NEW YORK STATE BAR EXAMINATION
JULY 2006 QUESTIONS AND ANSWERS

Question-One
In January 1998, Bob entered into a contract with John, a local window craftsman, for the purchase of hand-made, stained-glass windows for his home. The purchase price was $10,000. The windows were to be made with a special lead lining to prevent leakage. The contract included an express warranty against leakage for three years.

Before the execution of the contract, John told Bob that he was in the process of incorporating his window business into "Hand-Crafted Windows, Inc." The contract was signed by John as "John, for Hand-Crafted Windows." John completed the delivery and installation of Bob's windows in June 1998, at which time, at John's request, Bob issued his check for $10,000 payable to "Hand-Crafted Windows, Inc." The incorporation was finalized in July 1998, and Bob's check was then deposited into an account of the corporation.

Bob first noticed problems with water leakage around the windows in March 2001. At that time he discovered that the windows had not been lead lined when they were manufactured. The leakage through the windows, which resulted from the missing lead lining, caused damage to the surrounding structure of Bob's house. Immediately upon discovery of the leakage, Bob complained to John, who refused to repair or replace the windows. He also refused to pay for the damage caused by the leaks to the other parts of the house. In April 2002, Bob hired another window company to replace the windows and make repairs to his house, at a cost of $18,000. There is no dispute as to these facts.

In January 2005, Bob duly commenced a lawsuit against John personally and against Hand-Crafted Windows, Inc. for breach of the express warranty. He seeks a total of $18,000 in damages, claiming $10,000 for the cost and installation of new windows with a similar warranty, plus $8,000 for repairs to the damaged portion of his house caused by the water leaks.

Hand-Crafted Windows, Inc. moved (1) for summary judgment dismissing the action against it, asserting it could not be liable on a contract that predated its incorporation. In addition, John moved (2) for summary judgment dismissing the action against him personally on the ground that he was merely acting as an agent for Hand-Crafted Windows, Inc. when he signed the contract. Both defendants also moved (3) for summary judgment asserting the expiration of the statute of limitations and, in any event, (4) for partial summary judgment dismissing that portion of Bob's claim predicated on the cost of repairing the damage to his house caused by the water leakage.

How should the court rule on the numbered motions?

ANSWER TO QUESTION 1
1) At issue is whether a corporation may be held liable on a contract that predates its incorporation.

Under the New York Business Corporations Law, a corporation may be held liable for a contract entered into by a promoter if the corporation expressly or impliedly adopts the contract. A promoter is one who acts on behalf of the corporation in establishing the corporation. A corporation may expressly adopt a pre-incorporation contract in writing, or it may do so impliedly, by accepting the benefits of the pre-incorporation contract entered into by the promoter.

Applying this rule, Hand-Crafted Windows, Inc. may be held liable under the contract entered into by John because it impliedly adopted the contract. John is a promoter because he acted as an agent of the corporation (on behalf of it) in establishing it. He sought out business and took the actions to incorporate it. Furthermore, Hand-Crafted Windows, Inc. impliedly adopted the pre-incorporation contract between John and Bob because it accepted the benefits of the contract.

John had Bob make the check payable to "Hand-Crafted Windows, Inc.", and when the incorporation was finalized, Bob's check was deposited into the corporation's bank account.

Summary judgment should be granted when there is no genuine triable issue of fact. All inferences are to be made in favor of the non-movant. The court may search the record and may find against the non movant.

In this case, summary judgment should not be granted in favor of Hand-Crafted Windows because it can be held liable on a pre-incorporation contract that it adopted. Furthermore, if the court searches the record, and because there is no dispute as to the facts stated above, the court may order summary judgment in favor of Bob on this issue.

2) At issue is when a promoter can be held liable on a contract.

Under the New York Business Corporations Law, a promoter can be held liable on a contract until and unless the corporation for which he acted as a promoter, the promoter, and the third party execute a novation releasing the promoter from liability. Under the common law of contracts, novation is a modification to an existing contract, in which the original parties and a new party agree to release one of the original parties and replace him with the new party. Novation releases that party as to all obligations and liabilities of the contract. A promoter is one who acts as an agent for a corporation in helping to establish the corporation.

John was a promoter for Hand-Crafted Windows, Inc. because he acted as an agent in helping to establish the corporation. He sought out business for the corporation prior to its incorporation. He represented himself to the world as a promoter for it by signing his contract with Bob "John, for Hand-Crafted Windows." He represented to Bob that he "was in the process of incorporating" and he asked Bob to make his check payable to the corporation.

Under the facts, there was no novation executed between John, Bob, and an authorized agent for the corporation. Therefore, John may be held liable as a promoter for the pre-incorporation contract. Summary judgment should not be granted in favor of John.

Note that an agent will not generally be held liable on contracts made on behalf of a principle if he has authority to make the contract and the principle is fully disclosed to the third party. Authority may be actual express, apparent, implied or granted after execution by ratification. However, there is a special rule for promoters because they act for a principle not yet in being and therefore cannot yet have authority from a principle or fully disclose the principle (since it is not yet in existence).

3) At issue is whether Bob's claims against John and Hand-Crafted Windows are timely.

Under the CPLR, the statute of limitations for a breach of warranty claim is four years from the date of sale. The sale contract between Bob and John was executed in January 1998, and Bob commenced his suit against John in January 2005 (seven years later). Thus, the breach of warranty claim against John is not timely.

The statute of limitations for a breach of contract claim is six years from the date of breach. John and Bob had a valid contract with an express warranty against leakage for three years. Bob discovered the leakage problem within the three year period, measured from the date of installation and he requested that John repair the windows. John refused, thereby breaching his contract with Bob. Bob thus timely filed his claim for breach of contract on January 2005.

The claim for breach of contract is similarly timely against Hand-Crafted Windows because it

adopted the contract between Bob and John with the same terms agreed to by them. Thus it was similarly liable under the same statute of limitations period.

4) At issue is what damages are available, specifically whether consequential damages are available.

Under Article 2 of the UCC, a party seeking damages for breach of contract may recover monetary damages in the amount of replacement cost for defective goods (cover of fair market value if cover not possible), plus any incidental and foreseeable consequential damages. Consequential damages are recoverable if foreseeable. Article 2 of the UCC applies to the sale of goods, moveable personal property.

Article 2 of the UCC applies to this contract because windows are moveable personal property. The fact that they were eventually annexed to real estate is not material. John is entitled to $10, 000 for the cost and installation of new windows with a similar warranty as long as he sought the replacement goods in good faith. Good faith is honesty in fact.

John is also entitled to the $8,000 consequential damages for repairs to the damaged portion of his house caused by the water leaks because the damages were a foreseeable result of the windows not being properly manufactured to the specifications of the contract. The contract specified that the windows were to be made with "a special lead lining to prevent leakage." In fact, they were not manufactured with a lead lining at all. Because the lead lining was supposed to prevent leakage, the failure to make them with a lead lining made leaking foreseeable. Damage to the rest of the house was a foreseeable consequence of the leakage, and therefore of the breach. Thus, John and Hand-Crafted Windows, Inc. may be held liable for the cost of repairing the damage to Bob’ s house caused by the water damage.

ANSWER TO QUESTION 1

1) The issue is whether a corporation can be held liable for a contract that was entered into before the actual incorporation of the corporation. Summary judgment is appropriate when there is no issue of material fact and the moving party is entitled to judgment as a matter of law.

Under New York corporate law as contained in the BCL, promoters are personally liable for the contracts they enter into on behalf of not yet formed corporations. The corporation itself will not become liable for the contract until it has ratified the contract. The corporation can ratify the contract when it becomes aware or obtains knowledge of the contract and accepts the benefits of the contract. A promoter will still remain personally liable on the contract with the corporation unless there is a novation. A novation occurs when the corporation relieves the promoter of personally liability and decides to assume all responsibility and liability itself. Therefore, even though a promoter initially entered into a contract with a third party on behalf of the not yet formed corporation, the corporation will become liable on the contract when it exercises its rights to receive benefits under the contract such as payment.

In this case, John is the one who created the contract with Bob. John told Bob that he was in the process of incorporating the window business. He will be personally liable as a promoter unless there is a novation. The corporation, Hand-Crafted Windows, will also be liable however. This is because incorporation was complete in July 1998 and Bob’ s check was deposited into the account of the corporation. This shows intent to be bound by the contract entered into on the corporation’ s behalf by the promoter.

Thus, it does not matter that John personally entered into the contract with Bob in January 1998 since after incorporation in July 1998, the corporation accepted the benefit of the contract with knowledge of the contract by depositing the check into its corporate account. Hand-Crafted

Windows will be liable on the contract that predated its incorporation. Therefore, summary judgment dismissing the action against the corporation would be improper because there is clearly an issue of triable fact.

2) The issue is whether an agent (or promoter) can be personally liable for a contract entered into on behalf of a not yet formed corporation. Summary judgment is only proper when there is no issue of triable fact and the moving party is entitled to judgment as a matter of law.

The general rule is that principles will be liable for contracts entered into by their agents if there is actual, inherent, apparent authority or ratification. Actual authority can be express or implied. Implied actual authority results from the principle agent relationship based on necessity, custom, or prior dealings. Apparent authority results when the principle cloaks the agent with the power of representing the principle and a third party reasonably relies on this.

Also as a general rule, as stated above, promoters will be personally liable for the contracts they enter into on behalf of a not yet formed corporation regardless of whether the corporation is ever formed or not, and regardless of whether the corporation decides to bring itself to the contract. If the corporation accepts the benefits of the contract, it too will be bound, but the promoter will not be off the hook, and will remain personally liable unless and until there is a novation which would relieve the promoter of personal liability.

In this case, there is no indication that there was a novation. John told Bob that he was in the process of incorporating his window business into a corporation. This clearly shows that there was some kind of principle-agent relationship such that the principle should be bound. The problem was that in this case the corporation was not yet formed at the time John entered into the contract so there could not be an actual authority, either express or implied to enter into the contract. There could be a ratification in this case because the corporation had knowledge of the contract that John entered into, it received the benefit of the contract by depositing Bob's check into its corporate account, and it did not alter the terms of the original contract.

For these reasons, summary judgment should be denied for John because he is personally liable on the contract.

3) The issue is whether the statute of limitations has expired such that the action is not timely.

The general rule is that a warranty of merchantability will be good for four years. A warranty of merchantability is on behalf of a merchant who deals in goods of the kind who warrants that the goods will be fit for their ordinary purpose. A warranty of fitness for a particular purpose, however, warrants that the goods will be fit for the specific purpose to which the buyer is putting the goods.

In this case, however, the contract had an express warranty against leakage for three years. Despite the fact that there was an express warranty for only three years, it must be noted that in this case John had specific knowledge of what use Bob was going to have for the windows. John knew that Bob wanted hand-made stained glass windows for his home that were to have a special lead lining to prevent leakage. For this reason, the statute of limitations on the warranty of fitness for a particular purpose has not yet run. The statute of limitations would begin to run from the time that Bob learned of the defect which was in March 2001. Bob brought suit in January 2005 which was within the four year period.

Thus, summary judgment dismissing the claim on statute of limitations grounds would be improper.

4) The issue is whether the damages predicated on the cost of repairing the damage to Bob's house caused by the water leakage were foreseeable, and therefore whether they qualify as consequential damages.

Consequential damages will be awarded when the defendant knew of the particular plaintiff's needs and issues such that a breach by the defendant would be likely to result in foreseeable damages. In this case, John and thus Hand-Crafted Windows, knew that Bob needed lead-lined windows to prevent leakage. Because they both had this necessary information, it was foreseeable that any leak would lead to water damage.

Expectation damages and incidental damages are easily recoverable here because Bob had to "cover" by getting replacement windows. He did his best to mitigate the costs and because the new windows were obtained with good faith, the difference he will receive will be between the new contract price to fix the windows and the old contract price. He will also be able to get the consequential damages resulting for the leakage.

Therefore, partial summary judgment would be inappropriate and Bob will be able to maintain his claim to get the damages based on cover which was 10,000 and the consequential damages of 8, 000 resulting from the foreseeable damage to his house caused by the leaks.

Question-Two
Dan asked Mike to burn down a vacant building that he owned in order to obtain the proceeds from a fire insurance policy. Mike agreed to set the fire in exchange for $5,000.

Mike entered the building using a key that Dan had given him and ignited kerosene-soaked rags in the entranceway of the building. Unbeknownst to Dan and Mike, Harry, a homeless person, was in the building. The resulting fire caused the fire alarm to go off. The fire department responded and discovered that Harry had died of smoke inhalation.

Dan and Mike were indicted for the crimes of conspiracy, arson and felony murder for the death of Harry. The charges against Mike were disposed of through a plea bargain, but Dan chose to go to trial.

Prior to Dan's trial, the prosecutor notified the defense that, if Dan testified in his own defense, the prosecutor intended to cross-examine Dan regarding his conviction in 2005 for driving while intoxicated. Dan moved to preclude the prosecutor from questioning him regarding his prior conviction. The court (1) denied Dan's motion.

At trial, the prosecutor introduced evidence to support the facts set forth above. Dan testified that he did not set the fire, and that he did not know that Harry was inside the building at the time of the fire. The prosecutor, on his cross-examination of Dan, questioned him about his prior conviction.

At the conclusion of all the evidence, Dan moved for a trial order of dismissal on the grounds that: (a) the evidence did not establish the crime of conspiracy; (b) he could not be convicted of the crime of arson because (i) he did not set the fire, and, in any event, (ii) he had the right to burn down his own building; and (c) he could not be convicted of the crime of felony murder because he did not set the fire and Harry's death was not intended.

(1) Was ruling (1) correct?

(2) How should the court rule on Dan's motion to dismiss?

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ANSWER TO QUESTION 2

1) The issue is whether a prior conviction is admissible against a criminal defendant and whether there are any required procedures prior to admitting the prior conviction. The central governing principle of evidence is relevance. Evidence is relevant if it tends to prove or disprove a material issue of fact. All relevant evidence is admissible unless it is hearsay or precluded by other considerations such as confusion to the jury, waste of time, or danger of unfair prejudice. By taking the stand, a criminal defendant puts his credibility in issue, and the prosecution can seek to introduce evidence of prior convictions to impeach the defendant's credibility. Impeachment is a method of trying to show that the defendant or witness is not credible or not worthy of belief. In New York, a criminal defendant can be impeached with a prior conviction for any crime. In New York, before admitting the prior conviction, the court holds a Sandoval hearing during which it weighs the probative value of the conviction on the issue of veracity against the danger of unfair prejudice. In this case, the prior conviction is for driving while intoxicated. Arguably this crime is not very probative on the issue of truthfulness. However, New York's liberal policy of allowing impeachment for any conviction for any crime (as compared to the more limited federal rule) is based on the rationale that a person who has committed a crime in the past has demonstrated a willingness to put his interests ahead of society and may do so again by ignoring the oath to tell the truth on the stand. In balancing the conviction's probative value against the danger of unfair prejudice, the court will consider such factors as the seriousness of the crime, the inflammatory nature of the crime, and the similarity of the prior crime to the currently charged crime. In this case, because the defendant put his credibility in issue by taking the stand and because of New York's liberal policy regarding impeachment through using prior convictions, the court was correct in denying Dan's motion.

2) a) The issue is whether the prosecution established the elements of the crime of conspiracy beyond a reasonable doubt. Under the New York Penal Law, conspiracy is a specific intent crime and it does not merge with the substantive offense. The elements of conspiracy are 1) agreement, 2) intent to agree, 3) intent to pursue an unlawful objective, and New York additionally requires 4) an overt act in furtherance of the conspiracy. The crime is complete the moment there is an agreement and an overt act. Therefore, in order to withdraw from liability for the conspiracy, the defendant must voluntarily renounce the crime and prevent commission of the crime. One who merely conspires however, will not be liable for subsequent crimes. New York also follows the unilateral rule which means that one can be convicted for conspiring with a police officer. In this case, there was an agreement because Dan asked Mike to burn down his building and Mike agreed to set the fire. These facts also demonstrate intent to agree by both Dan and Mike. There was also intent to pursue an unlawful objective because arson is illegal. Lastly, there was an overt act because Dan gave Mike a key to the building which Mike then used to enter the building and ignite the kerosene-soaked rags. Therefore, the prosecution established all four elements of the crime of conspiracy and the case should not be dismissed on that ground.

b) The issue is what the elements of arson are, whether Dan can be convicted as an accomplice even though he did not set the fire, and whether an owner has a right to burn his own building.

Arson is a general intent crime and the elements are setting fire to a building and the material wasting of the structure of the building. Because arson is not a specific intent crime, malice or recklessness is a sufficient mental state to be convicted. If only the carpet ignites or there is only smoke damage, that is not considered arson. In this case, it is not clear whether the fire completely burned down the building or whether the fire department was able to put the fire out. An accomplice can be convicted of the substantive crime of the actively aids or encourages in the commission of the crime. In New York, an accomplice can be convicted even if the principle is acquitted or not prosecuted. A principle cannot be convicted on the accomplice's testimony alone. There must be corroboration. Additionally, in New York, an accomplice cannot benefit from a principle's defense that negates state of mind. In this case, Dan actively encouraged and

aided in the crime because he asked Mike to burn down the building and then gave him a key to the building. Therefore, he can be convicted of arson under a theory of accomplice liability even though he himself did not set the fire. Additionally, an owner can still be convicted of arson for burning down his own building. Being the owner of the building is not an affirmative defense to arson. Therefore, the court should not grant Dan's motion to dismiss on the second ground.

c) The issue is whether any of the defenses to felony murder are available to Dan. A defendant can be charged with felony murder when a non-participant is killed during the commission of the felony. The enumerated felonies include the felony of arson. The killing must be independent of the felony and it must be a foreseeable result of the felony. Death caused while fleeing from the commission of a felony is considered felony murder but a defendant will not be liable for felony murder for the death of a co-felon. A defendant has an affirmative defense to felony murder if 1) he did not commit or aid in the commission of the homicidal act, 2) he was not armed, 3) he had reasonable grounds to believe the other participants were not armed, and 4) he had no reason to believe the other participants intended to engage in conduct likely to result in death. In this case, although Dan did not set the fire, he aided in its commission because he conspired with Mike and gave Mike the key. Therefore, arguably he aided in the killing of Harry, who died as a result of the fire. In addition, setting fire to a building, although vacant, is an inherently dangerous activity and injury or death is a foreseeable result. Although both Dan and Mike did not know Harry was in the building, arguably it is foreseeable that a homeless person might be using the building as shelter and be injured. Furthermore, the fire could have foreseeably caused injury to passersby by falling debris or exploding windows. Therefore, because Dan conspired with Mike he had reasonable grounds to believe that Mike intended to engage in conduct likely to result in death, namely setting fire to a building and the court should not grant Dan's motion to dismiss on the third ground.

ANSWER TO QUESTION 2

1) The issue is whether a prior bad act, a conviction for driving while intoxicated, can be admissible against the defendant witness in a criminal case.

Generally, under the FRE, prior bad acts may not be introduced to show the propensity of the defendant to commit a crime. It is an impermissible basis of "once a criminal, always a criminal. " The court is concerned that a jury would convict the defendant for being a bad person and not because he is guilty of the crime at hand. However, prior bad acts of a witness may be inquired into on cross examination if they relate to the witness's character for truth and honesty because they tend to impeach the credibility of the witness. In New York, a prior conviction for any crime relating to moral turpitude is a permissible basis for impeachment of the witness. This is grounded in the belief that if the witness has shown a disregard for the laws of New York, he is more apt to lie on the witness stand since he has already shown he will put his own interests ahead of the interests of the court. However, In New York, when the witness being impeached is also the defendant in the case, the court must hold a preliminary hearing to determine whether the probative value of the prior conviction as to the defendant's credibility is substantially outweighed by the risk of unfair prejudice. The court has broad discretion to determine whether the probative value is outweighed by the risk of unfair prejudice but considers the nature of the current charge, the similarity of the current charge to the conviction, the seriousness of the prior offense, the prejudicial effect of the prior offense, etc.

In this case, since the defendant is the witness who is going to be impeached by his prior conviction, it is not enough for the court to simply determine that the crime relates to moral turpitude. The court must hold a preliminary hearing to decide whether the probative value of the prior conviction is substantially outweighed by the risk of unfair prejudice to the defendant. Here, it is not clear from the facts whether the court held a preliminary hearing to weigh the factors above. If the court summarily rejected the defendant's motion without engaging in a balancing

test, the court erred and the ruling would be improper. However, if the court did engage in a balancing of the facts listed above (nature of the current charge, the similarity of the current charge to the conviction, the seriousness of the prior offense, the prejudicial effect of the prior offense, etc.), then its ruling was proper. Since the court has broad discretion to determine whether the probative value is substantially outweighed by the risk of unfair prejudice, its ruling would be proper so long as it was not an abuse of discretion. Since the prior conviction was for DUI, which is not a particularly "outraging" crime (unlike say, a conviction for child molestation) and it is unrelated to the crimes at hand, it is not an abuse of discretion for the court to determine that the risk of unfair prejudice was not so great as to outweigh the probative value of the prior conviction on the defendant's character for truthfulness.

2) The issue is whether Dan's grounds for dismissal requires a dismissal of the action , whether there is legally sufficient evidence on the conspiracy charge; whether or not he can be convicted of the crime of arson on an accomplice theory; whether a person may be charged with arson for burning their own building, and whether he could be charged with felony murder.

a) The issue is whether the evidence establishes the elements of the crime of conspiracy. Conspiracy requires 1) agreement to achieve an unlawful objective, 2) intent to agree, and 3) an overt act in furtherance of the conspiracy. In New York, it is not necessary that the other co-conspirator be found guilty as an accomplice or even that the other person had the intent to achieve the unlawful objective (i.e., an undercover police officer). This is called the unilateral theory of conspiracy. The MPC also follows this approach. In New York, a defendant may not be convicted of conspiracy solely on the uncorroborated testimony of a co-conspirator. There must be some other evidence, including circumstantial evidence, to corroborate the co-conspirator's testimony.

In this case, there is an agreement between Mike and Dan to achieve an unlawful objective (arson). Mike and Dan intended to agree as evidence by their agreement to exchange $5,000 for Mike setting the fire. There are several overt acts in furtherance of the conspiracy – Dan giving Mike the key, Mike going to the building, obtaining the kerosene, etc. For the overt act requirement, it is not necessary that the defendant have committed the overt act so long as an overt act was committed by a co-conspirator in furtherance of the conspiracy. Thus, all elements of conspiracy are present. Now, we must determine whether the prosecution introduced sufficient facts or circumstantial evidence to corroborate the testimony of Mike, the co-conspirator. Again, New York does not allow a conviction for conspiracy to stand solely on the testimony of the other co-conspirator.

In this case, there are several corroborative facts adduced at trial sufficient to corroborate Mike's testimony. Dan gave Mike a key. This is circumstantial evidence that Dan intended to agree with Mike to commit arson. Further, Dan's insurance policy provides a motive for the conspiracy and could be sued to circumstantially corroborate Mike's testimony. Further, if bank records can show a withdrawal of $5,000 at or near the time of the arson, this too would provide circumstantial evidence of the conspiracy sufficient to proceed with the charge. Finally, the presence of kerosene-soaked rags at the entrance of the building could also circumstantially show intent to conspire to commit arson. The facts are unclear as to the amount of this evidence that has been produced by the prosecutor, but so long as at least some other evidence besides the testimony of Mike is introduced, it is likely that there is sufficient evidence to proceed with the charge of conspiracy. The court should deny Dan's motion to dismiss the conspiracy charge.

b) i) The issue is whether Dan can be convicted of arson as an accomplice even though he did not actually set the fire.

An accomplice is one who renders aid, encouragement, or help to another with the intent that such aid or encouragement helps another to commit a crime or further the commission of the

crime. An accomplice is liable to the full extent to which the principle is liable. An accomplice is liable for all crime committed by the principle which are foreseeable. It is irrelevant to accomplice liability who in fact committed the object crime. So long as one aids or encourages another to commit a crime with the intent to aid or encourage in the commission of the crime, he is liable to the full extent that the principle is liable. In New York, an accomplice may not be convicted solely on the testimony of another party to the crime (here, Mike). The other's testimony against the accomplice must be sufficiently corroborated by other evidence, including circumstantial evidence.

In this case, Dan, by asking Mike to burn down his building, offering to pay him $5,000 to do it, and providing him with a key to the building is certainly sufficient encouragement or aid to hold him liable as an accomplice. The facts show that he intended his aid or encouragement to actually aid in the commission of the crime, and in fact, his aid had precisely that effect. Further, although Dan may not be convicted solely on the basis of Mike's testimony, there is sufficient corroborative evidence to proceed with the charge. For example, Dan gave Mike a key. This is circumstantial evidence that Dan intended to agree with Mike to commit arson. If the key can be produced at trial, this would be circumstantial evidence of the intent to render aid. Further, Dan's insurance policy could be used to circumstantially corroborate Mike's testimony. Further, if bank records can show a withdrawal of $5,000 at or near the time of the arson, this too would provide circumstantial evidence of the attempt to render aid or encouragement. Finally, the presence of kerosene-soaked rags at the entrance of the building could also circumstantially show intent to aid or encourage Mike to commit arson. The facts are unclear as to the amount of this evidence that has been produced by the prosecutor, but so long as at least some other evidence besides the testimony of Mike is introduced, it is likely that there is sufficient evidence to proceed with the charge of arson on the basis of accomplice liability. The court should deny Dan's motion to dismiss the arson charge.

b) ii) The issue is whether the elements of arson are satisfied and whether someone may commit arson on a building owned by them.

In New York, fourth degree arson is the reckless burning of a building by intentionally setting fire to it. There is an affirmative defense (pled and proved by Dan by a preponderance of the evidence) to fourth degree arson when the defendant recklessly damages a building by intentionally setting fire to it and the building is owned by him alone. However, this defense is not available to one who intentionally sets fire to a building. Third degree arson is intentionally damaging a building by intentionally starting a fire. Second degree arson is third degree arson plus knowledge that a non-participant is inside or sets the fire under circumstances indicating that the presence of a third party is a reasonable possibility. First degree arson is second degree arson plus the use of an incendiary or explosive device. The affirmative defense that "it was my own building" is not a defense to any other degree of arson besides fourth degree.

In this case, Dan hired Mike to intentionally damage his building by intentionally starting a fire. The foreseeability of the presence of a non-participant is the only issue in determining what degree of arson Dan could be liable for. There are not sufficient facts to determine this. Although the facts state that the building was vacant, it is possible that other facts could make it a reasonable possibility that non-participants could be present, such as the number of homeless people who often sleep in the building, what time of day it is, whether the building is located on the outskirts of town or in a densely populated area where other buildings or pedestrians could be injured by the fire, etc. In this case, on the limited facts provided, it appears that the presence of a non-participant was not reasonably foreseeable. Neither Mike nor Dan knew that another person would be present and since the only fact given is that the building was vacant, the presence of a third party was not a reasonable possibility. Even still, Dan's motion to dismiss should be denied since he aided another to intentionally damage his building by intentionally starting a fire. At the

least, this is third degree arson, if not second degree. Accordingly, the fact that he was the owner of the building is no defense to the arson charge.

c) The issue is whether a co-conspirator/accomplice can be liable for an unintentional killing that results from the commission of an enumerated felony.

Felony murder is a charge available against all participants to an enumerated felony (of which arson is one) when a death occurs during the commission of that felony or in the immediate flight therefrom. The death must also have been foreseeable. The death need not have been intentional for second degree murder on a theory of felony murder. The intentional nature of the killing only goes to the applicability of first degree murder. In this case, since the death of the homeless man was certainly not intended, Dan cannot be convicted of first degree felony murder. However, as stated above, second degree felony murder does NOT require that the death be intentional for all participants to be held liable for the death. The death simply must have been a foreseeable consequence of the commission of the enumerated felony.

In this case, all the elements of the underlying felony of arson have been satisfied since Dan aided or encouraged another in the intentional damaging of a building by intentionally starting a fire. Thus, arson, an enumerated felony, is present. Next, we must determine if the death was caused during the commission of the felony and if so, whether the death was a foreseeable consequence of the felony. Here, the homeless man died as a direct result of the fire, so his death was caused by the commission of the felony. Further, his death was a foreseeable consequence of the felony of arson. It is foreseeable that n committing arson, a person might be present in the building, in an adjacent building, or on the street and that such person would be killed as a result of the fire. Since the man's death was a foreseeable consequence of the commission of the felony, Dan could also be held liable for his murder under a theory of second degree felony murder. It is irrelevant for felony murder whether the defendant actually committed the object felony resulting in death so long as he was a conspirator or an accomplice. Further, it is irrelevant that the death was not intended since second degree felony murder only requires that the death be a foreseeable consequence of the felony. The court should deny his motion to dismiss the felony murder charge on both grounds.

Dan can be held guilty for conspiracy, arson on an accomplice theory, and felony murder.

Question-Three
Owner purchased a new car, financing the purchase with B Bank, which duly perfected a security interest in the car. Owner went into default on the loan. Following Owner's default, B Bank hired Repo Corp. to repossess Owner's car.

Pug, an employee of Repo Corp., had been previously convicted of an assault which occurred while he was effecting a repossession for Repo Corp. On May 25, 2006, Repo Corp. sent Pug to Owner's home to take possession of the car. Pug found the car in Owner's driveway and was attaching it to a tow truck when Owner came out of the house, told Pug he could not take the car and sat in the driver's seat. While trying to forcefully remove Owner from the car, Pug injured Owner. Pug left without the car.

Thereafter, Owner's 18 year old daughter, Daughter, without asking permission to take the car, drove the car to a party, where she became intoxicated. Although Daughter had always been told she was not to take the car without permission, she had often used it without express consent. While giving Friend a ride home from the party, Daughter lost control of the car and hit a tree. Friend suffered lacerations to her head and arms and a fracture of a bone in her finger.

She was treated at the local emergency room and released.

NEW YORK STATE BAR EXAMINATION
JULY 2006 QUESTIONS AND ANSWERS

1. Discuss (a) the causes of action which Owner may have against

(i) Pug and (ii) Repo Corp. and (b) the time within which Owner must assert each available cause of action.

2. In an action by Friend against Owner to recover damages for her pain and suffering, will Owner be successful in asserting defenses that (i) he is not liable for the accident caused by Daughter's driving, and (ii) Friend was not seriously injured?

ANSWER TO QUESTION 3
1) a) The issue is whether Owner has a cause of action against Pug for battery and trespass to chattel and trespass to land.

In order to have a claim for battery there must be an intentional infliction of harmful or offensive contact with the plaintiff. Here, Pug intended to make contact with Owner when pulling him from the car and the contact was offensive because an ordinary person would not permit such contact. Therefore, Pug is liable for battery.

In order to have a claim for trespass to land, the defendant must have intentionally interfered with the plaintiff's possession of land by causing a physical object to unjustifiably enter the land. Here, Pug intentionally entered onto plaintiff's land without permission. Therefore, he is liable for trespass to land.

Finally, Pug is liable for trespass to chattels. A person is liable for trespass to chattels when they intentionally cause damage to another personal property (including preventing them from using the property). There must be actual damages proven. Here, Pug attached the car to the truck preventing the Owner from using it, but did not cause damage to the car presumably. Therefore, Pug will not be liable to Owner for trespass to chattels. Conversions is basically trespass to chattels where the extent of damage is enough that it would be fair to make the defendant pay the fair value of the property. Here, there is no evidence that the car was destroyed or substantially damaged, and no claim for conversion will ensue. Although some courts allow conversion claims when people take property from another without permission for any amount of time, NY probably will not allow such a claim here.

The issue is whether Pug has a defense that he was working for B Bank and B Bank was entitled to self-help under UCC Article 9. Under Article 9, a creditor may use self-help to repossess personal property for which it had an attached security interest in. However, self-help is never allowed when doing so would cause a breach of the peace. Here, Pug has breached the peace because Owner objected to him taking the car from his house. Therefore, this does not preclude Pug from being liable for personal injury claims and for trespass to chattels (or conversions).

b) The issue is whether Repo Corp. is liable for the tort actions of its employee performed during work.

Under New York's Agency Law, an employer is vicariously liable under respondeat superior for the conduct of its employees performed within the scope of the employment. Generally, however, employers are not liable for the intentional torts of its employees. There are a few exceptions: 1) the conduct is for the direct benefit of the employer, 2) the type of employment usually requires the use of tortuous conduct (i.e., a bouncer at a bar), or 3) the employer specifically requested the tortuous conduct.

Here, Pug was an employee of Repo because Repo has direct control over Pug's work performance, and therefore Pug is not just an independent contractor for which the control is merely over the outcome of the independent contractor's performance. Further, the torts occurred in the scope of employment because Pug was retrieving a car for which he is employed to do. Repo is liable for all the torts listed above because the type of work Pug engaged in is likely to cause the employee to engage in tortuous conduct (i.e., retrieving cars from their owners). Even if considered an independent contractor, there is a viable argument that Pug was engaged in an abnormally dangerous activity for which employers are liable for the independent contractor's negligence. Thus, Repo is liable vicariously for the torts of Pug.

Further, Repo is liable for negligent hiring of Pug. Because Repo was aware that Pug had been liable for previous assault, they breached a duty owned to foreseeable victims of Pug's tortuous conduct (in the form of assault). But for hiring Pug, the Owner would not have been injured, and anyone Pug sends to repossess their property is a foreseeable victim. Finally, Owner suffered foreseeable types of injury (physical injury from tortuous conduct). Therefore, Repo is also liable under a theory of negligent hiring. This could also be strict liability because the conduct of repossessing is arguably extraordinarily dangerous activity (in which case plaintiff would not have to prove negligence).

c) When must Owner assert the causes of action for intentional torts, negligence, and strict liability?

Under the CPLR, the statute of limitations on any claim begins to run from the moment the claim has accrued (the injury). The claim must commence for intentional torts (filing of summons and complaint to county clerk) no later than one year after the injury is caused. For negligence claims, the statute of limitations is three years from the date of the injury. Here, Owner has until

May 25, 2006 to commence his actions for intentional torts against Pug (and vicarious liability against Repo); and May 25, 2006 for negligent hiring or strict liability for the abnormally dangerous activity.

Also, claims under respondeat superior must also be filed at the same time. Claims for indemnity or contribution must be filed by Repo against Pug within six years after the date of payment to Owner, should the Owner be sued individually.

2) i) The issue is whether a car owner can be held vicariously liable for the negligence of the car's driver.

In New York, an automobile owner is vicariously liable for the negligent conduct of a person while driving the car provided the latter had permission. It is presumed that any person driving the car has permission to drive. First, Friend will have to prove that Daughter was negligent.

In order to be liable for negligence, there must be a duty, a breach, causation, and damages. There is a duty owed to anyone that could be foreseeably injured by your actions; the duty is breached when the person failed to act as a reasonable person in the circumstances; cause in fact is established if but for the defendant's conduct there plaintiff would not have been injured; proximate causation is established when the type of injury and the specific plaintiff are foreseeable by the defendant's conduct. Here, Daughter owed a duty to Friend to not drive negligently. She breached by drinking and driving, something that reasonable people do not do; but for her drinking and driving Friend would not have been injured. Finally, a person in your car is a foreseeable person who could be injured physically, and friend was injured physically.

In order not to be liable, Owner must prove that Daughter took the car without his permission. Here, Owner has told Daughter many times that she could not use the car. However, she took the

car several times without permission and was possibly allowed to. This may constitute implied permission due to the Owner's waiver. Under this theory of permissive use, Owner can be indemnified by Daughter (but he is still liable until then).

The issue is whether the Owner of a car may be liable for failing to keep the car reasonably out of the hands of other people in the claim for negligence. The Owner may be liable for negligence on his own behalf. The Friend may be able to prove that Owner owed a duty to other people that could be injured by his failure to watch over his automobile and keep it locked (and the keys from his daughter); the Owner breached the duty by unreasonably failing to lock the car, etc. For the Owner's failure, the daughter would not have taken the car and crashed, and physical injury to another person in the car is a foreseeable result of the Owner's failure to lock. The Owner may be able to state that the proximate cause was Owner's Daughter's theft of the car. However, since Daughter has taken the car before, it was a foreseeable intervening cause (and thus not superseding). Therefore, Owner's conduct would still be considered the proximate cause of Friend's injury.

Under either theory, Owner should be found liable for his daughter's conduct and thus liable for the injury (pain and suffering, hospital bills, etc.).

ii) The issue is whether Owner's no-fault insurance must cover the accident in this case because Friend was not seriously injured.

In New York, every owner of a car must have no-fault insurance up to $50,000 for personal injuries sustained by passengers (and pedestrians) injured by their car. A person injured by the owner's car must usually bring an action under no-fault insurance if the physical injury is not serious, and can only bring an additional claim in tort if her medical bills and 80% of her loss of work income ($2,000 per month for no more than three years) is greater than $50,000. However, some claims are not covered by no-fault insurance, such as those arising from drinking and driving and a separate action may proceed in tort.

Here, Friend may have a claim under no-fault insurance because she was physically injured by the owner's car. There does not need to be a finding of negligence, and Friend must bring the claim under the no-fault insurance coverage only. However, injuries caused by drinking and driving are not covered under no-fault insurance (as well as serious injuries) and the claim will be allowed to proceed in tort.

ANSWER TO QUESTION 3

1) a) The issue is what causes of action can be brought by Owner against Pug and Repo Corp. for the injuries suffered when Pug attempted to remove Owner from his car during repossession.

Under Article 9, the holder of a security interest has the right to engage in self-help repossession upon default of the debtor if doing so would not breach the peace. A breach of the peace occurs when the possessor of the chattel objects in any way to the taking of the chattel. Once this occurs, the holder of the security interest must stop the repossession and seek relief of the court by getting a writ of replevin. Article 9 will not protect the repossessor from any claims that arise from breaching the peace.

Under New York law, the intentional tort of battery requires intent and contact with the victim's person resulting in physical harm or an offensive touching.

Here, Pug committed battery when he intentionally and forcefully removed Owner from the car, and during the course of the removal injured Pug. While Pug committed the act during the

repossession of Owner's car, Article 9 does not provide a defense to torts committed during the repossession of chattel. Therefore, Owner can state a claim against Pug for battery.

Under New York law, an agency relationship is created when the principal assents to have the agent act for him, benefits from the agent's activities, and can exercise control over the agent (i. e., can supervise the agent). While a principle is vicariously liable for the torts of his agent committed within the scope of the agency relationship, a principle is generally not vicariously liable for the intentional torts of his agent. However, a principle will be liable for such intentional torts if the principle specifically authorized such actions, if they naturally stemmed from the nature of the employment or if the principle benefited from such acts.

Here, Pug was an agent of Repo Corp. because he was an employee of Repo Corp. While battery is an intentional tort, and while principles are not generally liable for the intentional torts of their agents, here Repo Corp. will be liable for the intentional tort of battery committed by Pug. Pug was hired by Repo Corp. to repossess chattel from defaulting debtors. Intentional torts naturally stem from the nature of this employment and it was for the benefit of Pug's principle. In addition, Pug had previously been convicted of assault while effecting a repossession for Repo Corp., and thus it could be argued that Repo Corp. consented to and authorized such actions by keeping Pug as an employee. Article 9 will not offer Repo any protection because creditors cannot breach the peace during repossession. Therefore, Repo Corp. is vicariously liable for the battery committed by Pug and Owner thus has a cause of action against Repo Corp. for battery.

Under New York law, a prima facie case of negligence is shown when plaintiff shows a duty owed to him, breach of that duty, cause in fact, proximate cause, and injury. Employers have a duty to hire employees that will carry out their tasks without causing injury to others. Negligent hiring occurs when a party hires a party when they know or should know of his dangerous tendencies. Here, Repo Corp. knew that Pug had been previously convicted of assault. In fact, it occurred while he was effecting a repossession for Repo Corp. Rep Corp. breached its duty to hire safe employees. This was the cause-in-fact of Owner's injuries because Pug, the dangerous employee, injured him and the proximate cause. This is what one would expect when a person convicted of assault was sent out to repossess chattel. Owner was injured. Thus, Owner can likely state a claim against Repo Corp. for negligent hiring. In sum, Owner can state a cause of action against Pug for battery and a cause of action against Repo Corp. for battery and negligence.

b) The issue is what the statute of limitations is for the various causes of action listed above.

Under the CPLR, intentional torts against the person must be brought within one year from when the injury occurred. Thus, Owner must file his claim for battery against both Pug and Repo Corp. by May 24, 2007 and serve them within 120 days of filing.

Under CPLR, causes of action for negligence must be brought within three years from when the injury occurred. Thus, Owner must file his claim for negligence against Repo Corp. by May 24, 2009 and serve Repo Corp. within 120 days of filing.

2) i) The issue is whether the owner of a vehicle is vicariously liable for torts committed by a driver of the vehicle.

Under New York statutory law, the owner of a motor vehicle is vicariously liable for negligent torts committed by someone who is using the car with the driver's permission. There is a presumption of ownership and permission when the car is registered to the owner, which can be overcome by showing that the driver did not have permission to use the car.

Under New York law, negligence occurs when a party breaches a duty owed to someone and in so doing is the proximate cause and cause in fact of that party's injuries. Here, Daughter

committed negligence when she drove a vehicle drunk and got in an accident that injured her passenger. A duty is owed to foreseeable victims of your negligence; a passenger is certainly a foreseeable victim. The duty owed is that of a reasonably prudent person under similar circumstances. A reasonably prudent person would not drive a car drunk. The breach of the duty was both the cause in fact and proximate cause of the passenger's injuries. Daughter lost control of the car and hit a tree, injuring the passenger. This is exactly the type of harm we worry about from drunk driving.

Owner, as the owner of the car, is vicariously liable for torts committed by anyone who uses the vehicle with permission. Although Daughter did not specifically ask for permission, permission will be presumed simply by the fact that the car is registered in Owner's name. Owner can attempt to rebut this by arguing that Daughter had always been told not to take the car without permission, but the fact that she had often done it in the past will cut against him. Had he really not intended for her to use it, he would have kept the keys in a hidden location or done something to make it extremely clear that she could not use it.

In sum, while Owner has an argument that the car was used without his permission and thus that he should not be liable, is not a very strong argument. Thus, Owner will likely be liable for the pain and suffering damages caused by Daughter's negligence.

ii) The issue is whether a party inured in a vehicle can bring a cause of action against a third party for serious injuries and what qualifies as a serious injury.

Under New York Insurance Law, any vehicle registered in New York must have no-fault insurance with coverage of $50,000. The no-fault insurance scheme is meant to keep minor tort claims arising from car accidents out of the court system. A covered person includes a passenger who is injured while riding in a covered vehicle. An injured person generally cannot bring claims against the insured. Rather, the covered person files a claim with the insurance company who will pay them for medical care, lost wages, and give them a per diem allowance, up to the statutory maximum of $50,000. However, the injured party can bring a cause of action against the insured in several cases, including when they have suffered a "serious injury".

Here, Friend was a passenger in a vehicle that was covered by no-fault insurance (assuming that Owner properly registered his car, proof of such insurance is required). While she generally would not be able to bring a claim against Owner, she would instead have to go directly to the insurance company. If she suffered a serious injury or her damages are above the statutory maximum, she can. Lacerations to head and arms do not qualify as serious injuries. It is questionable whether a fracture to a finger would qualify. While fractures generally qualify as serious injury, it is not clear that a court would view a finger fracture as serious.

Thus, while it is possible that she could recover on the basis of the fracture, it is also possible that the court would not see the finger fracture as serious and thus not allow her to sue the covered owner.

Question-Four
In 1985, Husband purchased Richacre, a commercial building, and Pooracre, an unimproved parcel of land. In 1990, Husband married Wife. At the time of the marriage, Richacre was worth $500,000 and Pooracre was worth $10,000.

In 1994, Husband graduated from law school, passed the bar examination, was licensed to practice law, and obtained a salaried position as a New York State Assistant Attorney General, which he retains to date. In 1995, Son was born. Since Son's birth, Wife has not worked outside the home, serving full time as mother and homemaker.

Husband actively participated in the management of Richacre by collecting rents, negotiating new leases and hiring contractors to make repairs. In December 2000, Husband negotiated a lease for one of the commercial units with Tenant for a term of five years ending on December 31, 2005. In addition to the base rent, the lease required that Tenant pay "an amount equal to 12% of the real property taxes assessed upon Richacre each year, payable in June."

After his lease expired, Tenant remained in possession, paying the base rent each month. The rent statement for June 2006 included a copy of the tax bill and a demand that Tenant pay 12% of the real property taxes as additional rent. Tenant refused to pay anything but the base rent, claiming that the lease had expired, and therefore, he was no longer bound by its terms.

In January 2006, Mall Corp. offered Husband $100,000 for Pooracre because it was located in the middle of the area where Mall Corp. intended to build a shopping center.

In February 2006, Husband and Wife separated, and Wife commenced an action for divorce in Supreme Court. Wife demanded equitable distribution of (a) the total value of Richacre, (b) the appreciation in value of Pooracre since their marriage, and (c) the value of Husband's law license. The parties stipulated that at the time of the commencement of the divorce action, Richacre was worth $2,000,000, Pooracre was worth $100,000, and neither Husband nor Wife had taken any action to increase the value of Pooracre.

Husband asserted that because he owned Richacre and Pooracre before the marriage, they were both separate property and therefore not subject to equitable distribution. Husband also asserted that his law license had merged into his employment as an Assistant Attorney General and therefore had no measurable value which could be equitably distributed.

During the course of the divorce action, Husband has incurred over $10,000 in legal fees, which are unpaid. Lawyer's written retainer agreement, which was signed by both Husband and Lawyer, provided that if Husband's unpaid legal fees exceeded $10,000, Lawyer would be entitled to obtain a mortgage on Richacre to secure payment of the fees.

(1) What liability, if any, does Tenant have for the payment of rent and taxes?

(2) What are Wife's rights under equitable distribution with respect to (a) Richacre, (b) Pooracre and (c) Husband's law license?

(3) What are the legal and ethical implications should Lawyer decide to obtain a mortgage on Richacre to secure payment of his fees?

ANSWER TO QUESTION 4

1) The issue is what liabilities a holdover tenant in a commercial lease has, if any.

Under the common law, a tenancy for a fixed period of time with a preset expiration date is a term of years. A holdover tenant (one who retains possession after the expiration of the lease) gives rise to two options on the part of the landlord: 1) he may evict the tenant, or 2) hold the tenant over. By holding the tenant over, an implied period tenancy is created with terms identical to the original lease terms, unless the tenant was informed that renewal of the lease would incur higher rent, in which case the higher rent would apply. In common law, the duration of the implied periodic tenancy was equal to that of the original tenancy. Due to the potential harshness of this rule, the common law was modified so that for leases greater than one year, the duration of the implied periodic tenancy was equal to one year. This has been further modified for residential leases. However, it remains the common law rule for commercial leases. Under the NYRPL, all

holdover tenancies create implied month-to-month tenancies unless otherwise agreed by the parties.

Here, a term of years was initially created by the agreement between Husband and Tenant. It should be noted that because the term of this lease was greater than one year, under the Statute of Frauds it must be in writing to be enforced. The term expired on December 31, 2005. However, because Tenant remained in possession, an implied period tenancy was created. Under the common law, the duration of this implied period tenancy would be for one year because the original lease was for the term greater than one year. Under the common law, by holding over (so far for half of a year) Tenant would be liable for one additional year under the terms of the original lease. Therefore, Tenant would be liable for the base rent plus 12% of the real property taxes assessed that year because those were the terms of the original agreement. However, under New York law, the tenant is held to a month-to-month implied tenancy upon his holding over. Therefore, Tenant is liable for a prorated portion, 1/12 of the base rent, plus 1% of the property taxes for every month which he holds over. By June, Tenant will have incurred liability of 1/2 of the year's base rent and 6% of the property taxes assessed that year.

2) The issue here is what property constitutes separate property, which is not subject to equitable distribution under New York Domestic Relations Law's Equitable Distribution Statute, and which property is marital property subject to Equitable Distribution.

Separate property includes property and assets acquired by each individual spouse before marriage, gifts and bequests to each spouse as an individual during marriage, personal injury compensation, property which the spouses agree will be separate property, and passive appreciation of assets in those categories. Passive appreciation is appreciation in value due merely to the passage of time, and not to the efforts of either spouse.

Marital property includes all other property acquired during the marriage. This includes the value of professional degrees and licenses acquired during the marriage (the value calculated by an analysis of how the professional degree contributed to earnings versus potential earnings without the degree). This also includes active appreciation in the above categories of separate property. Active appreciation includes appreciation caused by one spouse due to the other spouse's taking on household responsibilities, such as by being a stay-at-home parent or homemaker, thus allowing the out-of-home working spouse to cause those assets to actively appreciate.

2) a) Richacre is separate property because it was acquired by Husband prior to marriage (acquired in 1985, married in 1990). However, during the marriage Husband was able to "actively participate in the management of Richacre" thus causing active appreciation. This is active appreciation because Wife's taking care of the home and Son allowed Husband to do so. Thus, the active appreciation in Richacre is marital property. Therefore, because Richacre was worth $500,000 when the couple married, and because it is today worth $2 million, there has been active appreciation of $1.5 million. In addition, if that appreciation does not include the value of the lease with Tenant, the value of the lease is also marital property as it is income earned by Husband during the marriage. Therefore, Wife is entitled to equitable distribution of those two sums related to Richacre.

b) Pooracre is also separate property because it was acquired to Husband prior to marriage (it was acquired in 1985 and the couple married in 1990). Any appreciation to Pooracre was passive appreciation because neither Husband nor Wife had taken any action to increase the value of Pooracre. Therefore, because this was separate property that had passively appreciated, the full $100,000 value is separate property of the Husband.

c) The law license may be treated as marital property assuming it took three years for Husband to complete law school, he began his law studies after marriage (married in 1990 and graduated in

1994). Therefore, Husband's increased earning potential due to the degree/license is marital property subject to equitable distribution. The argument that the degree/license does not have measurable value because he is employed with the State Attorney General's office is not persuasive because the proper measure of the value of a degree is how it has augmented earnings beyond what would have been possible without the degree. Here, Husband would not be able to have a job as an Assistant Attorney General without a law degree. Therefore, the increase in earning potential should be equitably distributed. It should be noted that a court will note this when awarding maintenance, so as to avoid "double dipping" and awarding maintenance and an equitable distribution which both reflect increased earnings of a person with a professional license and law degree.

3) The issue is what ethical and legal consequences result from Lawyer's attempt to obtain a mortgage on Richacre to secure payment of fees.

Under the Code of Professional Responsibility, it is a violation of a Disciplinary Rule for an attorney, in any domestic relations case, to take a mortgage on a client's property to secure payment of a fee.

If Lawyer obtains a mortgage on Richacre, he will violate a Disciplinary Rule because doing so is prohibited as noted above. Lawyer will be subject to discipline, including censure, suspension, and disbarment. Legally speaking, the mortgage would be possible on Richacre. Because the property is not held as a tenancy by the entirety because it was acquired before the marriage and because it is separate property (despite any of Wife's rights to rents and active appreciation), the entire property is potentially subject to the mortgage.

ANSWER TO QUESTION 4
1) Tenant's liability for the payment of rent and taxes.

The issue is whether Tenant is liable for the payment of rent and 12% of real property taxes when the tenant remains in possession after the expiration of a written lease for a term of years requiring that he pay such taxes.

Under New York law, when a tenant remains in possession of property after the expiration of a lease for a term of years, the relationship is converted to a periodic tenancy if: 1) the tenant continues to pay rent, and 2) the landlord accepts payment. The period of the tenancy is determined by the frequency of rental payments and the terms of the tenancy, including the rent, remain the same as they were during the expired tenancy of years (unless one party gives the other notice of a change as a condition of renewal, such as an increase in rent before the expiration of the original lease).

In this case, Husband and Tenant had a lease for a term of years ending on December 31, 2005. That lease expired by its own terms, but tenant remained in possession and continued to pay rent each month. Because Husband accepted these monthly rental payments from January 2006 through May 2006, under the law he constructively agreed to the creation of a periodic tenancy. Because Tenant made rental payments each month, the tenancy was converted into a month-to-month lease beginning on January 1, 2006.

The terms of the month-to-month lease are the same as the terms of the previous lease because neither party indicated to the other that they required a change in the terms as a condition for continuing the relationship. Therefore, Tenant is obligated to continue to pay the monthly rent he owed under the original lease until the month-to-month lease is terminated upon one month's notice by either party.

The same rule governs the tenant's payment of 12% of the real property taxes. In the original lease, the tenant owed an amount equal to 12% of the real property taxes on the land as additional rent on top of the base rent due each month. That obligation carries over to the new month-to-month tenancy because the rent for an implied month-to-month tenancy is the same as it was during the original lease unless the landlord gives notice that a different rent is a condition of continued occupancy.

Therefore, the Tenant owes Husband monthly rent payments at the same base rental rate as under the original lease, plus 12% of the real property taxes assessed.

2) Wife's rights

This answer first lays out the general rules governing the determination of marital property, then applies those rules to each of the assets mentioned in the question, and finally discusses the equities governing the distribution of those assets that qualify as marital property in this case.

Under New York law, all property not fitting into one of five categories is considered marital property subject to equitable distribution: 1) property held by one spouse prior to marriage, 2) gifts given solely to one spouse during marriage, 3) assets that the spouses agree will be separate property, 4) personal injury compensation, and 5) passive appreciation on any of these separate assets.

a) Richacre

The issue is what rights a spouse has in an equitable distribution upon divorce in a piece of real property owned by the other spouse prior to marriage and then actively managed by that spouse during the marriage. Richacre itself is separate property because it was held by Husband prior to the marriage. He purchases Richacre in 1985 and the couple was not married until 1990.

Therefore, under New York law, Richacre's value at the time of the marriage ($500,000) is separate property that is not subject to distribution. However, Richacre has appreciated in value and is now worth $2,000,000. Under New York law, only the portion of this $1,500,000 increase that is due to passive appreciation is separate property. "Passive appreciation" means a change in value due to changed circumstances surrounding the property or in the real estate market. It does not include any increase in value due to active management, improvements, etc.

In this case, some portion of the increase in Richacre's value is likely due to passive appreciation because the value of the land generally increases over time and the property would therefore likely be worth more in 2006 than it was in 1990 even if Husband had done nothing. However, a large portion of the increase in the property's value is likely due to Husband's active management. By making repairs and negotiating new leases, Husband increased the value of Richacre (a property is worth more if it includes profitable leases that would pay regular rent to a purchaser).

Therefore, Wife has no rights in the $500,000 value of Richacre at the time of the marriage, but rights in the $1,500,000 increase in the value of Richacre are impossible to determine with precision. To the extent that the court determines that the increase in value was due to passive appreciation, it is separate property not subject to distribution. However, the portion of the increase due to active management and improvement is marital property subject to distribution.

b) Wife's rights in Pooracre

The issue is what rights a divorcing spouse has in real property owned by her spouse prior to marriage that has increased in value due to changes in the market for real estate. For the same

reasons identified above, the $10,000 original value of Pooracre at the time of the marriage is separate property because Husband bought the property before the marriage.

The issue is the characterization of the $90,000 increase in the value of Pooracre between the time of the marriage and the time of the divorce. Under New York law, any increase in the value of separate property due to passive appreciation is also separate property.

In this case, the increase in the value of Pooracre is due to passive appreciation. The land was unimproved when Husband bought it and it does not appear that he has taken any steps to repair, improve, lease, or otherwise manage the property. Instead, the increase in value appears to be due to a change in the market for real estate - Mall Corp.' s plan to build a shopping center in the area. Such external changes in the market for an asset are the classic case of passive appreciation.

Therefore, Wife has no rights in Pooracre. The full $100,000 value is separate property, which is not subject to equitable distribution.

c) Husband' s law license

The issue is what rights a divorcing spouse has in her spouse' s law license when that license was acquired during the marriage and when the licensed spouse has since obtained a job using that license.

As explained above, New York law classifies all assets, not fitting into limited defined categories, as a marital asset subject to distribution. In particular, the courts have held that a professional license obtained during the marriage is marital property, which can be valued by determining the extent to which it increases the possessor' s earning potential over the course of his career.

In this case, Husband' s law license is marital property because it was obtained entirely during the marriage (Husband and Wife were married in 1990, and Husband graduated from law school in 1994). Therefore, under the general rule, the court should consider the license to be marital property and value it by determining the resulting increase in Husband' s earning potential.

However, in this case, Husband argues that the license has "merged" into his employment and therefore has no measurable value that could be equitably distributed. It is true that Husband' s work from 1994 (graduation) to 2006 (divorce) did realize some part of the value of his law license. However, under New York law, the entire value of such a license is marital property. Even though Husband has been in his job for 12 years, the law license earned during the marriage still gives him increased earning potential over the remainder of his career.

Therefore, while Husband is correct that the original value of his law license should be discounted to reflect the amount already earned and the shorter time remaining in his career. It continues to be an asset that increases his earning potential and therefore his marital property is subject to distribution.

The preceding answers indicate which property will be counted as marital property. Under New York law, the court will make an equitable distribution of that property by looking to a number of factors. Specifically, the factors pointing toward a larger distribution to Wife include the fact that she gave up her career to serve as a full-time mother and homemaker. If Wife retains custody of Son, this will also favor a larger distribution to her. In the context of a relatively lengthy marriage such as this one, New York courts tend to favor fairly equal distributions of the marital property.

3) Ethical obligations of Lawyer' s fee agreement

The issue is whether a lawyer may ethically obtain a mortgage on a client's commercial property for unpaid fees in the context of a matrimonial action.

Under New York law, lawyers in matrimonial actions have special obligations. They must give clients 1) a written retainer agreement specifying fees and other terms, 2) a statement of client rights, and 3) an accounting of time spent along with the final bill. In addition, New York prohibits a lawyer from taking a mortgage in a client's home in matrimonial action.

In this case, the lawyer complied with the obligation to provide Husband with a written retainer agreement, and Husband signed the agreement. Assuming that the lawyer has otherwise complied with his ethical obligations and that the $10,000 in fees are appropriate, then the provision allowing Lawyer to obtain a mortgage on Richacre does not violate any legal or ethical obligations. The rule against mortgages in matrimonial actions applies specifically to mortgages on client's homes; a mortgage on commercial property such as Richacre is thus permitted by implication.

Question-Five
Sam and Ida were married in 1978. Twin sons, Jon and Jay, were born of the marriage in 1980.

In 2001, Sam transferred $800,000 of the funds in his brokerage account at B Broker in trust to Eve, his sister, naming her as trustee. The duly executed trust instrument provided that the income of the trust would be payable jointly to Jon and Jay for their lives, and that upon the death of both of them, the principal would be distributed to Sam's heirs. The trust instrument reserved to Sam the power to revoke the trust, but was silent as to the power to amend. It did not contain a spendthrift clause or direct the accumulation of income.

Jon died in 2002, survived by an infant daughter, Dana. In 2003, Ida obtained a judgment of divorce against Sam.

In 2004, Sound Inc. obtained a judgment against Jay for $7,500 for audio equipment sold to Jay for which he had failed to pay. At that time, Jay was a law student. The income of the trust was more than sufficient to pay his tuition and living expenses. Sound Inc. sought to execute on its judgment against the income of the trust.

Also in 2004, a judgment was entered against Sam by Games Inc. for $120,000 for breach of contract. Games Inc. sought to execute on its judgment against all of the assets of the trust, believing that the trust assets were within the reach of Sam's creditors.

Eve, as trustee, moved to stay the enforcement of the executions issued as to the judgments obtained by both Sound Inc. and Games Inc. The court granted the requested relief, holding that neither the income nor the assets of the trust could be reached by these creditors. In 2005, in a signed and acknowledged writing, Sam and Eve amended the trust instrument so as to name Eve as an additional income beneficiary. Sam died in 2006, leaving a net probate estate of $1.2 million. His will, which was duly executed in 1995, provides in pertinent part as follows:

FIRST: I leave one-half of my net estate to my beloved wife, Ida.

SECOND: I leave $300,000 to my issue, per stirpes.

THIRD: I leave the remainder of my estate to my sister, Eve.

FOURTH: I appoint my son, Jay, as executor of my estate.

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Sam was survived by Ida, Jay, Dana and Eve.

1. Was the court correct in staying the executions:

(a) against the trust income by Sound Inc., and

(b) against the trust assets by Games Inc.?

2. Was the trust properly amended?

3. How should Sam's estate be distributed?

ANSWER TO QUESTION 5
1) a) The issue is whether a spendthrift income interest in a trust can be subject to creditors.

Under the New York Estates Powers and Trusts Law, all income interests are inalienable or spendthrift. When a trust is silent as to which rights are spendthrift, all income interests will be spendthrift and all interests held in fee will be alienable. A spendthrift interest means that it cannot be sold by the income beneficiary, nor may creditors reach it. However, there are four exceptions to the rule that all income interests are spendthrift: 1) a judgment creditor may obtain 10% of the income interest, 2) an order for the child support or alimony can reach the income interest in the trust, 3) federal tax liens, and 4) the amount in trust above that which is needed for the beneficiaries health, education, and support.

Here, the trust is silent as to whether it is spendthrift. Therefore, all income interests are spendthrift. Jay's right in the trust is spendthrift, and not subject to the claims of creditors. However, Sound Inc. is a judgment creditor, and therefore automatically entitled to reach 10% of the income in the trust. Sound Inc. may also move, in court, to collect that income in the trust which is not reasonably necessary for Jay's health, education, and support. Because the facts state that the income was more than sufficient to pay for Jay's education and living expenses, the court was incorrect in staying the execution against the trust income.

b) The issue is whether a revocable trust, created by a grantor who granted life estates in the trust income, but exercised the residuary in favor of his heirs.

Under the Estates Powers and Trusts Law, a grantor may not create a self-settled spendthrift trust. That is, a grantor may not create a self-settled spendthrift trust in favor of himself solely to evade creditors. A revocable trust is considered a form of ownership, because at any time, the grantor may retain possession of the entire trust corpus. Therefore, the trust is subject to the claims of the grantor's creditors. Here, Sam reserved the power to revoke the trust. Therefore, it was as if Sam owned the trust, and Sam's creditors can move against all of the assets of the trust.

2) The issue is whether a trust which is silent as to amendment is amendable.

Under the New York Estates Powers and Trust Law, all trusts are presumed to be irrevocable and unamendable. Here, the trust specifically stated that it was revocable, but was silent as to whether it was amendable. Because of this silence, the trust was unamendable, and therefore, Eve cannot be an additional income beneficiary.

It should be noted that because the trust is revocable, Sam could have simply revoked the trust in writing, giving notice to its beneficiaries, and created a new one with Eve as an income beneficiary.

3) The issue is how divorce affects a disposition to a spouse in a will.

Under the New York Estates Powers and Trusts Law, any disposition made to a spouse in a will that was executed while the Husband and Wife were married, followed by a divorce, will be void. This section applies to monetary dispositions, and dispositions naming a spouse as executor.

Here, Ida obtained a judgment of divorce against Sam in 2003. Sam's will was executed in 1995, while the two were still married. Therefore, Ida will take nothing under Sam's will.

The issue is whether a testamentary disposition to issue, one of whom predeceased the testator, is subject to the antilapse statute.

Under the Estates Powers and Trusts Law, a gift made to a sibling or issue, one of which predeceases the testator, will not lapse, but will vest in the children of that sibling or issue. Per stirpes means that the gift should be first divided at the first generation at which there are living takers and distributed to those living takers, but the undistributed shares are not combined, and rather drop down to the issue of the predeceased takers in the first generation. This is in contrast to the default rule of "by representation" where the undistributed shares are combined. It should be noted that this distinction is only applicable if there are two or more predeceased takers, and one or more living taker, in the first generation.

Here, the fact that Sam's issue were provided for per stirpes is irrelevant because there were only two possible takers (in the first generation) of Sam's disposition to his issue. However, due to the antilapse statute, the gift to Jon (Sam's issue) did not fail, but rather vested in Dana, who is Jon's issue. Jay will not receive the $300,000, but will only have $150,000 from the disposition in Paragraph SECOND in Sam's will.

The issue is whether a surviving sister may take a failed gift to a spouse.

Under the New York Estates Powers and Trusts Law, a gift made to a spouse in a will, followed by a divorce, is void. It will lapse to the residuary estate, where any named beneficiary will take, pro rata. Here, the gift to Ida failed. Therefore, it lapsed into the residuary estate, where Eve is the taker. Therefore, the one-half of Sam's estate will lapse to Eve.

The issue is whether a beneficiary of a will can also serve as its executor.

Under the New York Estates Powers and Trusts Law (NYEPTL), a beneficiary may serve as an executor to a will. Here, Jay will receive a disposition under the will and is also named the executor of Sam's estate. He will be entitled to a full statutory commission as executor and will be able to take his share of the disposition under Paragraph SECOND.

The issue is how a trust should be distributed when a disposition is made to the grantor's heirs.

Under the NYEPTL, when a disposition is made to one's heirs, the rules of intestacy apply. If a person is survived by issue, but no surviving spouse, then the disposition must be made in favor of that issue, in the amount of 100%. The fact that a person is survived by a sibling is irrelevant in this situation.

Here, Jay can retain the life estate in trust income for his entire life. However, upon his death, Dana (should she survive Jay) and any children born to Jay in the future (should they survive Jay) , will receive that 100% of that trust to be divided equally among them.

The issue is to what extent may a judgment creditor levy against the estate.

A typical will contains a paragraph which directs the payment of all debts. However, where that paragraph is not included, a creditor may still levy against the estate to satisfy the judgment. The statute of limitations for an action on an unpaid judgment is 20 years.

Here, Sam did not direct the payments of all of his debts. If Games Inc. has not been paid by Sam, the company may levy against the probate assets in the amount of $120,000. This action will not be barred by the statute of limitations because the judgment was entered two year ago.

ANSWER TO QUESTION 5

1) a) The issue is whether a creditor can invade the trust income when the trust contains no spendthrift provision.

New York, by statute, has provided spendthrift protection for income beneficiaries in all trusts unless they are self-settle trusts, (i.e., where the settlor is also the income beneficiary). Thus, in New York, the income of a trust is protected from creditors of the income beneficiary, and the income beneficiary may not transfer his income interest to another.

Here, Sam created a trust with income for life to John and Jay. Although the instrument was silent as to spendthrift protection, New York will imply spendthrift protection for the income interests of John and Jay. Thus, while Sound Inc. obtained a judgment against Jay, it may generally not seek to satisfy the judgment based on Jay's trust income.

However, there are several exceptions to New York's spendthrift protection. Two are apt here. First, in New York, judgment creditors may take a total of 10% of the trust income due to the beneficiary to satisfy the debts. Note, all the creditors must share in this 10%. Secondly, creditors may invade the income if the trust provides excess income, beyond what is needed to support the beneficiary. However, a creditor must first exhaust all other remedies before it pursues the excess income exception. The facts do not indicate that Sound Inc. has pursued any other remedies, much less exhausted its remedies.

Here, while the income is subject to spendthrift protection, the court erred in not allowing Sound Inc. to obtain 10% of the trust income to satisfy its judgment.

b) The issue is whether a creditor can invade the trust principle when the settlor retained the power to revoke the trust.

In general, a creditor can reach the trust income and principle to the same extent that the settlor can. While New York provides spendthrift protection to the income of a trust, it affords no protection to the remainder, or principle, of the trust. Moreover, while New York presumes that a trust that is silent as to revocation is irrevocable, a settlor may reserve the power to revoke the trust, and if he so chooses, New York does not protect the settlor from claims of his creditors.

Here, Sam has created a trust with income to John and Jay, with the reminder to Sam's heirs, but has reserved the power to revoke the trust. While Sam's creditors may not reach the trust income because it has been transferred to John and Jay (who have valid spendthrift protection), Sam's creditors (Games Inc.) can reach the principle of the trust because Sam has retained for himself the power to revoke the trust.

Thus, the court erred in staying the enforcement of the judgment execution against the principle, or assets, of the trust.

2) The issue is whether the settlor may amend the trust terms when the instrument is silent and when there is a contingent remainder in his heirs.

When the trust is silent, New York allows a settlor to retain the right to amend the trust, but this right is limited. A settlor may amend a trust only with the approval of all those with a beneficial interest in the trust. If the trust benefits a child, New York law does not allow a guardian or parent of the child to consent to an amendment on the child's behalf. Therefore, a settlor may only amend the trust if all the beneficiaries are adults and all consent. Under New York law, a designation in a trust to heirs or next of kin, does not create a beneficial interest in the trust, and thus no consent is required from "heirs" or "next of kin."

Here, Sam's trust devised the income of the trust to John and Jay with a remainder interest (in the principle to Sam's heirs). It should be noted that at common law, the Doctrine of Worthier Title would have invalidated the attempt to create a remainder interest in Sam's as yet unknown heirs. However, New York has abolished the doctrine for transfers after 1967. Therefore, in New York, the remainder in Sam's heirs is permissible. However, for purposes of amendment, this remainder is not considered a beneficial interest, and thus the as yet unknown heirs do not have to consent to any change.

Applying the law above, to validly amend the trust, Sam needs to have the consent of Jay (because John has died), the only beneficiary in being. Jay is 25 years old, so could consent to the amendment, but because his consent was not obtained, the trust was not validly amended.

3) The issue is how the estate should be distributed after a divorce and when the testator seeks a per stirpes distribution.

First, with respect to the devise to Ida:

When a will makes a gift or gives a fiduciary appointment to a spouse, who is later divorced from the testator (by a valid divorce decree), New York treats the devise as though the surviving spouse predeceased the testator, and the gift falls into the residuary.

Here, Sam made his will while he and Ida were still married, but never changed the will after the divorce. In New York, the gift is revoked by operation of law if there has been a valid divorce decree, as there was here in 2003. As such, the gift of one half of the estate goes to the residuary because Ida will be considered to have predeceased Sam.

Second, as to the $300,000 to Sam's issue:

While New York's default rule distributes intestate shares per capita at each generation by representation, a testator may elect to use any form of distribution in his will. When a testator elects for a gift to be distributed per stirpes, the probate court will examine the first generation with a living taker and divide the estate by the number of branches (both alive and dead). Each branch will take their share of the interest, which drops down to the next generation if their parent was deceased. So, unlike in New York, there is no recombination of shares at the next generation.

Here, Sam has chosen to distribute the gifts per stirpes. John and Jay are the first generation with a living taker (here, Jay is alive). Thus, Jay will take half of the $300,000, and the remaining half will be passed down to John's descendants. Because John only has one daughter, Dana, she will receive the other $150,000.

Third, the remainder of the estate:

When a gift in a will fails or the devisee is considered to have predeceased the testator, their gift goes to the residuary (unless there is a class gift). Here, the residuary of the estate includes the

first devise to Ida, which failed because of the divorce, and the remainder of the estate after subtracting the $300,000 in the second devise. Thus, Eve will receive $900,000.

Fourth, Jay will be appointed executor of the estate. There is no prohibition against family members being executors, nor is there a requirement that an attorney act in that capacity.

MPT
Larson Real Estate File Applicants are associates at a law firm that represents Karen Larson, who has contracted to sell her home in Banford, Franklin, to Pierre and Lisa Meridien, residents of the neighboring state of Columbia. When they entered into the sales contract, the Meridiens had not seen Larson's house in person; now, after traveling to Banford to view the property, they are unhappy about the condition of the house and have concerns about the neighborhood. The Meridiens are demanding a $60,000 reduction in the purchase price as compensation for the conditions of the house and the environs that Larson allegedly failed to disclose, contrary to Franklin Real Property Law § 350, which requires sellers to disclose "material facts" to future buyers of residential real estate. Section 350 was recently enacted; previously, Franklin was a strict "buyer beware" jurisdiction. Thus, this is a developing area of the law in Franklin. Applicants' task is to draft an objective memorandum (1) discussing the disclosure requirements imposed on sellers of residential real estate by Franklin Real Property Law § 350 and the common law; (2) analyzing whether, with respect to disclosing the specific items listed by the Meridiens' attorney, Larson complied with § 350 and the common law; and, (3) identifying what relief, if any, the Meridiens are entitled to. The File contains the task memorandum, the transcript of the client interview, the letter from the Meridiens' attorney, the real property disclosure statement, and an article from The Banford Courier regarding a proposed neighborhood group home. The Library contains a Banford city ordinance on historic districts, Franklin Real Property Law § 350, and two cases.

You may order copies of the July 2006 MPTs and their corresponding point sheets from NCBE, in January 2007 on the NCBE website, http://www.ncbex.org, or telephone, (608) 280-8550.

ANSWER TO MPT
TO: Elaine Dryer
FROM: Applicant
DATE: July 25, 2006
RE: Larson Real Estate File

You asked me to prepare a memo regarding the obligation of Ms. Karen Larson (hereafter, "Ms. Larson") regarding the sale of her real estate property to Mr. and Mrs. Pierre and Lisa Meridien (hereafter, "the Meridiens"), the extent to which she conformed to those obligations, and any remedies the Meridiens might have. Please find below the information I have found.

I. The Disclosure Obligations of a Seller of Residential Real Estate Under Franklin Statutory and Common Law.

The extent of disclosure that a real estate seller must provide to a buyer is determined by both the common law and Franklin Real Property Law.

A. Seller's Disclosure Obligations under the Common Law

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Under the common law, a seller's obligation to disclose in a real estate transaction was dictated by the doctrine of caveat emptor. Under that doctrine, which means "let the buyer beware", the seller has no affirmative duty "to volunteer information about defective conditions in property being offered for sale" [Hernandez v. Comfrey; Wallen v. Daniels (both binding authority)]. Under this doctrine, as the Hernandez Court explained, "it is the buyer's responsibility to exercise due diligence by inspecting real property prior to purchase". The Seller is only liable in the event of intentional misrepresentation or fraudulent concealment.

Buyer has a claim for intentional misrepresentation if he establishes a misrepresentation of a material fact, justifiable reliance, and injury. Likewise, buyer has a claim for fraudulent concealment if he can establish concealment of a material fact with the intent to mislead, justifiable reliance, and injury. For this purpose, a statement is material if it "is one relating to the quality of a property which might decrease value" and a statement is not a fact if it is merely opinion, puffery, or a nonspecific utterance regarding the desirability of the property (Wallen; Hernandez).

Therefore, in summary, under the common law a seller has the obligation to refrain from intentional misrepresentation or fraudulent concealment.

B. Seller's Disclosure Obligations under Franklin Real Property Law §350.

Until 2005, the Franklin singularly followed the common law. At that time, it passed Franklin Real Property Law §350, "Residential Real Property – Required Disclosures". Section 350 applies to the sale of residential property having between one and four units regardless of whether it is sold in accordance with a real estate broker. It requires that a seller disclose known material facts relating to the property and its environs prior to entering into a contract of sale. Finally, it maintains the common law remedies for intentional misrepresentation and fraudulent concealment.

Despite the requirements that §350 imposes on a seller, the Franklin Court of Appeals in Wallen, held that §350 "does not go so far as to require that sellers inspect their properties for latent material conditions or defects to disclose". Therefore, in summary, a seller's obligations under Franklin statutory law is to disclose all known material facts relating to the property and it's environ.

II. Ms. Larson's Obligations to Disclose and Her Compliance (or failure to comply)

A. Ms. Larson's Obligation to Disclose the Opening of the Drug Rehabilitation Home.

Because the opening of the drug rehabilitation home was a material fact about the environ, Ms. Larson had a duty to disclose it to the Meridiens to the extent she knew about it. The opening of the home was a material fact, given that it was anticipated that the home would "ruin property values" in the area ("Group Home Approved Despite Protests") and possible increase crime rate. Ms. Larson herself seems to recognize that the home was a concern (transcript). In Harris v. Roth, the Franklin Court of Appeals held that seller violated §350 of Franklin's Real Property Law when it failed to disclose in its disclosure statement that the property was located near a toxic waste dump. While not everyone believes the home will have an adverse effect (see Liz Voorhees' statement in "Group Home" article). If Ms. Larson knew of the opening of the neighborhood on June 16, when she signed the disclosure form, she had a duty to disclose it on the form.

B. Ms. Larson's Obligation to Disclose the Designation of the Neighborhood as a Historic District

Ms. Larson did not have a duty to disclose the financial consequences of the historical designation of the neighborhood. In Wallen, the plaintiffs sued a seller for failing to disclose that the building was designated in a fault zone and would cost more to make improvements on the structure. The court held that the material fact the sellers were required was how the property was classified, not the ramifications of the classifications. The court held that Franklin law does not "render a seller liable for nondisclosure of facts that a buyer could have discovered with reasonable effort".

In this case, Ms. Larson disclosed that the property was in a historical district. Franklin §11.50 was available to inform the Meridiens of the consequences of that.

C. Ms. Larson's Obligation to Disclose the Water Stains

Ms. Larson had a duty to disclose the water stains on the ceiling. The defect was material fact, since it reduced the value of property. Ms. Larson knew it, as she had gotten an estimate from a roofer. Furthermore, because she painted over it to make it less noticeable, she is subject to a claim for fraudulent concealment so long as the Meridiens can show they justifiably relied (which might be difficult given that they failed to inspect the property).

D. Ms. Larson's Obligation to Disclose Fire Damage

Ms. Larson was not obligated to disclose the fire damage. As stated above, Ms. Larson only had an obligation to disclose known defects. As Ms. Larson made clear in her interview, she was not aware of the damage because it had been concealed by the prior owner.

E. Ms. Larson's Obligation to Disclose Wearing to Vinyl Floor

Ms. Larson was not obligated to disclose the water stains. Any reasonable buyer, upon inspection and with minimum due diligence, could have observed the wear on the kitchen floor. Because the buyers, the Meridiens, did not inspect the property or send Brad, their agent to do so, they cannot now hold the seller liable for what they could have discovered. The fact that the buyers felt pressure to buy because of the market will not excuse this duty.

III. Meridiens Remedies Against Ms. Larson

Under the common law, a seller is only liable for intentional misrepresentation or fraudulent concealment. In the event sellers commit either of these infractions, the buyer is entitled to actual damages, and if "the concealment or misrepresentation has severe financial or safety implications", punitive damages (Hernandez).

Under statutory law, the buyer can be granted actual damages measured either by the cost of repair, or where repair is not possible, by the difference in value between the property as represented in the disclosure statement and the independent appraisal that reflects the disclosed fact (Wallen), plus reasonable attorney's fees and court costs [§350(d)].

Therefore, Ms. Larson is obligated for the damage for failure to disclose the rehabilitation clinic and for the water stains (assuming the Meridiens prove reliance). This will probably be $30,000 for the water stains; i.e., the cost to repair, and any loss to the property value that results from the rehabilitation home. The Meridiens cannot void the contract, under Franklin §350(d).

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ANSWER TO MPT
TO: Elaine Dreyer
FROM: Applicant
DATE: July 25, 2006
RE: Larson Real Estate File

The memo will analyze Ms. Larson's potential liability under Franklin's new residential real estate disclosure laws and the common law. The memo will further address the Meridiens' specific claims and Ms. Larson's duties to disclose in regard to each of them. Finally, the memo will conclude by stating Ms. Larson's possible liabilities under both the statute and the common law.

1. Disclosure Obligations

A. Disclosure Obligations Under Current Franklin Law

The first step in determining Ms. Larson's potential liability in the sale of her home is to determine the current law regarding mandatory disclosures upon the sale of real estate. In 2005, the Franklin legislature enacted a statute to reform the jurisdiction's previous "buyer beware" law. Today, §350 of the Residential Real Property Law in Franklin requires sellers of residential real estate to issue a disclosure statement to buyers including "all known material facts relating to the property and its environ". If the residential real estate has between one and four units, his disclosure is mandatory. In 2006, the Franklin Court of Appeals defined a "material fact" as "one relating to the quality of the property which might decrease its value". See Wallen v. Daniels.

In a case where buyer sued seller for failure to disclose a zoning law that affected the cost of renovation, the Franklin court held that while the new law places an affirmative duty on the seller, it does not go so far as to require that sellers inspect their properties for latent material conditions or defects to disclose". The courts further stated that the statute did not require sellers to inform buyers of defects that the buyers "could have discovered with reasonable effort".

The court in Wallen ultimately held that the seller was not required to disclose the full extent of the zoning laws, since the buyer could have discovered the zoning laws from the public record. The court contrasted the zoning laws with a case that decided that a seller had to disclose an abandoned toxic waste dump a half mile from the property in question that was contaminating the drinking water. Wallen (citing Harris v. Roth).

While §350 creates an affirmative duty for the seller to disclose known material facts, it also explicitly preserves all common law remedies. Franklin's courts have continued to recognize the common law's place. Wallens.

B. Disclosure Under the Common Law

Prior to the enactment of §350, Franklin used the "buyer beware" common laws. Under the common law, a seller had no affirmative duty to disclose any defective conditions. However, the seller could not intentionally misrepresent or fraudulently conceal a material fact regarding the property's condition. See Hernandez v. Comfrey. Intentional misrepresentation occurred if the seller misrepresented a material fact, the buyer justifiably relied on that fact, and the buyer was injured. Fraudulent concealment occurred when the seller concealed a material fact "with the intent to mislead". The buyer justifiably relied on the concealment, and the buyer was injured (citing Fowles v. Hutchinson). The courts defined material by objectively looking to "whether the purported fact would affect the decision making of the reasonable home buyer".

The court rejected a claim for intentional misrepresentation when a seller did not disclose an unknown water damage condition. However, another court found fraudulent concealment where a seller placed furniture over a hole in the floor (citing Fowles).

2. Ms. Larson's Disclosures

The buyers, the Meridiens, have asserted a number of defects in Ms. Larson's property. Since the statute impacts each defect differently, this memo will analyze each in turn.

A. Group Home

The Meridiens claim that Ms. Larson was required to disclose the possibility that a Group Home for the substance abusers could move into the neighborhood. The Meridiens assert that the Group Home will have a detrimental impact on property values and jeopardize their children's safety.

To determine if Ms. Larson had a duty to disclosure the potential Group Home, one must ask whether the potential defect was 1) know and 2) material. In the interview, Ms. Larson said that she was aware of the Group Home and its quest to move into the neighborhood. We should ask Ms. Larson if she knew of this when the contract to sell the house was signed. If she did not, then the materiality of the defect is not an issue since, according to the decision in Wallens, Ms. Larson is not responsible for searching out latent defects.

If Ms. Larson did know about the Group Home, then she would have been required to disclose it only if it were material. As stated above, the Franklin courts have defined material fact as "one relating to the quality of the property which might decrease its value". See Wallen v. Daniels. The court in Wallens, however, made it clear that the new statute requiring disclosure of known material defects did not relieve buyers of their duty to detect defects through reasonable inspection. The court in Wallens contrasted its case, where the zoning law in issue was on the public record, with the case where a closed toxic dump was contaminating the water supply. It seems like the Group Home more resembles the zoning law than a toxic dump. According to the article in the Banford Courier, the controversy of the Group Home has been "raging for over six month". The article further states that over fifty residents showed up at the Council meeting to contest the home on May 31, 2006. This kind of community awareness most likely made the Group Home's move readily discoverable for the Meridiens. Had they read the newspaper or spoken to any neighbors, they could have found this defect by themselves. Therefore, it is unlikely, given the ruling in Wallens that preserves a buyer's duty to do reasonable inspection, and that Ms. Larson had to disclose the Group Home to the Meridiens. Ms. Larson's position would be greatly improved if we could obtain previous newspaper reports from before the date of the contract.

B. Historical District Ordinance

The City of Banford has a zoning ordinance that requires all "substantial changes to the exteriors of properties" located in Terrapin Heights (where the house in question is) must be approved by the Neighborhood Preservation Committee, in addition to the Building and Zoning Board. The Meridiens argue that this zoning ordinance places an undue burden on them because they want to build an addition in the back of the house. The Meridiens argue that Ms. Larson had a duty to tell them about this ordinance.

The Meridiens are incorrect. The court in Wallens specifically said that zoning ordinances are in the public record, and despite the new legislation, buyers still have a duty to reasonably inspect. The Wallens court stated, "We will not burden the seller to research local building codes and advise a buyer as to their effect on the reality when the buyer has already been accurately informed of as to the zoning." Ms. Larson disclosed that the zoning was "Residential-Historic".

This ordinance is on the books in the public record. Public records aside, the historic nature of the neighborhood, as described in Ms. Larson's interview, should have given rise to inquiry notice. Finally, Ms. Larson revealed in her interview that there are signs designating the area as a Historic District all around the neighborhood. This clearly should have given the Meridiens notice of the possible statute. According to the Wallens decision, it was then incumbent upon them to determine the cost of and ability to make renovations to the property. Therefore, Ms. Larson was under no duty to disclose the full effects of the historic zoning statute to the Meridiens.

C. Roof

The Meridiens claim that there is extensive water damage on the ceiling in one of the bedrooms caused by a leak in the roof. Ms. Larson should have disclosed this defect pursuant to Franklin statutory law if she 1) knew about it and 2) it was material. Ms. Larson admits she knew about the leaking roof because she had roofers come in to estimate the cost of repair. When the cost was too high, Ms. Larson simply repainted the ceiling. Therefore, it is clear Ms. Larson knew that there was extensive roof damage.

The roof damage is material if it relates "to the quality of the property which might decrease its value". See Wallen v. Daniels. Clearly a leaking roof relates to the quality of the property. It also decreases the value of the property, which is evidenced by the high cost of repairing it.

Since Ms. Larson knew of the damage to the roof and the cost of repairing it is high, she should have disclosed this defect to the Meridiens. The form explicitly includes boxes for ceiling and roof damage, but she left them unchecked. By failing to do so on the disclosure form, she violated Franklin's statute.

Ms. Larson also may be liable under the common law cause of action for fraudulent concealment. Fraudulent concealment occurs when the seller conceals a material fact "with the intent to mislead", the buyer justifiably relies on the concealment, and the buyer is injured. (Citing Fowles v. Hutchinson). Ms. Larson painted over the areas on the ceiling that showed the leaking roof. She admits she did it so that the damage would be "less noticeable". The buyers relied on the repaired ceiling, but were injured when the real condition of the roof was revealed (and needed fixing). Though there is a cause of action here, the Hernandez ruling does not directly address the full intent requirement or other elements. Thus, more research on fraudulent concealment is necessary to determine if the Meridiens could successfully bring this action against Ms. Larson.

D. Fire

Ms. Larson would have been required to disclose the fire damage if she 1) knew about it and 2) it was material. In her interview, Ms. Larson stated that she did not know about the fire damage until after the Meridiens called it to her attention. There was no fire while she lived there and the previous owner had covered up all signs of the fire. Therefore, she could not have known. Since the court in Wallen made it clear that homeowners do not have to search out latent defects, Ms. Larson could not be responsible for disclosing a fact she did not know herself.

E. Floor

Ms. Larson would have been required to disclose the condition of the floor if 1) she knew about it and 2) it was material. Ms. Larson admits she knew about the condition of the floor in her interview. She called it "worn in spots".

The real question is whether the condition of the floor is material and whether it is something that the Meridiens could have discovered if they had bothered to look. Ms. Larson says the floor was

worn. The Meridiens say that the floor is severely worn. To determine if the defect in the floor is material, we must know how much the state of the floor impacts the value of the house. To determine that, we need to get a better idea of the condition of the floor. We should ask Ms. Larson for photos she may have taken while she lived there and maybe seek an expert opinion from a contractor.

Even if the floor is in terrible shape, it may not be material if the Meridiens could have discovered it for themselves if they had simply come to the house to look. The Meridiens bought the house after seeing a few pictures on the internet. They were in a hurry to buy the house before the new school year. In their haste, they never looked at the house before signing the contract. The court in Hernandez dismissed argument by buyers who said that market pressures made it too difficult to do a reasonable discretion. Therefore, if the floor was obviously worn, and a reasonable inspection would have shown it, then Ms. Larson probably did not have to disclose the condition of the floor in the disclosure statement.

3. Relief

The Meridiens may be entitled to relief for Ms. Larson's failure to disclose the damage to her roof. Section 350 of the Residential Real Property Statute says that a seller who does not disclose property will be liable for actual damages "suffered as a result of the conditions existing on the property or its environs as of the date of the execution…of the contract". The seller may also be liable for reasonable attorney's fees and court costs. Thus, Ms. Larson may be liable for the cost of repairing the roof (approximately $12,000) and the attorney's fees paid to Mrs. Meyer, the Meridiens' attorney. Though the Meridiens threatened to void the contract, §350 states that a failure to disclose does not void the contract.

If Ms. Larson is further guilty of fraudulent concealment by painting the ceiling to cover the water damage, she may be liable for punitive damages in addition of the actual damages, if the concealment has "severe financial misrepresentations or safety implications". (Hernandez) Again, more research must be done into this cause of action to determine the extent of liability.

Conclusion:

The new disclosure statute in Franklin imposed a duty on Ms. Larson to disclose defects that were 1) known and 2) material. However, the statute did not relieve buyers of their basic duty to inspect the premises. Most of the defects claimed by the Meridiens were either unknown to Ms. Larson at the time of the contract or readily visible upon inspection. The Meridiens cannot hold Ms. Larson accountable when they failed to reasonably inspect. However, Ms. Larson probably violated the statute when she did not disclose the leaking roof, even though she had knowledge of it. She may be further liable for fraudulent concealment because she painted over the damage. Further research must be done.