NEW YORK STATE BAR EXAMINATION
JULY 2011 QUESTIONS AND ANSWERS

QUESTION-ONE

In 1997, brothers Alan and Brad inherited Greenacre, real property in upstate New York, through a devise in their father's will. Brad lived out-of-state, so the two brothers agreed that Alan would reside at Greenacre. Alan and Brad received an executor's deed conveying title to Greenacre. Neither the will nor the deed identified the form of tenancy they were to receive.

Greenacre is bordered by property owned by Ned. In 1998, Alan spoke with Ned and gave him permission to use a trail and to fish in a pond located on Greenacre. Since this conversation, Ned has fished in the pond and used the trail every Sunday. Alan and Brad have never used the trail or the pond.

In April 2011, Purchaser offered the brothers $1,000,000 for the purchase of Greenacre. The brothers accepted the offer, and the parties signed a written contract for the sale of Greenacre.

The brothers soon began discussing the division of the proceeds from the upcoming sale. Brad asserted that Alan owed him rent for the time Alan was living on the property. Alan asserted that Brad owed him money for emergency repairs that he had made to the plumbing and for improvements he made to the property. The improvements were an art studio and gallery that Alan had constructed for his own use. Ned heard the brothers discussing the pending sale and claims that he has an easement to use the trail and pond that will survive the sale.

In May 2011, before legal title was conveyed to Purchaser and before he took possession, the buildings on Greenacre were extensively damaged by massive flooding. Because of the flood damage, Purchaser now seeks to rescind the contract.

1. What kind of tenancy was established when the brothers inherited Greenacre?

2. (a) Is Brad entitled to receive rent from Alan?

(b) Is Alan entitled to reimbursement from Brad for one-half the cost of the repairs and improvements he made to Greenacre?

3. Does Ned have an easement or other interest in the trail and pond that will survive the sale of Greenacre?

4. Based on the flood damage, can Purchaser rescind the contract?

First Answer to Question One

1. The issue is what type of tenancy is created in a conveyance to two or more persons, where the deed does not specify.

A tenancy is an interest in land held indivisibly by two or more persons. New York recognizes three types of tenancies: a joint tenancy, tenancy by the entirety, and tenancy in common.

Creation of a joint tenancy requires clear survivorship language in the deed, and unities of time, title, possession, and interest. Creation of a tenancy by the entirety--which also contains survivorship benefits--is presumed in a joint conveyance to husband and wife. Only a husband and wife are capable of ownership as tenants by the entirety. Finally, the creation of a tenancy in common-- where tenants share an undivided interest but do not have survivorship rights--can be express (specifically creating the tenancy in common) or implied by a conveyance to two or more persons jointly.

Here, the devise to Alan and Brad created a tenancy in common. The devise could not have created a joint tenancy because it does not contain clear survivorship language --a prerequisite for the creation of a joint tenancy (although they do share unities of time, title, possession, and interest). Nor are Brad and Alan married, so they would not be able to share in a tenancy by the entirety. Because it does not satisfy the conditions for the creation of the other two tenancies, the devise of Greenacre to Alan and Brad created a tenancy in common, implied by the devise to the two of them jointly.

2. (a) The issue is if a tenant in common who possess the whole of the property in the absence of the other tenant is liable for rent. Although holding a separate interest in the property (that is alienable, devisable, and descendible), each tenant in common is entitled to possess the whole of the property. A tenant in common who possess the whole of the property will only be liable to the other absent tenant in the case of ouster--where the tenant in possession effectively does not allow the other possession or use of the property (ouster may be constructive if for 20 years). However, where one tenant in common voluntarily quits (or simply does not use) the property, the other tenant is not liable for rent for his use of the whole.

Here, Brad voluntarily decided not to use or possession any part of Greenacre because he and Alan came to mutual agreement that Alan would reside at Greenacre. Therefore, Alan did not oust Brad from property. Because each tenant is entitled to possession of the whole and no ouster is present, Alan does not owe Brad any rent for the time he was living on the property.

(b) The issue is if a tenant in common may be reimbursed for repairs and improvements to the property when the other tenant does not use the premises.

Each tenant in common has a basic duty to upkeep the property and make reasonable repairs. A tenant who spends his own funds to make such reasonable repairs is entitled to reimbursement of 1/2 the cost for those funds expended--regardless of whether the other tenant in common uses the property. However, a tenant who makes improvements to the property--regardless of whether for personal interest--cannot receive reimbursement for those improvements. A tenant is not barred from improvements--he simply is not entitled to reimbursement, absent a separate agreement between the tenants.

Here, Alan should be entitled to reimbursement for the repairs, because such plumbing repairs are reasonably (and likely necessary as well) to the use and enjoyment of the property. This applies regardless of whether Brad uses or resides at Greenacre. On the hand, Alan is not entitled to reimbursement for the improvements he made to the property because such are voluntary

actions and not necessary for the use or enjoyment of the property. Accordingly, Brad should be liable for his share of the plumbing repairs and not the improvements.

3. The issue is whether an easement (or any interest in land) is created by an owner's oral permission to a neighbor to use a portion of the property.

An easement is an interest in land that permits a non-owner the use of the land for a certain purpose. Because they are interests in land and pass with the dominant estate, easements may only be created by a limited number of ways. Easements can be created by grant, reservation, necessity, prescription, or implied by existing use. Easements by grant or reservation that are more than one year must be in writing because of the statute of frauds. To create an easement by prescription, the use of the other's land must be continuous for the 10 year statutory period, open and notorious, adverse to the other owner's rights, and hostile. Use of land with permission defeats the hostility element and thus no easement by prescription can arise when one's use of another's land is permissive.

Here, Ned may be attempting to argue that Alan's granting him permission to use a trail and to fish in the pond resulted in an express easement by grant. However, it did not do so because such easements more than one year must be in writing. Secondly, Ned may contend that his obtained an easement by prescription because he has been using the trail and pond for more than 10 years and thus the statute of limitations has expired. However, such an argument is not sustainable as Ned's use was not hostile because Alan expressly granted him permission to use the trail and pond.

At best, the promise to Ned--even if intended by Alan to be an easement-- created a license for Ned to use the trail and pond (b/c of it not being in writing). A license is fully revocable and will not survive the sale.

4. The issue is if a contract may be rescinded if the property is damaged after the contract is signed but before the buyer takes possession or title passes.

Under the common law doctrine of equitable conversion, absolute ownership passes to the buyer as soon as the contract to buy the property is signed. Accordingly, if the property is damaged or destroyed after signing but before possession or closing (passing of title), the buyer still bears the risk of loss. NY, however, has adopted the Uniform Vendor & Purchaser Act. Under the UVPA, which modifies the common law equitable conversion doctrine, the risk of loss does not pass to the buyer upon the signing of the contract, but only when the buyer takes either title or possession of the property. With the risk of loss remaining on the seller, the buyer can rescind the contract for destruction occurring between signing & closing, provided the buyer has neither title nor possession.

Here, the flood damage occurred between Purchaser's signing of the contract (April 2011) and prior to Purchaser taking legal title or possession to Greenacre. Although under the common law, Purchaser would bear the risk of loss, under the UVPA the Purchaser does not bear the risk of loss because he has taken neither title nor possession to the property when the flooding occurred. Therefore, Purchaser may properly rescind the contract.

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Second Answer to Question One

1. The issue is what kind of tenancy is created when relatives (brothers) inherit real property and the will and the deed are silent regarding the type of tenancy created. Under NY law, there are three kinds of concurrent interests in land - joint tenancy with the right of survivorship, tenancy in the entirety, and tenancy in common. Specific "right of survivorship" language is required to create a joint tenancy, and a tenancy in the entirety only exists between a married couple. When the relevant legal documents (here, a deed and a will) are silent regarding the type of tenancy created, a tenancy in common is presumed because NY law tends to disfavor restraints on alienation.

In this case, the deed and will were silent regarding the type of tenancy created, so the brothers A and B inherited Greenacre as tenants in common (each has a 1/2 interest in Greenacre and the right to use the whole).

2. (a) The issue is whether an out of possession co-tenant has the right to receive rent from an in-possession co-tenant. Under NY law, an out-of- possession co-tenant does NOT have the right to receive rent from the in possession co-tenant, unless the in- possession co-tenant wrongfully ousted the out of possession co-tenant from the property. This is different from the rule that applies when an in-possession co-tenant rents the property to a third party. In that case, the out-of-possession co-tenant would be entitled to his fair share of the third-party rent.

Here, the two parties (A and B) agreed that A would reside at Greenacre because B lived out of state. A did not oust B from the property. Therefore, B, the out of possession co-tenant, is NOT entitled to receive rent from A.

(b) The issue is to what extent an out-of-possession co-tenant is responsible for reimbursing another co-tenant for the cost of repairs and improvements the co-tenant made to the property. Under NY law, one co- tenant is entitled to reimbursement for the costs of reasonable repairs the co-tenant paid for. This right exists throughout the life of the co-tenancy, so long as the repairing co-tenant notified the other co-tenant about the repairs. The amount of reimbursement is determined by the % share each co-tenant owns in the property (10% share pays 10% of the repair costs). On the other hand, a co-tenant who makes improvements to the property is NOT entitled to get reimbursement for the improvements from the other co- tenant during the life of the co-tenancy. At the end of the co-tenancy (partition or sale of the land), the improving co-tenant bears all the downside risk of the "improvements" and gets all the upside gain. In other words, if the property appreciated by 10% because of the improvements, the improving co-tenant alone is entitled to this increase in value.

Here, A made emergency repairs to the plumbing and notified B about the repairs. Emergency repairs to the plumbing are certainly reasonable repairs. Therefore, as a co-tenant, B is required to reimburse A for his 50% of the repair costs. Regarding improvements, A is NOT entitled to 1/2 of the cost of the improvements he made. The "improvements" A made were solely for his benefit, and B has no obligation to reimburse A for them, even after A gave B notice of the

improvements. However, A will be entitled to all the upside gain (or downside loss) that his improvements contributed to the property at the time of sale.

3. The issue is whether an oral grant of permission to use a landowner's property for a specific purpose (use a trail and fish) constitutes an easement that will survive sale of the property.

An easement can be created in one of four ways - prescription, implication, necessity, and grant. Since the only possible theories Ned could allege regarding an easement are prescription and grant, I will limit my discussion to those two theories. To create an easement by grant, it must be in writing and signed by the grantor. An oral grant of permission to use a landowner's land is construed as a freely revocable license, because to construe it as an easement would violate the statute of frauds. To create an easement by prescription, the adverse possession elements must be met: (1) continuous use of the property for the statutory period of adverse possession (10 years in NY), (2) open and notorious use, (3) actual use under a claim of right, and (4) hostile use (i.e., the user didn't have the owner's permission). Additionally, the burden of an easement will run with the servient estate if the buyer of the estate has notice (actual, inquiry, or record) of the easement on his land.

Here, Ned seems to be asserting a non-commercial easement in gross to use A and B's land for its trail and fishing opportunities. However, Ned did not have an easement by grant because A's permission for Ned to use the land was oral, not signed and written. Therefore, all Ned has is a license, freely revocable by A and B at any time. Additionally, Ned does NOT have an easement by prescription. Although Ned's use of the property has been continuous for over the statutory period of 10 years (1998 to 2011), open an notorious because there is no indication that Ned hid his use of the trail/pond from anyone, and actual under a claim of right (because Ned had permission to be there), Ned's use was NOT hostile because A had given Ned permission to fish in the pond and use the trail. As such, Ned does not have an easement at all, but rather a revocable license that will not survive the sale of Greenacre.

4. The issue is which party bears the risk of loss (ROL) when the land in question is extensively damaged through neither buyer nor seller's fault after the signing of the contract for sale but before the buyer takes legal title or actual possession of the land. Contrary to the old common law rule, NY has adopted the modern approach when allocating the risk of loss between buyer and seller in a real estate purchase situation. Under NY law, the seller bears the ROL if the property is destroyed / damaged through neither party's fault until either (1) the buyer takes actual possession of the property, or (2) the buyer takes legal title to the property (i.e., at closing). If the property is damaged or destroyed during this time period, the buyer can rescind the K. This repudiates the old common law approach of placing the ROL on the buyer at any time after the signing of the K to buy the land.

Here, the land K was signed in 4/2011 and the land was severely damaged in 5/2011, before Purchaser took title to or possession of the land. The land was extensively damaged by natural causes (a flood), which is the fault of neither party. Therefore, NY law assigns the seller the risk of loss in this case, and Purchaser can rescind the K.

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QUESTION-TWO

Dan was an employee of Insure, a life insurance company. Starting in June 2010, Dan caused Insure to issue three checks per month to the order of Insure policyholders by telling Insure that the policyholders had requested policy dividend withdrawals, when in fact no such requests had been made. All the checks were drawn on B Bank. It was the practice of Insure to deliver such checks to Dan upon his request, and Dan was then responsible for sending the checks to the policyholders. Insure did not require any verification that the dividend withdrawals were requested by the policyholders or that Dan sent the checks to them. After Insure delivered the checks to Dan, Dan signed the payees' names on the checks beneath an endorsement that read "pay to the order of Dan." Dan then cashed the checks at various branches of B Bank.

On January 3, 2011, at Dan's request, Insure delivered to Dan three checks payable to policyholders who had not requested dividend withdrawals. Dan endorsed the checks in the same manner as before and placed the checks in his office drawer. Later that day, before Dan could cash the checks, Insure's president asked Dan to come to her office. Worried that Insure had discovered his scheme, Dan placed the checks in a shopping bag he found in the closet and quickly left the building with the bag.

Once outside, Dan saw Officer, who was in a marked police car, slowly driving down the street. Dan looked in the direction of the police car several times then started to walk quickly down the sidewalk. As he walked, Dan looked back at Officer several more times and quickened his pace. Observing this, Officer's suspicion was aroused so he pulled his police car next to Dan. Officer leaned out the window, asked Dan his name, and told Dan that he would like to speak to him. Dan stopped, gave Officer his name, and started to walk away. Officer then asked Dan where he lived. Without saying anything, Dan started to run. Based on Dan's refusal to answer and subsequent flight, Officer got out of the police car, gave chase and caught Dan. Officer then searched Dan's pockets and opened the bag, finding the checks. Before Miranda warnings were given to Dan, he stated, "I'm sorry. I'll return the stolen checks." Officer placed Dan under arrest.

Following further investigation, Dan was charged with the crime of criminal possession of forged instruments. A person is guilty of criminal possession of a forged instrument when with knowledge that it is forged, and with intent to defraud, deceive or injure another, he utters or possesses a forged instrument.

Prior to trial, Dan moved to suppress all evidence related to the checks found in the bag on the ground that he was unlawfully stopped and searched and, as to his statement, on the further ground that he was not given Miranda warnings. The court denied Dan's motion in all respects. At trial, the prosecution presented uncontroverted testimony from Officer of his encounter with Dan; from the policyholders that they had not requested dividend withdrawals and that the endorsements on the checks found in the bag were not theirs; and from Insure's president regarding Insure's procedure for giving the checks to Dan. There was no proof presented as to who endorsed the checks.

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Insure commenced an action against B Bank to recover the value of the checks that Dan cashed.

1. Were the court's rulings on the suppression motion correct?

2. Assuming denial of the suppression motion was correct, can Dan properly be found guilty of criminal possession of forged instruments based upon the proof presented at trial?

3. Is B Bank liable to Insure for the value of the cashed checks?

First Answer to Question Two

1. The Fourth Amendment, and its NY constitutional analogue, protects persons against unreasonable searches and seizures. A search is per se unreasonable when conducted without a warrant, unless circumstances fit an exception to the warrant requirement. Valid exceptions include a search incident to lawful arrest, exigent circumstances, public safety, search of an automobile, the suspect gives consent, the plain view exception, or where a criminal is in active flight from apprehension.

A seizure is per se unreasonable without a warrant, unless the officer has probable cause to believe a crime has been committed and that the defendant was the one who committed it.

New York categorizes street encounters between police officers and citizens into four levels, based upon the level of suspicion an officer has grounds for. In a level 1 encounter, the officer has no suspicion that criminal activity is afoot, and can only inquire of persons their name and residence; they cannot compel the person to remain, and the person is free to leave. In a level 2 encounter, the officer can ask pointed questions pertaining to a specific instance of criminal activity that might lead a reasonable person to believe they are suspected of a crime, based upon some founded suspicion that criminal activity is afoot. In a level 3 encounter, the officer can briefly detain a suspect and question them, as well as quickly frisk them for weapons to ensure the safety of the officer during the encounter, based upon the officer's reasonable suspicion that the defendant is engaged in criminal activity. Finally, a level 4 encounter culminates in an arrest, where the officer has probable cause to suspect that the defendant committed the crime in question.

Individually, furtive glances and flight from the police, absent some other corroborating circumstances, are insufficient to generate reasonable suspicion and permit a detention and search. Further, any search in a level 3 encounter must be confined to the suspect's person and a 'protective sweep' of the nearby area; absent consent, an officer may not rummage through closed containers in the suspects possession.

Here, Dan's initial furtive glances towards Officer's patrol car did entitle the officer to initiate a conversation with Dan and inquire as to his identity and purpose. Dan was within his rights to depart after complying with Officer's request for his name. However, the combination of suspicious conduct - furtive glances and quick walk, plus a flight in response to legitimate

questioning, gave rise to Officer's reasonable suspicion that Dan was engaged in criminal activity. That said, the search of the bag was impermissible, as the purpose of a Level 3 search is officer safety and the preservation of evidence that may be destroyed. Because the shopping bag was not on Dan's person, once restrained there was no way for Dan to access it to destroy evidence or retrieve a weapon. Accordingly, Dan's motion to suppress the checks should have been granted.

Pursuant to the Fifth Amendment, a statement produced by custodial interrogation is inadmissible unless a defendant has been advised of his right to counsel, the state's obligation to provide such counsel if defendant is indigent, defendant's right to remain silent, and the state's ability to use any statements against defendant in court. These Miranda warnings serve the dual purposes of informing an accused of his constitutional rights, and providing law enforcement a framework to ensure predictability and uniform application of the law. For a statement to be a product of custodial interrogation, the suspect must first be in custody - that is, a reasonable person in the suspect's position would not believe he was free to leave - and the suspect must have been interrogated, that is, the statement must have been made in response to some police action or speech designed to elicit a statement.

Here, Dan was clearly in custody at the time the statement was made, having been chased and caught and searched. However, Officer had not inquired of Dan or taken any action that was designed to or reasonably likely to elicit a response; therefore, no interrogation was underway, and Dan's statement will be held to be spontaneous, and admissible at trial.

However, the derivative evidence rule prevents the People from introducing evidence obtained as a result of an illegal search or seizure, in order to deter police misconduct. To admit derivative evidence, the People must show either 1) that the evidence would inevitably have been discovered; 2) that there was an intervening independent source for its discovery, or 3) that the subsequent discovery was sufficiently attenuated in time or space from the illegal search or seizure. None of the exceptions apply - absent the search, Dan would not have blurted out about the stolen checks; there was no intervening source but Dan's search, and the events were nearly contemporaneous. Accordingly, because Dan’s bag was unlawfully searched, absent an exception, the statement should be excluded as derivative evidence.

2. The issue is whether the evidence presented at Dan's trial was legally sufficient to sustain his conviction.

A conviction is supported by legally sufficient evidence when, if all the facts and permissible inferences presented by the prosecution are assumed as true, the evidence would prove every element of the charged offense. In this case, the required elements for conviction are a) knowledge that the instrument is forged, b) intent to defraud, deceive, or injure another, and c) possession or utterance of a forged instrument.

Knowledge and intent, owing to their subjective nature, can be proven circumstantially, inferred from the defendant's words or conduct.

Here, the knowledge that the instrument was forged can be inferred from the testimony of the policyholders and Insure's president. Because the policyholders never endorsed the checks, nor requested dividend withdrawals, and the checks were in the exclusive possession of Dan from their issuance to their deposit, a fact finder could reasonably infer that Dan had knowledge of their fraudulent nature. Further, knowledge can be shown from Dan's spontaneous statement to Officer, wherein he noted that the checks were 'stolen'.

As to Dan's intent, this can be inferred from Dan's mere possession of checks that were ostensibly meant for policyholders. Even assuming that some co-conspirator or third party had endorsed the checks to Dan, one who lacked the intent to defraud, deceive, or injure would have promptly destroyed them, or returned them to Insure. The inference of intent from the alleged criminal conduct is permissible and oft used, such as where a burglar's intent to commit a crime inside a structure is inferred from his mere unlawful presence inside the structure.

Finally, Dan's possession of the checks is proven by Officers testimony regarding their encounter - that Dan had possession of the checks. Assuming the checks are not excluded, Officer's testimony will be legally sufficient to establish the possession element of the crime.

Accordingly, if the checks and statement are admitted into evidence, the evidence presented at trial is sufficient to sustain a conviction for criminal possession of forged instruments.

3. The issue is whether the checks issued by Dan were issued to 'fictitious payees'.

Ordinarily, a bank is liable to the drawer of a check where it cashes that check pursuant to a fraudulent signature. This is because the bank is in the best position to determine the validity of an instrument, as a financial institution that deals regularly in negotiable instruments. Placing the risk of fraud on banks further incentivizes them to exercise due diligence when cashing checks. However, where the agent of a drawer causes the drawer to issue negotiable instruments to fictitious payees, the bank will not be liable to the drawer, as in this case it is the drawer in the best position to prevent fraud through the implementation of internal controls and auditing mechanisms. The responsibility for the agent's fraud flows to the principal, who must suffer the loss due to his failure to exercise adequate control over his agent.

Here, although the original payees on the checks Dan requested were actual policyholders of Insure, they had not requested the disbursements. Insure could have easily implemented a policy whereby request for policy dividend withdrawals had to be accompanied by a signed letter from the policyholder, to prevent exactly the sort of fraud perpetrated by Dan. Insure could similarly have required that the checks be sent via certified mail, to ensure that they actually reached their intended recipients. Because it failed to implement either of these policies, the fictitious payee doctrine will shield B bank from liability against Insure.

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Second Answer to Question Two

1. The first issue is whether a police pursuit and subsequent search of the defendant's person and bag violated the Fourth Amendment.

The Fourth Amendment of the U.S. Constitutions protects against unreasonable searches and seizures, and is incorporated against the states. Forcible detentions of persons on the street rise to the level of a "seizure" and must abide by Fourth Amendment protections. New York follows a "sliding scale" of police authority to stop, detain, and frisk persons suspected of criminal activity. A police officer may briefly inquire information from a person based on more than a whim or caprice that criminal activity may be afoot. The suspect may not be detained or forced to answer questions and suspect's refusal to answer or flight from the police does not give rise to probable cause to arrest. Next, under the common law right to inquire, the police officer may detain the suspect and ask more extensive questions based on a "founded suspicion" of criminal activity; however the suspect must be released if he provides answers to the questions. A police officer may engage in a forcible stop (known as a Terry stop) based only upon reasonable suspicion that criminal activity is afoot, and may frisk the suspect only if the officer has reasonable suspicion that the suspect is armed and dangerous. Only items immediately recognizable as weapons may be seized in a Terry frisk. Notably, unlike under the federal constitution where mere police pursuit does not rise to the level of a "seizure" until the suspect is forcibly caught or submits to the officer's authority, under the New York constitution, a police chase alone is a "seizure" and requires at least reasonable suspicion. Reasonable suspicion, while less than probable cause, still must be based on specific, articulable facts and must be more than just an officer's hunch. In order to arrest the suspect without a warrant, the officer must have probable cause. If this sliding scale of authority is violated by the police, any evidence obtained may be excluded at trial, as well as any "fruits" of the unconstitutional search or seizure.

In this case, when Officer first saw Dan, he fell at the lowest amount of authority on the sliding scale. Dan's furtive actions likely gave rise to more than a whim or caprice about potential criminality, but did not yet rise to the level of a founded or reasonable suspicion. Thus, the officer was only allowed to ask brief questions of Dan and was not allowed to force him to answer or to forcibly detain him. When Dan refused to answer the question regarding where he lived and started to run, Officer did not have reasonable suspicion to chase him. All that Dan had done prior to the stop was walk down the sidewalk, glance repeatedly at the police car, and quicken his pace. All of these actions could just as likely be performed by a person with no connection to criminal activity who merely sees a police car.

Additionally, since Dan was not required to answer Officer's questions when he was stopped, his refusal to answer and taking off running, without more, does not provide any additional specific, articulable facts that criminal activity was afoot. The U.S. Supreme Court has expressly held that merely looking suspicious does not give rise to reasonable suspicion, and New York law is even more protective of suspect's rights on public walkways.

Thus, Officer's initial chase and catching of Dan violated New York's protection against unreasonable searches and seizures. Moreover, Officer was not entitled to search Dan's shopping bag upon catching him. Even if his suspicion had risen to the level of reasonable suspicion, this

would only have allowed him to frisk Dan's person for weapons, not to search bags that Dan was carrying. Indeed, even if Officer had probable cause to arrest, under New York law, an arresting officer may only search bags or containers within the suspect's wingspan if he specifically and reasonably believes that the suspect is armed. Here, Officer had no suspicion that Dan was dangerous in any way.

For these reasons, any evidence seized from Dan's bag was the product of an unconstitutional stop and search, and Dan may properly have it excluded at trial. Since the bag belonged to him and was on his person, he had a reasonable expectation of privacy in it, and thus properly has standing to seek exclusion of the evidence.

Therefore, the court should have granted the motion to suppress the checks found in the bag.

The next issue is whether a spontaneous, unsolicited statement given prior to Miranda warnings violates the privilege against self-incrimination or is a fruit of an unconstitutional search.

Where a suspect has undergone an unconstitutional stop, search or seizure, any evidence that is a direct "fruit" of the unconstitutional action is likewise inadmissible. Only if the evidence could have come from an independent, lawful source, or inevitable discovery, or if it came from an intervening act of free will that "dissipated the taint" of the illegality may the evidence be admitted. The "fruits of the poisonous tree" doctrine applies equally to verbal statements that come as a result of the exploitation of the illegality of the initial search. However, it must be noted that spontaneous, unsolicited statements from a suspect do not violate the Fifth Amendment Miranda rule. Under the Fifth Amendment, a suspect who undergoes custodial interrogation must be apprised of his Miranda rights to remain silent, to have counsel present, and that his statements may be used against him at trial. A statement blurted out to police officers before the suspect is given his Miranda warnings and before he is interrogated in custody does not trigger the Miranda right.

In this case, Dan's spontaneous statement did not violate Miranda or the Fifth Amendment because it was blurted out before any custodial interrogation. However, since the statement was a direct product of the illegal stop and search, it may be excluded as a violation of Dan's Fourth Amendment rights and a fruit of the poisonous tree. The government may seek to argue that Dan's statement was an intervening act of free will, but since it would not have been uttered absent the unlawful stop and search, this argument will not succeed.

Therefore, the court was incorrect in denying Dan's motion on Fourth Amendment grounds and should have excluded all the evidence for that reason. The denial on the Miranda grounds, however, was correct.

2. The issue is whether a conviction for criminal possession of forged instruments requires proof of who committed the forgery on the instruments.

The New York crime of possession of a forged instrument requires that the defendant (1) possess a forged instrument; (2) with knowledge that it is forged; and (3) with intent to defraud, deceive or injure another. A defendant is in possession of an item where it has been reduced to his

control such that he has the opportunity to give up possession. This possession crime does not contain any element relating to who committed the forgery of the instrument, but only requires proof that the instrument was indeed forged, and that the defendant had knowledge of the forgery when he possessed it.

In this case, the prosecution introduced evidence that policyholders had not requested dividends and that the endorsements on the checks were not theirs and thus forgeries. Evidence was also introduced to establish that Dan was in regular possession of checks that were ostensibly issued to policy holders, and that he was in the habit of requesting the checks from Insure. Assuming the suppression motion was denied, there is also Officer's encounter with Dan, wherein Dan acknowledged his knowledge that the checks were "stolen" and illegal, and the forged checks were found by Officer in his possession. From this evidence, a juror could conclude beyond a reasonable doubt that the checks were forged with the signatures of the policyholders, that Dan knew of this forgery, and that he possessed the checks with the intent to defraud Insure (since he admitted they were "stolen").

Therefore, Dan can properly be found guilty of criminal possession of forged instruments.

3. The issue is whether a bank is required to repay a drawer of checks for money paid out on a forged special endorsement of those checks.

Under article 3 of the Uniform Commercial Code, a bank must only pay out of an account according to its customer's order, and must only honor checks and other negotiable instruments "as drawn." A bank can be liable to its customer, and thus under a duty to return any funds improperly paid, if the bank cashes a draft that was not signed or authorized by the customer-drawer or where the endorsement of the payee was forged.

Likewise, the bank will be liable if the instrument is post-dated or materially altered. However, the bank's liability may be eliminated where the customer was itself negligent in issuing or writing the check.

In this case, B Bank paid out of Insure's account on a check where the payee's endorsement was forged. On those facts alone, the Bank would be liable to Insure and would have to re-credit Insure's account for the amounts paid out. However, the evidence also establishes that Insure was negligent in its practices of issuing checks to Dan. Dan would be given checks to any policyholders merely on his request, Insure did not require any verification of that the policyholders in fact requested dividend withdrawals, or that the customers ever received the checks.

Thus, since Insure was negligent in its practices of issuing the checks to Dan, B Bank will not be liable for the value of the checks it improperly cashed.

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JULY 2011 QUESTIONS AND ANSWERS

QUESTION-THREE

After a long relationship, Jim and Lisa married in 2004, ten months after Lisa had given birth to her daughter, Dana. Although Jim knew he was not Dana's biological father, he was listed on her birth certificate as her father, acted as Dana's father at school and religious activities, contributed to her financial support, and is the only father Dana has ever known.

In 2010, after learning that Jim was having an affair, Lisa commenced an action for divorce and child support. Jim, thereafter, filed a motion requesting DNA testing in order to establish he was not Dana's biological father and, therefore, should not be required to pay child support. The court denied Jim's motion.

Jim and Lisa subsequently entered into a written matrimonial settlement agreement which provided that Jim would pay child support for Dana to Lisa. The agreement was incorporated, but not merged, into their judgment of divorce.

Last month, Dana was diagnosed with a chronic disease which will require ongoing treatment not covered by health insurance. Lisa has filed a petition seeking an upward modification of Jim's child support obligation based on Dana's increased medical needs. Jim opposes Lisa's petition as barred by the parties' prior settlement agreement.

Jim is the president of Immedia Care, Inc., a closely held corporation, and a member of its board of directors. Unbeknownst to the other board members and shareholders, Jim has a substantial financial interest in Equip Corp., a medical equipment supplier. In May 2011, the Immedia Care, Inc. board of directors unanimously voted to enter into a contract to purchase medical equipment from Equip Corp. for $600,000 for delivery in September 2011. The fair market value of the equipment is $600,000, the contract price. The contract was ratified by a majority vote of the shareholders. Last week, the Board learned that the same equipment is available at a discount from another supplier. The Board has also learned of Jim's interest in Equip Corp. and wishes to avoid the contract with Equip Corp.

In February 2010, Jim purchased a luxury automobile from Car Inc. and signed a security agreement-retail installment contract. Last month, Jim defaulted on his loan. Last week, without a court order, Car Inc. repossessed Jim's car while it was parked in his driveway overnight.

(1) Was the court's ruling on Jim's motion correct?

(2) How should the court rule with regard to Lisa's petition?

(3) May Immedia Care, Inc. avoid its contract with Equip Corp.?

(4) Was Car Inc.'s repossession of Jim's car lawful?

NEW YORK STATE BAR EXAMINATION
JULY 2011 QUESTIONS AND ANSWERS

First Answer to Question Three

1. The issue is whether an individual must pay support a child who is not his biological daughter but whom he has held out as his daughter since birth.

New York courts also adopt a rebuttable presumption that a child is the legitimate child of its mother's husband if the child was born during their marriage and the couple was not separated at the time. New York also follows the paternity by estoppel doctrine. Under this doctrine, an individual will be declared the legal father of a child, and hence liable for child support, even if he is not the biological father provided a number of conditions are met. These are: (1) the individual had held the child out as his own by publicly acknowledging the child as his, (2) there is detrimental reliance by the mother and the child on the individual's conduct, and (3) there has been a significant bond between the child and the individual such that declaration of legal parentage would be in the child's best interest.

Here, Dana was born during the marriage between Jim and Lisa. Thus the court will presume that he is the legitimate father. Even if he could rebut this presumption he will be held the legal father under the paternity by estoppel theory. First, Jim has publicly acknowledged Dana as his daughter by signing the birth certificate and by acting as Dana's father at school and religious activities. Second, the mother, Dana and Lisa have relied on Jim's financial support. Finally, there is a significant bond between Jim and Dana as he is the only father she has ever known. Thus, the court will find that Jim is the legal father and must pay child support.

2. The issue is whether illness of a child warrants an increase in child support where there is an incorporated separation agreement as to child support.

Under New York Domestic Relations law, parties can enter into separation agreements for child support. Normally, incorporated agreements survive the divorce decree and cannot be changed unless there are extreme circumstances. However, this does not apply to child support and child custody provisions. The court will review these provisions under the substantial change of circumstance test, with a view towards the child's best interest. Child support upward modification can be made where there has been a substantial change in the child's needs for which the initial support amount would be inadequate.

Here, Dana's chronic disease, diagnosed after the separation agreement was executed, is a substantial change because it requires ongoing treatment not covered by health insurance -- a cost that was not likely figured into by the parties at the time of the separation agreement. Dana's best interest requires that Lisa be able to provide her medical care. As such, the court will likely grant Lisa's petition.

3. The issue is whether a corporation can avoid a contract with another company when it had entered into the contract without disclosure of one of its director's interest in the other company.

Under the BCL, a corporate director has a duty of loyalty to his corporation. This requires him to avoid self-dealing transactions with the corporation. Self-dealing can occur where the director,

having substantial interest in another corporation, causes his corporation to enter into a business agreement with the other corporation and thus taking a position that might be adverse to the corporation. When there is self-dealing the director has a duty to disclose his conflict of interest, under the interested director statute, to the board or shareholders to cleanse the transaction.

The transaction can be cleansed by a unanimous vote of disinterested board members where the director must be counted for quorum or by a normal approval vote by disinterested board members, or by disclosing the interest to shareholders for their vote. Even if there has been no cleansing, the court will uphold the transaction if it finds that there has been no unfairness to the corporation after looking to determine whether the corporation received a fair value, measured at the time of the contract, in exchange for the benefit that the corporation conferred to the director in the transaction. Here, Jim is a director and had a duty of loyalty, which included disclosing his interest in Equip Corp. to Immedia Care. Even though the board unanimously voted to approve the contract, there was no such disclosure. As such the transaction was not cleansed. However, because Equip Corp. gave Immedia Care a deal that was identical to market value of the equipment at the time the contract was approved. Thus, the discount that the company might receive now does not render the exchange unfair. Thus, the court will likely uphold transaction.

Under New York BCL, a corporation can avoid a contract it entered into with one of its board of director members. However, the corporation will be liable for breach. Here, because the court will likely uphold the transaction because it was reasonably fair to Immedia Care, the corporation cannot rescind the contract without being liable for breach.

4. The issue is whether a seller can use self-help to repossess a car that buyer gained through a security agreement with seller upon buyer’s default.

Under the UCC Article 9 self-help repossession of personal property is allowed subject to a number of conditions. First, the seller must have secured interest in the good, meaning that there must be (i) value exchanged for the good (ii) a written security agreement memorializing the subject matter of the transaction, signed by the parties to be charged, and other essential terms, and (iii) the party must have rights to the good. When a buyer defaults, the UCC allows self-help repossession, but only if he does not breach the peace in the process. "Breach the peace" is a standard focusing not on whether there was an actual altercation but whether a party's conduct reasonably created a likelihood of violence. The seller cannot enter a buyer's house to secure the good without his consent. If the good is outside, the buyer can take the good as long as there is no objection from buyer. Here, Car Inc. had a signed and written security agreement with buyer. Car Inc. had paid value and had a right to the car because it gave Jim a loan to purchase the car. Because the car was outside Jim's house and it was taken at night, there is no evidence that there was a breach of the peace. Since Jim was asleep the likelihood of an altercation was low. As such, the repossession was lawful.

NEW YORK STATE BAR EXAMINATION
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Second Answer to Question Three

1. The issue is whether one who has acted as a child's father can be estopped from thereafter denying his status as the child's father.

Under New York law, paternity may be determined by filiation proceeding whereby DNA evidence can be used to show whether a man is the biological father of a child. Biological parents have a duty to support their children until they turn 21. However, an exception to this rule exists where a man has held himself out as a child's father, and the child has relied on the man's status as such. In that case, the father may be denied from denying his status as father of a child.

In this case, Jim was properly estopped from denying his status as Dana's father because Jim has held himself out as being Dana's father: Jim has been listed on the birth certificate, participated in religious and educational activities, and contributed to the child's financial support. Thus, he has openly and notoriously acknowledged Dana as being his child. Moreover, because Jim is the only father that Dana has ever known, Dana has relied on Jim's status as father and would be injured if Jim were now allowed to deny such status.

Therefore, Jim was properly estopped from denying his status as being Dana's father.

2. The issue is whether child support payments provided for in a separation agreement may be increased due to the needs of a divorced spouse who has custody of the child.

As between spouses, a properly executed separation agreement is governed by principles of contract law. Therefore, when a spouse seeks to alter the maintenance payments due her under a separation agreement, the standard for modification is very high (extreme hardship). However, a child is viewed as being a third party beneficiary to such contract. Because a child has her own rights to support under the law, the separation agreement will not be binding on a court with regard to who has custody of the child or how much child support is due to the child. Rather, custody and child support issues will be determined under the "best interests of the child" (BIC) test. With regard to altering child support payments, the BIC test generally requires a showing of a substantial change in circumstances such that the needs of the child require alteration of the support obligation.

In this case, Lisa can show a substantial change in circumstances and a change in the needs of the child, so a court will find that it is in the best interests of Dana that child support payments be increased. Circumstances have changes materially in an unforeseen way because Dana has been diagnosed with a new disease, which will be expensive to treat. Moreover, the increased child support payments will be allocated toward paying the medical expenses of Dana. Therefore, both prongs of the BIC test are satisfied.

In conclusion, Lisa is entitled to increased child support payments because it is in the best interests of Dana.

3. The issue is whether a corporation can avoid its contract because an officer and director breached the duty of loyalty.

Officers and directors of corporations (and shareholders of closely- held corporations) owe the fiduciary duties of loyalty and due care to their corporation. The duty of loyalty requires that officers and directors act in good faith and with the conscientiousness, morality, honesty, and fairness that the law requires of fiduciaries. The duty of loyalty is breached when an officer engages in self-dealing (aka interested director transaction), usurps a corporate opportunity, or participates in a competing venture against his corporation. An interested director transaction occurs when the officer or director is benefitted by an action taken by his corporation. An interested director transaction can be "cleansed" by full disclosure to the board of directors before voting on it, followed by approval of disinterested directors (or unanimous director approval if there are insufficient disinterested directors to constitute board action) or shareholder approval. Alternatively, the officer or director can show that the terms of the transaction were entirely fair to the corporation at the time when the contract was made.

In this case, Jim engaged in self-dealing in violation of the duty of loyalty because he participated in approval of a transaction whereby Equip Corp., a corporation in which he has a substantial financial interest, was benefitted. Moreover, he did not disclose his interest to the board before it approved the deal, so the vote of the board approving the deal was not sufficient to cleanse the transaction. However, because the terms of the deal were entirely fair to Immedia Care at the time when the contract was made (Immedia Care paid the fair market value at that time, so we know it was fair), Immedia Care will not be able to avoid the contract.

Therefore, Immedia Care cannot avoid the contract because it was entirely fair at the time it was made.

4. The issue is whether a secured creditor can repossess personal property collateral from a driveway without a court order.

Article 9 of the Uniform Commercial Code governs secured transactions where the collateral is personal property or fixtures. Article 9 allows a secured creditor to repossess collateral without a court order so long as there is no breach of the peace. This power allows the secured creditor to take property from the debtor's driveway, but not from inside a building or garage. In this case, Car Inc. had a security interest in Jim’s car, which qualifies as personal property. Therefore, Article 9 of the UCC governs. Here, there was no breach of the peace in the repossession because Jim did not in any way resist or protest the repossession--rather, it appears he was not even aware of it. There is no problem with Car Inc. taking the car from Jim's driveway because, although secured creditors cannot enter the debtor's building, they are allowed to enter the driveway for purposes of the repossession. Therefore, the repossession of Jim's car was lawful.

NEW YORK STATE BAR EXAMINATION
JULY 2011 QUESTIONS AND ANSWERS

QUESTION-FOUR

Peter was in a car stopped at a red light for 15 seconds when his car was struck in the rear by a car operated by Dan. A police officer arrived on the scene and saw Peter standing outside of the car with the engine still running. Dan acknowledged that his car struck the other car in the rear when he took his eyes off the road to adjust his car radio. Dan told the officer he saw Peter emerge from the driver's side of the car after the collision.

The officer spoke to Peter and smelled alcohol on Peter's breath. Peter's speech was slurred. The officer administered a breath test and certain other field sobriety tests, all of which suggested that Peter had consumed alcohol. The officer immediately took Peter to the nearest police station. With Peter's consent, the officer administered a chemical test to determine Peter's blood-alcohol content. The test revealed that Peter had .10 of 1% of alcohol in his blood. Peter was arrested for driving while intoxicated. He made no admissions at the scene or at the station with respect to either driving the car or drinking.

Although Peter was wearing a seat belt, he sustained soft tissue injuries to his back and leg, which disabled him for two weeks, as well as a fracture of his left index finger.

1. (a) Is Peter entitled to maintain an action in negligence against Dan to recover damages for his personal injuries?

(b) Assuming that Peter may maintain an action, is he likely to be successful, and if so, for what injuries is he entitled to recover?

2. To what extent will any award which Peter obtains against Dan be diminished by his own conduct?

3. Assuming proof is offered of the foregoing facts, can Peter properly be convicted of driving while intoxicated?

First Answer to Question Four

1. (a) The first issue is whether Peter can maintain an action in negligence against Dan to recover damages for his personal injuries despite the existence of New York's no-fault insurance statute.

New York has enacted a no-fault insurance statute to reduce the amount of frivolous personal injury claims arising from the operation of a motor vehicle. This law provides first party benefits to those injured as a result of a motor vehicle collision without regard to who was at fault. Such benefits provide compensation for non-economic damages including lost wages and medical expenses incurred as a result of the accident. Insurance companies are not required to pay benefits in certain scenarios such as where the accident was caused by intentional conduct, reckless conduct, where the accident is proximately caused by the driver's intoxication or for a driver of a motorcycle's injuries. The law bars further suits for personal injuries except where the

aggrieved party is seriously injured. A serious injury includes one that results in disfigurement, death, permanent disability, the loss of a limb, serious disfigurement, fracture, or where the injury deprives the party from being able to carry on daily activities for 90 out of the 180 days immediately following the accident.

At first glance, it would seem that Peter would be barred from recovering under the no-fault insurance law. He was injured as the result of a motor vehicle accident. That being said, Peter has suffered a qualifying serious injury. While his two-week period of disability is insufficient, Peter sustained a fracture. As such, he is not barred from suing Dan to recover for his injuries. Thus, he can maintain an action sounding in negligence against Dan.

(b) The second issue is whether Peter is likely to be successful in demonstrating Dan was negligent.

The law of negligence sounds in tort. To recover in such an action, the claimant must demonstrate that a legal duty of care was owed to him, that the defendant breached that duty through unreasonably careless behavior that the claimant suffered injuries as a result, and that such injuries were proximately caused by said negligence. An injury is proximately caused by a tortfeasor's negligence where, but for the defendant's negligence, the injury would not have occurred and that the injury was of the variety reasonably foreseeable to result from a breach of the duty. This requirement draws a line between that which was foreseeable to occur from the breach of a duty and that which was freak and not reasonably foreseeable to flow from a breached duty.

An operator of a motor vehicle owes a duty to fellow motorists to exercise reasonable care in the operation of their vehicle. In New York, a rebuttable presumption arises that a driver who strikes another driver stopped at a red light was negligent. Where such a presumption arises, the burden of persuasion then shifts to the defendant to raise some issue that "bursts the bubble" and then defeats the presumption. If no such evidence is produced, the jury will be instructed as to presumption and is not free to reject the conclusion of negligence.

Here, Dan struck Peter from behind after Peter had been stopped a red light for some 15 seconds. Thus, a presumption will arise that Dan was negligent. Moreover, Dan admitted his negligence when he told the police officer that the accident resulted from his decision to take his eyes of the road. Thus, Dan will be unable to defeat the presumption of negligence at trial. Peter will be entitled to recover all damages that were reasonably foreseeable from this accident. Peter has a duty to mitigate such damages by obtaining medical care that a reasonable person would undergo and that would be unduly risky or dangerous. As such, Peter will be able to recover for his soft tissue injuries and fractured index finger as such injuries are reasonably foreseeable to occur from a motor vehicle accident.

2. The issue is whether Peter's conduct will diminish his recovery against Dan under the doctrine of comparative negligence.

There are several approaches to dealing with a plaintiff's fault. These include contributory and comparative negligence. New York employs what is known as a "pure" comparative negligence

approach. Under this doctrine, a plaintiff whose own conduct proximately causes and contributes to his own injury will have any recovery reduced by the percentage of liability attributed to him at trial. New York allows a plaintiff to recover any the entire amount offset by his apportioned fault even where the plaintiff is found more than 50 percent liable.

In the present scenario, Peter is unlikely to have his reward reduced by any amount. Peter was intoxicated at the time of the accident. That being said, this intoxication did not contribute to the accident or his injuries. Rather, Dan's negligence was the sole proximate cause of the accident and Peter's injuries. As a result, Peter would not have his award reduced by any amount assuming he underwent all treatment required by law to deal with is injuries.

3. The issue is whether Peter may be convicted of driving while intoxicated under the forgoing facts.

Driving while intoxicated is a criminal offense in New York. To be convicted, the State must prove beyond a reasonable doubt that the defendant was intoxicated while driving his motor vehicle. The 5th Amendment does not bar the introduction of a defendant's statements to police tending to show that the defendant was intoxicated where those statements do not reveal the defendant's inner thought processes. Such statements are non-testimonial in nature and do not fall under the 5th Amendment's protection. The same is true of a blood-test administered to detect a suspect's blood-alcohol content administered with the consent of the subject.

Dan can be properly convicted of driving while intoxicated. The facts indicate that Dan was observed emerging from the driver side of the vehicle following the accident. Assuming no one else was present in Dan's car, an inference arises that Dan was driving the car. Dan's statements in response to the officer's basic questioning and performance on the sobriety test would also be admissible to show that Dan was intoxicated. These statements would give rise to grounds for the officer to initiate the blood- alcohol test to which Dan consented. The results of that test clearly show that Dan was above the legal limit in New York. Thus, the elements of the crime can be shown beyond a reasonable doubt. As a result, Dan could be properly convicted for the crime of driving while intoxicated.

Second Answer to Question Four

1. (a) The issue is whether Peter can recover against Dan in a negligence action for injuries he sustained as a result of the car accident.

New York No Fault law provides that driver's involved in car accidents may not sue other drivers for negligence unless they suffered economic damages in excess of $50,000 or if they suffer a "serious injury." Claims for economic damages less than $50,000 must be satisfied out of the insurance policy of the vehicle under which the injured was a "covered person." Economic damages include out-of-of pocket expenses, treatment, and 80% of lost wages up to $2,000 per month. Non-economic damages include pain and suffering claims. New York's No Fault law defines a serious injury as a fracture, loss of a fetus, soft tissue damage that results in the injured

having to miss 90 out or 180 days of their normal routine, death, disfigurement, or dismemberment. No Fault benefits are paid to any occupant of a car, a driver of a car, or pedestrian struck by a car out of the insurance policy in that car. No fault benefits need not be paid to a driver who is intoxicated by drugs or alcohol if said intoxication is the proximate cause of the accident.

Assuming that Peter is a New York resident and has insurance on his vehicle, as a driver of a vehicle with No Fault insurance he will be entitled to bring a negligence claim against Dan for any economic injuries exceeding $50,000 and for non-economic damages as a result of his "serious injury. Peter's injury to his back will not qualify as a serious injury as he has not been unable to conduct his daily routine for over 90 of 180 days, however, Peter's broken left index finger is a fracture and thus will qualify as a serious injury. Because Peter has suffered a serious injury he will be entitled to maintain a negligence action against Dan for non-economic damages (pain and suffering). Additionally, if Peter's economic injuries exceed $50,000, Peter will be able to maintain an action against Dan for negligence for those injuries as well. Finally, Peter will not be barred from recovering no-fault benefits from his insurance carrier as his intoxication was not a proximate cause of his injuries (he was rear-ended while stopped at a red light). Thus, Peter can maintain an action against Dan.

(b) The issue is whether Peter will likely be successful in his negligence action against Dan.

In New York, case law has created a presumption of negligence is situations where a stopped vehicle is rear-ended by another motorist. Thus, Dan will likely be found liable for Peter's injuries as there is no evidence to rebut the presumption that Dan was negligent. However, even without this presumption, Peter will be found liable for negligence. A defendant will be found liable for negligence when he breaches a duty or standard of care that a reasonably prudent person would observe, and that breach is the factual and proximate cause the plaintiff's injury. Here, Dan owed a duty to other driver's on the road to pay attention to his surroundings. Automobiles are dangerous instruments and a reasonably prudent person would foresee that inadvertence or thoughtlessness while behind the wheel of an automobile could foreseeably result in injuries stemming from traffic accidents. Here, Dan admitted that his car struck Peter's car in the rear while peter was stopped at the light, and that it was a result of Dan taking his eyes off the road to adjust his radio. Drivers owe each other a duty to stay vigilant behind the wheel and Dan breached this duty with his actions. By failing to observe the standard of care of a reasonably prudent driver, Dan will likely be found to have been negligent. Therefore, Peter has a viable claim that is likely to succeed. Furthermore, as mentioned above, Peter will be able to recover economic damages in excess of $50,000 for out-of-of pocket expenses, treatment, and 80% of lost wages up to $2,000 per month, and non-economic damages resulting from his "serious injury" to his left index finger.

2. New York is a pure comparative negligence jurisdiction. Thus, a plaintiff who is 99% at fault may still recover 1% of his damages from a liable defendant. New York verdicts in personal injury cases are required to apportion fault amongst tortfeasors, and as such, the jury will likely hear evidence concerning Peter's intoxication and assign Peter a share of fault. Here, the jury will likely find that Peter is not comparatively negligent at all, as the presumption of negligence stemming from the situation (Peter being rear-ended by Dan), coupled with Dan's admission

(which, although hearsay, will be admitted as an admission of a party opponent) will likely result in the jury returning a verdict where Dan is found 100% responsible for Peter's injuries.

The issue is whether Peter may be convicted of driving while intoxicated. In New York, a driver can be found guilty of driving while intoxicated if he has a blood-alcohol content of .08% or higher, and he is operating a motor vehicle on a public way. Driving under the influence is a strict liability offense and as such requires not mens rea be proven by the District Attorney. All New York drivers give implied consent to submit to an alco-sensor, or a Breathalyzer chemical test when they receive their driver's license. This provides law enforcement with an easy avenue to obtain a driver's consent to a chemical test because if a driver fails to submit they will forfeit their driver's license. However, in order to request a breathalyzer be performed, an officer must have a reasonable belief that the driver is intoxicated. The officer smelled Peter's breath, and observed Peter slur his speech. Thus, the officer had a reasonable belief that Peter was intoxicated. Here, Peter gave adequate consent and was found to be intoxicated to the level of .10% blood-alcohol content. This is above the legal limit by .02%, or roughly one drink. Thus, the question turns to whether the evidence will be sufficient to find that Peter was operating a motor vehicle on a public way. Here, When the officer arrived at the scene, peter's engine was still running. This creates an inference that peter's car was running at the time of the accident as it was stopped in front of a red light and it is unusual for a driver to start his engine after being rear-ended, or to park in the middle of a public thoroughfare. Furthermore, Dan observed Peter exit the driver's side of his car adding to the proof that Peter was driving or operating his vehicle on a public way. Thus, the evidence indicates that Peter will likely be found of driving while intoxicated.

QUESTION-FIVE

Kent, a widower, had two children, a daughter, Dina, from whom he was estranged, and a son, Slate. In 2004, Kent duly executed a will that left his estate in equal shares to Slate and to Kent’s brother, Ben. In 2006, following an argument with Ben, Kent duly executed a new will, leaving his entire estate to Slate. The will was silent as to the revocation of Kent’s prior will.

In 2007, Slate, age 55, was injured in an accident that left him partially paralyzed and in need of significant medical care and assistance with activities of daily living. The cost of his care exceeded his income and threatened to exhaust his assets. To assist Slate, Kent created an irrevocable trust, with a stated purpose of providing income to Slate for his life. The trust instrument directed the principal to be paid to Dina’s daughter, Gina, upon Slate’s death, stating that a further purpose of the trust is to provide for the education and welfare of Gina. Gina was then a five year old child. The trust instrument named Trent, as trustee, and gave him broad discretionary investment powers. Kent funded the trust with $1 million in cash, which he delivered to Trent.

Trent hired the law firm of Lake & Pierce, LLP to provide financial and legal advice to him as trustee. Lake and Pierce are the sole partners in Lake & Pierce, LLP, a duly registered limited liability partnership engaged in a trusts and estates practice. Lake handled all of the trust’s affairs

on behalf of the firm. On the advice of Lake, Trent invested the entire trust principal in Drug Corp., a start-up drug company that had a patent for and approval to market a new arthritis drug. The investment was intended to maximize income, and the investment produced significant income until 2009, when studies began to show that the drug had significant adverse side effects, and numerous lawsuits were filed against Drug Corp. Between 2009 and June 2011, the market value of the stock held by the trust dropped from $1.1 million to $100,000.

Kent died last month, shortly after he and Ben reconciled. Kent's 2006 will was found cut into two pieces in his desk drawer. Kent was survived by Slate, Gina, Dina, and Ben. Ben claims that the 2006 will was properly revoked, with the effect that the 2004 will was revived, and that he is entitled to one-half of Kent's estate. Slate claims that the 2006 will was not properly revoked, and that he is entitled to the entire estate.

Dina, who remained estranged from Kent until his death, claims that Kent died intestate, and that she is entitled to one-half of Kent's estate. Both the 2004 and the 2006 wills have been offered for probate.

Dina, as parent and natural guardian of Gina, has duly commenced an action against Trent for breach of fiduciary duty, alleging mismanagement of the trust assets. Trent, in turn, has duly commenced a third-party action against Lake and Pierce, individually, and against Lake & Pierce, LLP, for malpractice.

1. Should either Kent's 2004 or 2006 will be admitted to probate?

2. Is Dina likely to succeed in her action on behalf of Gina?

3. Assuming Trent is found liable in Dina's action, and further assuming that Lake is guilty of malpractice, which of the third-party defendants may be held liable to Trent in the third-party action?

First Answer to Question Five

1. At issue is how a will may be revoked.

A will is revoked either by the issuance of another document meeting all of the testamentary formalities that expressly revokes the previous will or by physical act with intent to revoke. When a second will is executed and it does not expressly revoke all previous wills the former wills will not be considered revoke to the extent that the two wills can be read together. If the two wills are wholly inconsistent then the first will will be considered revoked by the second. A will is revoked by physical act if the testator mutilates or destroys the will with the intent to revoke it. When a will was last in the possession of the testator and it is found in a mutilated condition - e.g., ripped in two, signature crossed out, entire text of the will crossed out or "VOID" written across all of the text - it will be presumed that the testator intended to revoke the will by physical act. Revocation of a subsequent will that revoked previous wills does not serve to revive the previous wills. Rather, a will may only be revived if it is re-executed with the

appropriate testamentary formalities or republished via codicil, the execution of which also requires testamentary formalities, which serves to re-date the will at the date the codicil is executed. The doctrine of dependent relative revocation is of unsure status in New York as it has been deployed and upheld a very limited number of times. Dependent relative revocation provides that if a will is revoked with the mistaken belief that this revocation will lead to the reviving of a previously revoked will, the later will will not be considered to be revoked if it is closer to the distribution the testator mistakenly believed he revived in the earlier will than would be distribution under intestacy, as would be the case otherwise when all will were revoked at the time of a decedent's death. If no wills are admitted to probate, the decedent's property will be disbursed via the intestacy statutes.

Here, the 2004 will, while not expressly revoked by the terms of the 2006 will, was revoked by the execution of the 2006 will because there is no way to read the 2004 and the 2006 will consistently as they each purport to devise the whole of Kent's estate. There would be no way to read consistently provisions providing for the state to be split equally between two parties with a provision bequeathing the estate as a whole to just one of these parties. Thus, the execution the 2006 will with its proper testamentary formalities served to revoke the 2004 will, thus the 2004 will should not be admitted to probate.

The 2006 will was in possession of Kent and it was found in a mutilated condition - ripped in two. This gives rise to the presumption that Kent revoked the 2006 will by physical act with the intent to revoke. The facts do not assert any evidence useful in overcoming this presumption. Furthermore, while a mutilated will will not be attributed to the decedent if a third party with interests adverse to the mutilated will was known to be in possession of it, that is not the case here. While Ben and Kent were reconciled, the facts do not suggest that Ben was in possession of the will which could have led to a presumption that he and not Kent ripped it in two. Rather, it seems more likely that upon the reconciliation Kent ripped the will in two, and the statutory presumption of it having been found in this condition in his possession upon death will control. Thus, the 2006 will was revoked by physical act, and should not be admitted to probate.

Next must be assessed whether dependent relative revocation should apply in this case. At issue would be whether Kent revoked the 2006 will under the mistaken belief that this would lead to the revivification of the 2004 will. It seems as though this may have been the case - upon a fight with Ben, Kent executed the will without him as a beneficiary, and upon reconciliation Kent may have revoked this will with the intent that the 2004 will be revived. However, it is not clear that applying the doctrine dependent relative revocation would lead to a distribution of assets closer to that in the will that Kent thought he was reviving. Under the 2006 will, Ben would receive nothing, and it appears that from the 2006 revocation Kent's intent was to restore Ben's inheritance. However, the 2006 will is closer to the intention of the 2004 will in terms of not leaving anything to Dina. However, since it is unclear whether not revoking the 2006 will would leave a distribution closer to the will that Kent thought he was reviving - with examples on both sides - dependent relative revocation should not apply, as it is unclear that this would be the best manifestation of the intent of the deceased. Thus, dependent relative revocation should not be applied, as if it were Ben would not inherit, whereas if it were not and both wills were considered revoked, Ben would receive the same portion of inheritance via intestacy or the 2004 will.

Neither the 2004 nor the 2006 wills should be admitted to probate.

2. At issue is the standard of care owed by a trustee in the management of the property of a trust.

The duty of a trustee in management of the property of a trust is on the modern portfolio theory of trust management. The investments of the trust will not be considered in isolation, but rather the trust will be examined as a whole to determine whether the trustee complied with his duty. The trustee must also manage the trust to carry out the intent of the settlor.

Here, the main purpose of Kent in creating the trust was to provide for Slate who was facing significant costs in medical care and assistance with daily life. A secondary purpose of the trust was to provide for the education and welfare of Gina by paying her the principal upon Slate's death. Trent would have been within his duty of managing the trust in creating a portfolio that maximized the income as the primary purpose was to care for Slate, and the income of the trust is what would support that purpose. However, just because one purpose is considered a "further purpose" does not mean it can be wholly neglected by the trustee. Thus while Trent would be within his proper duty of management by making investments that maximized income, by making an investment in only company violated the modern portfolio standard of trust management. By not diversifying the trust's investments at all, Trent was taking a huge risk and putting both purposes of the trust in danger. While this investment in Drug Corp. may have been an appropriate investment to maximize income if other parts of the principal were invested elsewhere in less risky investments, that fact that this was the only investment made by the trust suggests that Trent breached his duty and mismanaged the assets of the trust. Thus, Dina should succeed in her action on behalf of Gina.

3. At issue is the liability of partners in a registered limited liability partnership and of the partnership itself.

A registered limited liability partnership (RLLP) is a creation of state statute that allows professionals (doctors, lawyers, etc.) to create a partnership that limits the liability of the partners for all but their own torts. Thus, the partners of an RLLP will not be personally liable, for example, for any contracts the RLLP enters into, but will be liable for their own malpractice. The RLLP itself will be liable not only for all contracts but also for the torts of the partners, because even in an RLLP, the partners remain agents of the partnership and the partnership is thus liable for their torts as well. However, importantly, there is not personal liability among the partners for the malpractice or other torts of another partner, rather in an RLLP in order to be personally liable for any torts, usually malpractice, one must commit the tort his or her self.

Here, Lake, as the partner who dealt with Trent and personally committed the malpractice, is personally liable to Trent in the third-party action, as the status as an RLLP does not shield the partner who committed the tort from personal liability. Additionally, Lake & Pierce, LLP, itself as the RLLP is also liable to Trent because the entity is not shielded from liability either for torts or contracts. However, Pierce, himself, is not personally liable as he did not commit malpractice here and is thus shielded from liability.

NEW YORK STATE BAR EXAMINATION
JULY 2011 QUESTIONS AND ANSWERS

Second Answer to Question Five

1. The issue is which will should be admitted to probate - (1) an earlier will that was revoked by implication by a later will, (2) a later will that was revoked by physical act, or (3) neither.

Under NY's EPTL, a will can be revoked in one of two ways. First, by executing a subsequent testamentary instrument (new will) with all the formalities, or second, by physical act plus an intent to revoke. When a later will is silent as to revocation of an earlier will, the court will attempt to read the two wills together, treating the later will as a codicil to the earlier will. However, if the two wills are so different that they cannot be logically read together, the later will will be deemed to have revoked the earlier will by implication.

Regarding revocation by physical act, if a will is found cut in two, disfigured, or mutilated and it was last seen in the hands of the testator, NY law assumes that the testator revoked the will by physical act and intent to revoke. Importantly, the revocation of a later will does NOT revive an earlier will - there is no way to revive a revoked will in NY. However, under DRR, the court may ignore the revocation of the later will and submit the later will to probate if the proponent of the later will proves that (1) the testator (T) made a mistake of law and thought that revoking the later will would revive the earlier will, and (2) the provisions of the later will and earlier will are similar enough so that the T's general desire could be accomplished (i.e., reviving the earlier will). Again, the first will is NOT revived, but rather the second will would be admitted to probate.

Here, neither will should be admitted to probate. K's 2006 will was silent regarding revocation of the 2004 will, so the court will attempt to read the second as a codicil to the first, if at all possible. However, that's not possible here because the dispositions are so different. The 2004 will left Ken's estate to Slate and Ben in equal shares. On the other hand, the 2006 will left the entire estate to Slate. Under these circumstances, the 2006 will revoked the 2004 will by implication.

K's 2006 will will be assumed to be revoked by physical act. As far as we know, the will was last seen in K's possession, and it was found cut in two pieces, which is a sufficient physical act to constitute revocation. Therefore, the court will assume that K was the one to revoke the 2006 will by physical act, with intent to revoke it. Additionally, there is not enough evidence that K made a mistake of law, thinking that revoking his later will would revive his 2004 will. One could argue that the circumstances have changed (i.e., Ben has reconciled w/ K) and that K intended to revoke his later will to revive his 2004 will, which gave Ben 1/2 of the estate.

However, there is no concrete evidence of this mistake of law. Additionally, under DRR, even if there was sufficient evidence to show that K revoked his 2006 will with the mistaken intent to revive the 2004 will, the two wills are too different (as discussed above) to probate the 2006 will, and there is no way to "revive" a revoked will. After all is said and done, neither will should be admitted to probate, and estranged Dina takes 1/2 of K's estate since he died intestate.

2. There are two issues here: First, whether the guardian or a trust beneficiary has standing to sue the trustee for breach of fiduciary duty for his poor investment decisions. Second, whether a trustee, as a fiduciary, is liable for his poor investment decisions that cause the trust to lose money, even if he was given broad discretionary investment powers and was advised on trust investment decisions by an outside law firm.

Under NY EPTL and NY's fiduciary powers act, a trustee is a fiduciary that owes duties of care and loyalty to the beneficiaries of the trust. Beneficiaries therefore have standing to sue a trustee for breaching these fiduciary duties, and a minor beneficiary's guardian can sue the trustee in the minor's stead.

Here, T, as trustee, is a fiduciary of the trustees, including Gina. Because Gina is a minor, her mother has standing to institute a suit on Gina's behalf alleging that T breached his fiduciary duties to the beneficiaries of the trust.

Fiduciaries, including trustees, owe a duty of care to the beneficiaries of the trust. Regarding the duty of care, a fiduciary must act with good faith and the amount of skill, care, and diligence that would be expected of an ordinarily prudent person under the circumstances, in a similar position. Trustees generally have broad discretion regarding how to invest the principal of a trust, but they must invest the trust assets in accordance with the modern portfolio strategy of investment. Under this strategy, the trustee does not need to justify each individual investment, but should balance the investments to achieve a good balance of (1) income for the income beneficiaries, and (2) principal growth for the principal beneficiaries, as well as (3) flexibility. The trustee's main goal should be an equitable distribution of both capital gains and investment income, so that the Trustee's actions are in the best interests of both the income and the principal beneficiaries. Of course, a trustee / fiduciary is entitled to rely on the advice of outside counsel / lawyers in making his investment decisions, so long as he reasonably believes the lawyers are acting within the scope of their expertise.

Here, T breached his duty of care to Gina, so Dina is likely to succeed in the action against T. Even though T was given broad discretionary investment powers, he was still required to invest according to the modern portfolio investment strategy, balancing the interests of the income beneficiaries (here, Slate) and the principal beneficiaries (here, Gina). The hallmark of the modern portfolio strategy is a diversified portfolio that provides both income gain and principal growth. Here, T invested the entire trust principal in one start-up drug company - this is not a diversified portfolio, and it's full of risk. Additionally, the investment was intended to maximize income. No thought was given by T, or his advisors at Lake & Pierce, to the principal growth or security desired by the other beneficiary, Gina, who is only 5 and is counting on the principal for her future and education. Because of his reckless investment and lack of care for the principal beneficiary, Gina, T breached his duty of care and loyalty owed to Gina, and Dina will likely succeed in her action. The fact that T was given the advice to invest all the trust assets in one company by L&P does not excuse his liability because his duty of care and loyalty go beyond merely blindly accepting the advice of outside counsel - it was not reasonable for him to do so, so his reliance will not shield him from liability.

3. The issue is whether the partners in a duly registered limited liability partnership (LLP) are personally liable for malpractice of the partnership, and if so, which partners are personally liable.

Unlike a general partnership, in which each partner can be held personally liable for K's and torts of the other partners, a LLP provides the benefit of limited liability. The LLP as an entity is liable for torts (including malpractice) committed by a partner, but each partner is NOT vicariously liable personally for the torts of another partner. Of course, each partner in an LLP remains personally liable for his or her own malpractice.

Here, T invested the entire trust income into one risky stock on the advice of Lake, and Lake is guilty of malpractice. There is no indication that Pierce personally committed any malpractice or advised T to buy this stock.

Therefore, since the company is organized as an LLP, the LLP (L&P) is liable in a third-party action to Trent, and Lake is personally liable for his own malpractice. Pierce is NOT personally liable for Lake's malpractice - his liability only extends as far as his ownership of the LLP, which is liable.

MPT-ONE
In re Social Networking Inquiry

Applicants' supervising partner is the chairman of the Franklin State Bar Association Professional Guidance Committee. The committee issues advisory opinions in response to inquiries from Franklin attorneys concerning the ethical propriety of contemplated actions under the Franklin Rules of Professional Conduct. The committee has received an inquiry from a Franklin attorney asking whether an investigation using the social networking pages (such as Facebook or MySpace) of a nonparty, unrepresented witness in a personal injury lawsuit would violate the Rules. The supervising partner has reviewed the matter and believes that the attorney's proposed course of conduct would be contrary to the Rules. Applicants' task is to prepare a memorandum analyzing the issue with the object of persuading the other committee members that the proposed course of conduct would violate the Rules. This is an issue of first impression in Franklin. Applicants must therefore discern the relevance of, and guidance to be derived from, the three differing applications of those Rules in other states and then apply those differing approaches to the proposed course of conduct. The File contains the instructional memorandum, the letter from the Franklin attorney making the inquiry to the committee, and notes of the committee meeting. The Library contains the applicable Rules of Professional Conduct (including commentary on the Rules) and two cases—one from Olympia and one from Columbia—bearing on the legal issues.

NEW YORK STATE BAR EXAMINATION
JULY 2011 QUESTIONS AND ANSWERS

First Answer to MPT

MEMORANDUM

TO: Franklin State Bar Association - Professional Guidance Committee

FROM: Bert H. Ballantine, Chairman

DATE: July 26, 2011

RE: Melinda Nelson's Inquiry

Pursuant to our meeting of July 25, 2011, I have conducted additional research on the relevant law regarding misrepresentations by attorneys and those operating on behalf of attorneys and I remain convinced that Melinda Nelson's proposed course of action violates the Franklin Rules of Professional Conduct (the "Rules"). Courts take three distinct approaches to the rules regarding attorney misrepresentations: the strict approach, the conduct-based approach and the status-based approach. I shall discuss all three approaches, but Ms. Nelson's proposed course of conduct violates the Rules regardless of the approach taken.

I. The Proposed Course of Action Violates a Strict Reading of the Rules of Professional Conduct

Under what some courts have referred to as the strict approach, any misrepresentation by an attorney violates the Rule 8.4(c), which provides that "it is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation," or Rule 4.1(a), which provides that the lawyer shall not knowingly "make a false statement of material fact to a third person." The Olympia Supreme Court followed this approach in In the Matter of Devonia Rose, where it held that a district attorney's misrepresentation of herself as a public defender to a suspect holding hostages was misconduct, even though the court admitted that she "sincerely believed she was protecting the public." That court held that the Rules leave "no room for deception . . . regardless of the cause." Even a proper cause was held to be no license to violate the rules and even her high duty to protect the public as a governmental official did no excuse her deception.

Under this approach, Ms. Nelson's course of conduct clearly violates the Rules. Even though the assistant would not use any false information, having him or her pose as an acquaintance of the witness to gain access to her social networking pages is a misrepresentation, since she has an ulterior purpose for accessing the pages. The comment to Rule 4.1 indicates that misrepresentations can occur by "particularly true but misleading statements or omissions that are the equivalent of affirmative false statements." The assistant's omission that the purpose of the "friend" request is the equivalent of an affirmative false statement because the information would be material to the witness in deciding whether or not to grant the request. The fact that Ms. Nelson admits the witness would not allow her personally to look at the page shows that the omission is the equivalent of making an affirmative false statement that the assistant is not

affiliated with the attorney. It is no defense that the assistant is not an attorney, because the Rules specifically forbid a lawyer from violating or attempting to violate the Rules "through the acts of another." Franklin Rules of Professional Conduct 8.4(a). The strict interpretation leaves no room for justifications or questions of harm. Thus, even though the witness may not be harmed by the misrepresentation, and even though there may be a noble purpose in exposing a lying witness and ensuring justice is done for the defendant, there is no exception to the rules and any deceit or misrepresentation is disallowed.

The court in Devonia Rose did suggest that there may be an exception for cases of "imminent public harm," but found that it would not be met because the police and the district attorney had other options to prevent harm from coming to the remaining hostages. In this case, there is no threat of public harm at all, except perhaps the threat of an unjust verdict, but the court's reasoning that violations of the Rule should not be allowed if the party has other options is relevant to the discussion here. If Ms. Nelson can obtain the information sought in any other way that does not violate the Rules, even if it is more difficult or expensive, she is obligated to exhaust those options before considering conduct that would violate the text of the Rule.

II. Conduct-Based Approach

The second approach some courts have taken in misrepresentation cases is a conduct-based analysis of the attorney's behavior. As laid out by the Columbia Supreme Court in In re Hartson Brant, this approach assesses: (i) the directness of the lawyer's involvement in the deception; (ii) the significance and depth of the deception; (iii) the necessity of the deception and the existence of alternative means to discover the evidence; and (iv) the relationship with any other of the Rules of Professional Conduct. This approach is less rigid and accounts for the second comment to Rule 8, which suggests that only dishonest conduct which "goes to the core of the integrity of the profession and adversely reflects on the fitness to practice law" violates the Rule. Though that court chose to use a narrower resolution, it did find "substantial merit" in the conduct-based approach.

In our case, the lawyer is directly involved in the deception. Though it will be carried out by an assistant, it was the lawyer's idea and her plan to execute it; the only reason she is not doing it herself. The deception is significant because it allows the attorney access to all of the witness's personal information by means of a deception. Though some members of the board suggested that the misrepresentation was minor or that the conduct is harmless because the networking pages are open to the public, the misrepresentation is actually quite serious because the witness's personal page is not open to the public. Though the witness admitted that she grants access to the page to "just about anyone who asks for it," that is most likely because anyone who bothered to ask for it is likely to be a friend of the witness and is not probative of how deep a privacy violation it would be. In addition, it could open the witness up to a claim of perjury, which would be highly significant. The depth of the misrepresentation is not judged on how big a lie it was for the attorney, but how significant the reliance was for the person lied to. As in Devonia Rose, the district attorney's lie was not terribly important from her perspective, as the suspect received a public defender anyhow, but it was significant for him because it may have destroyed his trust in the justice system.

Next, the deception is not necessary because the evidence is available by other means. Ms. Nelson is free to subpoena any photos that the witness has of the night in question or ask for access to the account through the court system. Given how relevant the information is to the claim, she would certainly be able to access that information through discovery or subpoenas, and that type of discovery would minimize the privacy harms to the witness, because none of her other personal information would be visible to the attorney or her agents. Though it may be more troublesome for Ms. Nelson to access the information through the judicial system instead of asking her assistant to retrieve it for her, she is required to go through the courts where possible if it means avoiding a violation of the Rules. This also addresses the concern of members of the committee that it would be worthwhile to deceive the witness to expose her as a liar. While exposing a lying witness is in the interests of justice, through discovery and subpoenas exposure can be accomplished without a violation of the rules, and avoids invading the witness's privacy through the use of deception and misrepresentation. If Ms. Nelson knew for a fact she was lying, the case would be stronger, but as of right now she merely has a "belief" that the pages "may" contain information which "could" impeach the witness at trial.

To justify violations of the Rules on the grounds of necessity should require a stronger case than that. It would also be different if discovery were not available and the deception was the only means of procuring the information, but we have no indication that that's the case. Indeed, Ms. Nelson did not even ask the witness in the deposition to reveal the contents of the pages or for permission to access them. Surely these more traditional avenues should be pursued before we countenance a violation of the Rules.

The final point goes to whether the conduct is "otherwise illegal or unethical," separate and apart from a violation of the rules governing dishonesty, misrepresentation or deception. There is no evidence that the proposed conduct violates other rules or laws of which I am aware.

Under this approach, Ms. Nelson's conduct is not allowed because her direct involvement in a significant deception is not justified by any pressing necessity, and any necessity is mitigated by the ample alternative means of discovering the relevant evidence.

III. Status-Based Approach

The Columbia Supreme Court in In Re Hartson Brant took a third approach to problems arising out of attorney dishonesty, misrepresentation or deception. In that case, the attorney for the Fair Housing Association, a non-profit organization, recruited two assistants to pose as a couple looking to buy a home in order to expose discriminatory housing practices. The court did not read the Rule against misrepresentation strictly and instead took a "status-based" approach which focused on the "role that the attorney plays in advancing the interests of justice." In that case, the fact that evidence of unfair housing practices would be "virtually impossible" to obtain without resorting to "sting" operations of the type conducted by the attorney weighed heavily in favor of not disciplining him. This approach looks to the spirit of the Rules, "to see that justice is done, without compromising the integrity of the profession."

In Ms. Nelson's case, while there is some interest in seeing "justice done" by exposing a potentially lying witness and ensuring that the truth comes out at trial, the conduct proposed

would "compromise the integrity of the profession." In Ms. Nelson's case, unlike the fair housing case, the evidence would not be "virtually impossible" to obtain without deception. As discussed above, there are several ways in which Ms. Nelson could obtain the evidence without resorting to deception. The Brant court also recognized that exceptions to the Rule would be more readily available when the attorney was acting in the public interest to "root out violations of civil rights" as opposed to the vindication of the merely private rights of Ms. Nelson's client. Finally, the proposed action does not fit within the Brant court's other two examples, to prevent imminent danger to public safety or investigating violations of intellectual property rights, presumably by buying goods from the alleged violators without disclosing one's attorney status.

The conduct compromises the integrity of the profession. It furthers the stereotype that lawyers are willing to lie in order to get the information they want when it is expedient and undermines the judicially-controlled discovery process by allowing attorneys to short-circuit that process when it is arguably allowed, without requiring them to make any good faith attempt to acquire the same information through the usual legal channels. This exception is narrowly crafted to cases where the harm is minimal or the conduct is necessary for a greater public good. Here, the harm to the witness is significant and the conduct is only possibly necessary to advance a private party's interests.

The Brant court took pains to emphasize that the exception it was creating was narrow and that it they "limit our reading of permissible actions of this sort only to these circumstances and extend it to no others."

As Ms. Nelson's proposed course of action is not within any of those circumstances, civil rights, public safety and corruption, or intellectual property violations, it is not permissible under this approach.

CONCLUSION

For the foregoing reasons, this Committee should find that Ms. Nelson's proposed course of conduct would violate the Franklin Rules of Professional Conduct and issue an advisory opinion to that effect.

NEW YORK STATE BAR EXAMINATION
JULY 2011 QUESTIONS AND ANSWERS

Second Answer to MPT

To: Members of the Franklin State Bar Association Professional Guidance Committee

From: Applicant, on Behalf of Bert H. Ballentine

Date: July 26, 2011

Re: Social Networking Inquiry

In this case, we are asked to determine whether Ms. Nelson will violate the Rules of Professional Conduct by asking an assistant to friend a nonparty witness, under the guise of being a stranger to the case, for the purpose of obtaining evidence for impeachment at trial. It should be noted that although Ms. Nelson is not directly doing the "friending", she may be held liable under Rules 4.1(a) and 8.4(a) for asking or ordering her agent to do so under her direction. Under all available analyses, Ms. Nelson's actions would violate the Rules of Professional Conduct for deception and misrepresentation and she should be advised not to engage in such deceptive conduct.

I. Ms. Nelson Will Violate her Duties Under the Plain Language of Rule 4.1(a) and

Rule 8.4 by Making a False Statement of Material Fact to a Third Person and Engaging in Misrepresentation by Falsely Friending a Witness to Gain Access to Her Social Networking Pages Because Her Conduct is Not Excused by Her Motive to Prevent a Witness from Lying at Trial.

Ms. Nelson is engaging in a false statement of material fact as well as dishonesty and misrepresentation in ordering an assistant, not known to the third party, to "friend" a witness on a social networking site for the sole purpose of gaining access to evidence for impeachment. Franklin Rule of Professional Conduct 4.1 requires an attorney to know "knowingly (a) make a false statement of material fact or law to a third person." (RPC 4.1). The commentary to that rules provides that a misrepresentation can "occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." (RPC Commentary). Rule 8.4 states that "it is professional misconduct for a lawyer to (c) engage in conduct involving dishonest, fraud, deceit, or misrepresentation." Ms. Nelson proposes to allow her assistant to friend the witness by using truthful information. However, the assistant will withhold his working relationship with Nelson, his purpose for friending the witness, and that the information will be used in trial to impeach the friend. Moreover, the friending is done with the intent to impeach the witness. The friending is designed to deceive the friend into accepting the request so that she may be impeached. Nelson has stated that she believes the witness will not accept her friend request, indicating the friend wishes to keep the information on the sites private from Ms. Nelson. Using a third party whom the witness does not recognize is meant to trick the witness into acceptance, and thus into possible impeachment.

Ms. Nelson wishes to argue that her motive is to prevent a witness from lying on the stand. In a 2004 opinion, the Olympia Supreme Court noted that the Rule 8.4 and its commentary are devoid of any exceptions (In the Matter of Devonia Rose, Olympia Supreme Court (2004)). In that case, an assistant district attorney was deemed to have violated the rules of professional conduct by impersonating a public defender with a future defendant during a hostage situation. The court held that "even a noble motive does not warrant departure from the Rules." Although in that case, the court noted the special responsibilities of a prosecutor, it also stated that "the level of ethical standards to which our profession holds all attorneys, especially prosecutors, leaves no room for deception." (Rose). Similarly, no matter Ms. Nelson's motive, her actions violate the Rules of Professional Conduct. In the Rose case, the attorney's actions were meant to ensure the safe release of hostages. While her motive was outstanding, the attorney's actions were still held to be violations of the Rules and the court declined to make an exception even for "imminent public harm."(Rose). Here, Ms. Nelson means to keep the witness from lying on the stand. This may be a good motive, but it does not excuse her fraudulent conduct especially where other means of impeachment are available.

Ms. Nelson has other options available to impeach the witness and introduce the evidence. In Rose, the court made not that Rose had options other than acting deceptively. Similarly here, Nelson may subpoena the records of the site from the social networking sites themselves, may subpoena the witness, may subpoena the witness' camera itself, or could simply attempt to friend the witness under her own name.

II. Ms. Nelson's Actions is Unethical under a Conduct Based Analysis Because She Created and Will Benefit from the Deception; the Deception which Gathers Highly Personal Information is Significant and Deep; the Deception is Not Necessary Because Ms. Nelson has not Attempted the Alternative Means of Gathering Evidence; and It is Otherwise Unethical Because it Violates Rules of Professional (Conduct 8.4 and 4.1.)

Commentators reviewing attorney violations of the Rules of Professional Conduct have suggested a conduct-based analysis for cases involving dishonesty, misrepresentation, or deception. This analysis does not concentrate on a single rule, but instead applies in a unitary fashion across all relevant rules. (In re Hartson Brant, Columbia Supreme Court (2007)). This analysis requires assessment of four factors: (1) the directness of the lawyer's involvement in the deception, (2) the significance and depth of the deception, (3) the necessity of the deception and the existence of alternative means to discover the evidence, and (4) the relationship with any other of the Rules of Professional Conduct, that is, whether the conduct is otherwise illegal or unethical. (See Goldring & Bass, Undercover Investigation and the Rules of Professional Conduct, 95 Franklin L. Rev. 224 (2006)).

a. Ms. Nelson is Directly Involved in the Deception Because She is Ordering her Assistant to Provide False or Incomplete Information so that She May View the Information and Use the Information at Trial.

Ms. Nelson is directly involved in the deception because it is being done by her assistant for her benefit. The commentary to Rule 4.1(a) indicates that "misrepresentations can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false."

(Commentary). The Commentary to Rule 8.4 specifically indicates that a lawyer can be subject to discipline when "they knowingly assist or induce another to [violate the Rules] or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf." Here, Ms. Nelson is instructing her assistant to commit deception. Although the assistant is providing true information, he is merely acting as a conduit of information for Ms. Nelson. He has no ulterior motive of truly becoming the witness' Internet friend, but seeks to friend for the sole purpose of providing information for Nelson. Nelson then plans to use the information for impeachment at trial. The plan not only originated with Nelson, but the fruits of the deception will be directly used by Nelson in her case. As such, she is directly involved with the deception.

b. The Deception is Significant and Deep Because It Has the Possibility of

Revealing Highly Personal Information of a Nonparty Not Represented by Counsel.

The depth and significance of the deceptions indicates that it would violate the Rules of Professional Conduct because it has the possibility of revealing highly personal information. Although Ms. Nelson indicated that the witness stated she loosely grants access to the pages, she also admits that there may be highly confidential information and that the witness still retains the option of rejecting friendship requests. Given the option of leaving her pages open or requiring permission, the witness has chosen to require permission. In fact, Ms. Nelson openly admits that the witness would not accept her friend request, indicating that there may be information on the pages which the witness wishes to keep quiet.

In addition, Nelson stated that the nonparty witness was not represented by counsel. This witness is only a witness, and is not a party actively engaged in this suit. As such, Ms. Nelson's far reaching attempts into her private life in order to provide impeachment evidence are very significant. The fact that the witness has not retained counsel indicates that not only does she not believe her private life or information to be at stake, but also that she is not as informed as a party with counsel. Deceiving a witness without counsel is a significant deception.

c. The Deception is Not Necessary Because There Are Alternative

Means to Gain Access to the Evidence which Nelson has Not Attempted.

The deception here is not necessary. Nelson may gain access to the evidence in several other ways. First, Nelson could simply ask the witness for access to the pages. She may do so formally or through a "Friend request." Second, Nelson may subpoena the friend for access. She may also subpoena the site's administrator. She can subpoena for access to the physical copies of the photos. In addition, Nelson may seek to find the testimony of other witnesses who can testify to the drunken state of the plaintiff. However, the facts indicate that Nelson has not even attempted any of these prior to considering deceiving the witness by creating a false online friendship.

d. The Deception is Otherwise Unethical Because it Violates Rules 8.4 and 4.1 in Making a False Statement.

The underlying deception of falsely friending the witness violates Rules 8.4 and 4.1. This analysis is the same as the analysis provided in Section I, above.

III. Nelson's Conduct Goes to the Core of the Integrity of the Profession and Adversely Reflects her Fitness to Practice Law Because It is Not Impossible to Collect Evidence for Impeachment without Deception and it is an Impinges on the Rights of a Nonparty Witness.

Nelson's conduct would violate Rules 8.4 and 4.1(a), leading to a violation that would go to the core of the integrity of the profession and adversely reflect on Nelson's fitness to practice law. (In re Hartson Brant; Columbia Supreme Court (2007)). Under the status based analysis proposed by the Columbia Supreme Court in In re Hartson Brant, a misrepresentation may be acceptable where it is vital to the proper administration of justice and would neither jeopardize the integrity of the profession nor reflect on the fitness to practice law. (Brant). In that case, the Columbia Supreme Court held that an attorney who asked his assistants, both minorities, to feign interest in a housing development to reveal a landlord's violation of the civil rights law, did not violate the Rules of Professional Conduct. (Brant). However, the court also emphasized that it limited its reading to actions of civil rights violations, intellectual property infringement, and crime prevention. (Brant). Moreover, the court also noted the impossibility of collecting evidence for these types of actions in ways other than deception. (Brant).

Unlike the case in Brant, this deception compromises the integrity of the profession. In Brant, the attorney had no other means of collecting information about civil rights violations. Here, Nelson has several other options to show the witness may be lying. Nelson is seeking to find permanent evidence, which is stored by servers, site administrators, etc. The attorney in Brant had no other choice than to catch the perpetration while it was in action. Moreover, Nelson's action will expose a nonparty's highly public information to someone in her office solely for the purposes of possibly impeachment. Certainly, lying on the stand is prejudicial to the administration of justice. However, the witness was merely present at the site of the accident. The court in Brant noted that the Rules are made in the spirit of seeing justice carried out. Here, justice may be carried out without deceiving a nonparty into revealing private information. Impeaching a party may be important, but it can be done in manners other than obtaining this evidence (for example, a thorough cross examination would be likely to reveal inconsistencies in the witness's statement). In addition, this case does not fit in to the types of cases to which the Brant intended to apply it analysis. This is a personal injury case, with the collateral matter of impeaching by obtaining pictures or information about consumption of alcohol. The Brant court narrowed its decision to apply only to cases of civil rights violations; the prosecutors misleads an alleged perpetrator of a crime in the interests of preventing imminent danger; and the investigation of the violation of IP rights such as trademark counterfeiting. Conclusion

Ms. Nelson's action will be a substantial deception and provision of false information to a nonparty in a civil suit for personal injury. We should advise her not to attempt to obtain information in this manner because it will violate Rules 8.4 and 4.1. This is true whether we adopt a view of strict application of the rules; a conduct based approach; or a status based analysis.