February 2015

New York State
Bar Examination

Essay Questions

QUESTION 1

In 1995, Walt, a widower, executed a will prepared by his lawyer, Len, which contained the following dispositive provisions:

1. I give and devise my residence to my daughter, Amy.
2. I give and bequeath my 100 shares of C Corp. to my son, Ben.
3. I give and bequeath $100,000 to my son, Cal.
4. I give and bequeath $100,000 to the American Red Cross.
5. I give, devise and bequeath all of the rest, residue and remainder of my estate to my grandson, Dave.

Walt signed the will at Len's office, and at Walt's request, Len and Walt's son, Ben, signed as witnesses in the presence of Walt and each other after Walt acknowledged that the document was his will.

In 2000, Walt duly executed a new will which expressly revoked any and all wills previously made by him. In 2001, Walt decided that he did not like the terms of the 2000 will and physically destroyed it by his own hand.

Walt died last year, survived by Amy, Ben, Cal, and Dave. Dave is Walt's only grandson and is the son of Walt's deceased son, Ed. The 1995 will has been admitted to probate over the objections of Cal that the 1995 will had not been properly executed and that, in any event, it had been revoked.

Walt's residence has been valued at $300,000, and his 100 shares of C Corp. have been valued at $200,000. After payment of all debts, expenses and taxes, the net estate, including the residence and the C Corp. shares, is $600,000.

(1) (a) Was the 1995 will properly executed?
(b) Assuming the 1995 will was properly executed, was it properly admitted to probate?

(2) Assuming the 1995 will was properly admitted to probate, what part, if any, of the net estate should be distributed to:
(a) Amy?
(b) Ben?
(c) Cal?
(d) The American Red Cross?
(e) Dave?

QUESTION 2

Dell was driving his car at night on an unlighted winding country road when, without slowing down, he struck a pedestrian who was walking on the shoulder of the road adjacent to a field. The posted speed limit for the road was 30 miles per hour. Officer arrived at the scene of the accident 15 minutes later and found Dell sitting in his car in the field. Without giving Dell any Miranda warnings, Officer asked him why his car was in the field, and Dell said that he was driving down the road and his car hit "something." Officer noticed that Dell's eyes were glassy, his speech was slurred, and his breath had a strong odor of alcohol. When Dell exited the car at Officer's direction, he could not stand without holding onto the car. Dell refused Officer's request that he take a breath test to determine the percentage of alcohol in his blood. An ambulance arrived, and the pedestrian was pronounced dead.

Officer arrested Dell and took him to the police station. Officer then appeared before a judge who, based upon the above facts, issued an order for a chemical test of Dell's blood. The blood test was administered and showed Dell's blood alcohol level to be substantially above the legal limit for driving while intoxicated.

Dell was indicted for the crime of manslaughter in the second degree. A person is guilty of manslaughter in the second degree when he recklessly causes the death of another person. Prior to the trial, Dell moved to suppress the results of the blood test on the ground that it was improperly authorized. He also moved to suppress his statement - that he was driving down the road and his car hit "something" - because he was not given Miranda warnings. The court (a) granted Dell's motion to suppress the results of the blood test and (b) denied Dell's motion to suppress his statement. Uncontroverted testimony as to all of the above facts, except the blood test results, was received at the trial. In addition, an expert testified, based on his observations and measurements at the scene, that Dell's car was travelling in excess of 55 miles per hour when it left the road and struck the pedestrian.

After both sides rested, Dell made a motion (1) to dismiss the indictment on the grounds that the evidence was legally insufficient to establish the crime of manslaughter in the second degree, and (2) in the alternative, to submit to the jury a charge of criminally negligent homicide as a lesser-included offense. A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person. The court denied the motion in both respects. Dell was convicted of manslaughter in the second degree.

(1) Was the court correct in its pre-trial determinations:
    (a) to suppress the results of the blood test?
    (b) not to suppress Dell's statement?

(2) Was the evidence presented at trial legally sufficient to support the conviction of manslaughter in the second degree?

(3) Was the court correct in denying Dell's request to charge the lesser-included offense of criminally negligent homicide?

QUESTION 3

In 2000, Len, Jane and Charley, licensed architects, formed a New York professional service corporation (PC). PC designs commercial buildings in the New York City area and specializes in designing "green" buildings that utilize environmentally sustainable building materials. PC's only office is located in New York City.

In 2013, PC entered into a written contract with Developer, a commercial developer, for the design of an office building. Len was the only PC shareholder involved in creating the design of the building. PC timely completed the design according to the parties' contract, which did not contain any provisions about damages in the event of a breach.

Developer thereafter commenced construction of the building pursuant to PC's design. Mid-way through construction, extensive mold was discovered behind the building walls. It was determined that the cause of the mold was excessive moisture trapped behind the drywall caused by a design defect. Completion of construction of the building was delayed nine months while the mold was remediated and certain design changes were made. Developer claims that, due to the delay, it has lost rental income which would have produced a profit of $250,000. Although Developer did not have any tenants under lease, it claims that, had the building been completed on time, it could have rented all of its space earlier based upon the current rental market and comparable properties it owns in the same locale. PC was not aware of Developer's anticipated date for completion of the building, which was not part of its contract with Developer, and it had no knowledge of Developer's plans for rental of the building.

Developer thereafter commenced a breach of contract action against PC seeking to recover its lost profits as consequential damages. In addition to PC, Developer named Len, Jane and Charley, individually, as defendants in the action, and duly served each of them with the summons and complaint. In a separate cause of action sounding in negligence, Developer alleges that Len, Jane and Charley, as shareholders of PC, are personally liable for PC's negligence.

In 2008, PC had hired Sam as its exclusive sales and marketing director. As a condition of his employment, Sam was required to sign a non-competition agreement, which stated, *inter alia*, that for a period of one year after Sam left PC's employ, he could not:

> directly or indirectly own, operate, control, be employed by or consult for, participate in, render services for, or be connected in any manner with the ownership, management, operation or control of any architectural firm or other business engaged in the design or construction of "green" buildings anywhere in New York State.

PC trained Sam extensively in its confidential design techniques and its pricing methodologies. It also provided Sam with a generous expense account which enabled Sam to promote PC's designs.

Last week, Sam contacted Attorney seeking legal advice concerning the enforceability of the non-competition agreement. Sam would like to quit his position with PC and accept a similar sales position with Central Architectural, an architectural firm located in Syracuse, approximately 250 miles from the New York City area.

During the client interview, Sam told Attorney that he had over 20 years of experience in sales and marketing in various industries. He conceded that PC had devoted significant time and money creating its goodwill in the "green" building market, which enabled Sam to expand PC's customer base in that market. Although Central Architectural designs "green" buildings, Sam maintains that his new sales position would not require him to disclose any of PC's confidential designs and that its pricing methodologies are publically known. Sam explained that the business contacts, such as suppliers and contractors, he made while at PC are generally known in the industry and readily accessible through trade publications and other public sources. Finally, Sam believes that his employment with Central Architectural would not impact PC's business, because PC's customers are concentrated heavily in the New York City area, whereas Central Architectural's client base is only in the Syracuse area.

(1) Is Developer likely to succeed on its claim for lost profits?

(2) Can Len, Jane and Charley each be held personally liable for PC's negligence?

(3) What factors should Attorney consider in analyzing the enforceability of the non-competition agreement and what conclusion should Attorney reach?

QUESTION 4

Phil, a State X resident, was injured when the car he was driving was hit in the rear by a car driven by Donna, while he was stopped at a red light at an intersection in New York City. As a result of the accident, Phil complained of back pain and was taken by ambulance to a hospital emergency room where his back was x-rayed and other diagnostic tests were conducted. All test results were negative.

Nevertheless, Phil continued to have back pain. One week after the accident Phil went to his doctor who, without making a specific diagnosis, prescribed a number of medical devices, including an infrared heat lamp and a massager, to alleviate Phil's pain. Phil purchased the devices from Supply Inc., a New York corporation, for $7,500 and assigned to Supply Inc. his right to be reimbursed for this cost.

Thereafter, Phil commenced an action against Donna in New York State Supreme Court to recover $500,000 in damages for his pain and suffering.

At his deposition, Phil testified that at the time of the accident the traffic was bumper-to-bumper and moving slowly. Phil testified that his car was stopped at the time it was hit in the rear by the car driven by Donna. Phil also testified that, immediately following the accident, he was confined to his bed for one week, confined to his home for two weeks, and missed two months from work.

At her deposition, Donna testified that the traffic was heavy and moving slowly. Donna also testified that her speed prior to impact was 10 to 15 miles per hour, that she was following Phil's vehicle, and that after moving less than a block, Phil's vehicle came to a sudden and abrupt stop. Donna testified that she applied the brakes but was unable to avoid hitting Phil.

Based upon the foregoing, after discovery was complete, Phil moved for summary judgment claiming that (a) Donna was negligent as a matter of law, and (b) Phil suffered a serious injury under New York no-fault insurance law. Donna opposed the motion claiming that the facts did not establish her negligence and that, in any event, Phil had not suffered a serious injury. The court denied Phil's motion in its entirety.

Phil's automobile insurer is CarCo, a State X insurance company, which does business in New York. Phil purchased the insurance in State X where his car is garaged and registered. The insurance policy provides the no-fault coverage required by New York law when the vehicle is operated in New York, including payment for medical devices that are deemed medically necessary to treat injuries occurring in an accident.

Two weeks after supplying the medical devices to Phil, Supply Inc. sought payment from CarCo for the devices, but CarCo failed to pay or deny the claims. Six

months later, Supply Inc. again sought payment from CarCo for the devices. CarCo then denied payment, claiming the devices supplied by Supply Inc. were not medically necessary.

Supply Inc. subsequently commenced an action against CarCo in New York to recover the cost of the medical devices, pursuant to the assignment from Phil. CarCo has moved for summary judgment claiming that it should not be required to pay Supply Inc. because the devices provided by Supply Inc. were not medically necessary. Supply Inc., in opposing the motion, claims that it was too late for CarCo to raise the defense of lack of medical necessity.

Under New York law, a defense of lack of medical necessity is precluded on a claim to recover no-fault benefits paid by a supplier if the insurance carrier does not raise the defense within 30 days of receipt of the claim. However, State X law permits the defense of lack of medical necessity to be raised at any time. The insurance policy contains no provision addressing this issue.

(1) Did the court correctly deny Phil's motion for summary judgment on the issue of Donna's negligence?

(2) Did the court correctly deny Phil's motion for summary judgment on the issue of whether Phil suffered a serious injury?

(3) In Supply Inc.'s action against CarCo, which state's law regarding the time for raising the defense of lack of medical necessity should the court apply?

QUESTION 5

Ann owned Blackacre, a single family home in western New York. The backyard of Blackacre is at a higher grade than the adjoining property, owned by Ned. In 2011, Ann built a retaining wall along what she reasonably believed to be the line dividing her property from Ned's in order to support the grade differential between the properties and to prevent her property from eroding.

Ann thereafter entered into a contract to sell Blackacre to Beth for $225,000. The contract required the seller to deliver marketable title. The contract was silent regarding the effect of Ann's inability to convey such title.

A survey was performed pursuant to the contract, and it showed that a 15-foot section of the 100-foot long retaining wall encroached onto Ned's property, in depths

varying up to two feet. The encroachment, which was along an embankment at the rear of Ned's property, rendered Ann's title to the property unmarketable.

While the sale to Beth was pending, another buyer offered Ann $300,000 for Blackacre. Wishing to accept the offer, Ann advised Beth that she was canceling the contract, because the encroachment rendered Ann unable to deliver marketable title as required by the contract, and she offered to refund Beth's down payment. Beth informed Ann that she was satisfied to accept the property despite the defect in title, and she was fully prepared to proceed with the closing.

On the date set for closing, Ann refused to convey title to Beth. Beth thereafter commenced an action for specific performance. Ann opposed the action, arguing that the contract should be canceled because she could not convey marketable title in compliance with its terms. After a trial at which due proof of the above relevant facts was presented, the court granted specific performance to Beth. Ann then conveyed Blackacre to Beth.

After the closing, Ned approached Beth and advised Beth that he had learned that the retaining wall encroached on his property. Ned demanded that Beth remove the portion of the wall that encroached so as not to impair the value of his property to any extent. Beth offered to pay Ned for the diminishment in the value of his property, but refused to remove the offending portion of the wall, because removal would put Beth's property at risk and would be extremely costly. Ned thereafter commenced an action for an injunction to require the wall's removal. New York law permits but does not require the issuance of an injunction to remove encroachments. After a trial at which due proof of the above relevant facts was presented, the court denied the injunction but awarded Ned damages.

Beth thereafter took a job in another part of the state. She decided to keep Blackacre as rental property and leased the property to Tom. Tom was attracted to the property because of the finished basement, where he could put his pool table and entertain. During a heavy rainstorm, the basement of Blackacre flooded when a drain pump stopped working due to a power failure, without any fault on the part of Beth. The water damaged the paneling and carpeting in the basement, which Beth replaced. Tom was unable to use the basement for several weeks while renovations were made. After the renovations were complete, as a result of the flood, mold began to appear on the walls of the basement. Exposure to mold has been linked to respiratory and other serious illnesses. Dangerous concentrations of mold spores have been identified in the premises.

Tom, who has continued to pay his full rent, has now begun an action against Beth to recover damages alleging breach of the warranty of habitability. Tom seeks a refund of his rent for the period since the flood and an abatement of his rent until the mold is remediated. Beth cites the lease, which states it contains the entire agreement of the

parties and makes no mention of such a warranty. Beth also claims that, in any event, the flood was not her fault.

1. Was the court's ruling granting specific performance to Beth correct?

2. Was the court's ruling denying the injunction to Ned correct?

3. (a) Is Tom likely to succeed in his action for breach of the warranty of habitability?
   (b) Assuming Tom succeeds, what relief is he likely to receive?

MPT – In re Community General Hospital

Examinees' law firm represents Community General Hospital, which has received a letter from the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services. The letter from the OCR states that it has learned of three cases in which Community General disclosed protected health information without a written patient authorization as required by the federal Health Insurance Portability and Accountability Act (HIPAA) regulations. If Community General cannot justify the disclosures, the OCR will pursue an enforcement action against the hospital. Examinees' task is to draft a letter responding to the OCR, parsing the HIPAA regulations and setting forth the argument that the disclosures fit specific exceptions to the general rule requiring a written authorization from a patient (or someone authorized to act on the patient's behalf), and that therefore there has been no HIPAA violation by hospital personnel. The File contains the instructional memorandum, the letter from the OCR, a memorandum from the hospital's medical records director discussing the three patients' cases, a letter from a treating physician, a pathology report, and a memorandum from the supervising partner outlining the purpose and structure of the HIPAA regulations. The Library contains a Franklin state statute requiring health care professionals to report gunshot and stabbing wounds to law enforcement and excerpts from the HIPAA regulations [found at 45 C.F.R. §§ 164.502 and 164.512].

February 2015

New York State
Bar Examination

Sample Essay Answers

FEBRUARY 2015 NEW YORK STATE BAR EXAMINATION

SAMPLE CANDIDATE ANSWERS

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

ANSWER TO QUESTION 1

1. a) Walt's 1995 Will was properly executed. The issue is whether a Will is properly executed where an attesting witness is also a beneficiary.

Under the New York EPTL, a will is properly executed when it satisfies a 7 point test. The 7 points are as follows: (1)The testator must be at least 18 years old and of sound mind; (2) the will must be in writing and the testator must sign or have someone sign on his behalf at his request and in his presence; (3) the signature must be at the and the end there of and anything following the testator's signature is invalidated; (4) the testator must sign in the presence of 2 attesting witnesses or later acknowledge to them that it is his signature; (5) the testator must publish to the two attesting witnesses that this is his will; (6) the two attesting witnesses must sign, and do not need to sign in each other presence; and (7) the attesting witness's signatures must be signed within 30 days of each other.

When one of the attesting witnesses is an interested witness, one who also is a beneficiary under the will, someone who is given a gift in the will, the will remains valid. The interested witness's gift will fail however unless (1) there is a supermajority of voters, where even with the interested witness's signature there are still two other disinterested attesting witnesses to the will; or (2) the interested witness would have received an intestate share had the testator dies intestate, at which point the interested witnesses would receive their intestate share or the gift bequest under the will, whichever is lesser of the two.

Here, Walt executed his 1995 that was prepared by his lawyer Len. There is no indicated that Walt was under the age of 18 and there is also no indication that Walt was not of sound mind. The Will was in writing and Walt signed 'at the end there of' in the presence of Len and Walt's son Ben who that day signed as witnesses after Walt acknowledged and published that this was his will. Ben's status as a beneficiary and a witness, does not affect the validity and execution of Walt's will. However, it will affect his taking of his gift. Because there was not a supermajority of witnesses and because Ben would have taken an intestate share, he will however, take the lesser of his intestate share or the gift.

Therefore, Walt's will was properly executed because the will satisfies the 7 point test and because Ben's status as a beneficiary and witness does not affect the validity of Walt's will.

b) The 1995 will was not properly admitted to probate. The issue is whether a duly executed subsequent will that is later revoked revives the original will.

Under NY EPTL, a will is revoked in two ways, (1) through the proper execution of a subsequent will, or (2) through physical revocation at the hands of the testator, or at the request of the testator in his presence. A properly executed subsequent will, that is later revoked, does not revive the original will's status. Under the Dependency Revocation Rule (DRR), which NY has yet to determine its standing in NY, a later executed will that is revoked with the mistaken belief that it will revive the original will, will not revive the original will, but will revive the second will to the extent that it satisfies the intention of the Testator's wishes.

Here, Walt duly executed his first will in 1995. In 2000, he duly executed a second will which contained a clause that expressly 'revoked any and all wills previously made by him'. In 2001, Walt then decided that he did not like the terms of the 2000 will and physically destroyed the will at his own hands. When Walt executed the 2000, he effectively revoked the 1995 will, by both the execution of the 2000 will as well as the express clause stating that any and all prior executed wills were previously made by him. Then in 2001, Walt revoked his 2000 by physically destroying it at his own hands. Even if New York, took into account the effects of DRR, there is no indication that Walt had any belief that revoking his 2000 will would revive is 1995 will and furthermore, the 2000, expressly stated that it revoked any and all previously executed will, thus solidifying Walt's intention that he no longer wanted the 1995 will to be his will.

Therefore, Walt's Will was not properly admitted to probate because it was revoke by the due execution of the 2000 will as well by the expressly stated clause within the 2000 will "revoking any and all wills previously made by him."

2. When a will is admitted into probate, and it does not have an adequate net estate, the gifts that are distributed to the beneficiaries will be devised in the following order: (1) Specific Gifts; (2) demonstrative gifts; (3) general gifts; and (4) the residuary.

a) Amy will receive Walt's residence valued at $300,000. The issue is whether a gift devising 'my residence' is a specific gift.

Under NY EPTL, a specific gift is one that specifically identifies the gift that will be distributed upon being admitted into probate. If the gift is one of a residency, and the will states that the beneficiary will revive "my residence", the will will be interpreted based of what the testator's intent was and the residence that will be devised is the one that is in the testator's possession at his death.

Here, Walt devised in the will to Amy 'my residence'. This is a specific gift because it is one that is specifically identified. Because it stated my 'residence', Walt's intent will be interpreted by the courts as devising Amy the residence that was in his will at the time of his death.

Therefore, Amy will receive the residence in Cal's possession at the time of his death.

b) Ben will receive $150,000.00. The issue is whether Cal will receive his C Corp shares or his intestate share.

Under NY EPTL, a specific gift is one that specifically identifies the gift that will be distributed upon being admitted into probate. These gifts will be distributed first when the net estate is inadequate. Here, Walt devised Ben "my 100 shares of C Corp," thus designating it a specific gift.

However, under the New York EPTL, a will is properly executed when it satisfies a 7 point test. However, when one of the attesting witnesses is an interested witness, one who also is a beneficiary under the will, someone who is given a gift in the will, the will remains valid. The interested witness's gift will fail however unless (1) there is a supermajority of voters, where even with the interested witness's signature there are still two other disinterested attesting witnesses to the will; or (2) the interested witness would have received an intestate share had the testator dies intestate, at which point the interested witnesses would receive their intestate share or the gift bequest under the will, whichever is lesser of the two.

Under NY EPTL, when an estate is entered into intestacy, the estate is distributed per capita by representation at each generation. The estate is distributed at the first generation of issue and then subsequently distributed per capita at the second generation level if an issue in the first generation had previously deceased the testator and was survived by issue, through the NY Anti-lapse statue.

Here, Walt's will was duly executed and properly admitted to probate. Because Ben was an attesting witness, as well as a beneficiary, he will receive the lesser of his gift under the will and what he would have received had Walt died intestate, as he would have received and intestate share. When Walt died, after debts, expenses and taxes, including the residence and the C Corp shares, the net estate was valued at $600,000.00. Had the estate been distributed intestate, Ben would have received 1/4 of the net estate (150,000.00) because Walt was survived by 4 people who would be receiving an intestate share.

Therefore, Ben would receive $150,000.00 because it is the lesser of the 100 C Corp shares and what he would receive intestate.

c) Cal will receive $75,000.00. The issue is whether a beneficiary will receive their gift under a will if they contest the will's admittance to probate.

Under the NY EPTL, if a will contains a no contest clause, the beneficiary that contests the will's admittance into probate will be barred from receiving their gift devised in the will, unless the contestation falls within one of the exceptions.

Under the NY EPTL, a gift devising a sum of money is considered a general gift and will be distributed after the specific and demonstrative gifts. A general gift will be given out of the remainder of the estate after the distribution of the specific and demonstrative gifts.

Here, Walt's will did not contain a no contest clause, and so Cal will not be barred from receiving his gift under the will. However because Walt's will contained 2 general gifts, one to Cal and one to the American Red Cross, and because Ben and Amy will receive their bequest before Cal's general bequest, which equal 450,000.00, the gifts devised to Cal and the American Red Cross will be distributed proportionally from the remainder of the $150,000 in the probate estate.

Therefore, Cal will receive $75,000 because the remainder of the probate estate does not satisfy both his and the American Red Cross's bequest and so will be distributed two the two proportionally.

d) The American Red Cross will receive $75,000.00. The issue is whether a general gift giving under a will fails when the net estate is in adequate to satisfy the bequest.

Under the NY EPTL, a gift devising a sum of money is considered a general gift and will be distributed after the specific and demonstrative gifts. A general gift will be given out of the remainder of the estate after the distribution of the specific and demonstrative gifts.

Here, Walt's will contained 2 general gifts, one to Cal and one to the American Red Cross, and because Ben and Amy will receive their bequest before Cal and the American Red Cross's general bequest, which equal 450,000.00, the gifts devised to Cal and the American Red Cross will be distributed proportionally from the remainder of the $150,000 in the probate estate.

Therefore, the American Red Cross will receive $75,000 because the remainder of the probate estate does not satisfy both Cal's and the American Red Cross's bequest and so will be distributed two the two proportionally.

e) Dave will receive the rest, residue and remainder of Walt's estate, which is nothing. The issue is what Dave will receive under the residuary clause.

Under the NY EPTL, when a will is admitted into probate, and it does not have an adequate net estate, the gifts that are distributed to the beneficiaries will be devised in the following order: (1) Specific Gifts; (2) demonstrative gifts; (3) general gifts; and (4) finally the residuary. When after the distribution of the Special gifs, demonstrative gifts, and general gifts, there is no longer anything remaining in the estate, so the devisee of the residuary clause will not receive anything.

Here, after the special gifts to Ben and Amy were satisfied and the general gifts to Cal and the American Red Cross were satisfied pro- rata due to the inadequacy of the net estate, there was nothing remaining in the estate to devise to Dave as the holder of the residuary clause.

Therefore, Dave will not receive anything from the distribution of Walt's will.

ANSWER TO QUESTION 1

1. a) The issue is whether the 1995 will has been properly executed.

To be properly executed a will must be in writing and signed by a competent testator with present testamentary intent and witnessed by two witnesses who are aware of the testator's testamentary act (that he is making a will). A competent testator must be at least 18 years old at the time of execution and must be of sound mind and memory. Sound mind and memory means that the testator is capable of knowing his act, the nature and value of his property, the natural objects of his bounty, that he is making a will, and the plan of disposition. Actual knowledge is not required; the testator must only be capable of knowing these items. In addition, a will must also be signed at its end after all the provisions of the will. A beneficiary in the will is competent as a witness to the will. However, a beneficiary acting as a witness may have his own gift fail if there are not two other witnesses.

In 1995, Walt executed a will prepared by his lawyer, Len. The will was witnessed by Len and Walt's son, Ben. The will was in writing and signed by Walt presumably at its end following all its terms. There is no indication in the facts that Walt lacked any capacity. Len and Ben as witnesses are aware that Walt is signing a will as Walt acknowledged to them that the document was his will, indicating his present testamentary intent. Lastly, although Ben is a beneficiary in the will, he may still act as a witness. The will's execution is still valid even though Ben is a beneficiary, however Ben's own gift may fail (the details of Ben's gift are described below in (2)(b)).

Therefore, the 1995 will was properly executed.

b) The issue is whether the 1995 was properly admitted to probate assuming it was properly executed.

A will can be revoked by a testator with the intent to revoke by physically destroying the will. In addition, a will can be revoked by executing a new will that expressly revokes the prior will. In addition, revoking a will does not automatically revive any prior wills. Wills must be executed with testamentary formalities and thus a revocation will not revive prior wills. A will must be validly executed in order to be admitted to probate.

In 2000, Walt duly executed a new will which expressly revoked any previous wills made by him, including the 1995 will. Executing a new will revoking old wills is an effective method of revocation and with the execution of the 2000 will the 1995 will had been revoked. Walt then, in 2001, physically destroys his 2000 will. He had decided he did not like the terms of the 2000 will. This affectively revoked the 2000 will by physical destruction paired with an intent to revoke. However, in the absence of the execution of a new will, this act of destruction did not revive the 1995 will. The facts do not indicate that Walt took any steps to validly execute a new will, and thus the 1995 will was still invalid at his death and should not have been admitted to probate.

Therefore, Walt's 1995 will should not have been admitted to probate because it had been revoked and not affectively revived.

2. a) The issue is what part of the net estate should be distributed to Amy, assuming the 1995 will was properly admitted to probate.

A specific devise in a will allocates a specific piece of real or personal property to certain beneficiaries. This type of devise has priority and is the last type of devise to be used up in the abatement of probate property.

The will devises Walt's residence, valued at $300,000 to his daughter Amy. This is a specific devise and will not abated last to satisfy debts, expenses, and taxes. There is no conflict as to the residence and Amy will receive it.

Therefore, the residence valued at $300,000 should be distributed to Amy.

b) The issue is what part of the net estate should be distributed to Ben, assuming the 1995 will was properly admitted to probate.

A beneficiary who acts as a witness to a will may have his gift fail unless two other witnesses are present in addition to himself. However, if this beneficiary would have taken an intestate share of the decedent's estate then his gift will be saved up to his intestate share. In New York, intestate property is distributed to heirs by representation.

The estate property is divided into a share for each member, living or deceased, of the closest generation with living members. The living members take their share, and the remainder is then passed down to the next generation with living members and the process is repeated.

Ben was a witness to the 1995 will. Ben and Len were the only witnesses to the will, so Ben's gift may fail because there were not two witnesses in addition to himself. However, because Ben is Walt's son and would have been entitled to an intestate share his gift will be saved up to that intestate share. Had Walt died intestate his property would have been distributed to by representation to his heirs. His net estate after payment of debts, expenses, and taxes, is $600,000. By representation distribution would have divided this into quarters for the closest generation with living members, with Amy, Ben, and Cal, Walt's living children, each receiving a share. The remaining share, intended for Walt's deceased son Ed, would passed to the next generation. As Dave is Walt's only grandson and the only member of the next generation, Dave would receive the final quarter of the estate if distributed by intestacy. Ben would receive $150,000, as one quarter of the net estate. The gift to him of 100 share of C Corp valued at $200,000 will fail above $150,000. The additional $50,000 would pass to the residuary, or to general devisees as will be seen below.

Therefore, Ben should receive $150,000 of the C Corp shares.

c/d) The issue is what part of the net estate should be distributed to Cal and the American Red Cross, assuming the 1995 will was properly admitted to probate.

A general devise or bequest is one of property of the estate in whole. It is typically seen as a gift of a certain dollar amount not specified to be satisfied from a particular source. Residual gifts will be abated to satisfy general devises/bequests. General devises/bequests will be satisfied proportionally if there are insufficient assets in the estate to satisfy them all entirely.

Cal and the American Red Cross have each been granted a general bequest of $100,000. There is insufficient probate property to satisfy both entirely. Because of the partial failure of Ben's gift, $50,000 of C Corp stock will pass to the residuary. This will be abated to satisfy these general bequests. There is $150,000 to satisfy the general bequests because the net estate is $600,000, $300,000 of which is the residence, $200,000 was the shares, and $100,000 was additional cash. This $150,000 will be split up to satisfy Cal and Red Cross's gifts proportionally, with each receiving $75,000.

Therefore, Cal and the American Red Cross should each receive $75,000.

e) The issue is what part of the net estate should be distributed to Dave, assuming the 1995 will was properly admitted to probate. The residuary clause of a will gives any

property remaining after all specific, general, and demonstrative gifts to a particular beneficiary. It is abated first and has the lowest priority.

Per the above discussion, the entire probate estate has been given as either specific or general gifts. There is no property remaining in the residuary and therefore there is nothing to give to Dave.

Therefore, Dave should receive nothing as the residual beneficiary.

ANSWER TO QUESTION 2

1. a) Dell's motion to dismiss pre-trial motion to suppress the results of the blood test on the grounds that it was improperly authorized should have been denied. Given the fleeting nature of the evidence, namely, the alcohol content in Dell's blood, together with Dell's refusal to submit to a breath exam, the officer had a need to obtain important evidence to preserve it for trial. By appearing before a court and honestly disclosing the facts to a neutral and detached judge, the officer received proper authorization to obtain a blood sample from Dell. Lastly, Dell did not appear to raise any objection to the blood test.

b) At issue is whether Dell's statement was voluntarily (not the subject of actual coercion) issued before or after his Miranda rights were triggered. Under the Fifth Amendment to the U.S. Constitution, which has been applied to the states through the Due Process Clause of the 14th Amendment, a person must be read certain rights when they are under custodial interrogation. Custody is interpreted objectively to mean that a reasonable person under the circumstances would not feel free to leave. Here, Dell had no reason to believe that he couldn't leave due to an officer's resistance or threat of resistance (or claim of lawful authority to detain). Merely speaking with an officer while in your car does not automatically trigger custody.

Interrogation is based on a reasonable officer standard under which an officer knows or should have known that his or her questions were likely to elicit an incriminating response. Here, the officer arrived on the scene and asked a fairly basic investigatory question to find out generally what was going on. The officer had not even yet realized that someone had been hit or that the driver had been driving in excess of the speed limit or while intoxicated. Therefore, Dell was not under custodial interrogation.

The court properly denied Dell's motion to suppress his voluntary statement.

2. The prosecution has the burden of production to prove beyond a reasonable doubt all the material elements of manslaughter in the second degree. There is no evidence that

Dell's intoxication was involuntary and as such, his operation of motor vehicle at a speed above 55 mph will meet the actus reus requirement. At issue is whether the evidence is legally sufficient to show that Dell had the requisite mental state (mens rea, or culpable mind) for the offense, in this case, recklessness. Recklessness under NY law requires that the defendant be consciously aware of a substantial and unjustifiable risk of harm that is a gross deviation from that of a reasonable person. A reasonable person would not choose to operate a motor vehicle while intoxicated because it would substantially and unjustifiably present a likely risk of harm to other drivers or pedestrians.

Dell's collision was both the actual (but-for) cause of the death of the pedestrian and the proximate (legal) cause where his car hit the pedestrian walking along the side of the road without any intervening, superseding cause.

In addition to the results of the requested blood test showing an excessive blood-alcohol content (BAC), the officer could present testimony based on his personal observation that Dell's eyes were glassy, his speech was affected and his breath smelled of alcohol, all circumstantial evidence that Dell had been drinking. Without evidence that Dell had been involuntarily intoxicated (i.e., by a third party who had slipped something into Dell's drink), a reasonable jury could infer that Dell had consciously chosen to operate a motor vehicle while intoxicated and was reasonably aware of, even if not intending, the likely risks of his behavior.

The expert's testimony that the car was being operated at almost double the posted speed limit on a winding, dark country road would be admissible as helpful to the triers of fact and would further evidence that Dell was acting with a reckless state of mind. Under NY law, the minority Frye test still applies for the admission of any expert testimony, which bases admissibility upon whether the methods employed and relied upon by the expert in giving her testimony are "generally accepted by the relevant expert community." No evidence here indicates that measurements of skid marks and other general observations are not accepted by the relevant community (criminal investigators, most likely), and as such, the expert's testimony will come in and demonstrate further evidence of recklessness.

It is worth noting briefly that under NY law, the prosecutor could have alternatively brought the charge of vehicular manslaughter in the second degree, based on the death caused by Dell's operation of the vehicle while intoxicated.

Therefore, evidence presented at trial is legally sufficient to support the conviction of manslaughter in the second degree.

3. At issue is whether a reasonable jury could have found that Dell was liable for a lesser-included offense based on the fact that he would have possessed only the criminally-negligent mens rea as opposed to the more culpable reckless mens rea. The

court was likely not correct in denying Dell's request to charge the lesser-included offense of criminally negligent homicide (CNH). The only difference between the two offenses is the requisite mental state that must be proven beyond a reasonable doubt. In this instance, criminal negligence would mean that, based on a gross deviation from the conduct of a reasonable person under the circumstances, the defendant failed to be aware of a substantial and unjustifiable risk of harm to others. Based on these facts, a reasonable jury could have found that Dell was so drunk that he did not even consciously understand the nature and seriousness of his conduct but could have been found to have a negligent state of mind.

ANSWER TO QUESTION 2

1. a) The issue is whether the court was correct in determining in pre-trial that it should suppress the results of the blood test.

Under New York law, which largely follows the Federal Rules of Evidence, evidence includes physical evidence, which may include the markings on a defendant's body (e.g., a scar on his face) or the contents of that person's blood. A judge may determine the relevancy of evidence before it is submitted to trial. The submission of physical evidence does not require that the defendant be read Miranda warnings or even that a counsel be made present. Such physical evidence may include the defendant's fingerprints or handwriting.

Under these facts, the defendant produced physical evidence under the request of a judge, because after Officer arrested Dell and Dell appeared before the judge, the judge ordered a chemical test of Dell's blood. A judge may made a reasonable determination in asking for the defendant to supply physical evidence to the court, because Dell was slurring his speech, had a strong odor of alcohol, and had glassy eyes when the Officer arrived at the accident and the judge could have reasonably ascertained, either from a discussion with the Officer or by simply observing Dell himself, that a blood test would be reasonable. This physical evidence would not require that the defendant have counsel present, because the blood test would be considered physical evidence.

In conclusion, the court was not correct in suppressing Dell's blood test which had been ordered by the judge.

b) The issue is whether the court was correct in determining in pre-trial that it should not suppress the defendant's statement.

Under the US Supreme Court's decision in Miranda, a party who is in custody of a police officer or other governmental official is required to be read warnings that make the

party aware that he has the right to remain silent; that anything he says can be used against him a court of law; and that he has the right to counsel. Under New York law, a police officer may ask questions to a party under certain circumstances that would not necessarily require an arrest; these questions are rated based on levels and include (1) an inquiry (2) a stop and frisk, which allows the police officer to search that party for weapons or other instruments that may endanger the police officer. The police officer may also ask questions during an emergency situation in which the police officer arrives on the scene and must know information about an accident such that the officer may best serve the safety of those involved in the accident.

Under these facts, the police officer did not need to read the Miranda warnings to the defendant at the time of the accident, because Officer was responding to a deadly car accident and discovered Dell's car in a field. Determining whether or not Dell's car had hit a person or anything would be necessary for Officer to know whether or not Dan should be immediately taken from the vehicle, which could explode, depending on the damage. In addition, based on the speed of the accident, the danger to both the car and to Dell would have likely been elevated because an accident at more than 55 miles per hour would likely have caused significant damage to the car and also to the field, making Officer aware that knowing more about the accident could prevent further harm.

In conclusion, the court was correct in determining in pre-trial that it should not suppress the Dell's statement about hitting "something."

2. The issue is whether the evidence presented was legally sufficient for second degree manslaughter.

Under New York law, to commit a crime, a party must have the requisite mens rea (state of mind) and actus reus (the specific act included in the statute). Each element of a crime must be proven beyond a reasonable doubt. With a crime, a party commits an offense against the state, which is in contrast to a tort, which is an offense against a specific person or her property. The criminal mindset required by the statute may include (1) recklessness, which involves the defendant's appreciation of the danger involved in her act but that the defendant goes forward with the unreasonably dangerous conduct; (2) intentional, which is the defendant's weighed and measured decision to commit successfully the act; and (3) maliciously, which is the defendant's desire to afflict bodily harm on the plaintiff. Negligence is the absence of due care, according to the circumstances. Specifically, manslaughter in the second degree is defined as recklessly causing the death of another person. In determining the recklessness of an automobile driver, a court may examine the speed at which the car was traveling, both relative to the speed limit and to the conditions of the road (e.g., rain, snow, ice). A possible but rarely granted defense for mens rea is that for an involuntary intoxication defense, which would require that the defendant have been given alcohol or drugs without his knowledge or

consent. This intoxication must have been sufficient enough to cloud the defendant's judgment to the point where she could not determine her own actions and choices.

Under these facts, the defendant was charged with having a mindset of recklessness, because when Dell struck and killed the pedestrian, the Officer observed that Dell had likely been drinking because of the strong odor of alcohol that Dell had and because Dell could not stand without onto the car as he walked to the Officer. This recklessness occurred when the defendant entered the vehicle and started to drive, because Dell made the conscious decision to drive his car down an unlighted winding country road and night despite his drunkenness. Furthermore, the recklessness could be ascertained by on the speed at which the defendant's car was traveling, because an expert testified that the car was travelling over 55 miles per hour when it left the road and hit the pedestrian. Assuming that even the blood test would not be submitted into the trial, the defendant would be deemed to have been reckless by the court, because Dell's actions of driving while intoxicated on a dark, winding road would be considered reckless. The defendant would be unlikely to show an involuntary intoxication defense, because Dell has yet to demonstrate that someone else provided him with intoxicating drugs or alcohol or, most importantly, that he involuntarily took those drugs or alcohol and that it prevented him from realizing the danger of driving while intoxicated, thus negating the required mens rea.

In conclusion, the court was evidence submitted at trial was sufficient to support the conviction of manslaughter in the second degree.

3. The issue is whether the court was correct in denying defendant's request for the lesser charge of criminally negligent homicide.

As stated above, negligence is the absence of due care, according to the circumstances. To establish a prima facie case of negligence, in New York, a plaintiff must demonstrate that: (1) the defendant owed a cognizable duty to the plaintiff as one who was a foreseeable plaintiff; (2) the defendant breached his duty to the plaintiff; (3) the defendant's breach was the actual and proximate cause of the plaintiff's damage; and that (4) the plaintiff suffered legally cognizable injury or damages. The law of negligence provides a remedy for unintended injuries caused to persons or property due to conduct judged to be unreasonably dangerous under the circumstances. Specifically, the criminally negligent homicide is defined a negligently causing the death of another person. The difference between recklessness and negligence is that a party is deemed reckless when he perceives the danger as it exists and goes forward with his actions, despite knowing that his conduct could cause damages.

Under these facts, the defendant drove while intoxicated and thus would be presumed to have understood the risks of driving while intoxicated, because Dell was observed to have a strong alcohol odor and yet decided to drive down the dark, winding road. This act of getting behind the wheel while intoxicated was sufficient to be reckless

and not negligent, because Dell did not show an absence of due care but rather an understanding of the substantial, and in this case fatal, result of driving while intoxicated.

In conclusion, the court was correct in denying Dell's request for the lesser charge of criminally negligent homicide.

ANSWER TO QUESTION 3

1. The issue is whether Developer is likely to succeed on its claim for lost profits.

Consequential damages are damages that flow from a breach of contract and that were foreseeable to the parties at the time of contracting or that the parties were aware of at the time of contracting. Consequential damages can include lost profits if such lost profits were foreseeable or known to the parties and if they are able to be calculated with reasonable certainty. If a contract does not contain a time is of the essence clause, the court will not imply one, and a minor failure to complete performance by a particular date will not be deemed a breach of contract. If a party contracts to design a building, that party can be liable for breach of contract if the design is defective and causes damages to the other party, as a defective design does not constitute adequate performance.

Here, PC and Developer entered into a contract for PC to design Developer's building. The facts state that PC's design was defective because it led to the growth of extensive mold in the building walls. Thus, PC is liable to Developer for breach of contract based on inadequate performance. PC would ordinarily be liable for Developer's expectation damages, which aim to place a party in the position he would have been in had the contract been fully performed, including the cost of the delay in completing the building to deal with the mold. However, Developer also claims that PC owes it consequential damages in the amount of $250,000's worth of lost profits from rental income it would have received had the building been timely completed. These are not proper consequential damages for three reasons.

First, the lost profits were not known to the parties at the time of contracting. PC was not aware of Developer's plans for rental of the building, nor was it aware of the timeline for completing the building, which was not part of its contract with Developer. The court will not imply that time was of the essence if the contract does not have such a clause. Second, the lost profits were not foreseeable to the parties at the time of contracting. While PC was aware the building was an office building, it had no knowledge that Developer planned to immediately being renting the units and no knowledge of a goal completion date. Third, the lost profits are not calculable with reasonable certainty. Developer did not have any tenants under lease and its claim that

tenants would have rented the units and would have paid comparable rent to other properties on the market and/or owned by Developer is speculation.

Thus, Developer is unlikely to succeed on its claim for lost profits.

2. The issue is whether Len, Jane, and Charley can be held personally liable for PC's negligence.

A professional corporation is a corporation in which all of the shareholders are members of an approved, licensed profession, which includes architects. In a validly formed professional corporation, the shareholders of the corporation are not personally liable for the corporation's liabilities, although they remain personally liable for their own negligence.

Here, Len, Jane, and Charley are shareholders of a duly formed professional corporation and all three are licensed architects. They are therefore not personally liable for the negligence of the corporation. Developer has sued all three people in their individual capacities for PC's alleged negligence in producing a defective building design. Len, however, was the only PC shareholder involved in creating the design of the building. Len can still be held personally responsible for his own negligence if Developer can show that Len breached a duty of care to Len that proximately and actually caused Developer's damages. Len, as an architect providing a design of a building to a client, had a duty to exercise the care of another member of his profession in good standing in a similar community. Because Len was responsible for creating the design, the design was defective, and the defective design led to the need to delay the construction and repair the mold damage, Len's actions proximately and actually caused Developer property damage. Thus, Len can likely be held personally liable for his own negligence with respect to Developer.

3. The issue is what factors Attorney should consider in analyzing the enforceability of the non-competition agreement and what conclusion Attorney should reach.

An agreement not to compete is invalid as against public policy under New York law unless it is reasonable in duration and geographic scope, necessary to protect the interests of the employer, not harmful to the employee, and not harmful to the public interest. These are the factors that Attorney should consider in analyzing the enforceability of the non-competition agreement.

a) Duration and scope

Here, the non-compete provision forbids Sam from working for a competitor (defined as any architectural firm or other business engaged in the design or construction of "green" buildings) for one year anywhere in New York State. The length of time

appears to be reasonable, particularly since Sam was hired as a full-time employee and has been working for PC since 2008. However, the geographic scope is likely unreasonable. PC is based in New York City and its clientele is concentrated in New York City. Sam would like to work for a competitor in Syracuse, which is in New York State but 250 miles away from New York City. The Syracuse clientele is also only in Syracuse. The geographic scope therefore does not appear to have a reasonable basis.

b) Interests of the employer

The provision appears necessary to protect the employer on its face, since PC is a "green" architecture firm and it is likely that Sam would acquire confidential or sensitive information from PC that he could use on behalf of a competing "green" architecture firm. However, it is not necessary to protect PC's interests as-applied since, first, the Syracuse firm does appear to compete directly with PC's clientele and Sam's employment with the Syracuse firm would therefore be unlikely to impact PC's business. Second, although PC provided Sam with confidential design techniques and pricing methodologies, Sam maintains that his new sale position would not require him to disclose any of PC's confidential designs and that is pricing methodologies are publicly known. Additionally, the business contacts that he made while at PC are generally known in the industry and readily accessible through trade publications and other public sources. Thus, his employment with Central Architecture is unlikely to harm PC and the non-compete is unnecessary to protect its interests.

c) Harm to employee

Sam will likely be harmed by the enforcement of this provision because he has spent several years honing his skills in the "green" architectural industry and is prevented from securing employment in this area for a full year.

d) Public interest

The provision would likely harm the public interest since it unreasonably restricts a skilled individual from employing his services anywhere else in the state. Thus, the Attorney should conclude that the non-compete is not enforceable.

ANSWER TO QUESTION 3

1. The issue is whether Developer is likely to succeed in its claim for lost profits due to lost rental income where professional service corporation (PC) was unaware of Developer's anticipated due date and its plans for rental of the building.

To recover in breach of contract, the non-breaching party must show that there was a valid contract and that the other party failed to perform. The typical measure of damages is for expectation damages, which put the nonbreaching party in the position he or she would have been in had the contract been performed as promised. Expectation damages must be established with reasonable certainty, unavoidable (duty to mitigate) and foreseeable. Expectation damages include consequential damages that are foreseeable and that were known to the breaching party at the time of contract.

Here, Developer is suing PC for breach of contract due to the delayed building while the model was remediated and certain design changes were made. Developer claims that, due to the delay, it has lost rental income in the amount of $250K. This figure is based on the current rental market of all the spaces it could have rented. This rental income would constitute consequential damages to the Developer if it was successful in its breach of contract action against PC. However, PC was not aware of Developer's anticipated date for completion of the building or its plans to rent at the time of contract. Developer also did not have any tenants under its lease, which means that such consequential damages for the full rental value of all units would be speculative and not necessarily foreseeable, especially given the lack of clear indication for date of completion.

Therefore, Developer is unlikely to succeed in its claim for lost profits.

2. The issue is whether the members of a professional corporation (PC) can be held personally liable for the PC's negligence.

Per the New York BCL, a professional corporation is one whose members are members of a certain profession and that is established to render professional services. Those associated with a professional corporation will have limited liability for the corporation's actions. In a professional corporation, members can be held personally liable only for their own tortious conduct. In other words, one partner's tortious conduct will not be imputed to the other members.

Here, Len, Jane and Charley are all members of a PC. They are all architects, and the PC was formed to render professional services. Each member can thus be held personally liable for his own tortious behavior. The facts state that Len was the only PC shareholder involved in creating the design of the building, which is the basis of the alleged negligence action.

Therefore, only Len can be held personally liable for PC's negligence.

3. The issue is what factors Attorney should consider in analyzing the enforceability of Sam's non-compete agreement with PC and what conclusion he should reach.

A non-compete agreement will be enforced in New York if: (1) it is reasonable in geographic scope and duration; (2) not overly burdensome on the employee; (3) necessary to protect an employer's legitimate business interests; and (4) not harmful to the public.

The lawyer should consider the following in analyzing Sam's situation vis-a-vis the criteria for an enforceable non-compete agreement:

First, PC's office is located in New York City, whereas Central Architectural's (CA) office is located in Syracuse with a client base in only in the Syracuse areas and PC's customers are largely in NYC. Syracuse is more than 250 miles away. This tends to suggest that the agreement is not reasonable in geographic scope, especially when the bounds of their respective businesses do not really overlap. The time of the one year restriction is, however, reasonable.

Second, both design "green" buildings. However, in his new position he would not be required to disclose any of PC's confidential designs and that its pricing methodologies are publically known. Further, all potential business contacts are generally known in the industry and readily accessible. These facts strongly suggest that Sam's taking a similar position with CA would not be harmful to PC, as their customer base does not overlap and their contacts and methodologies are commonly known and do no requires Sam's disclosure of confidential trade information he acquired while at PC.

Third, there is no indication that this non-compete agreement is harmful to the public. However, one could argue that fostering green business is in the public's interest and a restriction on that could be harmful.

Fourth, based on the unreasonable geographic scope of the agreement and the lack of harm to CA if Sam were to take the new position with PC, Sam has a good argument that the agreement is overly burdensome on him. He has over 20 years of experience and has created a lot of goodwill in the "green" market and not being able to move firms or locations would be a burden on his mature career.

In conclusion, lawyer should advise Sam that he has a strong argument that the non-compete agreement is invalid.

ANSWER TO QUESTION 4

1. The issue is, whether the court correctly denied Phil's motion for summary judgment on the issue of Donna's negligence.

A motion for summary judgment may be granted, if there is no genuine issue as to material facts and a cause of action will be successful based on these facts as a matter of law. In deciding on a motion for summary judgment the court reviews the pleadings and the evidence, mostly affidavits but also depositions, in the most favorable light for the non-moving party. A person is liable for negligence, if the defendant (i) had a duty to act in a certain way, (ii) breached this duty by violating the standard of care of a reasonably prudent person, (iii) the person's acts were the actual and proximate cause of the damages, (iv) and the plaintiff proves damages. A person can be negligent, if this person violated a law that forbids the defendant's behavior, that seeks to prevent the class of injury the plaintiff suffered, and if the plaintiff actually suffered such injury. Such negligence is also called negligence per se. The violation of a rule of traffic may constitute such a breach of a duty.

Here, Donna crashed her car into Phil's car, while he was stopped at a red light. Both Phil and Donna testify that traffic was moving slowly, whereas Donna specifies that traffic was moving with around 10 to 15 miles an hour. Both parties state that Donna's car was driving behind Phil's car until the accident happened. Donna explains that she crashed into Phil's car because his car came to a 'sudden and abrupt stop.' She applied the brakes but was not able to stop the collision with Phil's car. Phil seems to agree to these facts. Under the traffic rules in NY, Donna has a duty to stop her car without crashing into another person's car, also if it is abruptly necessary. There is no such defense as a sudden stop that would justify her crash into Phil's car. She breached this duty, which seeks to prevent accidents and protect traffic participants from unforeseen crashes. The judge could rely for these undisputed facts on evidence of a deposition of Phil and a deposition of Donna. Since her breach of duty also is within actual and proximate cause, she would be liable for the damages caused to Phil as a matter law.

Thus, the court improperly denied Phil's motion for summary judgment for Donna acting negligent as a matter of law, because undisputed facts would allow this legal conclusion.

2. The issue is, whether the court correctly denied Phil's motion for summary judgment on the issue of whether Phil suffered a serious injury.

A motion for summary judgment may be granted, if there is no genuine issue as to Material facts and a cause of action will be successful based on these facts as a matter of law. In deciding on a motion for summary judgment the court reviews the pleadings and the evidence, mostly affidavits but also depositions, in the most favorable light for the non-moving party. Under New York law a plaintiff must first seek damages from his own no-fault insurance, if he is seeking damages for an accident that occurred during the operation of his car. No-fault insurance is compulsory for all automobile owners in New York State and is supposed to prevent unnecessary litigation between traffic participants. A person can claim up to $50,000 for damages occurred from an accident from his no-

fault insurance. In order to overcome this limit, and in order to be able to sue another person involved in the traffic accident, the person needs to allege that he suffered a serious injury. A serious injury may be a physical dismemberment, the loss of a limb, or any injury that prevents the plaintiff from going to work in 90 out of 180 days after the accident.

In our case, Phil had an accident with Donna while operating his automobile and therefore first needs to seek damages from his insurance company, CarCo. Although he is claiming $500,000 in damages, which is well above the sum that he would get from his insurer, he did not suffer a serious injury. He suffered a back pain, which could not be diagnosed in hospital after being x-rayed and other diagnostic tests. Moreover, immediately after the accident, he was confined to his bed for only one week, confined to his home for two weeks, and he missed two months from work. His absence from work is below the 90 days required, and as such he did not suffer a serious injury as a matter of law.

Thus, the court correctly denied Phil's motion for summary judgment on the issue of whether he suffered a serious injury, because he could go back to work earlier than required under the law, and he is therefore entitled to seek damages only from his insurance.

3. The issue is, which state's law regarding the time for raising the defense of lack of medical necessity the court should apply in Supply Inc.'s action against CarCo. New York conflict of laws rules follow a center of gravity analysis in insurance claims. In such an analysis the court assess where the insurance has been issued, where the insured party has her residence, where the insured incident occurred, where the claiming party is domiciled.

Here, Phil is domiciled in State X, CarCo, the insurance company that is the defendant in the underlying suit, is a State X insurance company, but also does business in New York. Phil purchased the insurance in State X and has is car garaged and registered in State X. The accident causing the damages to Phil occurred in New York and Phil purchased medical devices from Supply Inc., a New York corporation, and assigned his right to be reimbursed to Supply Inc. New York has a 30 day period for the receipt of claim, whereas State X has no such period and allows to make claims also later. Hence, there is no threat that Supply Inc. chose New York as a forum, because it wanted to choose the more preferable rules, i.e. forum shopping.

Thus, given that the center of gravity for this action is in New York, the court should apply New York law, without fearing that this is an incentive for forum shopping for other plaintiffs in the future.

ANSWER TO QUESTION 4

1. The issue is whether the court correctly denied Phil's Motion for Summary Judgment ("MSJ") on the issue of Donna's negligence.

A motion for summary judgment should be granted when there is no genuine issue of material fact in the case. In determining whether to grant a motion for summary judgment, the judge may consider all pleadings, affidavits, and exhibits and must view the facts in the light most favorable to the non-moving party. Negligence occurs when there is a duty of care that is breached and causes damages. In order to grant a motion for summary judgment finding a defendant liable for negligence, the judge must find that there is no genuine issue of material fact as to whether the defendant was negligent. Moreover, in NY, a car accident that involves one defendant that is hit from behind while another is completely stopped invokes a rebuttable presumption that the party was negligent.

Here, Phil is moving for summary judgment based on the Donna's negligence as a matter of law. Phil has testified that, at the time of the accident, Phil was moving slowly in bumper to bumper traffic. He said that it was stopped when Donna's car hit him from behind. Donna, on the other hand, testified that Phil stopped suddenly and she was unable to avoid hitting him even though she applied the brakes. She testified that her speed was approximately 10-15 miles at the time of the accident. A duty of is owed to all foreseeable victims. Thus, Donna owed a duty care to Phil. Her car hitting Phil's was the approximate cause of Phil's injuries. Further, Phil testified that he suffered damages in the form of pain and suffering. Thus, the only remaining element at issue is whether Donna breached her duty of care by not applying the brakes quickly enough. Donna will argue that her version of the story where Phil stopped abruptly versus his where he was traveling regularly and at a stop is a triable issue of material fact. Although she is correct, she has not presented enough evidence to rebut the presumption that she was negligent when she hit Phil from behind and his vehicle was at a stop. Thus, there is no material issue left in dispute and the court should have granted the motion for summary judgment.

Thus, the court incorrectly denied Phil's Motion for Summary Judgment on the allegation of negligence.

2. The issue is whether the court correctly denied Phil's Motion for Summary Judgment on the issue of whether Phil suffered a serious injury.

As mentioned above, a motion for summary judgment should be granted when there is no genuine or triable issue of material fact. In determining whether to grant a MSJ, the judge must consider all facts in the light most advantageous to the nonmoving party. Under New York no-fault insurance law, a serious injury is one that consists of

physical damage to the human body. It must be more than a mere pain that heals quickly. The defendant must prove more than mere economic damages.

Here, Phil moved for summary judgment on the issue of whether he suffered a serious injury under NY no-fault insurance law. Phil is alleging $500,000 in damages for pain and suffering. He cites back pain, bed confinement, home confinement, and two months of missed work (lost wages). Phil was x-rayed and diagnostic tests were conducted, but none of the tests were positive for injuries. Phil went to his regular doctor who also did not make a specific diagnosis but merely recommended a heat lamp and a massager. No bones were broken and no surgery was required. Phil did not have to spend the night in the hospital and was discharged shortly after arrival. His alleged damage is $500,000 in pain and suffering. He does not even allege lost wages damages. This back pain, although likely uncomfortable, does not rise to the level of a serious injury under NY no-fault insurance law. Thus, he will need to prove more to succeed on the merits of this claim and the issue should proceed to trial.

Thus, the court correctly denied Phil's Motion for Summary Judgment on the issue of whether he suffered a serious injury under NY law.

3. The issue is what state law the court, sitting in NY state court, should apply in determining the appropriate time period under which a lack of medical necessity defense must be raised.

When determining what law to apply, the forum state applies its own choice-of-law rules. In contracts cases, NY choice of law rules provides that the court will apply the most-significant contact rule to determine which state has the most significant interest in the dispute at hand. In NY torts law, the court will apply the governmental interest approach and examine which state has the more important interest in litigating the claim. For contracts with insurance carriers, the court will examine a variety of factors such as: the state of the insurer, the domicile of the insured, where the insured purchased the insurance, the law of the insurance contract, and how heavily the insurer operates there. If it is unclear, deference is given to the forum state's laws. As to the issue of assignment, a party may assign his ability to collect to another party to whom he owes a debt, and that new party will then step into the shoes of the original party.

Here, the right to collect on the claim was validly assigned by Phil to Supply Co. Thus, Supply Co will step into the shoes of Phil when collecting the insurance proceeds from CarCo. Here, insurer, CarCo, is a State X insurance company that does business in NY. Phil purchased the insurance in State X. Phil registered his car in State X and garaged it in State X. However, the insurance policy does maintain the no-fault coverage required by NY law when the vehicle is in NY. Thus, it has provisions relating to NY law. Similarly, there is no provision in the insurance policy regarding what law to apply or covering the issue at hand. The State X and NY laws are in actual conflict here, in that

NY requires the defense to be raised in 30 days and State X allows it to be raised at any time. Supply Co will suffer a detriment if the shorter period in NY is applied and their defense of medical necessity is barred. Because the policy was purchased in state X, from a state X company, and the car resides in state X, there are more contacts with State X for this claim and thus the law of State X should apply.

Thus, the court should apply the law of State X because it has the most significant contacts with the case.

ANSWER TO QUESTION 5

1. The issue is whether the court correctly granted specific performance when the seller cannot comply with a warranty but the buyer affirmatively waives that requirement.

In New York, parties may include warranties and conditions in private contracts, including contracts for the sale of land. Where a contract provides a specific obligation on one party for the protection of the other party (such as the obligation to provide marketable title or, for example, the contingency on a buyer obtaining a mortgage at a specified rate) the party that is protected by the requirement may choose to waive that requirement. If he or she does so, the other party may not rely on the failure of that condition or requirement in order to avoid the contract.

Courts have a number of available remedies in a breach of contract action, including the possibility of specific performance. Specific performance is an equitable remedy not appropriate for all cases (it generally will not be granted in personal service contracts) but is often available if the subject of the contract is unique. Because each plot of real property is deemed unique, specific performance of a contract is presumptively available (unless, for example, the property has since been conveyed to a bona fide purchaser). Here, the contractual warranty obligating Ann to provide marketable title was in place for the protection of Beth. (There is no indication that the requirement of marketable title was, in this case, an express condition that must be strictly complied with.) Even though both parties acknowledged that Ann could not provide marketable title, Beth was entitled to waive that provision of the contract. Ann could not then rely on it in order to avoid the contract (and sell the property to a higher-paying buyer). Because Beth was entitled to proceed with the contract despite the absence of marketable title, specific performance of the contract was an appropriate remedy, as real property lots are unique.

Accordingly, the ruling granting specific performance was likely correct.

2. The issue is In New York; injunctions to remove encroachments are permitted, but not required. In deciding whether to issue an injunction, a court is to balance the equities, including considering the magnitude and extent of the harm to each party if the injunction is granted or denied, the adequacy of damages as a remedy, and whether the condition arose as a result of good faith or inequitable conduct. Where an encroachment was made in good faith and is de minimis, New York courts will rarely require that the encroachment be removed. However, where the encroachment was done deliberately, courts often will require that the encroachment be abated.

Here, the encroachment is relatively minor- along 15 feet of the hundred-foot retaining wall, there is an encroachment that varies but is up to two feet deep. Depending on the size of Ned's lot, this is arguably a de minimis encroachment. In any event, it does not appear that it imposes a great harm on Ned (as Ned did not even notice the issue for several years). By contrast, Beth would suffer significant hardship if she has to remove the wall- it will be very expensive to move, and it is not clear that an alternate placement would be as effective at protecting the grade differential and preventing erosion (the facts suggest that moving the wall would place Beth's property at risk).

As to the second factor, given the relatively limited nature of the encroachment, it appears that monetary damages would likely fully compensate Ned for any loss. He has not shown any impairment in the value of his land (such as increased runoff or other issues) beyond the loss of up to two feet along a 15-foot stretch of land. Damages will in effect be a forced sale of this portion of Ned's property, and are likely to adequately compensate him. In addition, the facts state that Ann placed the retaining wall along what she "reasonably believed to be the line" dividing hers and Ned's property.

Therefore, the placement of the encroachment appears to have been done in good faith, albeit perhaps negligently. Although Beth took with notice of the encroachment, this does not undermine the fact that the wall was placed where it was in good faith.

Accordingly, in light of the equities here, the court was correct to deny Ned's request for an injunction and to award him damages instead.

3. a) The issue is whether the warranty of habitability is implied where a contract is silent, and whether the warranty is enforceable absent fault of the landlord.

In New York, the warranty of habitability is implied in every residential lease, and warrants that the premises are safe and fit for human habitation (and generally that the premises comply with the appropriate health and safety codes). To make out a breach of the implied warranty of habitability, a tenant must not have caused the condition herself. In addition, she must give the landlord notice of the problem and a reasonable period of time to make repairs or any necessary corrections. If those corrections are not made, and the tenant can show that her continued habitation in the premises would be unsafe or unhealthy, she may take any of a number of steps, including: making repairs herself and

withholding rent to compensate for the expense or begin paying rent into court and bring an action against her landlord for an abatement of rent and an order to repair the premises. (Unlike a constructive eviction claim, the tenant need not show that she has vacated the premises). The landlord need not have caused the unsafe condition; to be liable, the landlord simply must have notice and fail to take appropriate corrective measures.

Here, the warranty need not have been explicit in the lease for it to be binding on Beth. Tom can show that the damage to the apartment was not his fault (it was caused by the failure of a drain pump in a rainstorm due to power failure). In addition, it appears that Tom timely notified Beth of the issue, as she replaced the paneling and carpeting. However, the problem has persisted in the form of mold. It is not clear that Tom gave Beth notice of the mold problem before commencing an action against her. However, if Tom can show that Beth was on notice of the problem either due to their earlier communications or due to the severity or nature of the water damage, he can satisfy this element.

Tom likely can show that continued habitation in the home would be unsafe. Dangerous concentrations of mold spores are present in the basement. Moreover, the basement is part of the rental space allocated to Tom (and indeed, part of why he took the apartment). Accordingly, Tom can show that conditions in the apartment are unsafe or unhealthy.

Accordingly, key issue is whether Tom adequately gave Beth notice of the dangerous mold condition and gave her an adequate time to make repairs. If he can show that Beth was on notice of the problem, his claim will likely succeed. The fact that there is no warranty in the lease, or that the mold is not Beth's fault, will not be adequate defenses for Beth.

b) The issue is if Tom succeeds, what remedies will he obtain?

In New York, as noted above, a number of options are available to tenants who demonstrate that their landlord committed a breach of the implied warranty of habitability, including an abatement of rent for the portion of the premises that are unsafe or unusable, and an order to remedy the defects. Here, Tom seeks a refund of his rent for the period since the flood, and an abatement of his rent until the mold is remediated. It is not clear that the mold problem now or at any point has affected the entire premises, or made any portion of the home other than the building unfit or unsafe for habitation. Accordingly, for the period of time since the flood, Tom will likely receive a partial refund in rent (again, assuming that he has adequately kept Beth on notice of the problems). He is not likely to receive a full refund of his rent. He may, however, receive an abatement of the rent going forward until such time as the premises are restored.

ANSWER TO QUESTION 5

1. Was the court's ruling granting specific performance to Beth correct?

Yes, the court's ruling for specific performance for Beth was correct. Specific performance is an equitable remedy that is appropriate when monetary damages will not fully remedy a party's complaint. Here, the object of the contract is a piece of real property. Real property is always considered unique and specific performance is an appropriate remedy unless the property has since been sold to a bona fide purchaser without notice and for value during the interim. This is not the case here so specific performance could be granted by the court.

Ann will try to argue that the condition of delivering marketable title should be a determining factor of whether specific performance should be granted. However, the requirement to deliver marketable title is a condition that benefits the purchaser, not the seller. The purchaser, here Ann, would be excused from closing on the purchase of Blackacre if Beth was not able to deliver marketable title on the closing date, or in a reasonable period thereafter assuming that time is not of the essence in the purchase agreement. When a condition benefits one party, that party can waive the condition and continue to close or proceed on a contract. Here, Ann has expressly stated that she is willing to close over Beth's failure to deliver marketable title. Ann cannot try to invoke a condition that does not benefit her in order to prevent the closing. Thus, the court was correct in granting specific performance to Ann so that she could acquire the property and get the benefit of the contractual bargain that she made.

2. Was the court's ruling denying the injunction to Ned correct?

Yes, the decision to grant or deny the injunction was within the court's discretion where there was evidence from both sides on the issue and the court could weigh the evidence in its decision. An injunction is another equitable remedy that NY courts have the ability to grant when monetary damages are not an adequate remedy. An injunction can require another party to either refrain from doing something or to take some action. Here, Ned wants Beth to remove the portion of the retaining wall that encroaches on his property. The court held a trial where both sides presented evidence of the issue. It is clear that the wall encroached on Ned's property but Ann presented evidence that the cost of removing the wall was extensive and that removal of the wall would likely place her property at risk. The court properly weighed the arguments and decided that the risks and costs of removing the wall outweighed the diminution in value to Ned's property and thus did not grant an injunction. The fact that only 15 feet of the 100 foot wall protruded onto Ned's property and at depths of encroachment of more than 2 feet should have been considered by the court. The maximum amount of encroachment would have been 30 square feet and the court could very likely and reasonably have determined that this relatively small amount of encroachment did not warrant the granting of an injunction

due to the negatives that would result if the retaining wall was removed. The court's ability to weigh these arguments was appropriate where NY law permits, but does not require, the issuance of an injunction to remove an encroachment. The court will be able to consider the evidence and make its decision absent manifest error, which is not present on these facts.

3. a) Is Tom likely to succeed in his action for breach of the warranty of habitability?

Yes, Tom is likely to succeed in his action for breach of the warranty of habitability. The warranty of habitability is implied in every residential lease in NY. Despite Beth's argument that the lease contract should control and that there is no such warranty included in the lease, the warranty will be implied. The warranty of habitability cannot be waived by a landlord and it requires that the leased premises is safe for human habitation and that there are no conditions present therein that would make the premises unsafe or unhealthy for the residents of the premises. It does not matter whether the conditions in the premises are caused by the landlord or are the result of outside natural or artificial influences. Therefore, Beth's attempt to disclaim liability for the condition of the home because she did not cause the flood will not be successful.

Here, a combination of factors - a heavy rainstorm and a faulty drain pump, caused the basement to flood. Tom was using the basement for his pool table and for entertainment. It is not clear that Beth was aware of how Tom used this portion of the rental premises. However, the basement was clearly finished as it had paneling and carpet so it was part of the living space and is subject to the warranty of habitability.

Once a condition is identified and the landlord has been notified, the landlord has the responsibility of responding promptly to correct the condition so that the residence is habitable again. During that period of time, the tenant would be entitled to an abatement of the rent. Here, Beth appears to have responded promptly as "several weeks" does not seem to be an excessive period of time to complete the renovations.

However, once the renovations were complete, mold began to form and now dangerous concentrations of mold spores have been identified in the premises. This can affect the health and safety of the residents and thus is a breach of the warranty of habitability. The mold problem is continuing so the warranty of habitability is continuing to be breached.

3. b) Assuming Tom succeeds, what relief is he likely to get?

During the period of time that he was not able to use the basement, he will be able to get an abatement of the rent, and he may also be able to terminate his lease contract without further liability. This should be based on the portion of the premises that is uninhabitable. However, Tom may also be able to terminate his lease without further

obligation if the entire premises has become uninhabitable. Here, the facts state that dangerous concentrations of mold spores have been identified in the premises. If these dangerous concentrations are only in the basement, he could continue to live there with an abatement of the rent based on the portion he is not able to use. However, if the main portion of the premises also has the dangerous concentrations of the mold, he would be entitled to move out of the premises and be released from his lease contract. He would need to actually move out of the premises to claim this option.

ANSWER TO MPT

February 24, 2015

Robert Fields, Investigator
U.S. Department of Health and Human Services
Office of Civil Rights
1717 Federal Way
Lafayette, Franklin 33065

Re: Response to Audit for Compliance with HIPAA Regulations

Dear Mr. Fields,

In response to your audit on Community General Hospital ("Community General") for compliance with HIPAA regulations, we ask you to consider the following information and, in light of that information, decline pursuing an enforcement action and seeking appropriate civil penalties. Community General has worked to comply with HIPAA regulations since they were adopted, has hired and sought advice from an attorney to ensure compliance with the regulations, and has maintained records related to disclosure of information in the Medical Records Department.

Patient #1

Patient #1's protected health information regarding a gunshot wound was reported to police, but the release of information was proper under HIPAA. Under 45 C.F.R. §164.512(f)(1)(i) a covered entity may disclose health information as required by law. Under Franklin Statutes § 607.29, the person treating the gunshot wound victim must report the incident by the fastest possible means, and a written report containing the name and address of the victim must be sent to the chief of police in the county in which treatment was rendered.

Patient #1’s consent to disclosure was not necessary for this disclosure. While 45 C.F.R. § 164.512(f)(3) requires the consent of the victim of the crime, it states an exception for the disclosure of crimes required by paragraph (f)(1). Patient #1's injuries fall within the exception to paragraph (f)(3) as a disclosure required by Franklin Statutes § 607.29. The patient's vehement objections to Community General's disclosure does not require that Community General withhold the information from police as his consent was not necessary.

Because HIPAA allows for disclosures required by law, and Franklin law requires that Community General disclose any gunshot wounds, the disclosure by phone call to the police and subsequent letter to the police department stating Patient #1's name and address were proper and should not be the subject of any enforcement action or civil penalty.

Patient #2

Patient #2's protected health information regarding a suspicious arsenic poisoning was reported to police, but was also proper under HIPAA. Under 45C.F.R. §164.512(f)(4) protected health information may be released to a law enforcement official to alert a law enforcement official of the death of an individual "if the covered entity has a suspicion that such death may have resulted from criminal conduct." This section does not state that an individual or his personal representative must agree before disclosure is permitted.

Because of personal contacts with Patient #2's family as well as the manner in which he died, employees of Community General suspected that criminal activity was involved in his death. In accordance with 45 C.F.R. §164.502(b)(1), the minimum amount of protected health information was disclosed in order rule out other causes for Patient #2's death. Additional information, other than this patient's visit relating to symptoms of arsenic poisoning was also disclosed. The information was necessary to rule out any other potential causes of death, other than arsenic poisoning.

This section does not state the manner in which the information must be disclosed, but an employee of Community General discussed the circumstances of Patient #2's death to a police detective to alert him of the situation so he could determine how to proceed with the possible criminal activity. At that point the information was requested by and released to the detective because of the possible criminal activity involved in the death of Patient #2.

Because the minimum amount of information necessary was disclosed in relation to possible criminal activity, in accordance with HIPAA, Community General should not be the subject of enforcement action or civil penalties.

Patient #3

Patient #3's protected health information was disclosed in order to avert serious threat to the safety of others. Under 45 C.F.R. § 164.512(j)(1) protected health information may be disclosed when the covered entity, in good faith, believes that the disclosure is necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public and that disclosure is to a person reasonably able to prevent or lessen the threat, which includes the person against whom the threat is being made.

Patient #3 was acting erratically, and making threats against people both alive and dead. Because of the threats he was making against his employer and because the sister informed the hospital staff that he had a gun at his home, the disclosure to the Franklin state trooper, who was already at the hospital, was necessary to prevent or lessen the serious and imminent threat against Patient #3's employer.

The fact that the hospital employee did not have actual knowledge of the gun does not defeat the fact that the employee acted in good faith. Under 45 C.F.R. §164.512(j)(4), good faith is presumed and reliance can be "on a credible representation by a person with apparent knowledge or authority." The patient's sister had apparent knowledge of the fact that her brother had a gun, and the good faith belief will not be defeated based on the reliance on the sister's statement.

Because Community General had a good faith belief that Patient #3posed a serious and imminent threat to the health and safety of his employer, the disclosure of protected health information was proper and should not be the basis for an enforcement action or civil penalties.

Community General has work diligently to both provide medical assistance to the public and protect their private and protected information from unnecessary disclosures. Community General has complied with the requirements of HIPAA and we hope that this additional information about the three patients you have requested will be sufficient to demonstrate our compliance with the regulations.

Sincerely,

Jackson, Gerard, and Burton LLP
Attorneys for Community General Hospital
222 St. Germaine Ave.
Lafayette, Franklin 33065

ANSWER TO MPT

U.S. Department of Health and Human Services
Office of Civil Rights
1717 Federal Way
Lafayette, Franklin 33065

Dear Mr. Fields:

I am writing in response to your February 9, 2015 letter to our hospital, Community General Hospital (CGH). As you know, CGH is a "covered entity" subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §201 et seq. We believe that the complaints of disclosure of protected health information (PHI) that you have received are easily and clearly justified and that no enforcement action is warranted. Specifically, although the disclosure in each case was not authorized by either the patient or the patient's representative, the disclosure was (1) permitted or required by law and (2) was limited to the minimum amount necessary to accomplish the objective of the disclosure. 45 C.F.R. §164.502(a), (b).

Patient 1's PHI was properly released in compliance with a statute mandating reporting of gunshot wounds

Patient 1's gunshot wound was properly disclosed to the Lafayette Police Dept. (LPD), and a written report submitted to the Chief of Police pursuant to Franklin Statutes §607.29.

The issue is whether, in the absence of Patient 1's consent, the treating physician was justified in calling the LPD to report Patient 1's gunshot wound and later submitting a written report of the wound to the Chief of Police.

Under 45 C.F.R. §164.512(f)(1)(i), PHI disclosure is permitted if required by law. Disclosure permitted in this manner is not subject to the "minimum necessary" standard. 45 C.F.R. §164.502(b)(2)(v). Franklin Statutes §607.29 requires a treating physician to report a victim's gunshot wound to the chief of police by "the fastest possible means," followed by a written report including a brief description of the wound and the victim's name and address, sent by first-class U.S. mail to the chief of police within 24 hours after the initial treatment.

Patient 1 was treated for a gunshot wound to his right calf. The treating physician properly and expediently reported this wound by calling the LPD. The treating physician followed up by sending a written report containing a summary of the wound and the victim's name and address by first-class U.S. mail to the LPD Chief of Police. Although this disclosure is not subject to the "minimum necessary" standard, the physician properly

limited his disclosure to the wound's description and the victim's name and address, not specifying how the wound was received or by whom it was inflicted. Patient 1's PHI disclosure was required by statute and properly conducted.

Patient 2's PHI was properly disclosed in order to alert law enforcement of a suspicious death

Patient 2's death by arsenic poisoning was properly disclosed to a detective and the disclosure limited to the minimum necessary to alert the detective of the suspicion that Patient 2's death was the result of criminal conduct by certain members of his family.

The issue is whether, in the absence of the consent of Patient 2's personal representative, the executive vice president was justified in informing the police detective of Patient 2's death and her personal knowledge of the issues between Patient 2 and his family, and in releasing Patient 2's medical records to the detective.

Under 45 C.F.R. §164.512(f)(4), PHI of a deceased individual may be disclosed to a law enforcement official to alert law enforcement of a suspicion that the death was a result of criminal conduct. This type of disclosure is subject to the "minimum necessary" standard. 45 C.F.R. §164.502(b)(1).

Patient 2 died because of multi-system organ failure caused by arsenic poisoning. This, in itself, is sufficient basis for a suspicion that Patient 2 died as a result of criminal conduct, because arsenic poisoning is unlikely without criminal conduct. Our executive vice president had an even stronger basis for her suspicion because of her personal awareness of Patient 2's family strife. She was justified in alerting the police detective of Patient 2's death. Her disclosure of the family conflict was not PHI and thus not prohibited. It was necessary to release Patient 2's past records to the detective in addition to the pathology report to establish the basis for the pathologist's conclusion. That is, without release of the past records, the pathologist's conclusion may have appeared to lack basis. Thus, the disclosure of Patient 2's death and medical records were permitted by statute and properly limited to the minimum necessary to serve its purpose.

Patient 3's PHI was properly disclosed under a good faith belief that such disclosure was necessary to prevent a serious threat to public safety

Patient 3's name, behavior, and threat to his employer were properly disclosed to a Franklin state trooper under a good faith belief that such disclosure was necessary to prevent a serious threat to public safety. The disclosure was limited to the minimum necessary to make the state trooper reasonably able to prevent or lessen the threat.

The issue is whether, in the absence of Patient 3's consent, his treating physician was nevertheless justified in releasing Patient 3's name, belligerent behavior, and stated threat to his employer to a state trooper.

Under 45 C.F.R. §164.512(j)(1)(i), a treating physician may disclose PHI under a good faith belief that such disclosure is necessary to prevent a serious and imminent threat to public safety. The disclosure must be made to a person reasonably able to prevent or lessen the threat. 45 C.F.R. §164.512(j)(1)(ii). The treating physician is entitled to a presumption of good faith belief if it is based on her actual knowledge or reliance on a credible statement made by a person with apparent knowledge. 45 C.F.R. §164.512(j)(4).

Patient 3's treating physician disclosed Patient 3's PHI to a state trooper because she believed that the disclosure was necessary to prevent Patient 3 from harming another person. The physician's belief in the necessity of the disclosure was in good faith: it was based on her observation of Patient 3's erratic behavior and threat against another person. Moreover, the physician relied on a statement made by Patient 3's family member that Patient 3 could be armed. The physician properly disclosed the PHI to a state trooper, a law enforcement official that was reasonably able to prevent Patient 3 from causing serious harm to another person. And the physician properly limited her disclosure to the minimum necessary to permit the state trooper to act, not specifying the cause of Patient 3's belligerent manner. Although Patient 3 was seized while unarmed, the properly limited disclosure of Patient 3's PHI was nevertheless justified as a good faith belief in the necessity of such disclosure to prevent a serious threat to public safety.

Based on the foregoing, we believe that no HIPAA violation has occurred, and thus no enforcement action is warranted. Please feel free to contact me if you have any further inquiries regarding this matter.

Very truly yours,

Frances Paquette
CEO