July 2010

New York State
Bar Examination

Essay Questions

QUESTION 1

Dusty was indicted for the crime of robbery. At trial, the victim testified, identifying Dusty as the person who robbed him and identifying a watch belonging to him as having been taken in the robbery. The arresting officer testified that the watch was found in Dusty's pocket at the time of his arrest. Dusty testified that he purchased the watch at a pawn shop and that he was at Ben's Bar at the time of the crime, but no witness testified in support of his alibi. Dusty's attorney had served a notice of alibi, but had not served any discovery demands in connection with the robbery charge. Dusty was convicted of the crime.

One afternoon, while out on bail awaiting sentencing, Dusty visited Ben's Bar. The bartender recognized Dusty and told him he was sorry to hear of Dusty's conviction. The bartender told Dusty that the police had come to the bar investigating the robbery, and that he told the police that Dusty was in the bar at the time of the crime. Although the investigating officer had given his file containing the notes of his conversation with the bartender to the district attorney prosecuting the case, the district attorney had never read the notes, was unaware of their existence, and had not disclosed the bartender's statement to Dusty's attorney.

After Dusty had consumed several drinks, the bartender told Dusty that he would not serve Dusty any more alcoholic beverages because Dusty was intoxicated, and that he should go home and sober up. Dusty left the bar and began walking home, when he encountered Metz, a person unknown to him. Angry and frustrated by his conviction and without provocation, Dusty shoved Metz who fell into the road. Dusty proceeded to kick Metz in his head, rendering him unconscious. Dusty then walked away, leaving Metz unconscious and lying in the road. A few minutes later, a car driven recklessly by Logan struck and killed Metz.

Dusty was thereafter indicted for the crime of manslaughter in the first degree. A person is guilty of manslaughter in the first degree when, with intent to cause serious physical injury to another person, he causes the death of such person or of a third person.

(1) Does Dusty have grounds to have his conviction for robbery overturned based on the bartender's undisclosed statement?

(2) Without regard to his intoxication, is Dusty guilty of the crime of manslaughter in the first degree?

(3) How might Dusty's intoxication be used in his defense to the crime of manslaughter in the first degree?

QUESTION 2

Buyer, who was in the market for a car, heard that Seller wanted to sell his car for $5,000. On June 1, Buyer visited Seller and saw the car. Buyer asked Seller about the car's condition. In response, Seller said, "The car is in tip-top shape—the brakes and clutch were replaced in the last six months. It's in beautiful shape for a vehicle of this age. Good for another 100,000 miles easy."

Seller agreed to sell the car to Buyer for $5,000. They both signed the following document: "Seller agrees to sell, and Buyer agrees to buy, Seller's car for the price of $5,000. Buyer will pick up the car at Seller's home on June 2 and pay Seller $4,000 in cash and give Seller a check for $1,000 at that time."

On June 2, Buyer came to Seller's home. Before handing the check to Seller, Buyer said, "I'd like my mechanic to look at the car to make sure that it is as you represented it." Seller responded, "Don't waste money on a mechanic. The car is exactly as I described it." Even though Buyer, while at Seller's home, had no way to tell if the brakes and clutch were as represented, Buyer thought that it would be a waste of time and money to visit a mechanic and thus decided to proceed with the transaction. Accordingly, after briefly inspecting the car, Buyer gave Seller $4,000 in cash and a $1,000 check drawn on First Bank. Seller handed Buyer the keys to the car, and Buyer left with the car.

On June 3, Seller went to Checkco, where he indorsed the back of Buyer's check by signing his name with no other words and handed the check to the clerk in exchange for $950 in cash. Checkco was unaware of any facts about the transaction that gave rise to the check.

On June 10, the car broke down and Buyer had it towed to a mechanic's shop. After looking at the car, the mechanic accurately told Buyer that the clutch had failed because it was old and needed to be replaced. The mechanic also warned Buyer that the brakes were unsafe and that the engine needed a complete overhaul or it wouldn't last another 10,000 miles. The mechanic told Buyer that if the car had been as represented by Seller, it would have had a market value of $5,000, but in its current condition the car was worth only about $500—its value as salvage for parts.

On June 11, Buyer hand-delivered a letter to Seller. The letter informed Seller that Buyer was revoking his acceptance of the car and that Seller could recover his car at the mechanic's shop. Buyer also visited First Bank and instructed it to refuse to pay the check that Buyer had given Seller.

On June 12, an agent of Checkco went to First Bank and demanded payment of Buyer's check. First Bank refused to pay the check because of Buyer's instruction and

gave the check back to the agent. Checkco then promptly gave notice of First Bank's refusal to pay to both Seller and Buyer.

1. What rights, if any, does Buyer have against Seller? Explain.

2. What rights, if any, does Checkco have against Buyer and against Seller? Explain.

QUESTION 3

On December 30, X Corporation's legal record date, X Corporation had 100 shares of issued and outstanding common stock. Fifty shares were owned by Amy, 25 shares were owned by Brian, and 25 shares were owned by Carter. X Corporation also had 50 shares of stock that it previously had issued to, but later repurchased from, Amy.

On January 30, X Corporation's annual shareholders' meeting was validly held. Before the meeting, X Corporation's staff prepared a list of shareholders entitled to vote at the meeting and mailed proper notice to them. That notice stated that a proposal requiring shareholder approval would be voted on at the annual shareholders' meeting.

Before the annual shareholders' meeting and in a timely manner, Amy mailed in her duly executed proxy, directing the secretary of X Corporation to vote her 50 shares in favor of the proposal. However, before the annual shareholders' meeting date, Zach called the secretary of X Corporation and truthfully told the secretary that Amy's shares belonged to Zach because he had bought the shares from Amy on December 31. Zach then mailed the secretary a duly executed proxy directing the secretary of X Corporation to vote his 50 shares against the proposal.

Prior to the annual shareholders' meeting, Brian duly executed a proxy in favor of Dell. The proxy stated in its entirety, "I, Brian, hereby grant Dell full authority to vote my 25 shares of X Corporation at the January 30th annual shareholders' meeting." Dell timely mailed a duly executed proxy directing the secretary of X Corporation to vote Brian's 25 shares against the proposal. Dell also sent the secretary a copy of the proxy given to Dell by Brian. Brian, however, attended the annual meeting and voted his 25 shares in favor of the proposal.

Carter personally appeared at the annual shareholders' meeting and voted his 25 shares against the proposal.

X Corporation's president attended the annual meeting and, on behalf of X Corporation, voted the 50 shares that X Corporation had repurchased from Amy against the proposal.

X Corporation's Articles of Incorporation require an affirmative vote by the holders of two-thirds of the shares entitled to be voted to approve any proposal at a shareholders' meeting. The bylaws, on the other hand, require a unanimous vote of such shares to approve any proposal.

Your law firm represents X Corporation. You have been asked to advise the firm's senior partner on whether the proposal received sufficient votes to be approved. Explain your conclusion.

QUESTION 4

Angie's husband, the father of her daughter, Dawn, was killed, and Angie was seriously injured in an automobile accident. While recovering from her injuries, Angie became addicted to pain medication. While under the influence of drugs, she often left Dawn, age two, alone in their apartment. After investigating a call to its hotline, the Department of Social Services (DSS) filed a petition alleging that Dawn was a neglected child. Following a hearing, Angie stipulated to a finding of neglect and voluntarily surrendered Dawn to the custody of DSS for placement into foster care.

Casey, a DSS caseworker, was assigned to Angie's case. She gave Angie the names of several drug rehabilitation programs and also suggested Angie take a parenting class. She arranged a schedule for Angie to visit Dawn at the home of her foster parents. Angie entered a drug rehabilitation program, but attended only sporadically and did not enroll in a parenting class. She spoke to Dawn regularly by telephone and visited her occasionally whenever she could get a ride. Angie told Casey that she did not have a car and could not afford cab fare to the foster parents' home. Casey encouraged Angie to attend her drug treatment program more frequently, but did not tell her that the return of Dawn was conditional on her attendance. Casey gave Angie information about public transportation available to the foster parents' home, but did not provide her with transportation or otherwise facilitate visitation. Casey provided occasional reports to Angie regarding Dawn's progress and development. Angie continued to visit Dawn sporadically and to speak with her regularly by telephone while Dawn remained in foster care.

Two years after Dawn was placed into foster care, DSS filed a petition to terminate Angie's parental rights on the ground of permanent neglect. After a hearing at which proof of the above relevant facts was presented, the court (1) dismissed the petition. Following a dispositional hearing, Dawn was returned to foster care.

Shortly thereafter, Angie met and married Mike in New York. She successfully completed a drug rehabilitation program, and gave birth to a son, Sam. After Sam's birth, Angie relapsed into drug addiction, and, unable to convince Angie to get help, Mike left her, taking Sam. Mike filed a petition in Family Court seeking sole custody of Sam. After a fact-finding hearing, Mike was granted sole legal and physical custody of Sam, with visitation granted to Angie one weekday each week, alternating weekends and holidays, and for two weeks each summer.

Mike was thereafter offered a new job in State X, 130 miles from his then home in New York. Mike filed a petition in Family Court seeking permission to relocate with Sam. Mike's petition alleged that his new position would afford him higher pay and more flexible working hours, and would allow him to live close to his sister who would

help him with child care. Mike further indicated that he would provide all transportation for Sam to continue to follow the same visitation schedule that the court had previously ordered, aside from the mid-week visit. In opposing Mike's petition, Angie alleged that the relocation would deprive her of regular and meaningful access to Sam. After a hearing at which proof of the relevant facts was presented, the court (2) granted Mike's petition.

Mike then moved to State X with Sam and became domiciled there. Mike obtained an ex parte divorce in State X on the ground of incompatibility, a ground recognized in State X. Although Angie had been personally served in the State X action, she did not appear and contest either the jurisdiction of the court or the merits of the claim. Last month, Angie filed an action in New York seeking (a) to declare the State X judgment of divorce invalid, and (b) for an award of maintenance against Mike. Mike has now moved to dismiss the action on the ground that it was barred by the State X divorce decree.

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

(b) How should Mike's motion be decided?

QUESTION 5

Dad did business at Bank where he had a safe deposit box for many years and was well known to the two vault guards. On January 11, 2010, Dad asked the vault guards to witness his signature on a very important document because he was going on a long trip and he had written instructions to be carried out if anything happened to him. Dad signed at the end of the document in the presence of the two guards who, at Dad's request, signed their names as witnesses below Dad's signature. Unbeknownst to the guards, the document was Dad's will.

Dad's will contained the following dispositive provisions:

"I give to my adopted son, Sam, one dollar, which is more than he deserves."
"I give to my wife's daughter, Dora, my 50% interest in GP, a general partnership. I know that she and my partner Peter, working together, will continue to grow the business."
"All the rest residue and remainder of my estate I give to my beloved wife, Willa."

On his way home from Bank, Dad died in an auto accident. The will was found in Dad's briefcase in the car. No other will was found.

Upon his death, Dad was survived by Willa, Dora and Sam, but no other relatives. One month after Dad's death, Willa gave birth to Dad's child, Baby.

Dad and Peter were the only partners of GP, and each owned a 50% interest in GP. Peter objects to Dora taking Dad's 50% partnership interest and becoming a partner in GP. Dad left a substantial estate, and the value of Dad's interest in GP was less than 10% of his estate.

Willa, who was named as executor under the will, offered Dad's will for probate. Sam objects to probate on the ground that the will was not duly executed.

Willa asserts that Baby is entitled to take from Dad's estate even though Baby was not named in the will. Dad did not provide for Baby in any other manner .

(1) Should Dad's will be admitted to probate?

(2) If Dad's will is admitted to probate:

(a) Is Dora entitled to become a partner in GP?

(b) How should Dad's estate be distributed?

(3) If Dad's will is not admitted to probate, how should Dad's estate be distributed?

MPT - *In re Hammond*

In this performance test, applicants work for a law firm, which has received a request for guidance from another attorney, Carol Walker, related to her representation of William Hammond. A suspicious fire destroyed a building that Hammond owned and that housed his business. He has sought Walker's advice about whether he has any criminal exposure related to the fire and whether he may file an insurance claim for the loss of the building. While Walker suspects that Hammond may have been involved in the fire, Hammond has not admitted or denied involvement and Walker has not explicitly asked. Walker wants to know whether she can successfully move to quash a subpoena *duces tecum* compelling her to appear before a grand jury convened to investigate the fire and to testify and produce materials relating to her communications with Hammond. Applicants' task is to prepare the argument section of a brief in support of the motion to

quash on the grounds that under the Franklin Rules of Professional Conduct and the Franklin Rules of Evidence, Walker may not be compelled to give the testimony or produce materials.

The File contains the instructional memorandum from the supervising attorney, a memorandum on persuasive briefs, a letter from Walker to the firm, two memoranda from Hammond's case file, a police report, the subpoena *duces tecum*, and the motion to quash. The Library contains provisions of the Franklin Rules of Professional Conduct, the Franklin Rules of Evidence, and the Franklin Criminal Code, and two cases from other jurisdictions bearing on a question, unresolved in Franklin, involving the attorney-client privilege and the crime-fraud exception.

July 2010

New York State
Bar Examination

Sample Essay Answers

JULY 2010 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. The first issue is whether the prosecution has an affirmative obligation to turn over exculpatory evidence to the defense attorney?

Under the NY Rules of Professional Conduct (hereafter the RPC) and the NY Penal Code, the prosecution has an affirmative duty to turn over any exculpatory evidence to the defense attorney. This obligation includes a requirement that the prosecution read the information in their possession. The prosecutor may not use lack of actual knowledge of exculpatory facts as a defense to not disclosing this information to the defense attorney. This burden is placed on the prosecution because of their exclusive access to this information and is in the interest of justice as a prosecutor has a duty not prosecute people they believe to be innocent. Additionally, this duty to disclose exculpatory information is affirmative, so it is of no legal significance that the defense attorney did not serve discovery demand. Exculpatory information is information that tends to exculpate the defendant that supports his innocence. In the present case, the bartender's statement to the police officer was exculpatory because it supported the defendant's innocence. It supported the defendant's innocence because it put forth an alibi - that the defendant was someone other than at the crime scene when the crime was committed, making it impossible for the defendant to have committed the crime. Therefore, the prosecutor in this case had an affirmative obligation to turn this information over to the defense attorney.

The second issue is whether a prosecutor's failure to turn over exculpatory evidence requires the court to overturn the defendant's conviction?

Any trial court error may be sufficient to overturn a conviction unless the prosecution can show that it was harmless. Failure to turn over exculpatory information requires the court to overturn a defendant's conviction in almost all cases. Harmless error when the evidence of the defendant's guilt is overwhelming. Here, while there is some strong evidence of the defendant's guilt, it was not overwhelming - there was an identification and Dusty's possession of the stolen watch and the exculpatory evidence was quite strong as it tended to support the defendant's defense. Likely, the court would decide the conviction should be overturned as a reasonable jury could have found Dusty innocent if they had been aware of the exculpatory evidence which supported Dusty's alibi.

2. The issue is whether the prosecution has proved all of the elements of manslaughter in the first degree beyond a reasonable doubt?

In order to be guilty of a crime, the prosecution must prove that the defendant is guilty of all elements of the crime beyond a reasonable doubt. Every crime has four elements: a physical act, a *mens rea* or mental state element, causation and concurrence.

The physical act requirement of manslaughter in the first degree is physically injuring and killing someone. The *mens rea* element is intentionally. The defendant needs to intend to cause serious physical injury to another. Serious physical injury is injury that is protracted or continues for an extended period, or is of a major body part or organ or tends to cause death. The physical act must cause death, both actual or but for causation is required and proximate cause. Actual causation requires asking if the defendant had not done this physical act. Would the victim have died? Proximate cause has to do with forseeability. Was it forseeable that the death of the victim would have resulted from the defendant's physical acts? Finally, there needs to be a concurrence of the physical act and the mental state. For manslaughter in the first degree, the defendant needed to have the intent to cause serious injury while the defendant was doing the physical act that lead to the victim's death.

In the present case, the defendant met the physical act requirement because he shoved the victim into the road. He kicked the victim in the head. The defendant also met the *mens rea* element as he intentionally shoved the victim and intentionally kicked the victim. When the defendant was doing these things, he had the intent to seriously injure the victim. This intent can be presumed from his actions. The defendant also caused the death of the victim. He was the actual cause because but for pushing him into the road and knocking him unconscious, the victim would not have been run over and killed. Dusty was also the proximate cause because it was forseeable that the victim would be run over and killed once he was unconscious in the road and left there to die. Finally, the defendant met the concurrence requirement because he had the requisite intent to injury the victim while he was shoving and kicking him. Therefore, without regard to his intoxication, Dusty is guilty of manslaughter in the first degree.

3. The issue is whether intoxication is a valid defense to a crime requiring the *mens rea* of intent?

Voluntary intoxication can be a valid defense to crimes that require a *mens rea* element of intent if the defendant can prove that they were so intoxicated that they were unable to form the requisite intent. Manslaughter in the first degree is a crime that requires specific intent. The defendant must intend their acts and must intend to cause serious physical injury to another. Here, Dusty was very intoxicated because the bartender would not continue to serve him. Voluntary intoxication is an affirmative defense, so Dusty must prove that he was so intoxicated that he could not form the requisite intent to commit manslaughter in the first degree by a preponderance of the evidence. If he is successful, he will likely be charged with the lesser included crime of manslaughter in the second degree which is reckless manslaughter.

ANSWER TO QUESTION 1

1. The first issue is whether the prosecutor had a duty to disclose the evidence of the bartender's statement to Dusty.

Under the New York Criminal Procedure Law, and under the federal Constitution, criminal defendants have a right to challenge their conviction if a prosecutor was in possession of material exculpatory evidence, defined as any evidence tending to disprove a material element of the crime, and did not timely disclose that evidence to the criminal defendant. A prosecutor is required to disclose any and all material exculpatory evidence in her possession or control. This includes evidence of which the prosecutor has personal knowledge, as well as evidence for which constructive knowledge can be imputed to her. Here, the police investigatory report, containing the bartender's statement that Dusty was in the bar at the time of the crime, would be considered material exculpatory evidence because it tends to disprove that Dusty could have committed the robbery for which he was charged, as Dusty was in the bar at the time of the crime. Further, because that statement was contained in the police report that was included in the district attorney's file, knowledge of that statement will be imputed to the prosecutor for purposes of triggering the disclosure obligation. It makes no difference that the prosecutor never actually read the statements or knew they were contained in the file. Consequently, because the prosecutor failed to disclose materially exculpatory evidence to Dusty in a timely manner, this is generally good grounds for overturning Dusty's robbery conviction. It should also be noted that the defendant's counsel failing to make any discovery requests with respect to the exculpatory evidence does not relieve the prosecutor of her duty to disclose. It is an affirmative duty and must be disclosed whether or not a specific request for the file or for investigatory reports is made by the defendant. Consequently, Dusty's attorney's failure to serve any discovery demands does not change the result.

It does, however, constitute a violation of his duties to zealously and competently represent his client under the Rules of Professional Conduct. Dusty may also consider arguing that his attorney's failure to request such discovery constitutes ineffective assistance of counsel, which would also be grounds to reverse the conviction under the 6th Amendment to the federal constitution, if Dusty can prove that his counsel's performance was seriously deficient and that but for his deficiency, Dusty would likely not have been convicted. Because his attorney's failure to request such documents, which would have been a routine step in representation, Dusty will likely be able to show that his counsel's performance was seriously deficient, and that this would have had a material effect on the outcome of the case.

The second issue is whether the failure to disclose material exculpatory evidence was harmless error.

Generally, a prosecutor's failure to disclose material exculpatory evidence is grounds for overturning a conviction. The state may argue, however, that the error here was harmless, because the evidence against Dusty was overwhelming. Although failure to disclose material exculpatory evidence is generally grounds for overturning a conviction, the conviction may stand if it was harmless error. Under such circumstances, however, the evidence against the defendant must be overwhelming, such that the prosecution could and would have proved all elements of the crime beyond a reasonable doubt even if the potentially exculpatory evidence had been disclosed. Here, although the witness identified Dusty, and although the watch stolen was actually found in Dusty's pocket, this is not sufficient evidence to conclude that the error was harmless. Dusty explained that he had bought the watch at a pawn shop, and the witness could have been mistaken. A criminal defendant can only be convicted if the prosecution proves all elements of the crime beyond a reasonable doubt, and the disclosure of the bartender's statement proving Dusty's alibi could have been sufficient to introduce reasonable doubt. Therefore, the error was not harmless, and the conviction should be overturned on the grounds discussed above.

2. The issue is whether Dusty's conduct satisfied the elements of manslaughter in the first degree, and whether his acts can be said to have caused Metz's death.

Under the New York Penal law, a person is guilty of manslaughter in the first degree when, with intent to cause serious physical injury to another person, he causes the death of such person. First, Dusty's conduct meets the intent requirement, because he encountered Metz and shoved him, knocking him down, and proceeded to kick Metz in the head, which is a particularly vicious act to a vulnerable area of the body. Dusty did these acts while "angry and frustrated" by his criminal conviction, and the force was sufficient to knock Metz unconscious. Therefore, the evidence suggests that Dusty did in fact intend to cause Metz serious bodily injury by his violent acts towards him. Secondly, there is no dispute that Metz was killed; however, the issue is whether Dusty's violent acts caused Metz's death. To be convicted of manslaughter in the first degree, the defendant's acts must have both actually and proximately caused the victim's death. Here, there is no question that actual causation was present: Dusty's conduct was a cause in fact of Metz's death, because he never would have been hit by the car if Dusty had kicked him and left him unconscious in the road. On the issue of proximate cause, if the defendant's conduct leaves the victim in a particularly vulnerable state, which makes him more likely to be hurt or killed by other forces, the defendant's conduct will be legally sufficient to have caused the death, and will not be cut off by other intervening causes that act to cause the ultimate death. Here, Dusty's kicking Metz in the head and leaving him unconscious in the road left him vulnerable to being hit by a car and was entirely foreseeable; therefore, Logan's reckless driving will not be considered a superseding cause. Thus, all the elements of manslaughter in the first degree have been met, and Dusty may be convicted of the crime under the New York Penal Law.

3. The issue is whether Dusty's voluntary intoxication is a defense to manslaughter in the first degree.

Under the New York Penal Law, voluntary intoxication is only a defense to the extent that it negates the intent element of a crime. Thus, although voluntary intoxication may be a defense to specific intent crimes (under the New York Penal law, those requiring knowing or purposeful conduct), it is not a defense to crimes requiring only negligent or reckless conduct. Further, intoxication is not an affirmative defense. Rather, because the prosecution must prove all elements of a crime beyond a reasonable doubt, they must prove that Dusty had the requisite mental state to commit the crime, and that the intent was not negated by his intoxication. Here, manslaughter in the first degree is a specific intent crime requiring intent to cause serious bodily injury. Consequently, Dusty's involuntary intoxication could negate the mental state required if Dusty can prove that as a result of his intoxication, he lacked the specific intent to cause serious bodily injury to Metz. However, this will be a difficult argument to make, considering that all evidence points to Dusty knowing that he was shoving, and kicking a person in the head, while he was "angry and frustrated." Although this is a specific intent crime, a jury would be justified in finding, beyond a reasonable doubt, that Dusty had the requisite intent despite his intoxication.

ANSWER TO QUESTION 2

1. Because the contract between Buyer and Seller was for a sale of goods, the sale is governed by Article 2 of the Uniform Commercial Code (UCC). First, the seller is not a merchant but rather a casual seller, so there is no implied warranty of merchantability that the car is fit for its normal purpose. However, the seller made an express warranty about the car's condition. Under the UCC, a seller, whether a merchant or non-merchant, is liable for violations of express warranties. Here, the seller guaranteed the brakes and clutch had been replaced in the last six months and that the car would last another 100,000 miles. In truth, the clutch was old, the brakes were unsafe, and the car would not last another 10,000 miles. The seller therefore breached his express guaranty.

But the next issue is whether a buyer waives any rights by accepting imperfect goods. Under the UCC, a seller is required to make a perfect tender of the goods promised, and the buyer has a duty to inspect the goods and reject them within a reasonable time if they are not in perfect condition. Failure to reject the goods within a reasonable time constitutes an acceptance of the goods, allowing the buyer to sue the seller for damages caused by the imperfect tender, but precluding him from returning the goods and receiving the full purchase price. However, a buyer has a longer period within which to reject goods if there are latent defects not immediately detectable. In this case, the buyer did inspect the car on June 2 before accepting it and he was not capable of discovering the defects. He intended to take it to a mechanic, who could have discovered

the defects, but the seller intentionally induced him not to do so by again guaranteeing the condition of the car, and the buyer reasonably relied on those guarantees. Therefore, because the defects were incapable of immediate discovery by the buyer and he promptly notified the seller of his revocation of acceptance upon discovering the defects, the buyer may revoke his acceptance of goods.

The final issue is whether a seller of defective goods is liable for further damage to the goods caused by the buyer. A buyer may reasonably rely on the express guarantees of a seller. Here, the car was worth $5,000 in the condition it was in when delivered to the buyer, but it was worth only $500 when the buyer learned of the defects after driving the car. The seller should have known the buyer would rely on his guarantees and drive the car, and therefore he is liable for the further damage caused to the car.

The seller is liable for his breach of express warranty and the buyer may revoke his acceptance of the car. The seller may have the equitable remedy of rescission, returning the car to the buyer and receiving the full $10,000 he paid for it. In the alternative, he may keep the car and sue for his damages. His damages would be difference between the purchase price and the price the car is now worth, coming to $9,500.

2. The issue is whether an entity who gives value for a check may hold the check's drawer and subsequent endorsers liable for the amount of the check when the check was induced by fraud. Checks are commercial paper governed by Article 3 of the UCC. A holder in due course of a check may recover the amount of the check from the drawer and subsequent endorsers despite any personal defenses the drawer could assert. To be a holder in due course, the check must be duly negotiated, and the holder must give value for the check and be unaware of any such personal defenses.

In this case, the check was duly negotiated. The buyer made the check out to the seller, who then made a blank endorsement by signing his name and nothing more. A blank endorsement makes a check a bearer note, such that anyone in possession of it is a holder. Checkco gave value for the check because it paid the seller $950 for it. It does not matter that the check was made out for $1,000. "Value" is not required to be the face amount of the check. $950 is not an insignificant amount, and therefore qualifies as "value." Finally, Checkco had no notice that the check had been induced by fraud. Because of this, Checkco is a holder in due course.

Those who sign a check have signature liability on the check. The buyer, who was the drawer of the check, is liable to a holder in due course, and the seller guaranteed the check would be paid by endorsing it. Both the buyer and seller signed the check and are jointly and severally liable to Checkco for the full $1,000. The buyer could assert the defense of fraud in the inducement against the seller, but not against a holder in due course. It would have been appropriate for the bank to deny payment to the buyer, but a

stop order can not be enforced against a subsequent holder in due course. It was wrongful for the bank to refuse payment to Checkco, and Checkco can recover the full $1,000 from either the buyer or seller.

ANSWER TO QUESTION 2

1. The issue is the rights of a buyer of a good when the seller breaches an express warranty and whether the buyer may revoke an acceptance.

New York applies Article 2 of the Uniform Commercial Code (UCC) to contracts for the sale of goods. A valid contract for the sale of goods requires an offer and acceptance, valid consideration, and the absence of any defenses to formation of the contract. Under the UCC, contracts for the sale of goods may be oral or written, however under the UCC's Statute of Frauds any contract for the sale of goods for more than $500 must be in writing, stating the kind and quantity of the good to be bought and signed by the party to be bound. Here, Buyer and Seller entered into a valid contract. There was a valid offer and acceptance because Seller offered to sell the car at $5,000 and buyer agreed to buy at that price. There is valid consideration because Buyer agreed to pay $5,000 and Seller agreed to give Buyer title to Seller's car. Furthermore, none of the defenses to formation appear to apply. Additionally, the contract was in writing, stated both the quantity and kind of good (one car), and was signed by both parties. Thus, Buyer and Seller entered into a valid contract for the sale of Seller's car.

Under the UCC, in any sale of goods there is the possibility of two types of warranties. The first is an express warranty. An express warranty is created any time the Seller makes a factual statement about the item to be sold. An express warranty is not created however by a mere statement of subjective opinion. Here, Seller gave Buyer an express warranty as to the condition of the brakes and the clutch because Seller told Buyer that they had been replaced in the last six months. The Seller's statements that the car "is in tip-top shape" and that the car "is good for another 100,000 miles easy" are probably also express warranties because they go to the factual condition of the car. Although Seller could argue that they were statements of opinion, the statements probably fall into the factual realm because they create an impression that they are based on the factual condition of the car as opposed to simply subjective opinion.

The UCC also contains two implied warranties that may apply to a sale of goods. The first is the implied warranty of merchantability. This is implied in any sale of a good by a merchant that deals regularly with goods of the kind. It warrants that the good will work for its intended purpose. The second implied warranty is the implied warranty of fitness for a particular purpose. This is implied in any sale where the buyer purchases the good for a specific purpose, the seller is aware of it, and the seller tells the buyer that the good will be fit for that purpose. Neither of the implied warranties appears to apply here.

The implied warrant of merchantability does not apply because the facts do not show that Seller regularly sells cars. The implied warranty of fitness for a particular purpose does not apply because Buyer did not ask Seller if the car was fit for a particular purpose.

An express warranty is breached when the goods differ from the facts stated in the express warranty. In this case, Seller's express warranty to Buyer that the brakes and clutch were replaced in the last six months was breached because, as the mechanic informed Buyer, the clutch was old and needed replacement and the brakes were unsafe. Additionally, the warranty that the car is in tip-top shape and that it is "good for 100,000" was breached because the engine needs a complete overhaul and the car will not last another 10,000 miles. Thus Seller's express warranties to Buyer were breached.

Buyer may thus sue Seller for breach of warranty. In the breach of warranty action, Buyer may recover the cost of repairs, or the difference between the value of the goods as received, and the value as promised, whichever is less.

Buyer may also sue under a theory of breach of contract. The UCC's "perfect tender" rule allows a buyer to reject goods for breach of contract if they are nonconforming. A buyer that receives nonconforming goods may accept the goods and sue for damages, reject the goods and sue for damages, or accept some of the goods and sue for damages. The measure of damages depends on the action taken by the buyer. If the buyer accepts the goods, the buyer may recover damages for the difference in the value of the goods received from the value of the goods promised, including any incidental expenses. If the buyer rejects the goods and covers, the buyer may recover his or her cover price, the difference in price between the contract with the seller and the cost to replace the goods by purchasing them from a third party. If the buyer rejects the good and has already paid, the buyer may recover the full contract price plus incidental expenses.

Here, Buyer may recover the full contract price from Seller in addition to any incidental because although Buyer accepted delivery of the car, he validly revoked the acceptance. Under the UCC, generally a party that accepts goods under a contract may not revoke the acceptance after the party has had an opportunity to inspect the goods. Thus, under the general rule Buyer could not have revoked his acceptance after he left Seller's home with the car on June 2 because Buyer had an opportunity to inspect the vehicle.

However, there is an exception to the general rule where the nonconformance is substantial and difficult to discover. Here, the facts indicate that the nonconformance is substantial because the value of the car differs by $4,500. Furthermore, it is difficult to discover because Buyer could not have discovered the condition of the brakes and clutch on his own as indicated by the facts. Therefore, Buyer properly revoked his acceptance,

and may recover the contract price plus any incidental expenses (storing the car at the mechanic's shop).

2. The issue is whether a holder in due course can recover from the drawer of a check and/or its endorser.

A holder in due course is a party that obtains a duly negotiated promissory note or draft for value and without notice of any defect or defenses to its validity. Here, the facts do not indicate that there were any issues with the negotiability of the check drawn by Buyer on its face, and that it was indorsed by Seller before it was given to Checkco. The facts also indicate that Checkco was unaware of any facts about the transaction that gave rise to the check. Furthermore, Checkco obtained the check for value because it paid Seller $950. Thus, Checkco is a holder in due course of the check.

A holder in due course takes a negotiated instrument free of any personal defenses and subject only to real defenses. Real defenses are a material alteration to the instrument, duress, fraud in the factum, infancy, incapacity, illegality, and insolvency. None of the real defenses appear to apply to check at issue here.

Checkco has a right to sue Buyer for the value of the check because no real defenses apply to the validity of the instrument. A drawer that signs a check is liable for the amount of the check unless a real defense applies. No real defense applies here. The fact that the check was drawn because of Seller's misrepresentation of the value of the car is, at best, fraud in the inducement, which is a personal defense, and does not apply to Checkco as a holder in due course. Therefore, Checkco may sue Buyer for the value of the check because he has cancelled it with First Bank, the drawee, and as a holder in due course Buyer must honor the value of the check as drawn.

Checko also has a right to sue Seller for the value of the check. An endorser of a check that signs his or her name is liable for the value of the instrument to a party to whom he transfers the instrument. Furthermore, Seller has no personal defenses to the transfer as against Checkco. Because the check was not honored by the drawee, Checkco may sue Seller as an endorser for the sum certain on the instrument.

ANSWER TO QUESTION 3

There are a number of issues raised by this fact pattern, each of which will be addressed in turn. The law governing this answer is New York's BCL. Further, this answer assumes that the corporation has been incorporated pursuant to the BCL in New York.

First, the issue is whether a proxy filed by a shareholder as of the record date may be revoked by the filing of a proxy by a later purchaser of those shares.

Under the BCL, a shareholder may vote her shares at a shareholders' meeting without actually attending the meeting through use of a proxy. An individual granted the power to vote another's shares by a proxy must act in accordance with the agreement; if the shareholder directs that the proxy holder vote a certain way, then she must do so. A shareholder may also grant a proxy holder the ability to vote shares as the proxy holder deems appropriate.

As a general rule, proxies are freely revocable by the shareholder who granted them. A proxy may become irrevocable if (1) the proxy says so and (2) the holder of the proxy has a proxy coupled with an interest. Here, Amy was the holder of the shares as of the record date, entitling her to vote at the shareholder meeting -- either personally or through a proxy. Her proxy makes no mention of irrevocability. A third party who does not own shares as of the record date has no right to revoke another's proxy. Here, Zach's ownership of Amy's shares after the record date alone is insufficient to allow him to revoke Amy's duly executed proxy. Had Amy revoked her initial proxy and given one to Zach along with her shares and stated that this new proxy was irrevocable, then Zach would have the authority to vote because he would have a proxy coupled with an interest. But that is not the case. Zach's purchase of Amy's shares has no effect on her proxy and his request to vote the 50 shares against the proposal will be denied.

Therefore, Amy's 50 shares will be voted in favor of the proposal, pursuant to her duly executed proxy, and Zach's attempt to vote will be ignored.

Second, the issue is whether attendance at a shareholder meeting is sufficient to revoke a prior, duly executed proxy and allow the shareholder to vote his shares as he sees fit.

As discussed above, a shareholder who owns shares as of the record date has the right to allow another to vote at a shareholder meeting on his behalf if he grants such authority via a duly executed proxy agreement. Here, Brian owned 25 shares as of the record date and has properly granted Dell the authority to vote his 25 shares at the annual shareholder meeting. Proxies, unless coupled with an interest, are freely revocable. Here, there is no indication that Dell has any interest beyond that provided by the proxy agreement. Brian, by attending the meeting and voting his shares, has implicitly revoked his proxy to Dell. That Dell has sent the secretary of the corporation a copy of the proxy is irrelevant and does not serve to prevent Brian from revoking his proxy. As a result of Brian's attendance and voting, his proxy to Dell is revoked.

Therefore, Brian's 25 shares will be voted in favor of the proposal, and Dell's attempt to vote against the proposal will be ignored.

Under the BCL, a shareholder who owns shares as of the record date may personally attend the shareholder meeting and vote his shares as he sees fit. There is no requirement that a shareholder vote by proxy. Here, Carter attended the meeting and voted as he saw fit. Therefore, Carter's 25 shares will be voted against the proposal.

Up to this point, there are 75 shares voting in favor of the proposal and 25 voting against.

Next, the issue is whether a company may vote with treasury stock at a shareholder meeting. The BCL provides that a corporation may not vote its treasury stock at a shareholder meeting. Here, X Corporation has repurchased stock from a shareholder, Amy. This stock, by definition, is treasury stock. Because the corporation is barred from voting such stock at a shareholder meeting, the 50 shares of treasury stock will not be counted for or against the proposal. Additionally, they will not be counted in the total when determining the number of "shares entitled to vote."

Finally, the issue is whether the bylaws of a corporation or the corporation's certificate controls when the two documents are in conflict.

Under the BCL, the certificate is a contract between the corporation and its shareholders as well as a contract between the corporation and the state of New York. The bylaws are simply procedural rules adopted by the shareholders. While the certificate must be filed with the New York Secretary of State, there is no such requirement for the bylaws. When the documents are in conflict, the certificate controls.

Here, the certificate (called the Articles of Incorporation in the prompt as well as many other states) requires an affirmative vote by the holders of two-thirds of the shares entitled to vote to approve any proposal at a shareholders' meeting. There are 100 shares entitled to vote, and a two-thirds majority would require 67 votes in favor of the proposal. As discussed above, Amy voted her 50 shares in favor of the proposal and Brian voted his 25 shares in favor of the proposal. Carter voted his 25 shares against the proposal. Seventy-five out of 100 shares is greater than a two-thirds majority. That the bylaws would require a unanimous vote is irrelevant. If the corporation wishes to require a unanimous vote in the future, it must amend its certificate to cause such a change.

Because the certificate controls the majority required for approval of a proposal at a shareholders' meeting and 75% of shares voted in favor, the proposal received sufficient votes to be approved.

ANSWER TO QUESTION 3

Amy and Zach's Rights in the 50 Shares

The first issue is whether the owner of stock in a New York corporation at the record date can vote shares despite subsequently selling them. Under the New York Corporations Business Law (CBL), the record date is a set date between 10 and 60 days before a shareholder vote on which voting rights are locked. That is, the record owner of stock on the record date is entitled to vote the shares at the coming shareholder meeting. The owner of stock at the record date is entitled to vote the shares and the subsequent shareholders meeting even if she sells the shares before the meeting occurs. Here, the record date was December 30. Thus, the owner of shares on December 30 was entitled to vote the shares at the January 30 shareholders meeting. Here, Amy was the record owner of 50 shares on the record date. Because Amy was the owner of the shares on the record date, she is entitled to vote them despite subsequently selling the shares to Zach. Thus, Amy is entitled to vote the 50 shares and Zach is not.

The next issue is whether a corporate secretary may vote shares pursuant to a proxy agreement. As discussed above, normally the record owner of corporate shares at the record date is entitled to vote the shares. One exception to this rule is that a proxy may vote a record holder's shares pursuant to a valid proxy agreement. A proxy agreement is an agreement to allow a third person to vote a shareholder's shares on her behalf. A valid proxy agreement must be written, signed, and delivered to the secretary of the corporation. A valid proxy agreement cannot last longer than 11 months. Here, both Amy and Zach mailed duly executed proxies to the secretary of the corporation. Amy's proxy thus validly allows her 50 shares to be voted in favor of the proposal, as requested. However, Zach was not the record owner at the record date, so his proxy agreement has no effect.

Brian and Dell's Rights to Vote Brian's 25 Shares

The first issue is whether a shareholder proxy agreement may allow a non-shareholder to vote a shareholder's shares. The rule is that a proxy statement is valid if written, signed, and delivered to the secretary of the corporation. There is no requirement that the proxy holder be a shareholder himself. Here, Brian validly executed a proxy agreement for Dell to vote his shares. This proxy agreement was delivered to the secretary of the corporation. Thus, Brian and Dell's proxy agreement is valid.

The next issue is whether a proxy agreement that does not specify how to vote the shares is valid. There is no requirement that a shareholder specify how to vote his shares. Here, Brian and Dell's proxy agreement did not specify how Dell should vote Brian's shares. However, a shareholder can give a proxy holder discretion to vote as he sees fit. Thus, Brian and Dell's proxy agreement is valid.

The next issue is whether a proxy holder may enter a second proxy statement with the secretary of a corporation to vote the shares of a shareholder. A proxy holder given discretion to vote his shares as he sees fit is entitled to enter a second proxy statement to vote the shares. Such a second proxy statement must also be written, signed, and delivered to the secretary of the corporation, and must further include the original proxy statement as evidence of the proxy holder's right to vote the shares. Here, Dell submitted a letter to the secretary of X Corporation to vote Brian's 25 shares against the proposal. Dell included a copy of the original proxy agreement between Brian and Dell. Because these formalities were complied with and Dell had the right to vote Brian's shares, this second proxy agreement is also valid.

The next issue is whether a shareholder can override and revoke a proxy statement by showing up at a shareholder meeting and voting his shares personally. Proxy statements are freely revocable by the shareholder, even if they state that they are irrevocable. One exception to this rule is that a proxy statement couple with a legal right is irrevocable if it states that it is irrevocable. For instance, a proxy statement made pursuant to a valid voting (pooling) agreement between shareholders is irrevocable if it states that it is irrevocable. Here, Brian and Dell's proxy agreement did not state that it was irrevocable. Moreover, it is not coupled with a legal right such as a voting (pooling) agreement. Thus, Brian's proxy agreement is revocable. By showing up and voting his shares in favor of the proposal, Brian demonstrated unequivocal revocation of the voting agreement. Thus, the proxy agreement between Brian and Dell was revoked by Brian's voting of his shares personally. Brian's 25 shares are voted in favor of the proposal.

Carter's Right to Vote his 25 Shares

At issue is whether a corporate shareholder can validly personally vote his shares. A corporate shareholder is entitled to show up in person to vote his shares as he wishes. Thus, Carter (who was the record owner at the record date) validly voted his shares personally against the proposal. Carter's 25 shares are voted against the proposal.

X Corp's Right to Vote Treasury Shares

At issue is whether a corporation can vote treasury shares at a shareholders meeting. Treasury shares are shares originally issued to a shareholder but subsequently repurchased by the corporation. As stated above, generally the record owner of shares at the record date is entitled to vote the shares at a shareholders meeting. However, one exception to this rule is that a corporation may not vote treasury shares at a shareholders meeting. Here, 50 shares that were originally purchased from X Corporation by Amy were subsequently repurchased by X Corporation. Because they were repurchased by the corporation, they are considered treasury shares. Because these shares are treasury shares, the corporation cannot vote them at the shareholders meeting. Nor can the

treasury shares be voted by X Corporation's president at the annual meeting. Thus, the 50 treasury shares will not be voted.

The Required Number of Votes to Pass the Proposal

At issue is whether the certificate or bylaws of a New York corporation control when there is a conflict between the two. The certificate of a corporation is a fundamental corporate document filed with the secretary of state. The bylaws of a corporation are laws passed by its shareholders (or directors with shareholder permission) that govern the internal operations of a corporation. Bylaws are not binding on anyone who is not a part of the corporation. Where there is a conflict between the certificate of a corporation and its bylaws, the certificate controls. Here, the X Corp's certificate (it's Articles of Incorporation) requires an affirmative vote of 2/3 of the shares entitled vote on any proposal. However, the corporation's bylaws require unanimous approval. In a conflict between the bylaws and the certificate, the certificate will control. Thus, the proposal requires a 2/3 vote of all shares entitled to vote. (Furthermore, a requirement that proposals be passed by supermajority may only be approved in the certificate of a corporation, not its bylaws. Thus, even if the certificate did not exist, the bylaws would not control.)

The next issue is whether treasury shares are considered "shares entitled to vote". Treasury shares are not considered shares entitled to vote. They are not included in the denominator when determining whether a proposal has been passed by a majority of shares entitled to vote. Thus, here only 100 outstanding shares form the denominator. The 50 treasury shares are not included. Only 67/100 shares will be required to pass the proposal.

The proposal is passed because 75 of 100 votes were voted in favor of the proposal. This is more than the required 2/3.

ANSWER TO QUESTION 4

A. 1. Court dismissed DSS's petition to terminate parental rights.

The issue is what standard should be used on a petition to terminate parental rights, and whether that standard has been met.

In New York, under the Domestic Relations Law ("DRL"), in order to terminate parental rights, it must be shown that the parent is unfit. A parent can be declared unfit upon grounds of abuse, abandonment, mental incapacity or neglect. In order to find a parent unfit on the basis of neglect, it must be shown that there was insubstantial contact between the parent and the child for a period of more than one year. The court uses its

equitable discretion, and balances the parent's abilities with the harm that would occur in terminating parental rights. The standard is clear and convincing evidence of neglect in order to terminate parental rights on that basis.

In this case, Dawn was removed from Angie's care after Angie became addicted to drugs and often left Dawn alone in their apartment. This indicates an absence of ability to care for the child, after which Dawn was placed in foster care with Angie's consent. After Dawn was placed in foster care, Angie visited occasionally and spoke to her on the phone. Casey did not tell dawn that the return of Dawn was conditional on her attendance of a parenting class, and the drug rehabilitation program. Angie had trouble affording the transportation, and Casey did not help her in that regard, beyond proving her information about public transportation. For two years while Dawn was in foster care, Angie continued to visit Dawn sporadically and speak to her regularly by phone. The regularness of the phone contact would be likely to be held by a court to be substantial contact, despite the telephone nature. The visits, though sporadic, did occur for the two year period. The court may use its equitable discretion to deny the petition to terminate the parental rights on the basis of neglect because of this. Though the period of the alleged neglect was greater than one year, there was substantial contact, and there is a presumption against the termination of parental rights. Also, Casey did not disclose all of her interest in the case to Angie. Angie did not know that Dawn's return to her was conditioned upon the attendance in the drug treatment program. This will weigh in favor of the court's ruling to continue Angie's parental rights. DSS would have to show clear and convincing evidence in order to prevail on this motion. Based on the facts and analysis above, it could be said that there was substantial enough contact, and thus there was not clear and convincing evidence that there was neglect that rose to the appropriate level to terminate parental rights. Therefore, the court was correct in its ruling.

2. Granted Mike's petition to relocate with Sam to state X.

The issue is on what grounds a parent in sole custody of a child's petition to relocate should be granted.

Whether a court will grant one parent's petition for permission to locate when it will infringe on the other parent's visitation rights is decided on the standard of the best interests of the child. The court will weigh all factors in making this determination. The court uses its equitable discretion. Courts will not be likely to grant such a motion if it would interfere completely with another spouse's visitation with the child, but may grant the motion if it would otherwise be in the best interests of the child and would not completely hinder visitation.

In this case, Mike wished to relocate with Sam because his new position afforded him higher pay and better hours. With his relocation, he would live closer to his sister who could help him with child care. He also offered to provide all the transportation for

Sam to continue to visit with his mother. Angie had the right to visit one weekday each week, alternating weekends and holidays, and for two weeks each summer. The relocation would only interfere with the mid-week visit, leaving Angie with continued substantial visitation rights. The court will take all of these factors into account. They will weigh heavily on the fact that Mike would have greater ability to care for Sam with his sister's help in the new location. He would be making more money, and have better hours. This would allow him to better afford for Sam's needs, and to spend more time with the child. The court will balance this against Angie's interests in her visitation. She would be losing her mid-week visit. It would be up to the court to decide whether this is a substantial interference enough to block the relocation. She would still be able to maintain the rest of her visitation rights. The move would likely benefit Sam, and be in his best interests, based on this evidence. A court has discretion, and thus the court was not wrong in granting Mike's petition to relocate.

B. Mike's motion to declare judgment of divorce invalid.

The first issue is whether a state's ex parte judgment of divorce is valid and enforceable.

In New York, judgments for divorce may be obtained ex parte. Generally, to obtain a divorce, one must be a resident of the state where they are seeking the divorce. If one spouse is a resident, and the other is not, and is not subject to personal jurisdiction there, the divorce will be "ex parte." New York courts will recognize a divorce that was valid where it was obtained. This is true even if it was based on grounds that are not valid grounds for divorce in New York State. Generally ex parte divorces are valid, as the court will have "rem" jurisdiction over the action. Maintenance and property division, however, cannot be decided in an ex parte divorce. There must be jurisdiction over both parties for such awards to be granted and enforceable in New York. One cannot object to an ex parte divorce when they could have objected to it when it was granted.

In this case, Mike obtained a divorce in State X, while he was a domiciliary of State X. The grounds were for incompatibility, which is not a ground for divorce in New York State under the DRL. Angie was personally served in the case, and she did not contest the jurisdiction of the court or the merits of the claim. On that basis, the court granted the divorce. Because Angie did not contest the divorce, she is not estopped from denying the divorce. The New York court can hold the divorce valid because it was properly entered into in State X, on grounds that State X recognized, and Mike was a domiciliary there. Therefore, Mike's motion to dismiss Angie's action on this basis should be granted.

The next issue is whether an action for maintenance by a NY domiciliary spouse is barred by an ex parte divorce decree from another state.

In order for a court to award maintenance or an equitable distribution of property, according to New York Law, the court must obtain valid personal jurisdiction over both of the spouses. In New York, personal jurisdiction may be obtained in a marital action when the couple lived in New York at or around the time of the marriage, the defendant spouse abandoned the other in New York, or the obligations arose out of or under a NY agreement or New York law.

In this case, maintenance or property division would not have been able to be obtained by Mike in his ex parte divorce, and it is not indicated that he attempted to, and Angie would be able to assert a claim for maintenance in New York. The State X divorce decree did not bar such a claim because it couldn't have been granted in State X, and otherwise, an ex parte divorce decree does not bar a later suit for maintenance by the other spouse. Angie will be able to obtain valid personal jurisdiction over Mike in her suit for maintenance because they lived in New York at the time of their separation. Thus, the court should deny Mike's motion claiming that Angie's maintenance claim is barred by the State X ex parte divorce, though the divorce is valid and enforceable in New York.

ANSWER TO QUESTION 4

A. 1. The issue is whether the court's dismissal of a petition to terminate parental rights based on permanent neglect was correct where the parent in question remained in contact with the child.

Under the New York Domestic Relations Law (DRL), a parent's right to custody of her child can be terminated only upon a showing of unfitness, which is based on one of the statutorily-enumerated grounds constituting unfitness. These grounds include abandonment, defined as six months without parental contact with the child, when the parent is able to do so, severe and repeated abuse of the child, mental incapacity to serve as the child's parent, and permanent neglect. Permanent neglect is defined as insubstantial contact between the parent and child, lasting at least one year, or failure to make plans for the future with the child. A parent's rights to custody of the child are accorded a great deal of deference by the Family Court in determining whether this standard has been met, and typically an extraordinary showing, to the level of clear and convincing evidence, must be made to terminate parental rights.

In this case, the ground asserted for termination of Angie's parental rights is permanent neglect, which must rise to the level of Angie being an "unfit" parent. Although the Family Court may consider a variety of factors in making its determination, Angie's conduct regarding Dawn's care prior to the stipulation to neglect and voluntary surrender of Dawn to DSS is not likely to be dispositive on DSS's petition to terminate Angie's parental rights for neglect. Thus, while probative, Angie's decisions and conduct

after Dawn entered foster care are likely to play a more significant role in the court's decision. Thus, the most relevant "neglect" pertains to Angie's attempts after surrendering Dawn to maintain a parent-child relationship and plan for the future. Favoring Angie's position are her regular conversations with Dawn by telephone and her occasional visits to Dawn at the foster parents' home, suggesting that Dawn was in fact in contact with her daughter. She also received status reports on Dawn from Casey, Dawn's case worker. However, Angie failed to attend her drug rehabilitation classes with regularity and never enrolled in a parenting class that Casey suggested, indicating that Angie is not planning for a future in which Dawn returns to her care under conditions safe for a child. Further, although Casey provided her with information regarding public transit--presumably to accommodate Angie's inability to pay for cab fare--to Dawn's foster home, Angie's visits were only sporadic. In considering whether to dismiss the case, the court would have properly considered these factors, as well the case worker's failure to provide transportation to the foster home in light of Angie's apparent financial inability to obtain transportation. Casey's failure to alert Angie that Dawn's return depended on Angie's attendance at her drug rehabilitation courses will favor Angie, in that Angie may not have recognized the importance of this step in planning for the future with Dawn. The court would have also properly considered whether Angie spoke with Dawn regarding living with Angie in the future.

It appears that the court properly dismissed the petition to terminate Angie's parental rights on the ground of permanent neglect. Angie maintained consistent contact with Dawn, both before and after the custody petition, and visited her sporadically. Angie's financial inability to visit more frequently and infrequent attendance at drug rehabilitation courses, as well as her failure to attend a parenting course, do not rise to the level of permanent neglect in light of her continued contact with Dawn and given the court's strong presumption in favor of retaining parental rights. Further, the evidence presented does not tend to provide clear and convincing evidence of either Angie's insubstantial contact or her failure to provide for a future with Dawn. The content of their conversations is not disclosed, and given the high showing required of the DDS, they failed to meet it. Therefore, the court properly dismissed the petition to terminate Angie's parental rights.

2. The issue is whether a court properly grants a custodial parent's petition to relocate when the relocation would interfere with the non-custodial parent's visitation rights.

Under the DRL, a custodial parent wishing to move out of the state of New York must seek court approval for a relocation that would deprive the non-custodial parent meaningful access to the child. The Family Court will determine whether the relocation is in the best interests of the child, and has a great deal of discretion to consider various equitable factors in making its decision. Factors that the court will consider include the reason for the relocation, including whether the education opportunities for the child

would be more favorable in the destination and whether the parent's reason for the move would provide increased financial stability and ability to support the child; the child's relationship with any other persons who may be located in the destination, such as any relatives of the custodial parent; and the degree of interference the relocation would work upon the non-custodial parent's visitation rights. Also, potentially relevant to the court's decision will be whether the custodial parent's move is premised on a goal of depriving the non-custodial parent of access to the child. The equitable factors discussed above all aim to determine whether the relocation would meet the best interests of the child standard, and as such, the child's view on the move may also be probative.

In this case, Mike's new job would be about 130 miles from his present home and would be in a state other than New York. Therefore, under the DRL, Mike was required to seek court approval before proceeding with the relocation, which would interfere with Angie's right to visitation and access to Sam. Factors supporting the court's decision include that the new position would pay Mike more and would accord more flexible hours, permitting him to spend more time with Sam and to provide more easily for Sam, in a financial sense. Further, Mike's increased earning capacity would enable Mike to fund the transportation for Sam to visit Angie, pursuant to the original visitation schedule. Although the mid-week visitation rights Angie had would be extinguished, Mike could perhaps fund additional trips with his increased salary. Moreover, Mike has a relative in State X, his sister, who could help to provide support and child care. Though the extent and nature of Sam's relationship with Mike's sister is unclear, the court could consider the potential for developing that relationship in determining the petition. In sum, Mike's relocation would provide increased financial means to support Sam and would accord him a greater opportunity to personally raise Sam, in light of the flexible hours. Further, Angie's visitation rights would be substantially unchanged, and Mike would ensure transportation. The transportation aspect is significant, given Angie's limited finances. Thus, the court was correct to grant Mike's petition to relocate.

B. 1. The issue is whether an out-of-state divorce obtained in the state of one spouse's domicile is entitled to full faith and credit, and is therefore valid, in New York.

Under the Full Faith and Credit clause of the United States Constitution, a judgment rendered in one state is recognizable in another state if the full faith and credit elements are satisfied. To meet these requirements, the rendering court must have had personal and subject matter jurisdiction, unless personal jurisdiction is not required for the particular case. Further, the judgment in the rendering court must be final; that is, not modifiable, and must be on the merits. If these three requirements are met, a state called to recognize the judgment will do so unless a valid defense applies. The only remaining valid defenses to full faith and credit are extrinsic fraud, or fraud that could not have been cured in the prior proceeding, and that the judgment sought to be recognized is a penal judgment, or a judgment in which a government actor has won a civil penalty or criminal punishment.

In this case, the court in State X had the requisite jurisdiction to render a decision in a marital status action. For an ex parte divorce to be validly obtained, the court must only have subject matter jurisdiction over the marriage, and may obtain it when the plaintiff spouse is a domiciliary of that state. Mike was a domiciliary of State X, so that court had jurisdiction. Personal jurisdiction over the out of state spouse is not required. Additionally, the judgment rendered was on the merits and was final. A judgment is deemed on the merits even when it is on the basis of a default or consent judgment. Angie failed to appear or contest jurisdiction, but the judgment is still on the merits because her default is deemed to be so. Regardless, jurisdiction over her was not necessary. Thus, New York will recognize the ex parte divorce.

It should be noted that it is irrelevant that New York does not grant divorces on the ground of incompatibility. New York, as a matter of full faith and credit, will recognize divorces that are valid in the state in which they are granted, so long as the divorce is not on a ground that is volatile of public policy. This is not the case here, and Angie is bound by the divorce, unless she can collaterally attack it in a New York court on the basis that Mike is not validly domiciled in State X.

2. The issue is whether a valid ex parte divorce obtained outside of New York precludes a spouse from seeking a maintenance award in a New York court.

A valid ex parte divorce obtained against a spouse out of state is not binding on that spouse with regard to maintenance and support obligations. Any property award for or against a spouse may only be rendered by a court having personal jurisdiction over the spouse whose property rights are at state. Therefore, a New York spouse against whom an ex parte divorce was granted is not bound by any maintenance determinations in that decision and may seek maintenance in a New York court. Furthermore, a spouse is subject to marital jurisdiction in New York for the purposes of property rights when his legal obligation to support accrued under the laws of New York, pursuant to the CPLR.

In this case, there was no personal jurisdiction over Angie in State X even though she was served personally. She need not contest it if it is not valid in the first instance. Therefore, she may maintain an action against Mike in New York for maintenance. Mike is subject to the marital long arm statute because his obligations for maintenance accrued under NY law, as he and Angie were domiciled there during their marriage.

ANSWER TO QUESTION 5

1. The issue is whether a valid will was executed.

In order to validly execute a will, a testator must be at least 18 years old. The testator must also be competent, which means that the testator understands the nature of

the bequests that he is making; knows the approximate value of his property; and understands the nature of the act of making a will. Such competency has been recognized as very minimal, and less than that required for a contract. The act of making a will requires that the testator signs at the end of the written document, that he sign in the presence of or acknowledge his signature to at least two witnesses, that he publish the fact that the document that he is signing is in fact a will, and that the witnesses sign the will within 30 days of each other.

Here, Dad is apparently over age 18 and is competent in knowing the nature of his property and of the bequests he was making in his will. He properly signed the will before two witnesses who signed the will on the same day as one another. However, Dad's will is invalid due to the fact that Dad never published to the witnesses the fact that the document he was signing was in fact a will. For this reason, the will should not be admitted to probate and Dad's estate should be distributed under the intestacy statute.

2. a. The issue is whether management rights in a partnership are transferrable.

Generally, a partner may transfer only his interest in profits from the partnership, surplus, or proceeds upon dissolution. A partner may not convey partnership assets held in tenancy in partnership, nor may the partner assign his management duties to another, without the consent of all other partners.

Here, Dad seeks to bequeath his management interest in GP to Dora. To the extent that Dad sought to transfer his management rights and responsibilities to Dora, the bequest is invalid.

Generally, unless otherwise provided for, a partnership is automatically dissolved upon the death of a partner. Here, the facts indicate that there was no agreement to continue the partnership business upon the death of Dad or Peter. As such, the partnership assets should be liquidated. Peter would be responsible for conducting business during the winding up period (and would be entitled to compensation for his duties in the winding up). Partnership assets would be used first to pay outside creditors, then any loans from either of the partners would be repaid, next capital contributions would be repaid. In the absence of an agreement to the contrary, the remaining profits, if any, would be divided equally. Losses would also be divided among the partners (or their estate representative - here Willa).

Thus, following the winding up, Dora would be entitled to any profits that Dad would have been entitled to.

b. Sam: The issue is whether a parent is required to bequeath anything to a child.

NY law does not require any testamentary gift be made to a child. Indeed, where a testator makes a negative bequest and intentionally disinherits a party, NY will enforce the negative bequest even as against any portion of the testator's property which falls into intestacy. Here, Dad specifically evidenced an intent to limit Sam's inheritance to a nominal amount. The NY courts will uphold such a bequest and here Sam will inherit $1.

Dora: The issue is what happens to a specific gift which is not the testator's property at the time of death.

Generally, a specific testamentary gift will adeem and the beneficiary will inherit nothing if the property is not owned at the time of death. However, where specific profits of the intended gift accrue to the deceased's estate and may be clearly traced back to the specific gift, the beneficiary may recover those profits. Here, Dad did not have the power to convey managerial rights in the partnership. However, upon his death, his estate will inherit the profits accruing from his partnership interest. Because these profits may be traced directly back to the specific gift which Dad sought to leave to Dora, Dora may inherit the profits of the partnership following liquidation.

Baby: The issue is what a pretermitted child is entitled to inherit.

Generally, a child that is born after a will has been executed is entitled to inherit comparably to his/her siblings. Where the child's siblings receive nothing, the after-born child will receive nothing. Where the siblings receive testamentary gifts, the after-born child will receive an average value of those gifts, inheriting as if a member of a class gift made to all of the testator's children. However, where the siblings receive only a nominal gift, the after-born child will inherit his/her intestate share. Here, Sam, Baby's sibling, received only a nominal gift and Baby will thus be entitled to inherit her intestate share. This value, as discussed below, will be the amount of 1/4 of the residuary of the estate, after $50,000 has been taken off the top of the net estate value. This value will be deducted pro rata from the other beneficiaries under the will.

Note that a pretermitted child will only recover under the will where the child has not been otherwise provided for in an alternative settlement, such as a trust or an insurance policy.

Note also, a pretermitted child gets the intestate share if it is the only child left upon the testator's death.

Willa: The issue is whether the spouse is entitled to her elective share.

In order to protect against the risk that a spouse may be disinherited, NY provides for an elective share, under which the surviving spouse may take the greater of $50,000 or 1/3 of the net estate, including any testamentary substitutes. Here, Dad's partnership

interest in GP constituted only 10% of his estate value. The remainder (minus $1 to Sam) was to go to his wife, Willa. Because this testamentary gift of essentially 90% of the estate value clearly exceeds the 1/3 entitlement under the elective share, Willa will not be entitled to exercise her elective rights and will simply inherit the residuary of Dad's estate.

3. The issue is how proceeds of an estate should be distributed under the intestacy statute.

Under the intestacy statute, only specifically identified familial relatives are entitled to inheritance. Where a decedent is survived by both a spouse and child, the spouse is entitled to recover first $50,000 and then half of the residuary estate; the children are entitled to recover the remaining half of the residuary estate, divided equally as between them. NY law provides that children that are adopted are to be treated the same as other children. In addition, any child that is in gestation at the time of the decedent's death is able to recover as if the child had been born at the time of the decedent's death.

Here, Dad was survived by his spouse Willa. He had only two children that would be regarded as distributees entitled to inherit under the intestacy statute. These children were his adopted son Sam and the child Baby, that was in gestation at the time of Dad's death.

Under the intestacy rules, Willa is entitled to the first $50,000 of Dad's estate. Any residuary should be divided to give 1/2 to Willa and 1/4 each to Sam and Baby. Dora, Willa's child from outside the marriage, would not be entitled to recover anything.

Note: We are told that Dad's estate was substantial. However, if the full value did not exceed $50,000, Willa would inherit the full value of the estate and the children would receive nothing.

ANSWER TO QUESTION 5

1. The issue is whether a will is validly executed when the testator failed to publish the will.

Under the New York Estate, Powers, and Trusts Law (EPTL), in order for a will to be duly executed and thus valid, the testator must: 1) be 18 years of age or older, 2) sign the will, 3) the signature must appear at the end of the will, 4) the testator must sign in the presence of two witnesses, or attest to his signature in their presence, 5) the testator must publish his will by informing the witnesses that they are signing his will, 6) the witnesses must sign, and 7) the entire execution must be completed within thirty days of the first

witness signing. In New York the witnesses do not need to sign in the presence of each or the testator, but the testator must sign before the witnesses do, and must attest to his signature in each witness's presence. Here, Dad's will is not duly executed because Dad failed to publish his will to the two guards who were unknowingly meant to serve as witnesses. A will that does not meet the requirements of the EPTL for due execution cannot be admitted into probate. Therefore, Dad's will should not be admitted to probate.

2. a. The issue is whether a testator can validly bequest a share in a general partnership.

Under New York law, there are no formalities necessary to create a partnership. The key inquiry is whether two or more individuals are operating a business for profit with sharing of the profits. Generally, management interests in a partnership belong to the partnership, not to the individual partners. Thus, a partner cannot assign his or her management interest in the partnership. A partner holds as personal property only his or her interest in the profits of the partnership. Dora is thus not entitled to become a partner in GP because Dad did not own a management interest in the partnership which he could give to her in his will. All he could give is his interest in the profits.

Furthermore, in the absence of a written agreement to the contrary, a partnership will dissolve upon the death of one of the partners. Thus, in this case, unless the partnership agreement provides for continuation, the partnership dissolved upon Dad's death and the only interest remaining is Dad's share of the profits following the winding up of the corporation.

Finally, the court could interpret the language following the bequest as simply precatory language, demonstrating a wish or desire, but not having legal effect because it does not make a bequest but instead expresses a hope that "working together" Dora and Pete will "continue to grow the business."

Thus, for the aforementioned reasons, Dora is not entitled to become a partner in GP.

b. The issue is distribution of an estate where the decedent's spouse is given less than her elective share amount, a provision of the will is invalid and there is a pretermitted child.

Sam: Sam will receive one dollar as a demonstrative legacy if the will is admitted to probate because that is the only bequest given to him. Under the EPTL, adopted children are treated the same as marital children for purposes of both intestacy and devisement. Generally, a child is not entitled to receive anything under a parent's will. Thus, it is valid for Dad to leave Sam only a dollar (or nothing) and he is entitled to nothing else.

Dora: Dora will receive Dad's share of the profits in GP, but as noted above, she is not entitled to become a partner in GP. Dad's assignable interest in GP is only his share of the profits. She will thus receive 50% of the profits of GP.

Willa: Under the EPTL, Willa is entitled to either her bequests in the will or her elective share. A surviving spouse's elective share is equal to $50,000, or one-third the value of the estate, whichever is larger. Here, Willa will take the residuary of the estate, because as shown in the facts, Dad's interest in the partnership was worth less than 10% of his estate, and Sam, the only other beneficiary, only received one dollar. Thus, Willa effectively receives 90% of the estate under the will. As Dad left a "substantial" estate, we will assume that the 90% is worth more than $50,000. Thus, Willa will take the residuary under the will: everything other than Dad's partnership share, one dollar, and anything paid to Baby, as it is more valuable than the statutory elective share.

Baby: Under the EPTL, a child of the testator born after the testator's death is a pretermitted child. A pretermitted child is entitled to share in the estate if it is otherwise not mentioned or provided for. Here, no mention of Baby is made in the will, so Baby may share in the estate. The amount of the pretermitted child's statutory share depends on the devisements made to the other children. If they are only nominal, the pretermitted child takes his or her intestate share, to be paid pro-rata by the other beneficiaries. If they are more than nominal, the pretermitted child shares pro-rata with the other children. In this case, Sam was given a nominal gift because the value of his bequest was only $1. Dora's bequest on the other hand is probably also nominal because Dad's estate is "substantial" and her share is valued at "less than 10%." Thus, Baby is entitled to an intestate share, discussed below.

3. The issue is intestate distribution.

Under the EPTL, when an individual dies intestate and is survived by a spouse and issue, the spouse takes $50,000 plus 1/2 of the estate, (the estate includes the 50% partnership interest), and the issue split the remaining estate per capita at each generation. When a will is denied probate, the estate is distributed as if the testator died intestate. Thus, Willa should receive $50,000 plus 1/2 of the estate. Sam and Baby should split the remaining 1/2 equally. Sam will inherit under intestacy because an adopted child is treated the same as a marital child for purposes of intestacy. Dora will not inherit because she is not Dad's issue, she is referred to as "my wife's daughter," which indicates that she is Willa's child from a previous marriage, and there is nothing in the fact pattern indicating that she was adopted by Dad. Baby will inherit because children in gestation at the time of death of the decedent are entitled to receive their intestate share. Thus, Sam and Baby will each receive 1/4 of the estate under intestacy, splitting the 1/2 that goes to issue.

Furthermore, before the estate is distributed, Willa is entitled to keep certain personal property, such as the car, and various household goods, which are not included in the estate for distribution purposes.

ANSWER TO MPT

STATE OF FRANKLIN
GORDON COUNTRY DISTRICT COURT

In re Grand Jury Proceeding 11-10,

MOTION TO QUASH SUBPEONA
Hammond Container Company

DUCES TECUM

ARGUMENT

I. Under the Franklin Rules of Professional Conduct, a lawyer has a duty not to reveal confidential information related to the representation of client, and maintains complete discretion to reveal such information regardless of the circumstances.

The Franklin Rules of Professional Conduct states unambiguously that "a lawyer shall not reveal information relating to the representation of a client..." See FRPC Rule 1.6(a). However, a lawyer may reveal such information under three circumstances: 1) if the client gives informed consent, 2) the disclosure is impliedly authorized in order to carry out the representation, or 3) under FRPC Rule 1.6(b). Id. FRPC Rule 1.6(b) also gives the lawyer complete discretion in determining whether to reveal confidential information from a client, explicitly stating that a lawyer "may reveal" confidential information to the extent "the lawyer reasonably believes necessary" under certain circumstances. See FRPC Rule 1.6(b). One of those circumstances under FRPC Rule 1.6(b) is "to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result...from the client's commission of a crime of fraud." See FRPC Rule 1.6(b)(3). Once again, however, even if those circumstances are met, an attorney still maintains complete discretion over whether he or she must reveal the confidential communication from the client.

In this case, Attorney Walker is under no obligation to reveal any confidential communication made to her by her client, William Hammond, in the course of her representation of Mr. Hammond. Mr. Hammond has not given Attorney Walker informed consent to reveal any confidential communications, nor is disclosure of any confidential communication impliedly authorized by Mr. Hammond in order for Attorney Walker to carry out her representation of him. See FRPC Rule 1.6(a). Even if those

circumstances were present, Attorney Walker would be under no obligation to reveal the confidential communication, because under no circumstances does FRPC Rule 1.6(a) require disclosure by an attorney representing client. Id. Additionally, Attorney Walker is not under any obligation to reveal confidential communications from Mr. Hammond under FRPC Rule 1.6(b), as that rule gives Attorney Walker complete discretion to reveal information to the extent that Attorney Walker finds such disclosure "reasonably necessary." See FRPC Rule 1.6(b). Whether the circumstances under FRPC Rule 1.6(b)(3) have been met in this case are irrelevant, because even if Attorney Walker was "reasonably certain" that Mr. Hammond intended to commit a crime or fraud through her service (which Attorney Walker does not have enough information to believe), she could not be compelled to disclose such information under the rule. See FRPC Rule 1.6(b)(3). Nor does the Gordon County District Attorney have the right to compel such information from Attorney Walker, as such action would require Attorney Walker to violate the Franklin Rules of Professional Conduct and subject herself to professional reprimand, since Attorney Walker does not feel it is reasonably necessary to reveal any information that she received from Mr. Hammond under FRPC Rule 1.6(b)(3). Id.

For the reasons above, this Court should quash the subpoena *duces tecum* that requires Attorney Walker to reveal confidential client communication in violation of the Franklin Rules of Professional Conduct.

II. Because the attorney-client privilege is a cherished and highly important legal right, the court should adopt the more stringent "probable cause" standard to determine whether the party seeking to compel disclosure of privileged attorney-client communications has provided sufficient evidence to show that the client attained the attorney for improper purposes.

The Franklin Rules of Evidence state that a "client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communication made for the purpose of facilitating the rendition of professional legal services to the client." See FRE Rule 513(b). In addition, an attorney may assert the client's attorney-client privilege on the client's behalf when a party seeks to compel the attorney from disclosing confidential client communications. See FRE Rule 513(b)(3). However, if a client seeks the services of an attorney "to enable or aid" the client in a crime or fraud, then the attorney-client privilege will not apply to the statements made to the attorney by the client in the course of the representation. See FRE 513(d)(1). When a party seeks to compel attorney testimony regarding privileged client communications under the FRE Rule 513(d)(1) exception, the moving party bears the burden of proof by a preponderance of evidence. See FRE 513(d)(1), Comment 3. However, prior to showing proof by a preponderance of evidence, the moving party may compel the party seeking to keep the communication privileged to disclose the confidential communication *in camera*. Id. Franklin courts have yet to determine the standard to apply to compel an *in camera* disclosure, and other courts that have addressed the issue are split on which standard to

apply. Id. The Columbia Supreme Court applies a "probable cause" standard, which requires a showing that establishes probable cause that "the client sought or obtained the attorney's services to further a crime or fraud." See *State v. Sawyer* (Columbia Sup. Ct. 2002). The 15th Circuit has adopted a lower standard, requiring only that the moving party show "some evidence" that the client obtained the attorney's service to perpetrate a crime or fraud. See *United States v. Robb* (15th Cir. 1999).

While Attorney Walker urges the court to adopt the more stringent "probable cause" standard in order to protect the cherished attorney-client privilege, Attorney Walker asserts that she cannot be compelled to disclose Mr. Hammond's confidential communications under either standard. In *Sawyer*, the Columbia Supreme Court found that an attorney was not required to disclosure confidential communications where "evidence would support an inference that [the attorney was retained] to facilitate perjury [and there was] an equally strong inference that [the attorney was retained] to ensure that his choices were informed." See *State v. Sawyer* (Columbia Sup. Ct. 2002). In this case, the facts suggest that there is an equally strong inference that Mr. Hammond retained Attorney Walker to protect himself from potential criminal liability for the fire to his business as there is to suggest that Mr. Hammond retained Attorney Walker to perpetrate fraud upon the Mutual Insurance Company. Whether Mr. Hammond committed the arson or not, he is entitled to legal representation to protect himself from criminal liability because he is a suspect in the arson. See Gordon Police Incident Report. In addition, while there is circumstantial evidence that Mr. Hammond may be attempting to commit fraud against Mutual Insurance (the false alibi, the request for claim forms), that evidence does not suggest that Mr. Hammond retained Attorney Walker to perpetrate the fraud. Rather, the facts only point to suggest that Mr. Hammond retained Attorney Walker to protect himself from criminal liability, and that is not enough under the probable cause standard to suggest that Mr. Hammond's attorney-client privilege should be negated.

In addition, under the "some evidence" standard in *Robb*, Attorney Walker cannot be compelled to reveal Mr. Hammond's statements. In that case, the court compelled disclosure from the attorney where there was evidence that the attorney was retained in the midst of a fraudulent scheme, the attorney was the primary source of legal advice, the attorney had regular contact and access to all client information, and there was actual fraud present. See *United States v. Robb* (15th Cir. 1999). In this case, while Attorney Walker was Mr. Hammond's sole source of legal advice and she may have been retained during a fraudulent scheme of Mr. Hammond, there is no evidence that any fraud has actually occurred yet, nor is there evidence that Attorney Walker has had access to all of Mr. Hammond's records or had regular contract with him (although we may presume she has had regular contact and access as Mr. Hammond's attorney). Additionally, Attorney Walker did not have any information from Mr. Hammond that would suggest that he intended to commit fraud against Mutual Insurance. The fact that no evidence of fraud can be shown and that Mr. Hammond has a right to legal counsel to protect himself from criminal liability for the arson should be sufficient to prevent the Gordon County District

Attorney from showing "some evidence" of Mr. Hammond retaining Attorney Walker to perpetrate fraud under the *Robb* standard.

For the reasons above, this Court should quash the subpoena *duces tecum* that requires Attorney Walker to reveal confidential client communication in violation of the Franklin Rules of Evidence and adopt the "probable cause" standard to determine whether the party seeking to compel disclosure of privileged attorney-client communications has provided sufficient evidence to show that the client attained the attorney for improper purposes.

ANSWER TO MPT

I. Absent consent of the client an attorney shall not reveal information relating to the client's representation.

The lawyer-client privilege is well established by both the Franklin Rules of Professional Conduct (hereinafter FRPC) and Franklin Rules of Evidence (hereinafter FRE). The FRPC explicitly state that a "layer shall not reveal information relating to the representation of the client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out representation or the disclosure is permitted by paragraph (b) (to be discussed below). (FRPC 1.6)

Here, Attorney Walker's client has not only failed to give informed consent but Mr. Hammond has expressly stated that he does not wish to waive the privilege and does not want Attorney Walker to reveal his communications. Likewise, Mr. Hammond has not by the act of retaining counsel implicitly authorized disclosure to carry out his representation. Rather the reason for his retaining counsel is simply to ensure that he faces no criminal liability from the five which destroyed his business (a prudent move for anyone) and to discover whether or not he could file an insurance claim. Again, neither of these acts imply his desire for counsel to breach his confidence. Breach of Hammond's confidence based on the above would erode the very essence of the lawyer-client privilege the code seeks to protect.

Further, the alleged acts asserted by the prosecution do not fit the exception of subsection (b) of FRPC §1.6. Section (b) permits a lawyer to "reveal information relating to the representation of a client to the extent that the lawyer believes is reasonably necessary to 1) prevent reasonably certain death or substantial bodily harm…(or)…2) to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result from the clients commission of a crime or fraud of which the client has used the lawyer's services." [FRCP §1.6(b)]

Neither of the above exceptions to FRCP §1.6(a) are applicable. First off, Attorney Walker is fully aware of the rules set forth in §1.6 and the exceptions and believes that §1.6 protects her clients information.

Regardless of whether Attorney Walker's belief that she does not have to disclose her clients confidences it is clear that neither exception of §1.6(b) applies Attorney Walker's revealing information fails to fulfill the subsection (1) requirement because there is no threat of death or substantial bodily harm. The conduct alleged by the prosecution has already occurred making subsection (1) wholly implacable.

Further, there is no need to reveal client confidences based on subsection (3) of §1.6. Although it allows an attorney to reveal client confidences to prevent or rectify substantial injury to the financial interest of another there is no proper application of this exception. As police reports conclude Hammond at most has contacted his insurance carrier he has not filed any type of insurance claim as of date (see Gordon Police Department Incident Report). Thus, there is no threat of financial harm present to date to another's property interest. A claim under this exception if it was even appropriate (which is arguable at best) is not ripe.

Lastly, subsection (3) is implicable as per its final part because there is no fraud which has "resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." [FRCP 1.6(b)(3)] Attorney Walker is fully aware of her ethical obligations and recommends to all clients that they do not commit nor will she participate in a crime or fraud.

Accordingly, under §1.6 of the FRPC Attorney Walker is not permitted to reveal the client confidences of Mr. Hammond.

II. The people have failed to come forth with sufficient "some evidence" to breach the Franklin Rules of Evidences lawyer client privilege.

The attorney client privilege represents one of the oldest and most sacred privileges in the legal realm. It is meant to "encourage full and frank communication between attorneys and clients. (*U.S. v. Robb*). However, this privilege is not absolute and "because the privilege has the effect of withholding information from the fact finder it should apply only where necessary. (*Robb*). Thus, the Franklin Rules of Evidence (hereinafter FRE) as well as case law has established the crime fraud exception to the privilege set forth in FRE §513(d). This exception breaches the veil of the privilege "if the lawyer's services were sought or obtained to enable or aid anyone to commit or plea what the client knew or reasonably should have known to be a crime or fraud." [FRE §513(d)].

However, it must be noted as per the official advisory comment to §513 that a communication made between a client and a lawyer is presumed to be privileged. Any party (here the people) claiming that such communication is not privileged bears the burden of proof by a preponderance of the evidence.

Although to date Franklin courts have not yet determined what evidence must be proven to breach the privilege the proponent party must at least state sufficient "some evidence" (if not probable cause).

According to the court in *Robb*, the same evidence standard is established by the party seeking to breach the privilege that there exists at least some evidence supporting an inference that the client retained the attorney to commit a crime or fraud. The *Robb* court believed this to be a proper balance between the veil of the privilege and the need to prevent crime/fraud. However, the moving party must do more than simply assert crime or fraud they must present the same evidence discussed above. In *Robb*, the defendant was committing ongoing fraud by falsifying the value of his gold mine. In *Robb*, the court found that the government met its burden of the some evidence standard because the defendant retained his attorney while "in the midst of a fraudulent scheme" and that during the scheme the attorney was the primary course of legal advice to the defendant.

Here, no fraudulent scheme has been committed. The only fraudulent scheme alleged under the Franklin Criminal Code §5.50 is implacable because as stated earlier Hammond has yet to file a claim. Additionally, Attorney Walker was retained after the burning of Hammond's building thus she had no part in the alleged crime.

Thus, the peoples request is a mere fishing expedition and they have failed to raise a sufficient influence. Further, even if they had raised such an influence per *Robb* the defendant is allowed to come forward with evidence that the attorney was retained for a proper purpose. Additionally, even if the people have met their burden (which they have not) the appropriate remedy would be on in camera hearing not testimony at a grand jury trial. Thus, there subpoena is at least untimely.

Lastly, it is arguable that a higher standard should be needed rather than the some evidence standard to trigger an in camera hearing. Although not controlling the court in Franklin, *State v. Sawyer* applies a probable cause standard requiring the people to come forward with probable cause to believe that the attorney was retained "to further a crime or fraud" in order to trigger the in camera review. In *Sawyer*, the court believed that this standard was not met while the proponent of breaching the privilege argued that an attorney was retained to further crime or fraud, an equally likely inference was that the attorney was "retained to ensure…that choices were informed." Here, Hammond retained Attorney Walker to ensure he made correct choices and similar to *Sawyer*, the alleged guilty party could have "failed to cooperate because he was afraid he might

expose himself to liability with no countervailing benefit." Retaining a lawyer simply does not equal guilt. It is more prudence and good judgment.

Regardless of which standard the court applies some evidence or probable cause, the defendant is at first entitled to an in camera review and rebut the evidence prior to testifying at a grand jury. Likewise, an exception §1.6 of the FRPC has not been proven. The court must quash the subpoena *duces tecum* prior to an in camera review if the people have met their burden.