

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

Question-One

Owen, the owner of Blackacre, entered into a written contract with Bill, a builder, for the construction of a house on Blackacre. The contract was for a total price of \$150,000, with periodic payments to be made as the work progressed, and a final payment of \$25,000 to be made on completion of the house. The contract expressly required the house to be constructed with Acme brand windows and an automatic fire alarm system.

During the second week of construction, Bill told Owen that there had been a substantial and unanticipated increase in the cost of lumber, and that he would not complete the job unless Owen agreed to pay him an additional \$10,000. Owen therefore gave Bill a signed note which read: "I agree to pay you an additional \$10,000 when the job is completed".

The following week, when Bill arrived at the job site, he found that a number of his valuable power tools were missing. After making unsuccessful inquiry of his employees, Bill nailed a poster to a tree on Blackacre offering a \$500 reward for information leading to the recovery of his power tools. That afternoon, as Owen was driving to Blackacre, he passed an open garage located on a neighbor's property, and noticed power tools which appeared identical to Bill's. When he arrived at Blackacre, Owen asked Bill if he was missing any power tools. Bill said that he was, and Owen then told him of the tools located in the neighbor's garage. On further investigation, Bill discovered that his tools had been taken by the neighbor. Bill removed his tools from the neighbor's garage and returned them to Blackacre.

Approximately six months after construction started, Bill advised Owen that the job was complete. When Owen arrived for a final inspection, he noticed, for the first time, that Bill had installed Beta brand windows instead of the Acme brand windows required by the contract. Bill explained that the substitution had been made by his supplier without his knowledge, and that Bill had not become aware of the change until after the windows were installed. Although Beta windows were equivalent in style, quality, and cost to Acme windows, Owen insisted that he would accept nothing less than the Acme windows required by the contract. Owen subsequently obtained an estimate that it would cost \$8,000 to remove the Beta windows and replace them with Acme windows. Bill, however, refused to replace the windows unless he was paid \$8,000.

The following week, Owen entered into a written contract with Alarm Co, a company which connected its transmitter to Owen's alarm system and agreed to transmit any alarm received at its central monitoring station to the fire department. The contract between Owen and Alarm Co expressly and conspicuously recited that: "In no event shall Alarm Co be liable for its failure to notify the fire department following receipt of an alarm at its central monitoring system." Two weeks later, a fire, which caused \$15,000 in damages to Owen's house, went unreported because an employee at Alarm Co negligently failed to notify the fire department when an alarm rang at Alarm Co's central monitoring system.

Owen has consulted you, as his attorney, and has asked you the following questions:

1. Is Owen liable to Bill for the additional \$10,000 he agreed to pay for the increased lumber costs?
2. Is Owen entitled to the \$500 reward?
3. Is Bill entitled to the final contract payment of \$25,000, and is Owen entitled to a recovery or set-off because Bill installed the wrong windows?
4. Can Owen recover \$15,000 from Alarm Co?

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

ANSWER TO QUESTION 1

1. Owen will be held liable to Bill for the additional \$10,000.

The issue here is whether there was valid consideration for the modification of the Bill-Owen contract.

Generally, impracticability may serve as a basis for valid consideration in a contract modification. Impracticability exists where an unforeseen and unanticipated event, which both parties at the time of contracting did not expect to occur, occurs.

However, an increase in the price of materials will not usually constitute impracticability since one can be expected to anticipate such a possibility in the market.

Therefore, since Bill would not be able to claim the increase in the cost of materials (unless it were due to something like an embargo and were substantial), he cannot claim impracticability under the contract.

Accordingly, the common law would not enforce this modification since there is no additional consideration. Owen has merely agreed to pay an extra \$10,000 for the same job, and that would be unenforceable.

But under New York law, a good faith modification, even absent valid consideration, will be enforceable when in writing, and signed by the party against whom enforcement is sought (Owen), or his authorized agent. Since Owen delivered a signed written note for the additional \$10,000, Bill will be able to recover such sum when the job is completed (or very substantially completed).

2. Owen is not entitled to the \$500 reward for the returned tools.

The issue is when one may collect on an award, posted to the public.

A unilateral offer such as a notice of reward published or posted publicly is generally acceptable by performance only. Accordingly, had Owen seen the posting, found the tools and then returned them, he would be entitled to the reward.

However, for a valid contract, mutual assent is required. If one is not aware that he is responding to an offer by his conduct, there is no meeting of the minds, and thus no contract, even though there is otherwise valid consideration.

In this case, Owen returned Bill's tools unaware of the award posting. Therefore, there was no valid acceptance of Bill's offer and Owen may not recover. (Note: Bill was allowed to peaceably enter wrongfully possessing neighbors property to recover his rightful property).

3. Bill is probably entitled to the final payment under the contract and Owen may set-off any provable damages due to the substituted windows.

The issue here is when one may recover for slightly defective performance. Where a contract contains an express provision for use of specific materials, generally a contractor is obliged to use such materials, or compensate the home-owner for the diminution in value or the cost of replacement. Here, Owen did expressly state in the contract that Acme windows were to be used. The Beta windows however, are described as identical in style, quality and cost. Presumably, there is no valutive difference in the home attributable to the window substitution. Additionally, even if the Acme brand were chosen due to a non-economic/quality consideration, and rather a personal preference of Owen's, the cost of replacement now would place an undue burden upon

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

Bill since he would have to expend \$8,000 to replace, versus the absence of any economic harm of the Acme windows remain.

This appears a good candidate for the application of the substantial performance doctrine, which is a defense to non-compliance with a contractual condition precedent, where a party substantially performs his end of the contract. A court will be hesitant, however, to grant such relief where the breach was willful.

Here, Bill has substantially performed his duties under the contract because he rendered the completed home with a non-material breach (non-material because it didn't affect the appearance or value of the home). The breach was also not willful because he explains that his supplier made the substitution unbeknownst to Bill. Therefore, Bill should recover his final payment of \$25,000. If Owen could prove any diminution in value (which it seems he can't) he could offset that amount, though he would still have to pay Bill the balance owed.

4. Owen cannot recover \$15,000 from Alarm Co. under a negligence theory. The issue here is when an express disclaimer will be effective as against simple negligence. Under negligence analysis, there must be a duty, a breach thereof, causation and damages to prove one's prima facie case.

Alarm Co. definitely undertook a duty to Owen in entering the monitoring contract to report alarms to the fire station. Yet, its disclaimer may be valid against certain claims.

Since the bargaining power between Alarm Co. and Owen does not appear disparate, no unconscionability would be from the theory of an adhesion contract.

However, the sole purpose Owen has retained Alarm Co. is for the reporting of alarms, precisely what they disclaim liability for. Under these circumstances Owen may probably hold Alarm Co. liable on a theory of respondeat superior for a grossly negligent act of its employee. But, if the action is shown to be simple negligence, Alarm Co. could argue that it's covered under the disclaimer, to which Owen voluntarily agreed.

Nonetheless, because a matter of public safety is involved here, the state probably has an interest in enforcing the contract without the disclaimer, so as to promote adherence to its duties not to act negligently with a safety operation. Under these circumstances, the court could therefore strike the disclaimer as against public policy, and allow Owen to recover his \$15,000 damages under the unrestricted contract terms.

#### ANSWER TO QUESTION 1

1. Owen is liable for the additional \$10,000 he agreed to pay for the increased lumber costs. The issue is whether Bill's and Owen's subsequent agreement memorialized in writing is a valid and enforceable modification of the original construction contract.

Generally, modifications were not enforceable based on the pre-existing duty in that Bill was already obligated to perform the construction contract at the agreed price. The modern trend, however, allows modifications if all unanticipated change in circumstances makes it too costly to perform and if the modification is in "good-faith". Furthermore, New York will enforce a signed written modification of the original contract.

Although, generally, absent new consideration for the modification, the modification would not be enforced. Under New York Law a signed writing (here signed by Owen - the party to be

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

charged) will take the place of the missing consideration and thus the modification will be enforceable.

2. Owen is not entitled to the \$500 reward.

The issue is where Owen's information regarding the missing tools constituted sufficient acceptance of the offer in order to form a valid and binding unilateral contract.

A unilateral contract is a contract whose offer can only be accepted by performance unlike a bilateral contract in which a promise is the consideration for another promise forming a bargain exchange. Rewards are generally offers for a unilateral contract. In order for a contract to be binding there must be an offer followed by an acceptance (a reasonable acceptance), there must be valid consideration and the offeror must induce the performance. Here, Bill's offer did not induce Owen's performance. The offeree must be aware of the award and this offer must induce his performance in order for there to be a valid and binding contract. After seeing the tools, "Owen asked Bill if he was missing any power tools". This indicates that Owen was not aware of the offer of the reward and therefore his information (performance) was not induced by the offer. Ultimately, no binding contract was formed and Owen is not entitled to the \$500 reward.

3. Bill is entitled to the final contract payment of \$25,000 and Owen is entitled to a set-off because Bill installed the wrong windows.

The issue is whether Bill had substantially performed the contract and whether his breach of placing Beta windows instead of Acme windows is a material breach. Secondly, the issue is one of damages and whether Owen can obtain the usual measure of "cost of complete" or an offset of the contract price.

When a party has substantially performed, the other contracting party may not suspend its performance and must tender its return performance. When a contract does not specify the order of performance, such as the one here, then there is an implied condition that the longer performance is to come first and the "shorter" performance (payment of money) is to come second. While there is no specific percentage which will constitute a substantial performance, it will be measured by the level of the breach. Here, the Beta brand windows "were equivalent in style, quality and cost" to the Acme windows. While the contract expressly called for Acme windows, installation of the Beta windows was not a material breach and thus did not give Owen the right to suspend his performance. Owen must tender the last installment payment of \$25,000.

Damages - Generally, where a construction contract is breached by the builder, the owner's measure of damages will be "cost to complete". However, where there would be great hardship and inequity in forcing a demolition and reconstruction the courts will allow the measure of damages to be the difference between the value of what was bargained from the contract and the value of what the owner received. Here, it is questionable whether \$8,000 to replace the Beta windows constitutes great hardship. Since the Beta and Acme windows are equivalent in value, Owen's damages should probably be set-off by the decreased value of the house, thus the damages will be the difference between the value of the house with Acme windows and the value of the house with Beta windows.

4. Owen can recover the \$15,000 from Alarm Co..

The issue is whether an employer can validly disclaim liability for the negligent acts of its employees. Owen's written contract with Alarm Co. provides for services to be rendered by Alarm Co.. The written contract contained a disclaimer that it would not be liable for not notifying the fire department. The issue is whether an express written disclaimer of liability is sufficient to disclaim liability of an employer for a negligent employee. Here it would be insufficient since Alarm Co. will be liable as *respondiat superior* for the negligence of its employer. The doctrine of *respondiat superior* holds an employer liable for the negligent action of

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

its employees committed in the scope of their employment. Here, Alarm Co. cannot disclaim liability for its employees.

Question-Two

In June 1997, Mutt decided to rob a store and asked Jeff to be his driver. Knowing that Mutt had served time in prison on two armed robbery convictions, and too afraid of Mutt to refuse, Jeff drove Mutt to a liquor store in Queens County. While Jeff waited in his car, Mutt entered the store. With his hand in his pocket, Mutt told Roy, the owner, to empty the cash register or Mutt would "blow his head off." Roy, reasonably believing that Mutt had a gun, did as he was told. After taking the cash, Mutt got back into Jeff's car. As they drove away, Roy copied down Jeff's license plate number and immediately called the police.

After conducting a thorough investigation, Detective Dee determined that the perpetrators of the robbery were Mutt and Jeff. Two months after the robbery, Dee retrieved a photograph of Mutt from police files and showed it to Roy. Roy identified Mutt as the person who robbed him.

Mutt and Jeff were arrested and thereafter indicted and arraigned on one count of robbery in the first degree and one count of robbery in the second degree. Detective Dee did not inform the prosecutor of Roy's identification and the prosecutor did not serve Mutt's counsel with notice of the photo identification.

After a pre-trial hearing, the court granted Mutt's motion to preclude the prosecutor from questioning Mutt regarding his two prior robbery convictions if Mutt chose to testify. Jeff's motion to sever his case from Mutt's was also denied.

After jury selection, while reviewing police reports then turned over to him by the prosecutor, Mutt's attorney learned of Roy's photo identification of Mutt. At trial, Roy testified regarding the circumstances of the robbery. The prosecutor then asked Roy if he could point out the person who had robbed him.

Mutt's attorney immediately objected and moved to preclude any identification testimony by Roy. The court (1) denied the motion on the ground that by failing to make a pre-trial motion to suppress Roy's identification, Mutt had waived his right to challenge such testimony.

After completion of Roy's testimony the prosecution rested. Mutt's attorney moved to dismiss the first degree robbery charge on the ground that the prosecutor had failed to prove that Mutt had displayed a firearm during the robbery. The court (2) denied the motion.

On Friday afternoon, Mutt took the stand and testified that the robbery was all Jeff's idea. After the prosecutor finished cross-examining Mutt, Jeff's attorney began to question Mutt aggressively regarding his prior robbery convictions. Mutt's attorney immediately objected on the ground that the court's prior ruling, after the pre-trial hearing, precluded Jeff's attorney from cross-examining Mutt about these convictions. The court reserved decision on the objection and adjourned the case until Monday. Over his attorney's objection, the court (3) directed Mutt not to discuss his testimony with his attorney over the weekend recess because he was still under oath.

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

(b) How should the court rule on Mutt's attorney's objection to the cross examination of his client regarding the robbery convictions?

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

ANSWER TO QUESTION 2

1. The court incorrectly denied Mutt's attorney's objection to preclude any identification testimony by Roy. The issue is whether the failure to make a pre-trial motion to suppress evidence which the prosecutor wrongfully withheld from the defendant constitutes waiver of the right to challenge such testimony.

Under Rosario, the prosecutor is obligated to turn over all discovery materials to the defense before trial. Such materials include defendant's and co-defendant's confessions, pictures to be used at trial and pre-court identifications intended to be admitted at trial. The absence of the prosecutor to turn over Rosario material constitutes reversible error.

Here, the prosecutor did not serve Mutt's counsel with notice of the photo identification. Although Mutt's attorney learned of the photo identification on his own before trial, the prosecutor is not exonerated because he did not know of that independent discovery.

Further, if the pre-court identification procedure was unnecessarily suggestive, the court would have to exclude both that and the in-court identification even assuming Mutt's counsel had waived the right to challenge it on other grounds. The pre-court identification was unnecessarily suggestive because it was two months after the robbery and Roy was only shown a picture of Mutt. An exception to that general rule, however, is that if Roy had an independent source of identifying Mutt, such as remembering him from the robbery, the court might allow the in-court identification only.

However, based on these facts, the court incorrectly denied Mutt's attorney's motion to preclude any identification testimony by Roy.

2. The court correctly denied Mutt's attorney's motion to dismiss the first degree robbery charge on the ground that the prosecutor had failed to prove that Mutt had displayed a firearm during the robbery. The issue is whether one needs to display a firearm during a robbery in order to be convicted of first degree robbery.

Robbery is the trespassory taking and carrying away of the personal property of another from their person or in their presence with the intent to steal, carried out with violence, threats, or apprehension. First degree robbery is robbery accomplished with a firearm or placing the victim in immediate apprehension of a firearm.

Here, the prosecutor did prove all the elements of a first degree robbery because Roy testified about the circumstances of the robbery. Assuming Roy testified about Mutt telling him he would "blow his head off", with Mutt's hand in his pocket, there was testimony about Roy's apprehension of a firearm. Because Roy "reasonably" believed that Mutt had a firearm, the prosecution proved all the elements of first degree robbery. Thus, the court correctly denied this motion.

3. The court incorrectly directed Mutt not to discuss his testimony with his attorney over the weekend recess because he was still under oath. The issue is whether a defendant's right to counsel extends to recesses during his testimony.

Criminal defendants have a right to counsel guaranteed by both the 5th and 6th Amendments of the U.S. Constitution. This right, however, is overridden by the need for uninfluenced testimony while the defendant takes the stand. Thus, a brief recess during a defendant's testimony does not entitle him to his right to counsel.

A New York court, however, ruled that when a recess during a defendant's testimony lasted overnight, the defendant was entitled to confer again with his counsel. Here, the recess was for

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

the weekend. Mutt was entitled to discuss his testimony with his attorney because the recess was prolonged, thus invoking his constitutional right to counsel.

Thus, the court was wrong in directing Mutt not to discuss his testimony with his attorney over the weekend recess.

B. The court should deny Mutt's attorney's objection to the cross-examination of his client regarding the robbery convictions. The issue is whether testimony ruled inadmissible for use by the prosecutor may be offered by a co-defendant's counsel against another co-defendant.

A defendant in a criminal trial has the right to present evidence of any affirmative defenses to the crime charged. Once the defendant presents this affirmative defense, the prosecution still has the burden beyond a reasonable doubt to disprove the defense and prove all elements of the crime.

Here, Jeff has ample grounds for a duress defense to his robbery charge because he knew of Mutt's prior convictions and was "too afraid of Mutt to refuse". Duress is a defense in New York to any crime. Duress means that the defendant was under such emotional pressure and control that he acted in a way against his will and his crime was justified in these circumstances. Thus, Jeff has a right to introduce evidence of Mutt's prior convictions in order to justify his duress defense.

Further, Jeff had made a motion to sever his case from Mutt's, which the court denied. It would be unconstitutional to force Jeff the right to present evidence in his own defense based on the court's refusal to sever the trials.

It should also be noted that because the convictions which Jeff offers are felonies, the court does not have the discretion to deny their admissibility. The court might mitigate against the damage this would cause to Mutt's case by issuing a limiting instruction to the jury that evidence of Mutt's convictions should only be considered for Jeff's charge and not for Mutt's.

Thus, the court should deny Mutt's attorney's objection to the cross-examination of his client regarding the robbery convictions.

It should be noted that it is irrelevant that the detective didn't tell the prosecutor about the pre-court identification. The prosecutor could have discovered it as the defense attorney did and the prosecutor still had the obligation to tell the defense attorney under Rosario.

## ANSWER TO QUESTION 2

### A. NUMBERED RULING

1. The court was incorrect in denying Mutt's motion to suppress the identification.

Motions to suppress evidence of identification must be made pre-trial. However, they may be made at trial if good cause is shown.

Here, the prosecutor did not meet its discovery obligation in that it did not notify Mutt of the photo identification. Although Mutt's attorney had no right to be present at the photo identification, the prosecutor must disclose that one occurred pre-trial.

Since the prosecutor did not give notice of the identification procedure, Mutt's attorney could not have moved pre-trial for suppression (he didn't know there was one to object to). Therefore the court was incorrect in denying Mutt's motion, since there was good cause for its being made in

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

trial. (It should be noted: This photo ID has been held to be unnecessarily suggestive and therefore a proper basis for excluding an in court ID.)

2. The courts ruling was correct.

The issue is must the prosecutor prove actual display of a firearm in order to prove first degree robbery.

Robbery is the unlawful taking of property, from the person of another, by force. In order to be first degree robbery there is an added requirement that proof of the use of a firearm be introduced. The use of the firearm must be use, threatened use or display of the firearm in the commission of the robbery.

However, to meet this burden the prosecutor need only show that the actions of the defendant gave the victim a reasonable belief that the defendant was using or threatening to use a firearm.

The facts here indicate that Mutt entered the store with his hand in his pocket and threatened to "blow Roy's head off". These actions are sufficient to meet the prosecutor's burden of proof, therefore the court was correct in denying the motion to dismiss. (It should be noted even if use of a firearm were not proved the proper motion would only be to reduce the charges)

3. The courts ruling was incorrect.

The issue is may the court limit a criminal defendant's access to his attorney during an overnight recess?

A criminal defendant has an indelible right to counsel in New York. This right attaches anytime (1) a person is subjected to police action that would be overwhelming to an ordinary person, (2) at arraignment, (3) after institution of criminal charges or any other critical stage of the proceeding. Trial constitutes a critical stage.

The court does have discretion to limit attorney client discussions during short recesses in order to prevent improper coaching. However, denial of access to one's attorney overnight in the middle of a criminal trial has been held a violation of the right to counsel.

Here Mutt was told not to discuss his testimony because he was still under oath. This can reasonably be construed as limiting access if as a consequence Mutt was not granted access to his attorney. Therefore, under those circumstances the court was incorrect. However, a mere instruction not to discuss sworn testimony alone would not be a denial of Mutt's 6th Amendment right.

B. The court should allow Jeff's attorney to cross-examine Mutt about his prior convictions.

The issue is may Jeff's attorney inquire about Mutt's conviction even though the prosecutor may not.

Generally, a prosecutor may impeach a witness' credibility, including that of a criminal defendant, with questions about any crime of immorality. This impeachment method, however, is still subject to the court's discretion to exclude such impeachment if the probative value of it would be substantially outweighed by its prejudicial effect. Additionally, prior crimes may not be used to prove propensity (that is that defendant acted in conformity with his prior acts).

Here, the court may have reasonably concluded that any impeachment by the prosecutor on the

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

subject of Mutt's robberies especially where the prior convictions are for robbery and the current charge is robbery. Therefore, the court was correct in precluding the prosecutor from this area.

However, Jeff may have a defense to his accomplice liability. The defense of duress. Therefore, the prior convictions would be relevant to show the effect they had on Jeff in agreeing to drive Mutt to the store. Here, the probative value to Jeff's defense is not outweighed by the possible prejudicial effect.

Under these circumstances the court should allow Jeff to inquire into Mutt's convictions.

Question-Three

After Hank and Sue were married in 1980, they moved to Blackacre, property in Albany County, which Sue had inherited from an aunt. Sue then conveyed Blackacre to Hank and Sue as tenants by the entirety. Hank was an engineer employed by Hi-Tech, a small high-technology company, and Sue taught in an area school.

Frank, their only child, was born in 1981, and thereafter Sue became a full-time homemaker. She regularly entertained Hi-Tech customers at Blackacre and frequently accompanied Hank on business trips. In 1987, Hank became an officer and director of Hi-Tech, which experienced rapid growth over the next several years.

In April 1997, Hank and Sue agreed to separate. Hank then moved to an apartment in Albany. Sue and Frank remained at Blackacre. Hank and Sue, each represented by counsel, met to discuss a separation agreement.

Hank had an annual salary of \$175,000, and owned 20,000 shares of Hi-Tech worth \$800,000 which he had acquired during the marriage. Blackacre had been substantially renovated by Hank and Sue since they moved there. Its value in 1980 was \$200,000, and its value in 1997 was \$400,000.

On May 1, 1997, a written agreement providing that Hank and Sue would live separate and apart was duly executed by Hank and Sue. The agreement provided that Hank and Sue would have joint custody of Frank and that Frank would live with Sue. After Hank and Sue duly agreed not to be bound by the Child Support Standards Act, Hank agreed to pay \$1,500 per month to Sue for the support and education of Frank until Frank reached 21 or completed college. Hank also agreed to pay \$4,500 per month to Sue for her maintenance during Hank's or Sue's life, or until her remarriage. The agreement identified Blackacre and the 20,000 shares of Hi-Tech acquired by Hank as marital property. The parties agreed that the marital property would be divided, 60% to Hank and 40% to Sue, and that Hank would convey his interest in Blackacre to Sue and pay her \$200,000 in full satisfaction of her interest in their marital property. Finally, the agreement included a representation by Hank and by Sue that each had made complete and accurate disclosure of their respective assets and the value of such assets. The agreement was duly filed in the Albany County Clerk's Office. Hank made the monthly payments to Sue as required by the agreement.

Last month the local press reported that all of the outstanding shares of Hi-Tech had been acquired for cash at \$100 per share by IPM, a huge conglomerate. Hank, now president of Hi-Tech, was accurately quoted in a statement released by Hi-Tech, "We are gratified that 18 months of negotiations have happily concluded in our joining the IPM family of companies." Hank never disclosed to Sue that negotiations for the sale of Hi-Tech at \$100 per share had been on-going for several months prior to the execution of their separation agreement.

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

Frank, who has recently graduated from high school, has been accepted as a freshman at an excellent but expensive college where tuition, room, board and fees will be \$28,000 a year.

On July 10, 1998, while Sue was away from home on an errand, Frank was served at Blackacre with a summons and complaint in an action by Hank against Sue. The complaint alleged the foregoing pertinent facts and sought a divorce on the ground that Hank and Sue had been living separate and apart for more than a year pursuant to the terms of a separation agreement, and that Hank had complied with the terms of the agreement. Frank was also served with a copy of an order made by a Justice of the Supreme Court in Albany County authorizing substituted service on Sue. On July 13, 1998, Sue received in the mail an envelope with the return address of Hank's attorney which contained copies of the papers served on Frank.

Sue comes to you and asks your advice on the following questions:

- (1) Has Sue been properly served in the divorce action?
- (2) Was Blackacre properly considered marital property in the separation agreement and, if so, was Sue entitled to any credit for its value in 1980?
- (3) May the provisions of the separation agreement relating to the valuation and distribution of the 20,000 shares of the Hi-Tech stock be modified?
- (4) May Sue obtain an increase in support for the cost of Frank's college education?

ANSWER TO QUESTION 3

1. Sue was properly served in the divorce action. In marital actions, service on a party is proper only if the party is served personally or if leave of the court is granted which allows a plaintiff to use one of the other methods of service. Here, the Supreme Court of Albany County authorized substituted service. (I am assuming that the court did not require that personal service on Sue be attempted or that if it did, Hank made the requisite showing. The order itself seems to be proper.)

The service on Frank was proper. Under New York's Civil Practice Laws and Rules, a party may leave process with someone of suitable age and discretion at the residence or principal place of business of the party to be served. The CPLR further requires that copies of service be mailed within 20 days of the "leaving". Here, Frank was served at Blackacre (Sue's home) and he is of suitable age and discretion. He has been accepted at an excellent college, so his suitability is presumed, and it is likely he will give the process to his mother. Therefore, Sue has been properly served.

2. Blackacre was properly considered marital property and Sue was not entitled to credit for its 1980 value.

Marital property is anything acquired by the spouses during the marriage, anything they agree upon in an agreement to be marital property, and appreciation on separate property which accumulated during the marriage. Separate property, on the other hand, is property a spouse brings into the marriage or is given specifically to one spouse.

Blackacre was separate property because Sue (alone) had inherited it from her aunt. However, she conveyed it to herself and Hank as tenants by the entirety. New York allows a party to convey land to herself and her spouse as tenants by the entirety. New York no longer requires a "straw man" to reconvey the property. A straw man is the person to whom a landowner would convey the property so that the straw man could reconvey it to her and her husband. This was done to

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

keep the unities of title, time, interest and possession. Because a straw is no longer required, Sue was allowed to convey the property and the property became marital property.

Sue is not entitled to credit for the 1980 value of Blackacre. The issue is whether property that was separate is valued differently when it appreciates during the marriage. A spouse is entitled to the appreciation in value of property that was separate if the spouse contributed to the appreciation. Here, Hank and Sue substantially renovated Blackacre since they moved there. Sue would be entitled to \$200,000, which was personal property to her and its original value and Hank would be entitled to a portion of the \$200,000 that the property's value increased by because of their joint efforts.

However, because Sue lawfully conveyed the property, it is marital property. Therefore, Blackacre was properly considered marital property and Sue is not entitled to credit for its 1980 value.

3. The provisions of the separation agreement may be modified that relate to the valuation and distribution of the 20,000 shares. Courts, under the New York Domestic Relations law, will generally uphold separation agreements entered into freely by the parties. However, a court will not enforce an agreement which was procured by fraud. Moreover, New York law requires full financial disclosure in divorce and separation actions.

Here, Hank as president of Hi-Tech knew for 18 months that he was negotiating for the acquisition. In 1997, when Hank and Sue executed their agreement, the shares were valued at \$40 per share. ( $\$40 \times 20,000$  shares = the \$800,000 value). Now the stock is \$100 per share. Hank violated his duty to fully disclose his finances and his representations of his value were fraudulent. Therefore, the court may modify the agreement.

It should be noted that the stock should also be considered marital property. Although Hank acquired the stock because of his job, he acquired it during the marriage. Moreover, Sue contributed to Hank's rise up the corporate ladder because she left her job and became a full-time homemaker. The property is marital and Hank's failure to disclose its true worth was fraudulent. Therefore, the court may modify the agreement.

4. Sue may obtain an increase in support for the cost of Frank's college education. New York requires that parents who are divorced or separated support their children until the child reaches age 21 and possibly beyond. The possibility beyond means that a parent may have to support a child through college if the court determines that it is fair to impose those costs on a parent.

New York uses the "best interests of the child" approach. The court will also look to whether the parents have the means to support the child, whether the parents went to college, and whether the child has the aptitude.

Here, Sue may obtain an increase in the support. Frank has been accepted at an excellent college and Hank has the means to pay for college. Hank earns \$175,000 per year and has stock. The \$28,000 per year tuition is within his means. In addition, Sue taught high school before she became a homemaker and Hank is president of a company. It is likely that they expected Frank to go to college. Therefore, Sue should get an increase in support.

Sue is entitled to the increase also because New York courts will entertain motions for child support modifications on a changed circumstances standard when the modification is proposed on behalf of a minor. Generally, courts will not interfere with a separation agreement. However, a court will always intervene to protect the best interests of the child.

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

Here, Frank is requesting the increase, through Sue, for the changed circumstance of being accepted to college. The court should increase the support for the cost of Frank's education.

ANSWER TO QUESTION 3

1. Sue has been properly served in the divorce action. The issue is what constitutes proper service of process in a matrimonial action. Generally, service in a matrimonial action is performed by personal delivery to the party to be served, and service is complete upon delivery to that person at her home or place of business. Personal delivery can be made to a responsible adult at the residence of the party to be served.

Here, Hank served Sue at her home, but service was made to Frank, not Sue. Frank is not a competent adult, because he was born in 1981, and thus has not yet reached the age of 18. Hank's service thus was not complete as personal delivery. However, a party to a matrimonial action may receive an order authorizing substituted service on motion on the court. Hank clearly made such a motion because Frank was served with a copy of an order by a Justice of the Supreme Court (which has exclusive jurisdiction over divorce actions). Presuming that Hank made the appropriate showing to the court such that its order is valid, by showing, for instance, that personal delivery to Sue would be impossible service on Sue through delivery to Frank plus a mailed copy is sufficient for proper service, if that was the type of service authorized by the court.

It should be noted that there is proper jurisdiction over both the action and the parties. There is subject matter jurisdiction over the matrimonial action if one of the parties resides in New York. Here, both parties are New York domiciliaries. Thus, subject matter jurisdiction is proper. There is also personal jurisdiction of Sue because she lives in New York. Finally, the residence requirement for a divorce action has been met because both parties reside in New York and the cause of action arose in New York.

2. Blackacre was properly considered marital property. The issue is what assets are considered marital property for purposes of equitable distribution. Since July 19, 1980, distribution of marital assets at divorce is accomplished through equitable distribution, which awards separate property (e.g. inheritances, gifts to that party, property acquired before marriage) to the party with title, and divides marital property (anything purchased during the marriage or enhanced during the marriage) equitably, according to certain criteria, such as length of the marriage and the parties relative needs.

While Blackacre was an inheritance, it did not remain separate property because Sue conveyed the property to Sue and Hank as tenants by the entirety (which is permissible under New York's Real Property Law even absent the use of a strawman). As a tenancy by the entirety, Blackacre became marital property, and was thus subject to equitable distribution. Furthermore, Hank's contribution to the extensive renovations on Blackacre increased its property value and thus it became marital property by virtue of this contribution.

At divorce, the tenancy by the entirety was converted into a tenancy in common, with Sue and Hank each owning an undivided one half interest. As tenants in common, Hank was free to sell his interest to Sue, as he did here, for \$200,000.

It should be noted that pursuant to the separation agreement, which is enforceable as a contract, Sue was to receive 40% of the marital property, which would have been \$160,000 from Blackacre, plus \$320,000 from the 20,000 shares of Hi-Tech stock (40% x 800,000), which totals \$500,000. However, the facts state that Sue took \$200,000 from Hank's sale of his interest in Blackacre as payment for her entire share of the marital property. Thus, Sue only received \$400,000 (the total value of Blackacre), even though the separation agreement awarded her \$500,000

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

(40% of the marital property). However, because a separation agreement is a contract governed by contract laws and principles; it seems unlikely that Sue could evoke the agreement because the discrepancy probably does not reach the level of mutual mistake. If Hank knew of the discrepancy, Sue may be able to void the contract on grounds of unilateral mistake.

3. Sue should be able to modify the property agreement. The issue is whether a distribution of property pursuant to a separation agreement can be modified. Unlike support, a distribution of property cannot be modified. Here, Sue is seeking modification of a property distribution by separation agreement (which will be enforced by the divorce court if Hank's conversion divorce is granted). Thus, she should not be able to modify the agreement.

However, the change in property division is necessary because Hank lied when he stated, in the agreement, that his financial disclosures were accurate and complete because he knew that the acquisition of Hi-Tech stock had been in negotiations for 18 months. Property acquired after separation, but negotiated during the marriage are subject to equitable distribution. Hank acquired the \$100 per share after the April 1, 1997 separation, but began negotiating the deal during the marriage because the couple was still married 18 months before the acquisition. Hank's failure to disclose this fact should allow Sue part of that asset. It should be noted that even if the couple never divorced, the separation agreement, like any contract, can be avoided for unilateral mistake if the other party had reason to know of the mistake. Here, Sue mistakenly thought that Blackacre and the \$800,000 worth of the stock were the only marital property. Hank knew that the stock's value would increase. Thus, Sue should be able to avoid the current agreement. Sue could alternately get relief on a quasi-contract theory because Hank has been unjustly enriched by his willful failure to disclose the full amount of his assets.

4. Sue will be able to get increased support for the cost of Frank's college tuition. The issue is when a child support agreement can be modified. The general rule is that child support can be modified upon a showing of unreasonable and unforeseen changes in the child's circumstances. Here, Frank's ability to gain admission to an excellent school is unexpected, and might not have been contemplated by Hank and Sue at the time the agreement was drafted. Thus, Sue should be able to get more child support to defray the increased cost of Frank's education. Furthermore, a parent in New York is obligated to support his child until the child reaches 21, and perhaps to pay for college depending on the parents' ability to pay and the child's ability to excel. Here, Hank has the funds to contribute to Frank's college education, and Frank is clearly a gifted student. Thus, Hank should have to contribute to Frank's education because he still has joint legal custody of Frank and is therefore still responsible for support.

Finally, it should be noted that Hank and Sue's agreement to not be bound by the Child Support Standards Act cannot be upheld by a court. The statutory child support guidelines cannot be avoided by a separation agreement. While a court will uphold a division of property or maintenance award pursuant to a valid separation agreement, the court is not bound by provisions of the agreement dealing with children (custody or support). Certainly, a provision of a separation agreement that wholly rejects the Statutory Child Support guidelines would be void for reasons of public policy. If Sue and Hank agreed to give Frank less than he would receive under the statutory guidelines, that provision of the agreement is void.

#### Question-Four

On May 14, 1996, Nick was visiting his Uncle Unc when Unc took delivery of his new sports car. Although Nick had often used Unc's old car with Unc's permission, Nick took the new car that day without Unc's knowledge and gave his girlfriend, Gina, a ride.

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

As Nick and Gina were returning to Gina's house, Nick attempted to turn into Gina's driveway, but he was driving too fast to make the turn. Nick lost control of the car, and narrowly missed striking Gina's mother, Meg, who was standing on the sidewalk alongside the driveway waving to Gina. The car struck a tree, and Gina, who was not wearing a seat belt, was thrown from the car and seriously injured. Meg was frightened but not physically injured.

Gina was taken by ambulance to H Hospital, where she was seen by Dr. Dix. Dr. Dix determined that Gina had ruptured her spleen in the accident, and he operated on her to remove it.

For several weeks thereafter, Gina complained of pain in her abdomen. An x-ray revealed that there were surgical forceps in her abdomen, in the location where her spleen had been removed. The forceps were removed in further surgery, from which Gina spent several months recuperating.

Following the accident, Meg developed severe depression. In March 1997, Meg commenced an action against Nick, alleging the relevant foregoing facts, to recover damages for her emotional distress, caused by having witnessed Gina being thrown from the car. Before serving an answer, Nick moved to dismiss Meg's complaint, on the ground that her complaint failed to state a cause of action. The court (1) granted Nick's motion.

In August 1997, Gina commenced an action against Unc and Dr. Dix to recover damages for her injuries, alleging the relevant foregoing facts. Unc moved to dismiss the complaint on the ground that he could not be held liable for the negligence of Nick in the operation of the car. The court (2) denied Unc's motion.

The trial of Gina's action is now proceeding. On her cause of action against Dr. Dix, Gina has offered proof that surgical forceps were found inside her abdomen, that the forceps were of the type used by Dr. Dix during the operation which he performed on her and during which she was unconscious, and that she never had any surgery prior to the accident. Dr. Dix has denied leaving the forceps inside of Gina and has offered proof that no surgical instruments were unaccounted for following Gina's surgery.

Gina has requested that the court instruct the jury that they can infer negligence on the part of Dr. Dix from the evidence presented.

Unc has offered proof that Gina was not wearing an available seat belt at the time of the accident, and that her spleen would not have been ruptured if she had been wearing the seat belt. Unc has requested that the court instruct the jury that they can consider Gina's failure to wear a seat belt on the issues of negligence and damages.

Were the numbered rulings of the court correct?

Should the court instruct the jury as requested by (a) Gina, as to Dr. Dix's negligence, and as requested by (b) Unc, as to Gina's failure to wear a seat belt, on the issues of negligence and damages.

#### ANSWER TO QUESTION 4

1. The court incorrectly granted Nick's motion to dismiss Meg's complaint. The issue is whether she has stated a cause of action for negligent infliction of mental distress. In New York, a plaintiff may recover for negligent infliction of mental distress where (1) the plaintiff is in the "zone of danger" at the time of the occurrence, (2) the plaintiff witnesses a close family member get injured and (3) the plaintiff has resultant physical manifestations. Here, the facts indicate that the

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

car narrowly missed striking Meg. Therefore, she was in the zone of danger and is a foreseeable plaintiff. Meg witnessed Gina, her daughter, get thrown from the car and become seriously injured. Thus, element (2) above is satisfied. And, although Meg was not physically harmed at the time of the accident, she later developed severe depression. If she can prove that the depression is attributable to witnessing the accident, she has stated a valid cause of action for negligent infliction of mental distress because severe depression would constitute a sufficient physical manifestation.

2. The court correctly denied Unc's motion to dismiss. The issue is whether the owner of an automobile may be held vicariously liable for the negligence of a third-party driver. In New York, a car owner may be held vicariously liable for the negligence of one whom is expressly or impliedly authorized to use the car. Here, Unc's consent may be inferred from the fact that he had previously allowed Nick to use his old car. There is another issue regarding the car however - the fact that Nick had never before borrowed this particular car. Unc's consent may still be implied despite the fact that the car was a different one however, because of their close family relationship and because there was no express prohibition by Unc. There is an exception to the permissive use rule which provides that the owner will not be held vicariously liable for the intentional torts of the driver. However, that exception is not applicable here because Nick did not intend to crash the car - he was merely driving too fast, which would amount to negligence or recklessness at the most. The intent required for intentional torts is substantial certainty that the consequences will occur. There is nothing here to indicate that Nick was substantially certain his fast driving would cause the crash. Therefore, the exception does not apply and a claim can be made against Unc based on the permissive use statute.

a. The issue is whether Gina has made out a sufficient inference of negligence under the doctrine of *res ipsa loquitur*. *Res ipsa* is used as a substitute for proof of breach where the plaintiff is unable to prove a precise theory of negligence, that is, how the injury occurred. *Res ipsa* may be used where (1) the injury or accident is of a type that does not normally occur absent negligence and (2) the injury - causing instrumentality was under the exclusive control of the defendant. It should be noted that this is an appropriate *res ipsa* case because Gina was unconscious during the surgery and thus would be unable to prove a precise theory of negligence, i.e., precisely, how the forceps were left behind. Here, Gina can easily establish the first prong because forceps do not normally get left behind in one's body during surgery absent negligence. The second prong is more problematic because Dr. Dix has claimed that no surgical instruments were unaccounted for following the surgery. Therefore, there is an issue as to whether the forceps were under the exclusive control of Dr. Dix. However, Gina has stated that she never had any prior surgery. Therefore, based on her allegations, there is a sufficient inference of negligence to send the case to the jury because there is no other conceivable way the forceps could have ended up in Gina's body. The jury can make a credibility determination and decide whether Gina is telling the truth. If they believe her, there is a sufficient inference of negligence based on the facts and Dr. Dix's offer of proof of no unaccounted for instruments will not be sufficient to rebut it. Therefore, the jury should receive the instruction.

b. The court should grant Unc's request to instruct the jury that they can consider Gina's failure to wear a seatbelt on the issue of damages but not on the issue of negligence. The issue is whether Gina's conduct has bearing on causation or damages. A *prima facie* case of negligence can be made out by showing duty, breach actual and proximate causation and damages. Clearly, the first two elements, duty and breach, can easily be established because Nick was driving too fast in breach of his duty to drive safely (in a reasonably prudent manner).

Nick's driving was the initial actual or but - for cause of the harm (but for his driving too fast the accident would not have occurred and Gina would not have been harmed). His driving too fast was also the proximate cause of her injuries in general. By driving too fast it was foreseeable that an accident would occur and that Gina, the passenger, might be injured. As to damages, generally

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

a defendant takes the plaintiff as he finds her and will be held liable even for unforeseeable damages. This is the eggshell-skull theory. However, this is not an eggshell-skull case because Gina's conduct contributed to the extent of her injuries. But for her failure to wear a seatbelt, she would not have been so severely injured. A reasonable, prudent person would wear a seatbelt and therefore, Gina's failure to do so was a breach of the ordinary standard of care. While contributory negligence is not a bar to recovery in New York because New York follows the comparative negligence rule, Gina's failure to wear a seatbelt may properly be considered in apportioning the percentage of fault and in allocating damages.

ANSWER TO QUESTION 4

1. The court was incorrect to dismiss Meg's complaint for negligent infliction of emotional distress. The issue is what is required for such a claim.

Negligence is the failure to use ordinary care. A plaintiff alleging a claim under negligence must allege that defendant owed her a duty to act with reasonable care, that defendant breached that duty, that this breach proximately caused her damages and that she did indeed incur damages.

Generally, in order to establish a claim for negligent infliction of emotional distress, a plaintiff must have suffered some physical injury as well as emotional distress. However, physical injury is not required if the emotional distress was caused by the injury of a close family member. Also, injury (physical) is not required if the plaintiff narrowly avoided physical injury. In such cases, plaintiff is deemed to have been in the "zone of danger".

Meg has alleged a claim of negligent infliction of emotional distress. She was a foreseeable plaintiff because Meg was in the zone of danger. Accordingly, Nick owed Meg a duty of care. He breached that duty by driving negligently and his negligence proximately caused Meg's distress.

Meg was in "the zone of danger" because Nick very narrowly avoided striking her. Moreover, Meg was within the zone because she watched her daughter Gina be thrown from the car and seriously injured while Meg stood at close range.

Thus, because Meg was within the zone of danger, and owed a duty, and because she could establish a breach of that duty as well as proximate causation and damages, Meg should've been allowed to proceed with her claim of negligent infliction of emotional distress.

The court thus erred in dismissing her claim.

2. The court correctly denied Unc's motion. At issue is the New York permissive use statute.

Generally, one cannot be held liable for the negligent acts of another. Under the theory of vicarious liability, however, one can be held liable for the acts of his agents though he himself was not negligent and did not cause the injury.

New York's permissive use statute provided that the owner of a car is vicariously liable for the injuries caused by another driving the owner's auto with permission. Permission is presumed, although the presumption may be rebutted.

Here, Unc has not produced sufficient evidence to rebut the presumption of permission. Although the facts indicate that Unc did not know Nick had borrowed the car, the facts also state that Nick had repeatedly used Unc's old car with permission. It is possible under these facts that Nick had a longstanding grant of permission and Nick and Unc understood that Nick could always use that

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

car if it was available. The facts, as stated, are simply not sufficient to rebut the presumption that Unc gave Nick permission to use the car.

Accordingly, for purposes of Unc's motion to dismiss, the permissive use statute's presumption of permission applies. The court was correct to deny Unc's motion.

Note that Unc could seek indemnification from Nick if Unc is required to pay damages under this theory of vicarious liability.

a.) The court may instruct the jury that the jury can, but is not required to, find Dr. Dix negligent from Gina's evidence. At issue is *res ipsa loquitur*.

As previously noted, a plaintiff alleging negligence generally must prove duty, breach, causation and damages. When the breach element is very difficult to prove, the court may allow plaintiff to survive a directed verdict (for failure to produce evidence as to an essential element) by virtue of the theory of "*res ipsa loquitur*" ("the thing speaks for itself").

A plaintiff using the theory of *res ipsa loquitur* must show (i) that her injury is of a sort which typically does not occur in the absence of negligence, and (ii) the thing/object which caused her injury was in defendant's exclusive control.

Gina has satisfied these requirements. A pair of forceps is generally not left in the patient's body in the absence of negligence. Moreover, Gina has produced evidence that she had never had surgery before. Thus, the forceps must have been put in her body during this surgery.

The other elements (aside from breach) of negligence are easily satisfied. Dr. Dix owed his patient a duty of care (thus "duty" is established). Gina suffered damages as a result of the forceps, and the forceps being left in her body proximately caused said damages.

Accordingly, the jury may infer negligence on the part of Dr. Dix. However, the court must make clear that the jury is not required to find such negligence. Gina has simply put forth enough evidence to get the case to the jury, not necessarily to prevail in her action.

b.) The court may instruct the jury regarding Gina's failure to use the seatbelt with respect to damages only, not to negligence. The issue is whether the failure to use a seatbelt constitutes negligence by the plaintiff.

A defendant who has been found negligent may seek to relieve himself of some liability by showing that the plaintiff was herself negligent and that this negligence proximately caused her injury. Under old common law, any negligence on plaintiff's part barred her recovery. New York has adopted comparative negligence. Under this regime, a plaintiff may still recover against a defendant if plaintiff was contributorily negligent. But, her recovery will be reduced in proportion to her percentage of negligence.

New York is one of a minority of states which allow a defendant to introduce plaintiff's failure to use a seatbelt as evidence which will mitigate plaintiff's damages. The evidence, however, will serve only to reduce the damages and will not go to whether plaintiff was negligent or to whether defendant proximately caused plaintiff's injury.

Here, Unc may introduce Gina's failure to use a seatbelt in order to reduce the amount of recovery, but may not introduce said evidence with respect to the issue of negligence. Gina's failure will not be deemed an intervening, unforeseeable cause of her accident which could sever Unc's causation.

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

Accordingly, the court should instruct the jury to consider Gina's failure in connection with damages, but not negligence.

Question-Five

In 1980, Ham opened a bank account at Bbank in his own name "as trustee for my son, Sam." Ham deposited \$10,000 in the account and the same amount each year thereafter for ten years.

In 1991, Ham had a bitter argument with Sam and thereupon called Bbank and told an officer to take Sam's name off the account. The bank did so.

Ham acquired a \$75,000 insurance policy on his life in 1992, naming his wife, Sue, as beneficiary.

In 1993, Ham and Sue began to live apart without a separation agreement. Sam was their only offspring.

Ham became critically ill in 1996 and withdrew some of the funds from the Bbank account to pay his medical bills.

In 1996, Ham opened a bank account at Cbank in his own name and that of his wife, Sue, "as joint tenants with right of survivorship." He explained to Sue, in the presence of Sam and a nurse, that he had opened the account merely to facilitate the payment of bills related to his illness.

In 1997, Ham duly changed the beneficiary on his life insurance policy from Sue to Sam. Ham died on March 5, 1998.

Ham's duly executed will left \$50,000 to his brother, Ned, and the remainder to Sam. After Ham's death it was discovered that lines had been drawn through the provision leaving \$50,000 to Ned, followed by Ham's initials. The original provision is clearly discernible. The witnesses to the will would testify that there were no alterations to the will at the time it was executed.

Upon Ham's death, the Bbank account and the Cbank account each contained \$60,000. Ham left no other assets.

Sam, Sue and Ned all claim a share of the bank accounts and insurance proceeds. Discuss their respective rights to the accounts and proceeds.

ANSWER TO QUESTION 5

Sam

Sam will be able to keep the \$60,000 in the Totten Trust but subject to Sue's elective share.

When Ham opened the bank account at Bbank in his own name as trustee for Sam, Ham validly created a Totten Trust. There are two ways to cancel the Totten Trust. Ham could either withdraw all the money out of the Bbank account, or change the beneficiary of the account in his will by specifically naming the bank and the beneficiary. Ham did neither of these, therefore, he did not validly revoke the trust and Sam gets the \$60,000. This amount is subject to Sue's elective share because a Totten Trust is a testamentary substitute.

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

Sam will also receive the insurance proceeds because Ham duly changed the beneficiary to Sam in 1997. But because Ham held the right to change the names of beneficiaries in his insurance, the amount would be subject to estate tax.

In addition, the amount of insurance proceeds will not be subject to Sue's elective share because it is not a testamentary substitute. Therefore, Sam will get to keep the \$75,000 insurance policy.

In addition, Sam will get \$10,000 from the C account (Assuming Cbank account is convenience account and therefore, passed through by will. Discuss more fully with Sue's claim.)

Ned

Ned will not have a claim to the Bbank and Cbank accounts or the insurance proceeds. But because he was given \$50,000 from Ham's will, he will be able to take \$50,000 from the \$60,000 Cbank account since the \$60,000 will be put back into Ham's estate. (Assuming that Sam and the nurse can prove that the Cbank account was just a convenience account and not a true joint account of Ham and Sue. Will discuss more fully with Sue's claim.)

A fully executed will needs to be signed by the testator, at the end thereof, acknowledged in the presence of witnesses, publication of the will to the witnesses, and needs 2 witnesses and has to be signed by the witnesses within 30 days. New York does not recognize partial revocation. A will can only be revoked by physical act (full revocation) or by another validly executed testamentary instrument. Here, Ham drew a line through one of the provisions and wrote his initials. This is not a valid revocation of the provision and therefore the provision stays and Ned will get \$50,000 but this is also subject to Sue's elective share.

Therefore, Ned will get \$50,000 (which came from Cbank account because Ham left no other assets) subject to Sue's elective share.

Sue

Sue will not be able to get the Cbank account.

The issue here is whether there was a valid joint account with Ham and Sue as joint tenants.

Because Ham told Sue in front of two witnesses that the Cbank account was made only to facilitate the payment of bills related to his illness, Sam and the nurse can testify and give evidence showing that the joint account between Ham and Sue was only a convenience account and therefore Sue will not be able to get the \$60,000 from the Cbank account.

In any event, Sue may claim an elective share from Ham's estate. Sue is not barred from claiming her elective share from Ham because in order to be barred from electing, there needs to be: (1) divorce or annulment; (2) separation decree; (3) invalid divorce obtained by surviving spouse; (4) void marriage; or (5) abandonment or lack of support. Even though Ham and Sue began to live apart, Ham did open up a convenience account so that it can facilitate payment of bills relating to his illness. Therefore, under the elective share she would either get \$50,000 or 1/3 of the assets. To calculate: \$60,000 Totten Trust would be included. Also, the \$60,000 from Cbank account would be included.

This totals \$120,000. 1/3 of \$120,000 equals \$40,000. Therefore, she would be able to get \$50,000 because it is greater than 1/3 of the assets. This amount is taken out of Sam's share and Ned's share ratably.

Sue will get 5/12 out of Sam's \$70,000 (60,000 Bbank account and 10,000 remainder).

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

Sue will get 5/12 out of Ned's \$50,000 (50,000 given by will).

ANSWER TO QUESTION 5

1. Sam's Rights

Bank Account

Sam has a right to whatever is remaining in this account at Ham's death. The issue is subject to Sue's elective share amount whether this account was a Totten Trust account and whether it was properly revoked.

A Totten Trust bank account is created when the depositor opens up an account for himself as trustee for another. Totten trusts are revokable both by will and within the lifetime of the creator but revocation is strictly construed. In order to revoke the account during the creator's lifetime he must withdraw all funds or deliver a signed, written and acknowledged revocation to the bank.

Here, Ham did not properly revoke. While he did take back the amount he used for his medical bills (partial revocation) he did not follow the formalities required to cancel the Totten trust. He simply called the bank and told an officer to remove Sam's name. This is not enough. Thus, Sam gets what is remaining on deposit; \$60,000 subject only to his contribution to Sue's elective share.

Sam's Rights in the Insurance Proceeds

Sam takes as beneficiary under the life insurance. The issue is whether Ham could change his beneficiary during his lifetime. Ham validly changed the beneficiary to Sam months before he died thus, Sam takes the entire \$75,000 after Ham's estate tax. This money is not subject to Sue's elective share because life insurance is not a testamentary substitute. Thus, Sam takes the proceeds as beneficiary.

Sam's Right in Cbank Account

Sam has a right to the proceeds in the joint bank account that Ham opened with his wife Sue. The issue is whether Sam can validly rebut the presumption of the right of survivorship on the account by showing by clear and convincing evidence that this account was a mere convenience account.

Under New York law, a contestant may overcome the presumption of the right of survivorship in a validly executed survivorship account by showing that the account was set up merely for the convenience of the parties.

Sam can show that despite the language "as joint tenants with right of survivorship" his father had opened the account merely to facilitate payment of bills related to his illness. He can call the nurse in to testify to this and would meet his burden. Thus, the proceeds in the account would pass into Ham's residue estate and Sam would take all \$60,000 under the will subject to Sue's elective share amount.

2. Ned's Rights

1) Ned has no rights to claim under the Bbank account. The issue is whether he can claim a share of the Totten trust for his \$50,000. The rule is that a Totten trust is a non-probate asset and thus, a beneficiary under the will cannot claim for funds under it. Thus, Ned has no right to Bbank.

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

2) Insurance

Again, Ned has no right to the insurance proceeds as non-probate assets.

3) Cbank

Ned may claim \$50,000 from the account subject only to Sue's elective share. The issue is whether Ham validly revoked the \$50,000 gift he made to Ned in his will by physical act, or in the alternative if he validly amended his will by a properly executed codicil thus removing the gift.

New York recognizes revocation by physical act (burning, tearing, destroying). However, New York does not recognize partial revocation by deleting only certain terms. Those deleted terms will be given full effect unless they were properly executed codicils to the will; if not they merely will be unattesting words or omissions and will be ignored.

In order to validly amend your will, the amendment must be duly executed. The EPTL requires: 1) two attesting witnesses, 2) signed by the testator, 3) signed in front of the witnesses or acknowledge an earlier signature in front of them, 4) sign the document or amendment at the end thereof, 5) the testator "publishes" the will in that he tells that witnesses that they are signing his will and 6) the execution ceremony is completed within 30 days of the first witnesses signature.

Here, Ham only partially revoked his gift to his brother. The amendment was only initialed by Ham and not duly executed. Thus, since the original provision is clearly discernable, the court should ignore Ham's attempts to cancel his gift and Ned should take the \$50,000 subject only to Sue's elective share.

3. Sue's Claims

A. Bbank and Cbank Account

As discussed above, Sam gets both the Totten trust account at Bbank and, since he could validly contest the joint bank account as a mere convenience account, he gets \$60,000 in that account as well.

B. Sue's Right of Election

Sue is entitled to \$50,000 as her elective share amount. The issue is whether Sue has a right to election and how much that right is.

The elective share protects a spouse who is left nothing or limited amount under the will to take \$50,000 or 1/3 of the net estate plus various non-probate testamentary substitutes. The elective share amount will reduce by any outright dispositions to the spouse.

A spouse who has been divorced or who has been separated with a separation order as against them will be denied the right of election.

Here, Sue and Sam were separated without any court order. Sue is still entitled to her elective share. She must file for election 6 months after the letters have been filed and in no time after 2 years have past from death.

Sue's elective share will include: the \$60,000 in the Totten trust account, as a testamentary substitute, the \$10,000 left in the Cbank account of Sam's and the \$50,000 left to Ned. The net estate equals \$120,000 thus 1/3 of that is only \$40,000 so she gets to elect \$50,000.

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

It should be noted that if Sam is unsuccessful in claiming that the survivorship estate was merely a convenience account, one-half of the survivorship estate would be counted as a testamentary substitute (\$30,000) and she would have gotten 1/2 outright. This is because there is a presumption in joint accounts of husband and wife that each take half. Also, the life insurance proceeds are not testamentary substitutes.

Thus, Sue can claim \$50,000 as her elective share.

Question-Six

Len and Mal, experienced cabinet makers, decided to go into the business of manufacturing and installing kitchen cabinets. Len and Mal asked Nell to invest in the business and Nell agreed. They then duly incorporated Kitch, Inc. ("Kitch") and shares were issued 26% to Len, 26 % to Mal and 48 % to Nell, with the intention that the profits would be paid out to the shareholders as dividends. Len, Mal and Nell were elected directors of Kitch, and the directors elected Len as President and Treasurer and Mal as Vice President and Secretary.

Kitch's business grew and prospered. Len and Mal, unhappy about sharing the profits with Nell, formed a partnership consisting of Len and Mal, d/b/a Cabinet Sales (Sales). Len, as President of Kitch, and without calling a meeting of the board of directors or informing Nell, entered into an agreement with Sales which provided that Sales would be a preferred distributor of Kitch cabinets. The agreement required that Kitch sell half of its production of cabinets to Sales at cost, with the result that all of the profits from the sale of those cabinets would go to Sales.

A year later, Nell learned of the agreement between Kitch and Sales, that \$100,000 of profits which otherwise would have been earned by Kitch, had been siphoned off to Sales, and dividends from Kitch had been reduced by the same amount.

Nell duly commenced an action entitled "Nell, individually, and on behalf of Kitch, Inc, Plaintiff, -v- Cabinet Sales and Len and Mal, individually, Defendants." The complaint alleged the pertinent foregoing facts and sought judgment for \$100,000 against Sales, Len and Mal, together with reasonable attorneys fees.

The defendants moved to dismiss Nell's complaint on the grounds that (i) Nell did not have standing to bring the action against Sales, Len and Mal, and (ii) the complaint failed to specifically allege that Nell, before commencing the action, had demanded that the board of directors of Kitch take action against Sales, Len and Mal. The court (1) denied both branches of the motion.

After a non-jury trial, the court rendered its decision in favor of Nell against Sales, Len and Mal for \$100,000. Nell then timely moved to modify the decision to (i) award an additional \$25,000 to Nell for her attorney's fees, whose services were reasonably worth that sum; and (ii) award the \$100,000 to Nell individually, arguing that otherwise Len and Mal, the wrongdoers, would share in the recovery by reason of their ownership of 52% of the outstanding shares of Kitch. The court (2) granted Nell's motion in its entirety.

(a) Were both branches of ruling (1) correct?

(b) Were both branches of ruling (2) correct?

ANSWER TO QUESTION 6

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

A. RULING 1

(i) The court correctly denied the defendant's motion to dismiss Nell's complaint on the grounds of lack of standing. The issue is what's necessary to bring a shareholder's derivative suit on behalf of the corporation.

To bring a shareholder's derivative suit, the shareholder must prove they have standing to bring the claim. The shareholder must show that they owned stock at the time the alleged breach occurred; that they as a shareholder suffered harm as a result of the breach and that they will adequately represent the interest of the corporation.

In the current case, Nell was a 48% shareholder at the time of the breach of duty by Mal and Len. Furthermore, Nell suffered harm, as did the corporation when profits were siphoned off from the corporation towards Mal & Len's partnership. Furthermore, Nell represents the interests of the corporation, the intent of which it was to pay profits as dividends.

Consequently, Nell did have standing to challenge Mal & Len's breach and the court correctly denied the motion to dismiss.

(ii) The court correctly denied Mal & Len's motion. The issue is whether Nell had to plead with particularity the demand that was made on the board.

In general, in a shareholder derivative suit, a plaintiff must make a demand on the board to bring suit unless demand would be futile. The plaintiff must then plead with particularity the efforts that were made to make the board bring an action.

However, demand is excused where such demand would be futile. For demand to be futile, it must be the case that: (1) the board is dominated or composed of interested directors, (2) the board failed to adequately inform itself of the issue at hand and (3) the breach is so egregious that it couldn't possibly be the result of sound business judgment. Nell can show futility on the basis of board domination.

The board consists of three directors; Nell, Mal & Len. To take any action, a majority must be present (quorum of two). However, because a quorum consists of two, in order to do any business a majority of that quorum must rule; meaning the same two. Considering that Nell is only one of the three directors and that she would never be able to get the majority vote necessary to initiate action because of the board's domination by Mal & Len, any demand on her part would have been futile.

Therefore, Nell was excused with having to make any demand on the board and her failure to plead her efforts of demand do not constitute grounds for dismissal. The court correctly denied Mal & Len's motion to dismiss.

B. RULING 2

(i) The court incorrectly granted Nell's motion for attorney's fees. The issue is whether a shareholder who brings a derivative suit on behalf of the corporation is entitled to reimbursement for attorney's fees in addition to the award.

In general, a shareholder who successfully brings a derivative suit on behalf of a corporation is entitled to recover reasonable attorney's fees. However, this sum is generally deducted from the award to the corporation because it was the shareholders efforts that allowed for the recovery in the first place.

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

In Nell's case, Nell moved for an additional \$25,000 be granted to cover the costs of litigation. While Nell is entitled to reimbursement, the amount should be deducted from the \$100,000 award to the corporation. Thus, the courts award of an additional \$25,000 was incorrect.

(ii) The court incorrectly awarded the \$100,000 to Nell individually. The issue is whether a court can award the damages in a derivative suit to the shareholder directly when the other shareholders of the corporation are responsible for the breach which led to the suit.

In general, the award of damages in a derivative suit goes to the corporation because the shareholder is suing on behalf of a breach of duty owed to the corporation.

In the current case, Mal & Len breached the duty of loyalty they owed to the corporation. Directors owe the corporation the duty that they will exercise their duties with the good faith and with the morality and honesty that the law requires of fiduciaries. In this case, their creation of the cabinet sales partnership to siphon off profits was a direct breach of this duty. Nell's suit essentially rerouted the siphoned funds back into the corporation where they always should have gone.

However, even though Mal & Len are guilty of breach, the entire share of profits should not go to Nell directly. The purpose of the derivative suit was to get the corporation what it was owed and to give each shareholder their fair share. Nell's victory for the corporation, and Mal & Len's guilt do not entitle Nell to a greater portion of the profits. Profits should be awarded according to the agreement. Consequently, the courts award of the full \$100,000 to Nell was incorrect.

#### ANSWER TO QUESTION 6

Both branches of Ruling #1 were correct. The issues are whether Nell, as a shareholder, can bring a suit for the corporation and whether Nell must demand that the directors take action before commencing a suit.

In New York, a shareholder's derivative suit can be maintained if the shareholder bringing the suit is a record shareholder with shares in the corporation at the time of the act complained of, and that they are shareholders at the time of the filing of the suit. The suit must also be one which the corporation could have brought itself and was harming the corporation in some way, and not merely the plaintiff-shareholder. The shareholder, if victorious, is entitled to costs and expenses from the corporation but is not entitled to the judgment. That goes to the corporation. A shareholder must first demand of the directors of the corporation that they must prevent the complained of act by the officers of the corporation unless it would be futile to do so. Futile means that the directors approved the action, knew of the action but did nothing, or are involved in the action complained of.

In this case, Nell had standing to bring this action. She was a shareholder when the act occurred and she was a shareholder at the time she brought the action. The corporation has lost \$100,000 of profits due to the acts of Len and Mal. This is an act the corporation could have brought and it does not benefit Nell. While the dividends to shareholders have been affected, Nell is suing for a return of the \$100,000 profits to the corporation. In addition, Nell did not have to demand that the Board of Directors take action before filing suit because it would be futile. Here the directors are Len and Mal and they are the ones siphoning off corporate profits. They should not bring an action for self-dealing, usurping a corporate opportunity or any other action against themselves. So Nell was justified in bringing a shareholders derivative suit against Sales, Len and Mal.

In Ruling #2, branch one of the ruling was incorrect and branch two of the ruling was incorrect. The issues are whether Nell is entitled to compensation for reasonable attorney's fees from the

NEW YORK STATE BAR EXAMINATION  
JULY 1998 QUESTIONS AND ANSWERS

corporation and from where that money should come from, and whether Nell can receive the judgement individually.

In New York, a shareholder that has won a shareholders derivative suit can recover the attorney's costs incurred in the litigation from the corporation. These fees must be reasonable. These fees are paid out of the judgment received by the corporation. The court has the power to modify an award after a determination but this will not be done in the case of awarding fees and expenses. These must come from the judgment rendered for the plaintiff. A shareholder has no right to the judgment granted by the court. The amount awarded goes directly to the corporation since it is the corporation that has suffered the injury. If a shareholder is dissatisfied with the directors of a corporation, the shareholders can elect to vote the directors out of office. A majority of the votes entitled to vote and actually voting at the election must be present to conduct business. If this is not possible, the shareholder can record their displeasure in the minutes of the next meeting and ask to be bought out. They must register their dissent immediately with the Board after they discover a violation of the board's duty of loyalty and duty of care. If the directors have not discharged their duties with the due diligence care and skill required of fiduciaries, then the shareholder can elect to be bought out at whatever the going rate is for those shares. If the company is publicly traded on a national or over-the-counter market, then a shareholder cannot be bought out.

In this case, the court should not have allowed a modification of the judgment to award an additional \$25,000 to Nell for attorneys fees. The corporation is responsible for reimbursing Nell for her attorney's fees and expenses and that must come out of the \$100,000 judgment to the corporation. In addition, Nell is not entitled to the \$100,000 judgment because it belongs to the corporation, and if Nell wants to prevent Len and Mal from profiting she can try to remove them as directors, which will be impossible or she can request a buyout of her shares. It is not stated in the facts whether the corporation is publicly traded but with the percentages of shares owned by Len and Mal it doesn't appear to be, so a buyout of a shareholder will not be a problem. Therefore, Ruling #2 is incorrect in both branches.