NEW YORK STATE BAR EXAMINATION
JULY 2000 QUESTIONS AND ANSWERS

Question-One
June 1999, Han, the owner of a retail computer store, contacted Compco, a computer manufacturer located in Nassau County, to inquire about purchasing personal computers that were year 2000 compliant. Leia, a Compco salesperson, told Han that Compco has just what he needed, the Millennium Falcon computer.

Han then entered into a written agreement with Compco for the purchase of 500 Millennium Falcon computers at $1,000 each, to be delivered on October 1, 1999. The agreement set forth in pertinent part that all the computers would be year 2000 compliant and that Han would be allowed to test a random sample of computers before accepting delivery.

In early September, Han had Luke, his hardware expert, test a random sample of the computers. Luke reported to Han that while the computers performed satisfactorily, he did not believe they were year 2000 compliant. Nevertheless, Han accepted delivery and paid Compco in full for the computers. Han then resold all of the computers for $1,500 each, expressly representing to his customers that the computers were year 2000 compliant. Han made a net profit of $250,000 from the sale of the Millennium Falcon computers.

On January 1, 2000, the computers failed because they were not year 2000 compliant. As a result Han was forced to make full refunds to all his customers. He also paid an additional $50,000 to those customers who satisfactorily documented that the failure of their computers had caused them additional money damages.

After hearing what had happened to Han, Leia realized that Compco had a huge inventory of computers that were not year 2000 compliant. Fearing that Compco was about to encounter serious financial problems, she quit her job. Leia's written employment contract with Compco provided that if she left Compco's employ for any reason, she could not work for any other computer manufacturer, wholesaler or retailer located anywhere in New York State for a period of three years. In February 2000, she became a salesperson for The Force, a computer manufacturer located in New York County. By May 2000, Compco had lost almost all of its business; however, none of its customers had been lost to The Force.

On June 1, 2000, Compco duly commenced an action against Leia seeking a permanent injunction restraining her from working in violation of her employment contract. Compco also sought a preliminary injunction preventing Leia from working at The Force during the pendency of the lawsuit, alleging that it would be irreparably injured if she were allowed to continue to work there.

(1) Does Han have a claim against Compco for his losses?

(2) What damages, if any, would Han be entitled to recover if successful in his lawsuit against Compco?

(3) Is Compco entitled to a preliminary injunction against Leia?

(4) Will Compco be successful in its action for a permanent injunction?

ANSWER TO QUESTION ONE
1. Han's claim against Compco for losses.

Han has a valid claim against Compco on the grounds of breach of warranty as well as breach of contract. The issue is whether, when a buyer receives non-conforming goods and accepts them, does he waive his rights to sue upon the grounds of breach of contract or warranty.

Both parties to the computer contract are merchants and the contract is for the sale of goods. Accordingly, the UCC governs the parties' contract provisions.

A valid contract for the sale of goods was entered into between the parties in June 1999. It was properly put in writing as a contract for the sale of goods for $500 or more must satisfy the Statute of Frauds (here the writing does this). Moreover, contracts for the sale of goods often contain express and implied warranties. An express warranty is one that is given by a merchant (one specializing in the sale of particular goods) as to a specific quality that the goods have. An express warranty cannot be waived by a purchaser. An implied warranty of merchantability is created between parties when a seller typically deals in a certain type of goods and sells those goods. In the sale, there is an implied warranty of merchantability that the goods are fit for their ordinary purpose. An implied warranty of merchantability can be waived either expressly through language (i.e. "as is") or through conduct. Finally, an implied warranty of fitness arises when a merchant sells products which he knows the buyer relies on his opinion, and those products are to be used for a specific purpose of which the seller knows. An implied warranty of fitness can also be waived through conspicuous language or through waiver by the buyer if certain fitness defects can be reasonably discovered upon inspection by the buyer.

Under the UCC, the "perfect tender rule" applies to sale of goods contracts. This rule provides that a buyer upon receipt of the goods has the right to reject any non-conforming shipment before accepting the goods. After acceptance of the goods, a buyer is no longer allowed to reject a shipment unless grounds for revocation of acceptance apply.

Upon application of these rules to the facts, Compco's sale of computers to Han provided both express and implied warranties. There were express warranties because Compco promised the computers were Y2K compliant. There were also merchantability and fitness warranties because, 1) Compco was a usual supplier of computers, and 2)

based on the salesperson's statement that the Millennium Falcon was just what Han needed. These statements created both express and implied warranties.

When Han received the computers in early September, he had the right to withhold acceptance until satisfaction that the computers were compliant. This was because of an express condition in the parties contract. Upon discovery that the computers were imperfect, Han had the right to reject them. Instead, however, he accepted them, after inspection, and waived his right to claim breach of an implied warranty. He also waived his right to later revoke his acceptance because the imperfection was one which Han was aware of at the time of acceptance. Nevertheless, Han has a claim for breach of the express warranty that the computers were Y2K compliant. This warranty was not waived.

2. Han is entitled to recover damages for lost profit and other consequential damages that were a foreseeable result of the breach. The issue is what are Han's damages.

Upon breach by the Seller, a Buyer is entitled to recover his expectation damages, those which would attempt to put him in as good of a position had there been no breach. This includes all damages including lost profit, incidental damages, and foreseeable consequential damages.

Here, Han suffered $250,000 of lost profit based on the express warranty breach by Compco. Compco is liable for this loss. Furthermore, it is reasonably foreseeable that incompatible

computers could cause additional damages to individuals who used them thinking they were compliant. Thus, Han should recover those damages as well in the amount of $50,000.

3. Compco's preliminary injunction against Leia.

Compco is not entitled to a preliminary injunction against Leia. Under the CPLR, a preliminary injunction is a provisional remedy awarded by a New York court when the plaintiff is able to show the following:

1) no adequate remedy at law

2) no unclean hands by plaintiff

3) immediate harm if relief is not granted

4) a likelihood of success on the merits

Notwithstanding the first three elements, Compco is not entitled to a preliminary injunction because it cannot show a likelihood of success on the merits. Here, the facts state that Compco's loss of business had nothing to do with The Force and that none of

Compco's customers had been lost to The Force. Absent proof of success, Compco's motion for a preliminary injunction will fail.

4. Permanent injunction motion.

Compco will not be successful in its motion for a permanent injunction against Leia. The issue is the enforceability of Leia's non-compete clause with Compco.

To execute a valid non-compete clause in New York, there must be three things to make the agreement enforceable.

1) Agreement is necessary in purpose.

2) Agreement is reasonable in duration of non-compete and its geographic scope.

3) The employee's services must be unique.

If any of these three elements fail, a court will not uphold a non-compete agreement. Here, Leia's contract provided for a three year non-compete clause which covered anywhere in New York State. This seems too broad in both scope and duration. Moreover, there is no possible way that a computer salesperson qualifies as offering unique services. As such, the non-compete agreement must fail as unenforceable on its face and thus Compco's permanent injunction should not be granted.

ANSWER TO QUESTION ONE
1. Han's claim against Compco.

Han does have a claim against Compco for his losses suffered as a result of the computer's failure. The issue is whether a buyer who inspects and accepts delivery of goods can later revoke his acceptance for breach of warranty.

In New York, Article 2 of the UCC governs the sale of goods. For goods over $500, the sale agreement must be in writing to satisfy the Statute of Frauds. Here, the sale falls within Article 2 because computers are goods. Han's agreement for the sale was in writing.

A buyer may condition his acceptance of goods by demanding a period of time to inspect the goods when they are delivered to him. After such inspection, the buyer may accept the goods or reject them if they are not a perfect tender. Upon acceptance, a buyer can only later revoke his acceptance if a defect is found that could not have been reasonably discovered at the time of acceptance.

Here, Han had a right to inspect the computers, which his employee did. Han then accepted the goods, even though his employee expressed doubts about their fitness.

Under Article 2, a seller is liable for a breach of an express warranty she makes to a buyer. An express warranty is any statement regarding the quality or nature of the goods. A seller also makes an implied warranty of merchantability, promising that the goods are fit for regular use.

Here, Leia, as Compco's employee, made an express warranty to Han that the computers would be year 2000 compliant because the written agreement included such a promise. In addition, Leia did not waive the implied warranty of merchantability because there was nothing in the written agreement that indicated the goods were being sold "as is".

Once a buyer discovers the breach of a warranty, he can revoke his acceptance of the goods within a reasonable time and sue for breach of contract.

Here, Han could not have discovered the breach until after midnight of December 31, 1999, when it was the year 2000. Therefore, Han can revoke his acceptance of the computers for breach of warranty and sue Compco for damages.

2. Han's damages.

Han will be entitled to damages from Compco resulting from its breach in the amount of $800,000. The issue is what amount a buyer who revokes acceptance may recover from a breaching seller.

Article 2 attempts to restore the non-breaching party to the position it would have been had the breach not occurred. When the buyer has accepted and paid for the goods, his measure of damages is the difference between the contract price and the market value of the goods as tendered, plus any consequential damages, minus any expenses saved. A merchant who resells the goods may recover his lost profit as well.

Here, Han accepted the goods and paid $500,000. Since the computers failed shortly thereafter, their fair market value at the time of delivery would be minimal. Han will, therefore, likely recover the full price paid. In addition, Han can recover his lost profit ($250,000) as a consequential damage of Compco's breach and the $50,000 he incurred as a result of damages to his customers. Han is therefore entitled to $800,000.

3. Preliminary injunction.

Compco will not get a preliminary injunction against Leia. The issue is whether an employer will suffer irreparable harm when an employee breaches a non-compete clause that results in minimal loss to the employer.

A preliminary injunction is an equitable remedy that may be granted before a judgment is entered. To be granted, the moving party must show he faces an irreparable harm from a threatening action of the non-moving party and that he will likely succeed on the merits of the case.

Here, Compco has not shown it faces an irreparable harm as a result of Leia working for The Force because it has lost none of its customers to The Force and because it has not shown that Leia's leaving caused its customer loss.

4. Permanent injunction.

Compco will not be successful in its action for a permanent injunction against Leia. The issue is whether a non-compete clause that broadly restricts an employee will be enforced by a court.

To obtain a permanent injunction to enforce a non-compete contract, an employer must show: 1) that a valid contract existed; 2) that the terms of the agreement were reasonable with respect to the time, purpose and scope of the restriction; 3) that money damages are inadequate to remedy the employer's harm; 4) that a court can enforce the injunction; 5) that there was mutuality of remedies between the parties; and 6) that the injury to the employer outweighs the harm to the employee.

Here, the contract itself was valid because it was written. However, the scope of the non-compete clause is not reasonable because it precludes Leia from seeking employment in the computer field for three years. The purpose of this clause would be to prevent customer loss to Compco, yet the time of the restriction (three years) and the scope (all of the state) are too broad to meet the reasonable test. In addition, there is no mutuality of remedy because Leia has no rights against Compco if she is terminated without cause - the remedy under the written contract belongs to Compco alone.

Because Compco has not met all the above elements, it will not be successful in its action for a permanent injunction.

Question-Two
I just had a meeting with Tess and Rob. Tess is the surviving spouse of Sam, who died last week. Sam and Tess had three sons. Rob is their only surviving son, and he has a son, Tot. Another son, Sol, predeceased Sam, survived by one child, Joe. Jim, the oldest child, also predeceased Sam, and is survived by two children, Jack and Jill.

Tess gave me an original will, duly executed by Sam two years ago, before Sol and Jim died, and a life insurance policy on Sam's life for $50,000, owned by Sam, and payable to Tess as beneficiary. Sam's will contains the following dispositive provisions:

First: I give my wife, Tess, $75,000, and the $50,000 I have maintained in an account at Big Bank in the name "Sam, in trust for Rob". This, together with the life insurance policy for $50,000, payable to Tess as beneficiary, should be sufficient for Tess.

Second: I give the rest of my estate to my issue.

At his death, Sam had a net distributable estate of $900,000, including the account at Big Bank, plus the life insurance policy payable to Tess. Tess has expressed disappointment at the extent of

her inheritance, and she wants to know if she has any legal remedies. Rob shares his mother's disappointment, and he is willing to renounce his inheritance if that will benefit her.

Prepare a memorandum for me which identifies the issues, resolves them, and advises me how Sam's assets should be distributed.

ANSWER TO QUESTION TWO
Identification of Issues:

1. The totten trust and its revocability

2. Tess' option under the elective share statute

3. The distribution to Sam's issue

4. The consequences of a renunciation by Rob

1. The Totten Trust

The account in Big Bank is validly revoked by Sam's will and would go to Tess under the will. The issue is whether a totten trust is revocable by will, and whether the identification is sufficient. When an account is made "in trust for" someone, it is a totten trust and will generally be excluded from probate and go directly to the beneficiary. However, totten trusts are revocable by will if properly identified therein. The identification requirements are quite strict, and the account must then be specifically identified.

In the present case, the account was a valid totten trust, but by identifying the account at Big Bank in the name "Sam, in trust for Rob", Sam validly revoked the totten trust by properly identifying the account. The totten trust would thus go to Tess under the will.

2. Tess' option under the elective share statute

Tess would be able to receive $300,000 plus the life insurance by the elective share statute. The issue is how much Tess would be entitled to under her elective share.

A surviving spouse is always entitled to take $50,000, or 1/3 of the elective share estate, whatever is greater, no matter what the decedent spouse intended. The elective share estate is the probate estate plus any testamentary substitute, which includes totten trust but not life insurances. When 1/3 of this amount is found, all bequests (excluding life insurance) is subtracted and the spouse is entitled to this amount on top of the bequests to her. The other grantees of the estate must contribute proportionately.

In this case, the elective share estate would equal $900,000, since the totten trust (no matter if it was validly revoked) would have been included. One third hereof is $300,000. What Tess gets through the will ($125,000) should be subtracted from $300,000. As a result, Tess is entitled to $175,000 extra contributed by Sam's issue proportionately. The life insurance is neither included in the elective share estate as testamentary supplement nor subtracted in calculating Tess' entitlement. Tess is thus entitled to a total of $350,000; $125,000 by will, $175,000 by elective share and $50,000 by the life insurance. It should be noted that the reason the life insurance goes to Tess is that a life insurance policy cannot be changed by will.

3. Distribution to Sam's issue

Rob gets $200,000, and Joe, Jack and Jill will each get $133,000. The issue is how distribution of the residue to Sam's issue is done.

A general legacy to "my issue" is distributed to decedent's descendants as a matter of representation just as if it went by intestate. The amount is first distributed to decedent's children equally. In this case, the residuary equals $600,000 after Tess has taken her elective share of $300,000 plus the life insurance. Divided among children alive or leaving living descendants this gives $200,000 to each. Thus, Rob takes $200,000. The $200,000 reserved for Sol and Jim are however "gathered" and distributed equally among Sol's and Jim's living children. Thus, Joe, Jack and Jill each takes $133,333. Rob gets $200,000 and Joe, Jack and Jill each get $133,333.

4. The consequence of Rob's renunciation

Rob could validly renounce his bequest, but it would go to Tot and not benefit Tess. The issue is what the consequences of a renunciation by Rob would be.

Anybody entitled under a will can renounce their entitlement by writing and signed within nine months for testator's death. In such case, the renouncing person is treated as a predeceasing testator. For bequests, the anti-lapse statute would result in a distribution to the renouncing party's descendants if he is a sibling or descendant of testator. If Rob renounced his entitlement, the $200,000 would thus go to Tot and it would not help his efforts to benefit Tess, since Rob is a descendant of Sam and has living descendants qualifying under the anti-lapse statute (Tot).

Rob should not renounce his entitlement, but rather take his $200,000 and support Tess by gift or otherwise.

ANSWER TO QUESTION TWO
1. Totten Trust

Sam's bequest to Tess of the totten trust of $50,000 is valid. The issue is whether a testator may change the beneficiary of a totten trust in his will.

Under the EPTL, a testator may change the beneficiary of a totten trust in his will if he identifies the specific account and bank in his will and names the new beneficiary.

Here, Sam's bequest of the totten trust is valid and Tess can take because Sam named the bank "Big Bank", and because Sam specified the account, the totten trust in which Rob was the named beneficiary. Tess can therefore take the $50,000.

2. Tess' Elective Share

Tess can elect for her elective share under Sam's will and will take $300,000 plus the $50,000 life insurance policy. The issue is how much of a decedent's estate a surviving spouse is entitled to under the elective share statute.

The EPTL provides that a surviving spouse is entitled to $50,000 or 1/3 of the decedent spouse's estate; whichever amount is greater. The net elective amount of the estate includes the net probate assets plus certain testamentary substitutes. These testamentary substitutes include totten trusts, revocable lifetime gifts, general presently exercisable powers of appointment, monies from joint accounts, deferred compensation amounts, and gifts made within one year of death. Life insurance proceeds are not included as a testamentary substitute.

Once the net elective share is calculated, the electing spouse must subtract any amounts given to her under the will and any testamentary substitutes she will receive. This final amount is what the spouse will take under her elective share, and all other takers under the will contribute proportionately from their bequests to satisfy this amount.

Here, the net elective share is $900,000, which includes the totten trust bequeathed to Tess because such account is a testamentary substitute. Tess is entitled to 1/3 of this amount, $300, 000, minus the assets Sam gave to her outright in the will. The amount to be subtracted is $125, 000 because it is the sum of the outright gift of $75,000 and the totten trust gift of $50,000. The life insurance proceeds are not subtracted because they are not a testamentary substitute.

Tess' elective share is $175,000, which she will take pro rata from the other beneficiaries, plus the $75,000 gift, the $50,000 totten trust and the $50,000 life insurance policy. Tess will take $300, 000 from the estate, and $50,000 from life insurance for a total of $350,000.

3. Distribution of Sam's Estate

The remaining $600,000 will be distributed to Sam's issue according to the law of intestacy. The issue is how a residual amount is distributed to the testator's issue.

A residual bequest, under the EPTL, to the testator's issue is distributed by the laws of intestacy. Any issue who have predeceased the testator will not take, but if they died leaving issue, such issue will take by representation. The total assets in residual are distributed as follows. At the first generational level, each surviving issue or deceased issue who died leaving issue take one share. The surviving issue takes this share outright. The shares of deceased issue are added together and distributed at the second generational level, where the issue take by representation.

Here, there is $600,000 in residual assets after Tess takes. At the first generational level, there are three shares because Rob is alive, Sol died leaving issue and Jim died leaving issue. Rob takes $200,000 outright, and Sol's and Jim's shares are combined and distributed at the second generational level to their issue; Joe, Jack and Jill. Joe, Jack and Jill each take $133,333 by representation which is Sol's and Jim's shares divided by three.

4. If Rob Renounces His Gift

Rob should not renounce his gift to benefit his mother. The issue is whether a child, taking by intestacy, can renounce his gift as to increase the amount his mother will take.

As explained above, Tess can take under the elective share and receive $300,000. The remaining $600,000 is distributed by intestacy. Under the EPTL, a beneficiary may renounce a bequeath to him by notifying the surrogate and signing an affidavit stating he received no consideration in exchange for his renouncement. By renouncing, the beneficiary is treated as though he predeceased the testator. By the laws of intestacy, the next generation would take the renouncer's share by representation.

Here, if Rob renounces his gift, he will be treated as though he predeceased Sam. Rob's son, Tot, will then take by representation and Jill, Joe, Jack and Tot would divide the $600,000, each receiving $150,000.

5. Estate Tax

It should be noted there are no federal estate tax issues, as Sam's net probate estate minus what

Tess will take ($900,000 - $300,000 = $600,000) is less than the federal estate credit of $675, 000.

Question-Three
Molly and Joe were married in 1983 in Niagara Falls, New York. In 1987, Molly conceived a child, fathered by another man, with whom she had a brief affair. After the child was born, Molly admitted to Joe that he was not the child's father. Joe forgave Molly and agreed to raise the child as his son. They decided to name the child Tim and to keep secret the fact that Joe was not Tim's biological father. They listed Joe as Tim's father on his birth certificate.

In 1995, Molly and Joe began to have matrimonial problems and decided to separate. They entered into a separation agreement which recited that Tim was a child of their marriage and provided that Joe would have custody of Tim and that Molly would have regular visitation with Tim three days a week, and on designated holidays. The agreement provided that Joe would not move beyond 40 miles from Niagara Falls, New York, where they both resided, without court approval, until Tim was 18. The agreement was signed and acknowledged in January 1996.

In March 1997, Molly went to see Parker, an attorney, in order to get a divorce. She gave Parker the original signed separation agreement and told him that both she and Joe had abided by its terms and that they had been separated since it was signed. Parker told her that his fee would be $150 per hour, and that there would be a $4,000 nonrefundable retainer. Molly orally agreed to the terms of the retainer and gave Parker $4,000.

In April 1997, Parker filed the separation agreement in the Niagara County Clerk’ s Office. In June 1997, Parker commenced an action for divorce by Molly against Joe based on the separation agreement. Joe did not contest the divorce. Upon due proof of the above relevant facts, a judgment of divorce was granted. The judgment incorporated the terms of the separation agreement and referred any future issues as to custody, visitation or support to Family Court.

Parker sent Molly a bill, marked paid in full, which showed that he had spent 10 hours working on her divorce. No portion of the retainer was returned to Molly.

After he and Molly separated, Joe returned to school, and he has now received a masters degree in finance. In June 2000, Joe was offered a high paying job as an analyst at an investment firm in Florida.

Joe filed a petition in Family Court for modification of the divorce judgment to allow him to move to Florida and take Tim. Molly opposed Joe's petition, asserting that Joe is not Tim's biological father, and seeking an order requiring blood testing to disprove Joe's paternity. Molly has never before told anyone that Joe is not Tim's biological father, and Molly and Joe have always held Tim out as Joe's son in every way. The court precluded Molly from offering any evidence contesting Joe's paternity and denied Molly's request for blood testing.

A hearing was then conducted on Joe's petition. At the hearing, Joe testified that he has made arrangements for Tim to attend an excellent school in Florida. Tim presently attends a school where funding is low and the academic achievement of the students is below the state average. He further testified that he is planning to remarry, and that his fiancee, an attorney who already lives and works in Florida, has developed a close relationship with Tim and has two sons who have become good friends with Tim.

Joe acknowledged that the proposed move will disrupt Molly's visitation with Tim and will deprive her of the regular and meaningful access to him she has always enjoyed. He testified,

however, that he is willing to send Tim for frequent visits with Molly and that the income he will be earning will allow him to do that. He also indicated that he will send Tim to visit Molly on all holidays and school vacations during which she wishes to have visitation, and will cooperate fully in ensuring Molly's continuing nurturing relationship with Tim.

Joe admitted that there is no health or economic necessity for the move, and acknowledged that he would have employment opportunities in the Niagara Falls area. He testified, however, that the jobs available to him in the Niagara Falls area would not offer him the same economic advantages as the job he has been offered in Florida and staying in the Niagara Falls area will disrupt his marriage plans.

Molly testified that she has been an active participant in decisions regarding Tim's care and upbringing. She further testified that Tim is very close to her parents and to her siblings and their children, who all live in the Niagara Falls area.

The court denied Joe's petition on the ground that no exceptional circumstances were presented justifying the relocation. Joe has now appealed from that ruling.

(1) Was the retainer agreement Parker made with Molly proper, and was Parker entitled to retain the $4,000?

(2) Was the judgment of divorce properly granted?

(3) Did the court correctly preclude Molly from denying Joe's paternity of Tim and deny Molly's application for blood testing?

(4) Should Joe succeed on his appeal?

ANSWER TO QUESTION THREE

1. The retainer agreement Parker made with Molly was not proper. Parker is not entitled to retain the $4,000. Moreover, Parker is subject to discipline because of his unprofessional actions.

The issue is whether an attorney can ask a client in a domestic relations matter to provide a retainer in the amount of $4,000 as part of the attorney's fees. In domestic relations matters, the attorney is held to an even higher standard of conduct than in other matters. The client, Molly, is in a position of relative powerlessness. Presumably, she does not require the services of an attorney in any regular manner. In domestic relations matters, the attorney must 1) charge reasonable fees and 2) explain the fees in writing to the client.

Parker's hourly rate may satisfy the first requirement but the retainer does not. Fees must be based on time needed to do the work (contingent fees are typically banned in the area of domestic relations - an attorney cannot take a percentage of custody or maintenance payments) and the skills required. Attorneys can charge clients additional fees if they have to give up time to work on the client's matter. An attorney can also make the client pay a non-refundable retainer if the attorney must sacrifice other matters. Here, Molly is not a Fortune 100 company paying to guarantee a law firm's services if it decides to take over another company. Rather, Molly needs some basic legal services for her divorce and child custody concerns. The amount of Parker's retainer is almost three times as much as the total hourly fees for his work ($1,500) and is consequently unreasonable.

Furthermore, the retainer is in violation of the second requirement. The retainer (and the hourly rate) were not in writing. In domestic relations matters, the attorney must provide the client in

advance with a written explanation of fees. Parker did not do this - according to the facts, he "told" Molly about his fee structure.

Parker's retainer agreement was improper. He must return the retainer (all $4,000) to Molly. He is also subject to professional discipline for his actions.

2. The judgment for divorce was not properly granted. The issue is whether a conversion divorce may be granted when the parties have abided by a separation agreement for at least a year without co-habitating with the intent to reconcile.

Molly and Joe did have a valid separation agreement. To be valid, both parties must enter into the agreement voluntarily. Molly and Joe presumably, voluntarily agreed to the separation. The parties must also sign and acknowledge the agreement. Molly and Joe met this requirement.

A separation agreement can lead to a conversion divorce if for one year, both parties abide by the agreement, do not co-habitate with the intent to reconcile, and the separation agreement is filed with the county clerk of the relevant county after it is signed and acknowledged. In this case, Parker did not file the separation agreement until April 1997. When Parker commenced the action for a conversion divorce in June 1997, the requisite time had not passed from the filing. Molly and Joe could obtain a conversion divorce in April 1998 (a year from filing). It should be noted that Molly and Joe did meet the other requirements. They had not co-habitated with the intent to reconcile. They had abided by the terms of the separation agreement.

3. The court correctly precluded Molly from denying Joe's paternity of Tim and correctly denied Molly's application for blood testing.

The issue is when can a party deny or try to affirm paternity. If Tim were not a marital child (he is - since it is presumed that a child of a named couple is their biological child), Molly could file an action to determine filiation in the family court if she thought she knew the father. In such a case, the court could order the defendant to undergo blood testing. If HLA or DNA blood tests indicated that it was more than 95% likely that the defendant was the father, there would be a presumption of paternity the defendant could try to rebut.

However, Molly is not trying to prove paternity (which would result in support and inheritance rights for Tim). She is rather trying to disprove paternity. The court would use the best interest of the child standard to determine whether Molly should be able to deny Joe's paternity. The only benefit to denying Joe's paternity of Tim would presumably be to help determine who Tim's biological father really is. But Tim has a legal father - Joe, who treats Tim as Joe's son. The harms to Tim from denying Joe's paternity include the potential loss of Joe as a parent, psychological trauma and unnecessary pain. Tim believes Joe is his father. Joe could choose to tell Tim the truth. Molly does not need to force the court to participate in an action that will likely cause Tim great harm. The court in weighing these factors could reasonably determine that it is in Tim's best interest if the court precludes Molly from denying Joe's paternity of Tim and denies Molly's application for blood testing.

4. Joe should succeed on his appeal and obtain court approval to move to Florida with Tim.

This issue is governed by the best interest of the child standard. The question is whether it is in Tim's best interest if Joe moves to Florida for a better job and for a new marriage. This standard also considers the effect on Molly because the court is very concerned about maintaining parent-child relationships.

This issue is not governed by a standard of exceptional circumstances. The lower court had denied Joe's petition on the ground that no exceptional circumstances were present to justify the

relocation. The court must determine if there are exceptional or extreme circumstances present when a party wants to modify maintenance provisions of a duly executed separation agreement. This standard does not apply to child custody issues.

The court, in considering the best interests of a child when the custodial parent wants to move away from the other parent, can look to a variety of factors - including the availability of better schools, improvements in home life from a remarriage, and improvements in economic status. All of these factors suggest that Joe's relocation would benefit Tim.

The court must also consider the impact of the relocation on Molly's relationship with Tim. Part of the best interests of the child standard includes the child's relationships with both parents. If Joe moves to Florida, it will be harder for Molly to spend time with Tim, which will harm Tim. Nevertheless, Joe is willing to make a substantial number of accommodations - including sending Tim to visit, allowing Molly to have visitation on all holidays and school vacations, and promising to ensure Molly's continuing nurturing relationship with Tim. The court could decide that it is Tim's best interest if Joe moves to Florida - even though Tim's relationship with Molly will be diminished.

It could be noted that Joe had a valid ground of divorce after Molly admitted the affair if he had brought it within five years, and if he had not continued to co-habitate with Molly.

ANSWER TO QUESTION THREE
1. Retainer Agreement

The retainer agreement between Parker and Molly was improper and Parker cannot retain the $4,000. The issue is whether an oral retainer agreement is valid in a domestic relations matter. Under New York law, an attorney in a domestic relations matter is obligated to: 1) provide a statement of the client's rights and responsibilities, 2) obtain a signed written retainer agreement and 3) provide the client with an itemized closing statement when the representation ends.

Here, Parker did not provide the statement of rights nor was there a written signed retainer agreement. Thus, the agreement was improper because Parker failed to fulfill his professional responsibilities in obtaining employment.

With regard to the retainer agreement, an attorney in New York is entitled to a reasonable fee for his services. Here, Parker worked ten hours at $150 per hour for a total of $1,500. By retaining the $4,000, Parker is earning nearly three times his hourly rate. His failure to provide an itemized statement is a further breach of his ethical obligations. Finally, a non-refundable retainer is invalid in a domestic relation matter. Thus, Parker is not entitled to retain the balance of the $4,000 retainer.

2. Conversion Divorce

The court improperly granted the divorce. The issue is whether a divorce can be obtained after a couple has separated under an agreement for over a year. A conversion divorce is proper in New York when there is 1) a valid separation agreement and 2) one year has passed without the parties co-habitating.

A valid separation agreement is a freely entered contract that is signed by both parties and acknowledged by a notary. Here, there are no facts to suggest duress of any kind, and the agreement was validly signed and acknowledged. But, the separation agreement was not properly

filed with the clerk of the county of the marital domicile. Thus, the separation agreement was invalid and the court should not have granted the divorce.

3. Paternity

The court properly precluded Molly from denying Tim's paternity. The issue is whether in a petition for a modification of a divorce judgment, one parent can attempt to disprove another's status as a biological parent. The rule in New York is that a former spouse is estopped from denying paternity when a child born into wedlock is raised as the child of both spouses.

Here, Molly admitted that the child was not Joe's when he was born. Nevertheless, Tim was accepted by Joe and raised as such. Furthermore, Molly allowed Joe's name to be placed on the birth certificate.

Ordinarily, blood group testing is used to establish that an individual is not the father in a filiation proceeding. When the evidence is attempted to be used to deny paternity in a modification proceeding, an assenting spouse is estopped. Molly should be estopped from denying Joe's paternity because she assented to the child being raised as Joe's son.

4. Joe's Appeal

Joe should be successful on his appeal. The issue is whether the family court applied the proper standard in determining to deny Joe's petition. The proper standard to apply on a petition for a modification of the divorce custody arrangement is the "best interests of the child". Here, the court apparently applied a different standard by denying the petition on the grounds that no exceptional circumstances were present.

The "best interests of the child" standard embraces a variety of factors that a court can consider when deciding a motion that affects the well-being of a child. Here, the facts indicate that Tim is currently in a below average school and would be able to attend a better school in Florida. Tim also has developed a close relationship with Joe and his step-siblings. Furthermore, Joe was originally given custody of Tim.

Molly's main objection is that she will not get to see Tim as frequently. Joe's move, however, will allow him to afford to send Tim to visit often, thus reducing the impact of the move. Based on the fact that the lower court did not apply "the best interests" standard, Joe should succeed on his appeal.

Question-Four
Merrill purchased and took delivery of a new 1996 Jupiter automobile on December 20, 1995 from Sayre Motors Inc. ("Sayre Motors"). On March 1, 1998, Merrill and his wife, June, drove to a restaurant in Merrill's Jupiter, with Merrill driving and June as a front seat passenger.

On the way to the restaurant, without any prior warning, the Jupiter pulled sharply to the right and struck a concrete bridge abutment. At the time the Jupiter was traveling at 15 miles per hour above the posted speed limit. Despite the fact that June was wearing a properly functioning seat belt, she sustained a fractured skull.

Post-accident investigation revealed that the steering mechanism on the Jupiter was defective and was a cause of the accident. In fact, a short time before the accident Merrill had received a recall notice from the manufacturer concerning the steering defect. He had promptly taken the car to Sayre Motors to have the problem resolved. The recall notice called for replacement of the

steering mechanism. The dealership also received the notice. Investigation established that Sayre Motors had not done the required recall work and the defective steering mechanism had not been replaced prior to the accident.

Merrill and June live in Waverly, New York and Sayre Motors is a State X corporation that does business in New York. The accident occurred in State X. New York law and State X law are identical in all pertinent respects, except that State X recognizes interspousal tort immunity, which precludes one spouse from suing the other in tort.

June comes to the Elmira, New York law firm by which you were recently employed. You are assigned by a partner to prepare a memorandum addressing the questions below. You are not expected to address any potential federal claims or jurisdictional issues.

1. If June now commences an action in New York, what causes of action does she have against Sayre Motors?

2. What defenses will be available to Sayre Motors?

3. What law governs June's claim against Merrill?

ANSWER TO QUESTION FOUR

1. June may sue Sayre Motors for products liability (strict liability) in design defect, negligence in repairing the defect, and breach of warranty.

The issue is what are the causes of action a buyer may sue a manufacturer (distributor) for, in a personal injury suit.

June has a products liability (strict liability) claim for design defect against Sayre. A design defect is proved by the plaintiff who proves: 1) she bought the product from a merchant (a seller of goods of that particular kind) who sold the goods in the ordinary course of business, 2) there is a practical, safer and economical alternative and 3) she was using the product in a foreseeable manner (not necessarily "intended"). The claim may be made against a manufacturer, distributor or anyone else within the chain of distribution. Warnings do not insulate the manufacturers liability.

Here, Merrill purchased the automobile. This does not preclude June from suing under product liability. She need not have personally purchased the car. The car was sold in the ordinary channels of distribution (i.e., not at a flea market, etc.) and there is available an alternative design that is safer (without the defect), economical (can be made safer with a cost that does not outweigh the utility of the safer design) and practical (does not render the product cumbersome or inefficient). Additionally, June will prove that driving 15 miles over the speed limit, while not an intended use of the car by law, is certainly foreseeable. It should be noted that she should also seek this claim against the car manufacturer, Jupiter.

June also has a claim against Sayre for negligence (negligent repair).

Negligence is proved by: 1) duty, 2) breach, 3) cause and 4) harm. Duty may be established by a relationship to a foreseeable plaintiff. A contract to repair is sufficient to establish a duty. Breach is the failure to act (or the act which renders the plaintiff's harm). Cause must be established in both the factual "but for" sense, as well as the legal or proximate cause. Harm is the resulting injury or damage.

June may establish negligence against Sayre by: 1) duty-which arose out of the contractual obligation the company had to fix the car evidenced by the note, the warning recall which led June/Merrill to take the car into the dealership, 2) breach - by not fixing the steering as they had contracted to do, 3) cause - the accident would not have happened "but for" the mechanism default and legal/proximate cause of June's fracture and 4) harm - the skull fracture.

June may also have a claim against Sayre for breach of warranty and breach of merchantability. June can establish that the car was sold with an implied warranty of merchantability (fit for the purpose that the good is usually used for - i.e., driving) and breach of warranty as the car could have been sold after a test drive of a model. If a "sample" was used for the test drive, an express warranty was established. The failure of the steering mechanism was a breach of all warranties. The breach of warranty claim will not be timely as the statute of limitations is four years from date of purchase.

2. Defenses available to Sayre Motors

Sayre may attempt to prove Merrill was negligent in driving 15 miles above the speed limit, and therefore, also negligent as a matter of law (negligent per se).

It should first be noted that New York is a pure comparative negligence jurisdiction so that even if Merrill/June are also found negligent they may still recover.

The negligence per se requirement is that 1) the risk be of the kind the statute is intended to prevent and 2) the plaintiff be the kind the statute aims to protect.

Here, Sayre Motors is not within the "zone" of plaintiffs the statute is intending to protect and will not be able to use negligence per se.

If Sayre wants to use negligence they must prove Merrill was driving not as an ordinary prudent person, but rather at a standard below the ordinary standard of care. If Sayre does establish this, they will be able to use the percentage negligence attributed to Merrill to offset their total liability. It should be noted, however, that if they are found the least bit liable, they will be held jointly and severally liable to June. She may collect the entire amount from Sayre and it will be Sayre's duty to indemnify or ask for contribution from Merrill either by impleader action or by later suit within six years of the judgment.

The statute of limitations for June's actions are three years from accident date for product liability and negligence, and four years for breach of warranty. Therefore, the breach of warranty claim will be precluded by the statute of limitations.

3. New York law will govern June's claim against Merrill.

The issue is choice of law for tort claims. New York does not adhere to the "situs" of the accident theory but rather uses a government interest analysis refined by Neumeier to determine loss allocating/conduct governing tort claims.

The government interest analysis determines the interest of both state's rules, the interest of the parties and then applies the following formula. If both parties are from the same state the court will apply that law (of the state where the parties live), if only one party is from the state where the accident occurred and the other party is not, the court will apply the law of the site of the accident and where the party lives, and will apply the law of the situs only if neither party is from the state where the accident happened unless the accident is fortuitously in that state.

Here, both June and Merrill are from New York. New York has abolished interspousal immunity and New York has an interest in allowing husbands and wives to seek remedy against each other for harms. There are no interests served by using the state X law. Therefore, New York will apply its own law by Neumeier analysis.

ANSWER TO QUESTION FOUR
1. June v. Sayre Motors

June has causes of action against Sayre Motors for negligence, strict liability and breach of warranty of merchantability.

First, a merchant who sells a defective product in the ordinary course of business gives an implied warranty of merchantability. It provides that the product is fit for the purpose for which it was designed. Since Merrill and June were driving the car in the manner for which it was designed when the accident occurred, there was a breach of merchantability and therefore Sayre is liable. In addition, when a manufacturer, retailer, distributor or other merchant sells a product that has a manufacturing or design defect in the ordinary course of business, it is strictly liable for any injuries that occur as a result of the defect. The plaintiff must prove that there is a defect, either manufacturing or design, that the defect existed when the product left the hands of the manufacturer, the defect was the proximate cause of the injury, and the plaintiff was a foreseeable user who used the product in a foreseeable manner. Here, the fact that the manufacturer sent a recall notice concerning the steering defect is proof of the fact that a defect existed, and that it existed at the time it left the manufacturer's hands and went to Sayre's to be sold in the ordinary course of business. The plaintiffs were driving in their car in a foreseeable manner, even though they were speeding. Finally, the accident which occurred as a result of the defect was the direct cause of June's injury. Therefore, June has met all the requirements for a strict products liability cause of action. It should be noted that Sayre is liable for strict liability, even though it did not manufacture the car since it is a merchant. However, Sayre may be able to be indemnified by suing the manufacturer if Sayre is found liable. Finally, Sayre was negligent in repairing the defect. The issue is whether Sayre breached a duty to the plaintiff that resulted in her injury. In order to prove negligence, the plaintiff must prove that the defendant had a duty, breached that duty, the breach was the cause of the plaintiffs injury, and that there were damages. Sayre had a duty to replace the defective steering mechanism in Merrill's car. Since Merrill bought the car from them, and the manufacturer sent Sayre a notice indicating that there was a steering defect that needed to be replaced in order to correct the defect. Since Merrill brought the car into Sayre in order to have the defective mechanism replaced but Sayre failed to replace it, Sayre breached it's duty. The standard by which Sayre's duty is judged is the reasonably prudent person standard. Moreover, Sayre is a professional business specializing in cars and therefore will be held to the standard of a reasonably prudent car dealer. A reasonably prudent car dealer would have replaced the defective part, and by not doing so, Sayre breached its duty of care. June also has to prove causation, both factual and legal. Factual causation provides that but for the defendant's negligence, the plaintiff would not have been injured. The only reason the facts give for the accident is the defective steering mechanism. Therefore, but for Sayre's failure to replace the defective part, June would not have been injured. Legal causation requires that the plaintiff and the plaintiff's injury be foreseeable. It is foreseeable that when someone buys a car, they will have passengers riding in the front seat. In addition, it is foreseeable that a wife will be riding in the passenger seat while her husband drives. It is also foreseeable that if there is an accident resulting from the negligence of the defendant, the passenger in the car will be injured. Thus, June can prove causation. Consequently, June's fractured skull is the damage resulting from the defendant's breach of duty. Therefore, June has met all the requirements for an action in negligence against Sayre.

2. Sayre's defenses

In the action for strict liability, the only defense Sayre might have is comparative negligence. However, this will not be successful since June was wearing her seatbelt, and Merrill had brought the car in for the defect to be repaired. As a result, Sayre has no defenses to the strict liability cause of action. With regard to the warranty of merchantability, the facts do not indicate whether the agreement between Merrill and Sayre disclaimed the warranty. Assuming there was no disclaimer, Sayre also has no defense to the breach of warranty action. Finally, in the negligence action, New York is a pure comparative negligence state. This means that a defendant's liability will be reduced by the amount of the plaintiff's own negligence. Here, Sayre might have a defense since Merrill was speeding. However, this would probably not result in a high percentage of negligence on the plaintiff since there are no facts to indicate that the speed had anything to do with the accident. Moreover, the facts do not indicate that even if Merrill had not been speeding the results would have been any different. Therefore, Sayre would probably not have a successful defense based on plaintiff's negligence.

3. Assuming June sues Merrill, the law of New York would govern her claim, and allow her to recover from him. The issue is what state's law governs when there are two states laws involved. The state of New York's choice of law is done under a government interest analysis. With regard to torts, the choice is determined either by conduct governing analysis or loss distribution analysis. Here, since there is no difference in the laws of New York and State X with regard to conduct, the only question is loss distribution. New York determines which state's law should govern based on Neumeier's three rules of liability. In this case, the first of Neumeier's rules governs since both June and Merrill are New York residents. This is known as a false conflict since only one state has an interest. As a result, New York will apply its own law which allows one spouse to recover from the other and therefore, June's claim against Merrill will be governed by New York law.

Question-Five
In July 1998, Al entered into a one-year lease of a saw mill in Warren County and opened a business to produce and sell kits of pre-cut materials for the construction of log homes. Al ran ads in area newspapers and magazines and sold and delivered several log home kits to customers in Warren and nearby Essex counties. In each case 10% of the purchase price was paid with the order and the balance was paid on delivery of the kit.

By March 1999, it became apparent to Al that he would require substantial additional financing in order to continue his business, but applications to several banks in the area for such a loan were denied. On April 30, 1999, the mill employees were laid off and no log home kits were thereafter produced, although Al continued to solicit orders.

Carl, a resident of Warren County, placed an order for a log home kit on May 5, 1999, and paid Al $4,000, representing 10% of a $40,000 order, with delivery to be made on or before June 5, 1999. On June 5, Al told Carl there would be a two-week delay in delivery due to "problems" at the mill. When no delivery had been made by July 1, Carl attempted to telephone Al and learned that the telephone service had been disconnected. Carl then went to the mill and found the office closed. A neighbor told Carl that Al told him earlier that day that the business was closed and that Al was leaving town. Carl went immediately to the police station and reported the foregoing events. Pat, a police officer, was dispatched to the house where Al had been living.

Although no accusatory instrument had been filed or warrant issued, Pat arrested Al as he was leaving the house. Al was carrying a briefcase. After handcuffing Al and placing him in the police car, Pat opened the briefcase and found that it contained a large sum of cash.

Further investigation revealed that in the months of May and June 1999, orders were taken and down payments were received by Al in amounts from $3,000 to $5,000 from five other customers in Warren County and four customers in Essex County. The orders all provided for delivery of materials in thirty days, with the balance of the order to be paid on delivery. Al had offered to his customers various excuses for delays in delivery, but no deliveries were made with respect to orders placed after April 30. Bank records revealed that the large balance in Al's account was withdrawn in cash earlier on the day that Al was arrested.

A Warren County grand jury, after hearing evidence of the foregoing pertinent facts, indicted Al charging him with six counts of grand larceny by false promise. No charges were ever brought in Essex County with respect to the four transactions there which occurred after April 30. Al duly moved to dismiss the indictment on the ground that the evidence presented to the grand jury was not legally sufficient to establish the crime of grand larceny by false promise. The court (1) denied the motion.

Al also duly moved to suppress the evidence seized at the time of his arrest on the ground that his warrantless arrest and the search and seizure of the contents of the briefcase were unlawful. The court (2) granted his motion.

At the trial of Al in May 2000, the prosecutor called Carl as a witness. Earlier, after the jury was sworn and before the prosecutor's opening statement, the prosecutor turned over to defense counsel a transcript of Carl's grand jury testimony. In the course of cross examination, Carl testified that he had given a detailed written statement to a police investigator on July 2, 1999. That statement had not been made available to Al. Al moved to compel production of the statement or, in the alternative, strike the testimony of Carl. In opposing the motion, the prosecutor stated that the July 2 statement was not in the possession of the district attorney's office and the office was not aware of its existence until Carl testified at the trial. The court (3) denied the motion.

Later in the trial, the prosecutor called Dan as a witness, making an offer of proof, outside the presence of the jury, that to establish a common scheme to defraud creditors, Dan would testify that Al took his order for a log home kit in Essex County on June 1, 1999, that he made a 10% down payment of $3,000 with delivery due on July 1, 1999, that he never heard from Al after June 1 and that no log home kit was ever delivered. Al objected to the offer of proof and the court (4) sustained the objection.

Were the rulings numbered (1), (2), (3) and (4) correct?

ANSWER TO QUESTION FIVE

1. The court correctly denied the motion to dismiss the grand jury indictment. The issue is whether sufficient evidence exists to indict Al on grand larceny by false promise.

When a defendant is brought before a grand jury, he can be indicted if the grand jury finds that the prosecution presented sufficient evidence to make out a prima facie case for the crime charged. False promise is a crime whereby a person obtains property falsely based on an intentional misrepresentation of precentor past fact. Under the crime of larceny by false promise, a person can wrongfully obtain possession of property under similar means. Here, the evidence tends to establish sufficient evidence for this crime. The fact that Al closed his mill and laid off his employees on April 30, 1999, would tend to show that he no longer desired to continue his business. By soliciting orders during May and June, Al was necessarily making false statements of material fact as to his ability to provide materials to the solicited customers. As such, sufficient evidence was presented to indict.

2. Lawfulness of the warrantless arrest and search of Al's briefcase

A. Al's arrest

Pat's arrest of Al in his home was an illegal warrantless arrest not justified by exigent circumstances. The issue is the validity of the arrest.

Under New York law, an officer cannot arrest someone in or at their home without an arrest warrant or unless exigent circumstances exist (i.e., a "hot pursuit"). Because these circumstances are absent, an officer may not go to a person's home to arrest them without a warrant. A warrant can only be acquired based on probable cause and issued by a neutral magistrate. Here, because Pat had no warrant, an arrest of Al while leaving his home would be illegal.

Assuming, however, that "as he was leaving the house" implies that Al was sufficiently outside of his home and that he was in the general public. The rule is that an officer can arrest a person in the public so long as he has probable cause to believe that the person arrested has committed the target crime. If "as he was leaving" is interpreted to mean Al has left his house, the arrest would be legal because based on Pat's probable cause acquired by Carl's statements at the police station.

B. The search of Al's briefcase

Assuming the arrest in Al's home was illegal, the issue is whether the contents of the briefcase must now be suppressed as a violation of Al's Fourth Amendment rights against illegal search and seizure. Put more simply, would the discovery of the money be a fruit of Pat's unlawful search?

The Fourth Amendment protects individuals against unlawful searches and seizures. The general rule is if a search warrant is absent, the police cannot search an individual unless one of the enumerated warrant exceptions applies.

The only relevant exception here would be the warrant exception that applies to searches that are incident to a lawful arrest. This rule allows an officer to search the "wingspan" of an individual so long as it is part of, and at the same time as, a lawful arrest. Because the arrest of Al in his home was unlawful, the money found in Al's briefcase would be considered to be the fruit of an unlawful search and would not qualify for the "incident to a lawful arrest exception". Accordingly, the contents of Al's briefcase should be suppressed.

It will be noted, however, that if as stated previously, Al was enough out of his home for the arrest to be lawful. The contents of the briefcase should not be suppressed because the search would be incident to a lawful arrest.

3. Production of Carl's statement

The court was incorrect to deny Al's motion to compel the statement or strike Carl's testimony. The issue is the prosecution's duty of production as to past statements by prosecution witnesses to the police.

Under the New York Criminal Procedure Law (CPL), upon request by the defendant, the prosecutor in a criminal case must turn over certain relevant evidence to the defense. This includes past grand jury testimony, any reports (scientific or medical) the prosecution has in its possession, along with other materials including the prior statement of a prosecution witness made to any law enforcement official to be used at trial. The purpose of this rule is so that the defense can have an opportunity to cross examine a prosecution witness through his prior statements. This rule extends to all statements that the prosecutor has as well as any statements he

could obtain through reasonable efforts. This would include statements in possession of law enforcement officials.

Here, although the prosecution was not in possession of the statement, it cannot be said that with reasonable efforts they could not have obtained it. Accordingly, the court was wrong to conclude that the prosecutor had no duty to produce the statement or the court could strike the witnesses testimony. Upon reasonable request to the prosecution, which it appears that Al gave, such material must be produced.

4. The court improperly sustained Al's objection to the proof of a common scheme to defraud.

In a trial based on fraud, the prosecution can introduce evidence to prove that the defendants activities established a common scheme to defraud creditors. The issue is whether this type of evidence of Al's character is admissible in a criminal case. Under the Federal Rules of Civil Procedure, the prosecution cannot introduce evidence of a defendants character to show conduct in conformity with that character on a specific occasion. An exception to that rule is when the defendant's conduct is used to show a common scheme to commit a crime. Here, Dan's testimony shows just that. Therefore, it should not be considered impermissible character evidence. Accordingly, it should be allowed in under the Rules of Evidence to show a common plan or scheme. Evidence must be relevant to be admitted in court. Here, the evidence is relevant because it has a tendency to prove or disprove a matter in issue in the case. Only relevant evidence will be allowed in by the court in a proceeding and proving a common plan or scheme by a defendant is certainly relevant, even though it is a past act by the defendant. Other exceptions to this rule include evidence establishing motive, opportunity or identity of the defendant. These types of evidence have been deemed relevant and are admissible in a criminal trial under the Federal Rules of Evidence.

ANSWER TO QUESTION FIVE

1. The court's denial of Al's motion to dismiss the indictment was proper. The issue is whether the prosecution has established the elements of grand larceny by false pretenses. In New York, according to the New York penal law, an indictment for larceny generally requires showing 1) a trespassory taking, 2) and carrying away, 3) of property of another 4) with intent to steal. As applied to these facts, the indictment for larceny can be sustained. First, Al took the six customers' money after his employees had been laid off and production shut down, showing that he had no intent to actually produce the ordered goods. Next, Al had possession of the money as owner of the business. Al also was found with a good deal of money on his person. However, to establish larceny by false promise, the prosecution must also show a false promise to supply goods in return for money. The facts support this proposition, even though the delivery deadline probably had not passed for all orders. The fact that the saw mill shut down and Al was on his way out of town would be enough. To establish grand larceny in New York, the prosecution must show that the amount of money exceeded $3,000 for third degree, $50,000 for second degree and $1,000,000 for first degree. Thus, Al would be indicted for six counts of third degree grand larceny. In order to achieve a conviction at trial, the prosecution must prove all of the elements beyond a reasonable doubt. However, to sustain a grand jury indictment, the prosecutor need only present legally, sufficient evidence. Here, the evidence presented sustained the indictment, even without the use of the possibly illegal evidence.

2. The court's granting of Al's motion to suppress both the arrest and the search of the briefcase was correct. The issue is whether evidence seized in violation of a defendant's Fourth Amendment rights is admissible. The rule is that arrests without a warrant made in the home are invalid, as are any contemporaneous searches pursuant to such illegal arrest.

First, the arrest was illegal and violated Al's Fourth Amendment rights because it was made without a warrant as he was leaving his home. A warrant requires three things: 1) probable cause, 2) neutral and detached magistrate and 3) specificity as to the things and places to be searched. Although all searches and arrests need a warrant, exceptions are made for warrantless seizures. In this case, Pat, the police officer, had no warrant and had only Carl's statement to support probable cause. When Pat was dispatched to Al's home, she should have obtained a warrant to arrest him. Although he was leaving his home and not in it, a public arrest was still not valid because it is questionable whether Pat had probable cause, or a good faith belief based on evidence, that Al had committed a crime. Although the fact that Al appeared to be leaving town, an exigent circumstances exception to the warrant requirement would not be met. Pat had a duty to obtain more evidence before making an arrest.

Second, as to the search of the briefcase, it was also illegal. A person has a Fourth Amendment right to be free from unreasonable searches and seizures. Like the law of arrest, a search requires a valid warrant based on probable cause, or an exception to the warrant requirement. Although the search of Al pursuant to a valid arrest might be valid, since his arrest was unconstitutional, such a search would also be excluded under the "fruit of the poisonous tree" doctrine of the exclusionary rule. The exclusionary rule is a judicial remedy whereby all illegal evidence is suppressed from use at trial. This rule extends to all evidence resulting from the first illegal act, if they are interdependent. In this case, since the arrest was invalid, the following search incident to arrest was also invalid. Al had proper standing to challenge both because he had a reasonable expectation of privacy in both his person and his briefcase, and the police violated this privacy. Finally, even if the arrest was valid and a search incident to an arrest were conducted, the briefcase may not have been an acceptable search unless the police feared that Al might be carrying weapons inside. New York law restricts the scope of permissible searches pursuant to arrest and allows such searches within the arrestee's wingspan only if the police fear the arrestee poses a threat of violence from possession of a gun.

In sum, both the arrest and the search were validly excluded.

3. The court was wrong in denying Al's motion to suppress Carl's testimony, or alternatively produce Carl's statements to the investigator. The issue is whether a criminal defendant has a right to obtain all the statements of witnesses against him, prior to testifying, if made to the government. In New York, such materials are compelled under the Rosario doctrine. Therefore, Al, in this case, had a right to see the statements made by Carl to the police investigator so that he could effectively cross-examine Carl about them. Despite the fact that the prosecutor did not have the statements, it still had a duty to inquire after any such statements made by witnesses and turn them over. Thus, the court should have sustained Al's motion.

4. The court erred in sustaining Al's objection to the testimony of Dan. The issue is whether Dan, a witness, may testify as to outside circumstances of events that establish a common scheme or plan by the defendant. New York's rule of evidence, as established by the common law of evidence, would allow such relevant testimony to show a common scheme or plan by Al to defraud his customers. Evidence law, in general, allows the admission of any relevant testimony. Evidence is relevant if it tends to prove or disprove a dispositive issue. The testimony of Dan was clearly relevant as an uncharged prior bad act because it met an exception to the rule that unrelated events are not admissible. Under the "MIMIC" rule as adopted in New York, evidence of motive, intent, identification, or a common scheme or plan is admitted as relevant evidence. Dan's testimony shows that Al committed similar acts to the ones at issue and should have been admitted. In this case, there is little chance that the prejudicial value of this testimony will outweigh its beneficial one, since Al is already convicted of six counts of similar larceny. The evidence should have been admitted.

NEW YORK STATE BAR EXAMINATION
JULY 2000 QUESTIONS AND ANSWERS

Question-Six
You are an associate in a law firm representing Alex, a shareholder of ABCO Realty, Inc., a New York business corporation. The law firm's senior partner plans to meet with Alex tomorrow and would like a memorandum that addresses Alex's questions based upon the following facts:

In June 1996, Alex and nine other shareholders formed ABCO to engage as a principal in the business of buying, selling and leasing commercial properties in the New York City area. They are still the only shareholders of ABCO. ABCO's shares are not listed on a national securities exchange or quoted in an over-the-counter market.

Bev, her husband Carl, and Eric were elected to the ABCO board of directors and the board appointed Deb president of ABCO.

ABCO's business grew and in February 1998, Deb hired Peter as her personal assistant at ABCO. Peter had no supervisory responsibilities nor authority to make decisions for ABCO. About the same time, Eric and Frank formed E&F Realty, a brokerage partnership.

In March 1998, with the approval of the board, ABCO entered into an agreement with E&F by which E&F would provide all of the brokerage services for ABCO. Eric's interest in E&F was not made known to the other members of the board. The agreement provided that E&F would have the exclusive right to represent ABCO on all sales and leases in New York City. The commission rates ABCO agreed to pay E&F for its brokerage services were far in excess of the standard rates in the industry. Thereafter, ABCO's sales flourished and the agreement proved profitable for E&F.

In July 1999, Bev decided that she wanted to purchase a boat for her personal use. Without the consent of the shareholders, the board voted unanimously to make a $75,000 loan to Bev. The loan was to be repaid on June 1, 2000.

In the fall of 1999, ABCO began to experience serious financial difficulties. It has failed to pay E&F substantial commissions due and has failed to pay Peter his wages for several months. E&F has also begun to experience financial difficulties. In March 2000, ABCO terminated Peter's employment.

Alex has just learned that Eric is a partner in E&F and wants ABCO to void its agreement with E&F to avoid paying outstanding commissions. Peter, who believes that ABCO may soon become insolvent, has informed Alex that he is planning to seek his outstanding wages from Alex and the other ABCO shareholders personally.

Alex believes that the loan to Bev is unlawful. No payments on the loan have been received, and Alex wants the loan repaid to ABCO immediately. Alex also believes that ABCO may be due monies from E&F as the result of overcharges that occurred between 1996 and the present. Because of E&F's current financial situation, he wants to know ABCO's chances of recovery from Eric and Frank.

Please prepare a memorandum that answers the following questions:

(a) Can ABCO avoid the agreement with E&F?

(b) Can Peter recover his wages from ABCO's shareholders?

(c) Who is liable to ABCO for the repayment of the loan proceeds?

(d) If ABCO is due money from E&F, to what extent, if at all, are Eric and Frank liable?

ANSWER TO QUESTION SIX
A. Can ABCO avoid the agreement with E&F?

ABCO can avoid its agreement with E&F. The issue is whether an undisclosed interest of a director affects the transaction which benefits that director. Under the BCL, directors of a corporation owe both the duty of care and duty of loyalty in their roles as directors. The duty of loyalty includes the duty to disclose any transaction that will benefit a director personally to the board as a whole. The transaction, once the director's interest is disclosed, may proceed if either: 1) a majority of directors approve it provided a quorum is met; 2) a majority of shareholders approve it; or 3) the transaction is fundamentally fair to the corporation.

Here, the transaction was not validly approved because Eric's interest was not disclosed to the other board members. Without such disclosure, their approval of the transaction cannot be upheld. In addition to failing the approval test, the transaction will not meet the fairness test because it is not fundamentally fair to the corporation - the commission rates being paid by ABCO to E&F far exceed standard brokerage service rates.

Because Eric's interest in the transaction was not disclosed, ABCO can avoid the agreement with E&F.

B. Can Peter recover his wages?

Peter can recover his wages from ABCO's shareholders. The issue is whether the shareholders of a closely held corporation are liable for the wages of the corporation's employees.

Under the BCL, shareholders of a corporation usually enjoy limited liability, such that they are only liable for the corporation's obligations up to the amount they paid for their shares. However, in a closely held corporation, a corporation whose shares are not publicly traded, the ten largest shareholders are responsible for the employees' wages in proportion to their respective shares.

Here, ABCO is a closely held corporation because its shares are not listed on a national securities exchange or sold over the counter. All ten shareholders of the corporation, including Alex, are liable for Peter's wages because he was an employee of the corporation.

C. Who is liable to ABCO for repayment of the loan?

The board of directors, in their individual capacities, are liable to the corporation for the repayment of Bev's loan. The issue is whether a board may approve a loan made to a director without the consent of the shareholders.

For corporations in existence on February 22, 1998, a loan made to a director must be approved by the board and ratified by 2/3 of the shareholders. Any loans made by the board without such shareholder approval subject the directors to financial liability for the loan, unless the director properly objected to the loan and gave proper notice.

Here, the board of directors, Bev, Eric and Carl, are responsible for the repayment of Bev's loan because they did not get consent from the shareholders for the loan.

D. Eric's and Frank's Liability

Eric and Frank will each be responsible for half of the monies owed to ABCO by E&F. The issue is the personal liability of partners for debts of the partnership.

New York follows the UPA which directs that partners are jointly liable for the debts and obligations incurred by the partnership. This is a departure from liability for torts and other causes of action, where multiple wrongdoers are held jointly and severally liable for their wrongs such that any single wrongdoer is responsible to the plaintiff for the full amount of damage.

Eric and Frank are jointly liable for the monies owed by their partnership to ABCO because they are partners. Both will have to pay half of the monies owed.

ANSWER TO QUESTION SIX

1. ABCO can avoid the agreement with E&F. The issue was whether a transaction by an interested director with the corporation was valid.

As a preliminary matter, New York BCL governs this case.

In New York, a director must discharge her duties in good faith and with the honesty, conscientiousness, morality and fairness as required by law of the fiduciary. A director can not engage in interested transactions, i.e. the director would benefit personally from the transaction with her own corporation unless the director proves that the transaction was fair and reasonable to the corporation at the time it was made or after the material facts of the director's interest were disclosed and known to shareholders or the Board, and the transaction was approved by 1) sufficient votes of the shareholders, 2) sufficient votes of the board not counting the interested directors or 3) unanimous votes of the disinterested directors if the interested director was necessary to constitute a quorum.

In this case, because the fact that Eric was a partner of E&F, and therefore an interested director, was not disclosed and made known to the shareholders or the board, the agreement between ABCO and E&F would be avoided unless Eric can prove that the translation was fair and reasonable at the time it was made. In this case, because the commission rates charged by E&F were far in excess of the standard rates in the industry, Eric would not be able to carry his burden of proof. The agreement could be avoided by ABCO.

2. Peter can recover his wages from ABCO's shareholders. The issue was whether the shareholders in a closely held corporation are personally liable for the wages of its employees.

Generally, shareholders of a corporation are not liable for the debts and liabilities of the corporation. They are liable only to the extent of their investment. Nor would a court in New York pierce the corporate veil in the absence of fraud or injustice. In this case, ABCO had its own existence in mind and there is no evidence of excessive entanglement by the shareholders. The shareholders did not use the corporation as a mere cloak of illegality. Therefore, Pete would not be able to recover his wages under the piercing the corporate veil theory.

However, Pete would nevertheless recover his wages from the shareholders of ABCO because under New York BCL, the top ten shareholders of a closely held corporation are personally liable to the wages of the employees. In this case, ABCO is a closely held corporation because it has only ten shareholders. It is not listed on a national securities exchange or quoted in an over-the-counter market. Therefore, the shareholders of ABCO, including Alex, would be personally liable to Pete for his wages if ABCO cannot pay for this debt.

3. The whole Board of directors are personally liable for the repayment of the loan to Bev. The issue is when can a corporation approve a loan to a director for personal use.

Since ABCO was formed in 1996, and therefore before February 22, 1998, two-thirds of the shares entitled to vote would be required to approve a loan that is not in the corporation's benefit. In this case, the loan to Bev was for personal use to purchase a boat. It was not in the corporation's interest and therefore must be approved by two-thirds of the shares. Since the shareholders never approved the loan, the directors who knowingly approved the loan are personally liable. Because the Board approved the loan unanimously, Bev, Carl and Eric are personally liable for the loan.

4. Eric and Frank are personally liable for any money due to ABCO. The issue is the partner's liability for a partnership's obligations.

In a general partnership, partners are personally liable (jointly) for all the debts and obligations of the partnership.

In this case, Eric and Frank formed E&F Realty as partners. There is nothing that indicates the partnership is a limited liability partnership that would have limited Eric's and Frank's personal liability for the partnership's debts. Eric and Frank are jointly liable to all money due to ABCO if E&F fails to satisfy the obligation.

It should be noted that ABCO should have been able to disgorge any profit Eric made from the commission agreement because Eric breached his duty of loyalty to ABCO.