non-lawyer in connection with the practice of law or referrals.</p> <p>Under the NY Rules of Professional Responsibility, a lawyer cannot be provide others for referrals for service. Referrals occur when another individuals brings or sends prospective clients to a lawyer.</p> <p>Here, Attorney's payments to Stu for Stu bringing clients to the attorney constitutes referrals. This act constitutes referrals because Stu sent these individuals to Attorney for legal services, which is a violation of the NY Rules of Professional Responsibility. Attorney is acting through his agent and employee, Stu, has impliedly authorized and condoned Stu's action by paying Stu bonuses, which directly correlate to these referrals. Stu may be paid for his services generally as a paralegal, he cannot be paid specifically for and in connection referrals. Therefore, the Attorney's payments of bonuses to Stu for referrals are improper.</p> <p>Under the NY Rules of Professional Responsibility, solicitation of clients, including in-person solicitation, is also impermissible. Solicitation occurs when an attorney approaches a prospective client about the possibility of forming an attorney-client-relationship. In-person solicitation is sometimes permitted, such as with friends or family.</p> <p>Here, Stu recommended that his friend see Attorney about forming an attorney-client relationship. Stu, who is an agent of Attorney, cannot solicit client on Attorney's behalf. However, Stu's solicitation of his friend Dan is a permissible exception to the solicitation rule, because Dan is a friend.</p> <p>Under the NY Rules of Professional Conduct, the payment an attorney receives as a retainer belongs to the attorney and should be placed in the attorney's corporate funds. Attorney cannot give a portion of this retainer to a non-lawyer or to a lawyer who is not assisting with the case. Attorney cannot condone the non-practice of law by providing a portion of a legal fee to the non-lawyer.</p> <p>Here, Attorney gave Stu a portion of the retainer. Attorney's payment of this legal fee is arguably payment to Stu for outcome with a case, which is impermissible under the NY Rules of Professional Conduct. Attorney may provide Stu compensation out of the firm's legal funds, but not out of a client retainer. Therefore, this bonus payment is impermissible.</p> <p>2) This issue is whether the court should suppress evidence found under a warrant search. Under the NY Criminal Code and the US Constitutional, an individual's home is considered a private area that police can only enter with a warrant or under an exception to the Fourth Amendment warrant requirement. To obtain a warrant generally, the police need probable cause. Probable cause is present when the police have reason to believe that a specific item is in the areas to be search. If the court agrees that probable cause is present, it will issue a warrant to search the specified area. This probable cause may be based on other evidence or based on information from an informant, even an anonymous one.</p> <p>Here the police based it's probable cause on the information provided to the police by Dan, an informant. The court issued a warrant to search. The police executed this warrant to search Dan's apartment and found the item(s) it was looking for, including a stolen computer.</p> <p>When a warrant is later found to be invalid, the result of the police's search may still be upheld if the police were found to be acting in good faith. The good faith exception recognized in NY. Good faith exists when the police believe the warrant to be valid and act in accordance with requirement of the warrant.</p> <p>Here, even if the warrant is found to be invalid, the result of the police's search of Dan's apartment may still be admissible in court. If the police executed the warrant on Dan's apartment believing the warrant to be valid and followed the requirement of the warrant, and the police's resulting search may be valid. Though the police did not independently verify Larry's information, the police and court believed that there was probable cause and that the warrant was valid. The police search, based on the facts, apparent to be a valid one consent with the warrant and was generally improper. If this search was valid, then the results of it, namely the discovery of Dan's computer, will not be suppressed and will be admissible in court. Therefore, the court's decision to grant to the motion to suppress was improper.</p> <p>3) (a) The issue is whether the jury should be instructed on the defense of justification Under the NY Criminal Code, justification requires that an individual act in a way to protect individuals or property. In order to claim justification, a party must demonstrate that he or she had reason to believe that he or others would be in danger in the given circumstances. Though voluntary intoxication may be a defense to some crimes, it is only a defense to specific intent crimes.</p> <p>Here, the court should instruct the jury on the required believe for justification, including the believe that the individual or other may be harmed under the given circumstances.</p> <p>3) (b) The issue is what instruction should be given to the jury regarding the burden of proof for defense of justification.</p> <p>Under the NY Criminal Code, justification is an affirmative defense. The defendant has the burden to demonstrate that he or she has met the required elements of an affirmative defenses. Therefore, the court here should instruct that jury that Dan has the burden of proof in regards to the defense of justification.</p>	<p>Issue 1</p> <p>The issue is whether an attorney can pay legal fees to someone who has not provided substantive assistance in the rendition of legal services. Under the Rules of Professional conduct, an attorney can pay referral fees to other attorneys, including other professionals such as financial experts, accountants, engineers, etc. who have provided substantive assistance in the representation of a client. The attorney has to inform the client that the fees will be shared and that another attorney or professional will provide assistance to the case. Client has to consent to the sharing of the fees for the legal representation. An attorney is NOT allowed to pay referral fees or share the legal fees with someone who has provided a referral, but who has NOT substantively assisted with representation of the client's legal case. Here, Stu is a paralegal of Attorney. He has provided referrals in the past. The facts state that attorney has paid Stu a bonus for those referrals. In this case Attorney paid Stu a bonus of 500 dollars when Attorney received from Dan 12000 dollars. Based on the facts, absent evidence to the contrary, it can be inferred that Stu only refers clients to Attorney, but do not substantively provide assistance in the rendition of the legal services. It should be noted that neither client was not informed of the fee sharing nor the client consented to the fee sharing. Attorney can be subject to snations from the Board of the Bar.</p> <p>Therefore, Stu is not entitled to the bonus from attorney.</p> <p>Issue 2</p> <p>Whether the search warrant was valid.</p> <p>Under NY Penal Law and the Due Process of the 14th Amendment of the US constitution, the police should have a search warrant or arrest warrant when the person to be searched or the thing to be seized is located in the defendant's house. It will be unreasonable if there is no search warrant or arrest warrant. Moreover, in order for a search warrant to be valid, it has to include these following elements: 1) The search warrant has to have probable cause. 2) the warrant has to clear as to the person to be searched or the thing to be seized an 3) the warrant must be issued from a neutral and detached magistrate. NY follows the Aguilar-Spinelli test with regards to probable cause: A) The informant must state the basis of his information b) The informant and his information must be reliable and credible. This probable cause is provided in an affidavit by the police.</p> <p>In this case, Larry provided the police with detailed facts as to the conversation he had with Dan or his observation as to the stolen computers. He signed an affidavit containing all of these facts, including name, and personal information. The first part of the Aguilar Test is satisfied, the basis of Larrins' information. However, in order for Larry's information to be reliable and credible, the police has to have used him as prior informant or has to check the validity of his information. Here, based on the facts, the police has not used Larry as a prior informant in other related crimes. Also, the police has not checked the credibility of his information. The police has not checked the validity of his information.</p> <p>Therefore, because the warrant lacks probable cause, the search warrant is not valid. The computer should be suppressed.</p> <p>Issue 3</p> <p>The issue is whether the Dan can use the affirmative defenses of self-defense or defense of others in order to contest his charge of operating a motor vehicle while intoxicated.</p> <p>In NY, under NY Penal Law, a defend can raise the defense of wither self defense or defense of others in order to contest the substantive criminal charge. Self defense is the physical defense used in order to avoid harm or injuries to the person. The defense of others is the physical defense used to protect 3rd persons from injuries or harm. However, when the criminal charge is Driving While Intoxicated, a defendant can not raise the defense of either: self-defense or defense of Others. The facts clearly state that Dan's Blood Level alcohol is .15, which is higher from the statutory guideline of .08. It can be reasonably inferred that Dan was intoxicated. Even though he tried to avert injuries to himself or others by driving the truck and trying to stop, he will not be allowed to raise this affirmative defense.</p> <p>The court should not instruct the jury of self defense.</p> <p>The issue is what burden of proof is required for the affirmative defense of self-defense.</p> <p>In NY and the Due Process of the Constitution, a defendant should use preponderance of the evidence when raising and proving an affirmative defense. If a lower standard compared to the prosecutor's burden of proof of beyond reasonable doubt.</p>	<p>1. The issue is whether an attorney may pay bonus for a paralegal for the referral. An attorney is allowed to the advertising as long as obeying the Professional Rules of ethics and he is allowed to pay for the advertising as long as in the scope of the advertising. A referral fee in general is not allowed. Here Stu often refers clients to Attorney and receives payments under the discretion of attorney. Although the payments are called bonus since they raise in connection with the referral to the attorney it is not proper for them to be accepted.</p> <p>2. The issue is (A) whether the search warrant was proper without verifying the reliability of the informant.</p> <p>Under the 4 th Amendment a person's belongings may not be searched and seized without a warrant. A person has expectancy of his privacy in his home and curtillage therefore a valid warrant is required in order to search and seizure in ones home. A search warrant has to be given by a dependent magistrate based on probable cause of a crime committed or the contrabands or the person committed the crime is at that place where the warrant is requested for. A search warrant has to have the place and the items to be searched. According to Ny law a search warrant may be given based on hearsay and the verification of the reliability of the warrant is not required.</p> <p>Here Dan admitted Larry that he has done burglary and showed him the computers he had stolen. Larry himself also saw the stolen computers and informs Police about the crime committed. Because Larry himself gives affidavitly what he has seen and heard from Dan suggest that police has the probable cause to get the warrant and the warrant is valid. Therefore is likely that the reason for the motion dismiss is not valid.</p> <p>b. The issue is whether the evidence to be suppressed based on a valid search warrant. Under the rule of fruit of a poisonous tree' if a police do not have a valid warrant to search and seize a house or the warrant obtained is not valid any evidence obtained have to be suppressed based on invalid search warrant. Here the warrant is obtained by the information takek from Larry and is likely to be valid. An the computers are the evidence seizerd from Dans home based on a valid warrant, and there is no reason to suppress the computer evidence. Therefore it is likely that the courts motion to suppress the computer is not proper.</p> <p>3. a The issue is whether trying to save the others may be used as a justification to driving while intoxicated.</p> <p>Self defense or defense of others are grounds for justification. Under the justification of defense of others there has to be an imminent risk to the people other than the defendant as to cause death or serious bodily injury. According to New York law the death do not need to be any immediate family member. According to the law a bystander do not have a duty to save others from an imminent danger but if he prefers to do so any crime committed during the saving of others may be a ground for justification of defending others.</p> <p>Here Dan is trying to stop the truck going down the hill and although he is doing his best he can not stop the truck and eventually truck hits the pedestrian. Here Dan is accused of driving intoxicated. If he would not need to stop the truck he would not have use the truck and would not been charged with driving under influence. The only reason for him is the defense of others therefore he may use the defense of justification.</p> <p>b. The issue is in a justification defense what is the burden of proof.</p> <p>In a criminal case judge decides the matter of law and jury decides matter of fact. Whether the defendant is right on raising the defense of justification is a matter of fact and has to be decided by jury. Justification is a the in a criminal case the prosecution has the budern of proff with a clear and convincing evidence. In case the defendant raises a justification the prosecution has to prove the contrary with a clear and concing evidence.</p> <p>Here Dan is raising the defense of Justification and court should hive jury that the prosecution has to prove the contrary by clear and convincing evidence.</p>

July 2014 NY BAR EXAM ESSAY QUESTION  
 PROF-RES: Solicitation/Referral Fees (Seperac Est. score of 6/10)  
 CRIMLAW: Search and Seizure-Warrant (Seperac Est. score of 8/10)  
 CRIMLAW: Justification (Seperac Est. score of 3/10)  
 CRIMLAW: Burden of Proof (Seperac Est. score of 0/10)

Seperac Estimated Score of 49.6 (versus actual score of 48.40)

July 2014 NY BAR EXAM ESSAY QUESTION  
 PROF-RES: Solicitation/Referral Fees (Seperac Est. score of 8/10)  
 CRIMLAW: Search and Seizure-Warrant (Seperac Est. score of 6/10)  
 CRIMLAW: Justification (Seperac Est. score of 8/10)  
 CRIMLAW: Burden of Proof (Seperac Est. score of 3/10)

Seperac Estimated Score of 56.4 (versus actual score of 58.17)

July 2014 NY BAR EXAM ESSAY QUESTION  
 PROF-RES: Solicitation/Referral Fees (Seperac Est. score of 8/10)  
 CRIMLAW: Search and Seizure-Warrant (Seperac Est. score of 9/10)  
 CRIMLAW: Justification (Seperac Est. score of 4/10)  
 CRIMLAW: Burden of Proof (Seperac Est. score of 0/10)

Seperac Estimated Score of 57 (versus actual score of 66.81)

July 2014 NY BAR EXAM ESSAY QUESTION  
 PROF-RES: Solicitation/Referral Fees (Seperac Est. score of 10/10)  
 CRIMLAW: Search and Seizure-Warrant (Seperac Est. score of 10/10)  
 CRIMLAW: Justification (Seperac Est. score of 10/10)  
 CRIMLAW: Burden of Proof (Seperac Est. score of 10/10)

Released TYPED Above Average Answer 1  
 Estimated Scaled Score of 85.00

July 2014 NY BAR EXAM ESSAY QUESTION  
 PROF-RES: Solicitation/Referral Fees (Seperac Est. score of 10/10)  
 CRIMLAW: Search and Seizure-Warrant (Seperac Est. score of 10/10)  
 CRIMLAW: Justification (Seperac Est. score of 10/10)  
 CRIMLAW: Burden of Proof (Seperac Est. score of 10/10)

Released TYPED Above Average Answer 2  
 Estimated Scaled Score of 85

Jul2014-Essay-001-ID 030-Typed-Score 48.40	Jul2014-Essay-001-ID 031-Typed-Score 58.17	Best Examinee Jul2014-Essay-001-ID 034-Wrote-Score 66.81	Released TYPED Above Average Answer 1 Estimated Scaled Score of 85.00	Released TYPED Above Average Answer 2 Estimated Scaled Score of 85
WORD COUNT: 847	WORD COUNT: 622	WORD COUNT: 599	WORD COUNT: 1076	WORD COUNT: 1066
<p>1. The issue is whether the attorney would be violating the Rules of Professional Conduct (RPC) by paying bonus to anyone who would refer the client to the attorney.</p> <p>According to the NYRPC, an attorney has to strictly adhere to the rules of the code. These rules list down in particularity the actions and conduct that are allowed and those conduct that would be deemed a violation of the rule. Attorneys should never indulge into referral bonuses as that is violating the rules of conduct. An attorney is allowed to charge reasonable fees from his client for the legal services rendered. An attorney can also charge the client on a contingent fee basis (except in criminal matters and domestic relations matter). A retainer agreement maintained by the attorney is also valid as long as the retainer agreement lists down the manner in which the expenses are to be calculated. An attorney is not allowed to personally solicit business from a client. The referral in some manner can be implied as a personal solicitation.</p> <p>Here, Sue who is working as a para legal for the attorney is referring her friend Dan to the attorney in exchange for a bonus. The payment of the bonus is also the complete discretion of the attorney. This shows an unfettered discretion at the hands of the attorney thereby showing his own personal financial interest. If there was some arrangement for a regular basis of salary paid to Sue, there could have been defense for the attorney. However, it would still be a referral fee that is not favored according to the RPC. Therefore the attorneys payment of the bonus to Sue was not improper as violating the NY Rules of Professional Conduct.</p> <p>2. The issue here is whether a warrant obtained solely on the basis of an informant's tip is sufficient basis for showing probable cause.</p> <p>The 4th Amendment to the US Constitution provides for the rules on searches and seizures such that the search and seizures must be reasonable and not violate the plaintiff's due process rights. The NY criminal procedure rules provide for the reasonableness of the searches and seizures in compliance with the 4th Amendment requirements. In order for a search to be valid there must be a valid warrant. A warrant is valid if it is based on a probable cause, is issued by a neutral and detached magistrate and lists down in particularity the things to be seized or persons to be searched.</p> <p>A probable cause is a fair probability that facts and circumstances will lead a reasonable person to conclude that the person in question has committed the crime or that certain thing that is subject of a crime would be found at some particular place. However a valid warrant must be based on a valid warrant. The probable can be based on several things like police observation, eye witness, forensic evidence and also party admission. It can also be based on an anonymous or confidential informant's tip. In NY for the reliability of the informant's tip the most important thing required is (1) veracity of the informant for truthfulness, (2) his knowledge of the information and (3) and whether the information corroborates with the police investigation. It is presumed to bolster ones reliability where the informant is confidential because by providing his identity he is subjecting him to penalty for providing false information. In this case Larry gave the information to the police by personally reporting to the detective the entire incidence. She also signed an affidavit stating the his identity details that would put him into penalty if there is likelihood that he provided wrong information. This kind of information from a confidential informant is considered to be more reliable. Furthermore, Larry has gained first hand knowledge of the information from Dan himself. For probable cause the reliability standard is more than that for reasonable suspicion. For probable cause as per the common law criminal procedure rules there should be totality of circumstances which mean that the information is more reliable where it is obtained by someone who has personal access to the person questioned for the crime. Here, Larry had insider access to Dan and therefore the information is considered more reliable. If there was police corroboration the information must have been more strong but even then for obtaining probable cause, the informant information was sufficiently reliable and therefore there was valid warrant.</p> <p>Therefore the court improperly decide upon the motion to suppress the computer.</p> <p>3. The issue is whether the court should instruct the jury on the defense of justification and if what instruction should the court give.</p> <p>A valid defense of justification requires a showing that the defendant's actions were such that a reasonable person in his position would also have taken done a similar thing. The justification defense is available to a tort defendant who can show that he was justified in doing the act. However the court must provide sufficient instructions to the jury about the defense of justification for the jury to give a proper outcome.</p>	<p>(1) The issue is whether an attorney may use an agent to solicit his client. Under New York's Rules of Professional Conduct, an attorney is prohibited to solicit the client in person if there is a preexisting relationship between the client and the attorney such as close friend of family member. Furthermore, under New York's Rules of Professional Conduct, the attorney may not pay a referral fee for the people who introduce clients to the attorney. Here, even though Stu and Dan is a friend, there is no previous relationship between Dan and Attorney. Stu works as an agent to solicit a new client in person. In addition, it can be inferred from the fact that Stu solicited not only Dan but also other clients in person, and Attorney paid some bonus in turn. Attorney violates the rule, therefore Attorney's payment of the bonus to Stu is improper.</p> <p>(2) The issue is whether the search warrant was validly issued based on Larry's information.</p> <p>Fourth Amendment of United States Constitution provides that citizen may not subject to unreasonable search and seizure. Generally, to conduct search and seizure, a police officer must have valid warrant. To be valid, the warrant must (i) be issued by neutral and detached magistrate, (ii) based on probable cause, and (iii) items and places to be searched must be particularly mentioned. Search warrant can be issued based on the informant's tip. However, if the warrant will be issued based on informant's tip, under the New York law, the informant's veracity must be proved and the information must be based on the informant's knowledge. Evidence that is acquired in unlawful search and seizure must be suppressed.</p> <p>Here, Detective was granted a search warrant to search Dan's apartment validly. Larry and Dan are friends, he had face to face conversation with Dan in Dan's apartment, and he actually confirmed the computer that Dan said he had stolen. Therefore, in Larry's information, there is enough ground to be used as informant's tip to issue the warrant. The computer should not be suppressed. The court's ruling was incorrect.</p> <p>(3) (a) The issue is whether the defense of justification is available for Dan against the charge of operating a motor vehicle while intoxicated. Under the New York penal law, operating a motor vehicle while intoxicated is reckless offence. Under the New York law, the defendant may assert the defense of justification against his offense if he reasonably believe that there is an exigent necessity to act to prevent other crime or accident even if the act itself is resulted in violation of the criminal law. Furthermore, under the situation of that the defendant does not have required intent to commit operating a motor vehicle while intoxicated, the defendant is allowed to assert the justification defense.</p> <p>Here, Dan was faced with reasonable necessity to operated the motorvehicle while intoxication in order to stop the truck causes an accident. The pedestrian's death was inevitable and Dan is not liable because he had no intent to kill the pedestrian. Dan should be allowed to assert defense of justification. Therefore the court should instruct the jury on the defense of justification.</p> <p>(b) The issue is who owed the burden of proof for the defense justification, and what kind of evidence is required to prove.</p> <p>Under New York Penal Law, defense of justification is affirmative defense available for the defendant. Generally, prosecution owes the burden of proof to show the defendant is guilty by the evidence beyond reasonable doubt. However, in case of affirmative defense, the defendant has to assert the defense by preponderance of evidence.</p> <p>Therefore, in the instruction, the court should mention that Dan owes the burden to proof of his affirmative defense by preponderance of evidence.</p>	<p>(1) The issue here is whether or not the attorney's bonus to Stu was proper despite the fact that there is no express agreement regarding the bonus and it's in the attorney's sole discretion.</p> <p>Under the NY RPC, a lawyer shall not pay a non-lawyer for case referrals, up on and including, any bonuses regarding the same.</p> <p>Here, Stu is a law student and not a lawyer. It is against the NY RPC that lawyer is paying Stu and the fact that there is no express agreement regarding the bonuses demonstrates it is unethical. The lawyer should not have paid Stu of bonus of \$500.00 for referring Dan who paid the lawyer a \$12,000 retainer. The lawyer will be subject to punishment under NY RPC.</p> <p>Thus, it was against the NY RPC that lawyer paid Stu a bonus for referring Dan.</p> <p>(2) The issue is whether or not the court was right in its motion to suppress the computer based on an informant's information.</p> <p>Under the 4th Amendment the U.S. Constitution, people have a privilege against unreasonable searches and seizure. The NY Constitution grants broader protection for criminal defendants than the U.S. Constitution. A search warrant in NY will be granted based on probable cause and the search warrant shall be with particularity regarding the items to be seized. An informant's information shall be sworn to and based upon probable cause. Under the NY CPL, a person shall be arrested based upon probable cause.</p> <p>Here, Dan told Larry that he stole the computer and showed Larry the computer as well. Despite the fact that Larry and Dan was drinking, Larry was sober enough to go to the local police precinct and reported this to the detective he observed the stolen computer in Dan's bedroom – this is probable cause. This is also probable cause because Larry signed an affidavit repeating the above facts and stated his name, address and telephone number. In addition, this provided probable cause to execute the search warrant and the stolen computer was found in Dan's apartment which gave the detective further probable cause to effectuate Dan's arrest.</p> <p>Note: Under the Aguilar/Spinelli test, an informant's probable cause information will establish reliability if sworn to pertinent facts, does not need to be independently verified. Here, Larry swore to pertinent facts and the stolen computer was found upon a valid search warrant.</p> <p>Thus, the court was in error in dismissing the indictment because the search and arrest was proper and not a product of an illegal search and fruit of the poisonous tree- the search was valid.</p> <p>(3) The issue is what instruction should the court give regarding the burden of proof regarding Dan's defense of justification.</p> <p>Under the NY Penal Law, a defendant shall prove all affirmative defenses by a preponderance of the evidence. In NY, the affirmative defense of justification will work if it is to protect yourself, your property or ethics.</p> <p>Here, Dan saw a truck that was double-parked, facing downhill and it started to move. Dan ran between two parked cars, jumped into the truck and applied the brakes, but the truck would not stop. The truck struck a pedestrian.</p> <p>Also, under NY Vehicle Traffic Law, driving while intoxication must be voluntary. For the above, Dan was not voluntarily driving intoxicated but tried to prevent an accident from occurring despite his blood alcohol content being is one percent (is over the limit). More likely than not, Dan has met his burden of proof.</p> <p>Thus, Dan will not be held guilty for drunk driving because he was justified in attempting to stop the truck.</p>	<p>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.</p> <p>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.</p> <p>Thus, Attorney's payment to Stu of \$500 for referring Dan as a client is improper.</p> <p>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 Aguilar-Spinelli test.</p> <p>Under NY law, a valid warrant requires probable cause, particularly, 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. Particularly 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 Aguilar-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.</p> <p>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.</p> <p>Here, the testimony of Larry would likely be sufficient to demonstrate probable cause under the Aguilar-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 Aguilar-Spinelli test for the police to independently verify Larry's information.</p> <p>Thus, the warrant was valid because it possessed sufficient probable cause due to Larry's information, possessed particularly 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.</p> <p>3. a) The issue is whether justification may serve as a defense to a strict liability crime.</p> <p>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 is 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.</p> <p>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.</p> <p>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.</p> <p>b) The issue is whether justification is an ordinary defense under NY law such that the prosecution possesses the burden of proof.</p> <p>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.</p> <p>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.</p> <p>Thus, the prosecution must both disprove Dan's justification defense and prove he was DWI by a preponderance of the evidence.</p>	