

New York State Board of Law Examiners

ID: [REDACTED]
Question: 1
Exam Name: NYSBOLE_7-29-14_AM
Grade: _____

1)

1. Referral Fees

Under the New York Code of Professional Responsibility (NYCPR) an attorney is not permitted to share her fees with non-lawyers and shall not pay referral fees. An attorney may share his fees with other lawyers of his same. An attorney may also share fees with other lawyers working on the client case only with the client informed consent, but cannot share his fees with non-lawyers and cannot pay referral fees in any case. A legal assistant or paralegal working for an attorney can be paid salaries and employment benefits but not referral fees even when these are called "bonus"

In this case, Stu is a paralegal working for attorney no a lawyer in the same firm or an outside lawyer working with attorney in the same case. Stu is not entitled to receive referral fees and should not be pay "bonus" for client referred to attorney. It is a violation of the NYCPR.

Therefore, the payment of the "bonus" to Stu was not proper

2. Search Warrant

Under the Fourteenth Admendment, a person shall be secured in their persons, home and effects from unreasonable searches and seizures, and no search warrant shall be issued unless with probable cause, for a neutral magistrate, under oath of affirmation, and with the particularities of the place to be search. Probable cause exists when the facts and circumstances under the police office's knowledge are sufficient to justify a reasonable person's belief that criminal activity is afoot or that a crime has been committed. Under New York if the officer requesting the warrant has probable cause and a good faith belief that the information received from an informant is reliable and the issuance of the warrant is necessary, the warrant validity should be sustained.

In this case, Detective has probable cause based on Larry's information about his conversation with Dan, Larry saw the stolen computer and got first hand knowledge about Dan's criminal activity. Larry also testifies on the veracity of the facts stated and signed an affidavit attesting the true of his allegation. When Detective requested the warrant he had probable cause and a good faith belief that Dan was a theft and that he possess stolen property.

Therefore, the warrant was properly issue and the court suppression of the computer was not correct

3. Affirmative Defenses/Justification

Under New York Penal Law, a defendant may asserted the affirmative defense of justification

when impelled by the circumstances to avoid an imminent harm or threat of harm, to himself or to a third party, the defendant commits an offense. Even though the defendant's volitional act constitutes a crime, the defendant's act is justified by the imperative necessity of avoiding a serious harm or threat of harm.

In this case, Dan saw the truck when it started to move and immediately jumped into the truck to try to control it when the truck was going down hill. Even though he was heavily intoxicated, he was not operating the vehicle but for the necessity of controlling the truck to avoid an accident. But for the immediate necessity to avoid an accident, Dan would not have been operating the truck and would have not been "the driver" harming the pedestrian. Dan was not driving while intoxicated; he was trying to avoid an accident.

Therefore, Dan may successfully raise the affirmative defense of justification, which a defendant shall prove by preponderance of the evidence.

It should be noted that under NYPL, a person who is operating a motor vehicle with an alcohol concentration of his blood of 0.08 is considered to be driving while intoxicated.

- a) The Court should instruct the jury on the defense of justification
- b) The Court should instruct the jury that the defendant must prove the affirmative defense of justification by a preponderance of the evidence and the prosecution must rebut that defense beyond reasonable doubt.

END OF EXAM

New York State Board of Law Examiners

ID: [REDACTED]
Question: 2
Exam Name: NYSBOLE_7-29-14_AM
Grade: _____

2)

1 (a) De Facto Corporation/Shareholder Derivative Action

Under New York Business Law, a corporation is a legal entity formed to carry out businesses for profits and manage by internal statutes. A De Facto corporation is a corporation that in the belief of its promoters and members, apparently complies with all the corporate formalities, but its article of incorporations were not properly filed before the New York Department of State as the BCL provided. A shareholder derivative action is an action that a shareholder of a corporation brings on behalf of that corporation on the grounds that the corporation's interest has been harmed by other shareholders, directors or managers of the corporation. The shareholder bringing the action on behalf of the corporation must be a shareholder at the time of the alleged wrongdoing and at the time of the filing. Previously to file the claim the shareholder bringing the action must demand the boards of directors to act on behalf of the corporation or must indicate in the complaint with particularity why that demand will be futile, which is generally the case when the directors harming the corporation are the majority. The corporation must be a necessary party to the action.

In this case, ABC, LLC may be considered a De Facto Corporation because its article of incorporation were not properly filed before the New York Department of State. However, a Limited Liability Company is classified as a partnership and a shareholder derivative action is a not an action contemplated to be use for that type of business association, because there are not shareholder, but members in a partnership. Other remedies are contemplate for partnership members when they violated the duties of loyalty of care.

Therefore, the court should dismiss the shareholder derivative action on the grounds that ABC is a limited liability partnership and Bill and Call have not standing.

It should be noted that under BCL, a director must discharged his duties in good faith and with consciousness, fairness, honesty and morality that the law requires from the fiduciaries.

2. Statute of Fraud/ Enforceable Contract.

Under the Statute of Fraud, when one merchant sends the other merchant a written confirmation with definite and seasoned terms as an acceptance of the offer, the written confirmation operates as an acceptance and a contract is formed unless rejection of the written confirmation is received within 10 days of its receipt. A contract is an enforceable legal agreement that must include offer, acceptance and consideration.

In this case, Betty sent the written confirmation on July 25, inmmediately after talking on the phone with Dan.The facts do not indicate that the written confirmation was rejected by Dan within 10 days of its receipt and because of that an enforceable contract was formed between Meat Supply and ABC because all the necessary terms where agreed on and stated on the

written confirmation and because those terms were accepted by ABD. The contract was formed by the offer of ABC, the acceptance of Meat Supply and the consideration (price). The Statute of Fraud was satisfied.

Therefore, the agreement between ABC and Meat Supply does not violated the Statute of Fraud and is an enforceable contract.

3. Testimony Evidence

Under FRE and common law, evidence is any material that can be offered on court and allowed by the judge helping the fact finder to reach a conclusion in the case at trial. Relevant evidence is any evidence that has any tendency to make a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Testimonial evidence may be brought into trial by a declarant or witness that can testify in person during the trial or as a prior testimony giving by a declarant under oath in a previous trial or deposition if the defendant had the opportunity to cross-examined the declarant in that opportunity. Relevant parts of a prior testimony may also be brought as a written statement.

In this case, Betty's deposition satisfied the elements of a prior testimony given under oath and because it was a deposition, because Meat Supply had the opportunity during the deposition to confront Betty and cross-examined her. Even though Betty is available to testify attorney can read Betty's deposition testimony into evidence.

Therefore, attorney may read Betty's deposition transcript into evidence at trial.

END OF EXAM

New York State Board of Law Examiners

ID: [REDACTED]
Question: 3
Exam Name: NYSBOLE_7-29-14_AM
Grade: _____

3)

1) Trust

A trust is a property interest in which a trustee holds title of the property at request of one party (the settlor) for the benefit of another (beneficiary) to whom a trustee owe a fiduciary duty. Generally, trusts are irrevocable and if it is the case to revoke the trust the consent of the beneficiaries is necessary. Nonetheless, the settlor may set a revocable trust, in that case the settlor may dispose of the assets of the trust and these assets may be reach by the settlor's creditors.

In this case, the content of the trust is the property of Grant unless the trust is irrevocable and if the case, the bank, as a creditor, may applied the amount in trust to satisfy the judgment.

Therefore, the court was not correct in ruling that the assets of the trust could not be applied to the satisfaction of B Bank's judgment against Grant.

2) Spendthrift Provisions

Under EPTL, a spendthrift provision is a provision in a trust that avoid that a trust beneficiary voluntary or involuntary dispose of the benefit of the trust.

Ann, did not act properly on paying Jill's share of the income of the trust to Bella.

3) The money that Grant gave to Jeff was not an advance because the written was not contemporaneous with the payment of the money and was not signed by Jeff.

END OF EXAM

New York State Board of Law Examiners

ID: [REDACTED]
Question: 4
Exam Name: NYSBOLE_7-29-14_PM
Grade: _____

4)

1.

a) The court properly considered Husband's marital fault in determining equitable distribution. Husband is not likely to succeed in his appeal on the grounds that the court decision was improper.

Under the DRL, in case of divorce generally, marital property is divided half and half between both parties, regardless of who holds title of the property. However, the court have discretion and will consider different factors in determining the equitable distribution of marital property that can be awarded in a different manner than the default standard, among these factors are:

Duration of the marriage
Husband and wife's incomes
Number of Children
Earning capacity of each party

Additionally, what party is at fault of the marriage breakdown is also considered by the court to decide the equitable distribution of marital property.

In this case, is evident that the husband is at fault for the breakdown of the marital relationship. The facts indicate continuous extra-marital affairs and mistreatment supporting the wife's complaint. Husband is clearly at fault of the termination of a long time marriage and that will be considered by the court to establish the equitable distribution of the marital property.

Therefore, the court properly considered Husband's marital fault in determining equitable distribution of the marital property.

b) The court properly considered Husband's economic fault in determining equitable distribution. Husband is not likely to succeed in his appeal on the grounds that the court decision was improper.

Under the DRL, in case of divorce generally, marital property is divided half and half between both parties, regardless of who holds title of the property. However, the court have discretion and will consider different factors in determining the equitable distribution of marital property that can be awarded in a different manner than the default standard, among these factors are:

Duration of the marriage
Husband and wife's incomes
Number of Children
Earning capacity of each party

Additionally, if a party commits waste of marital assets that will also be considered by the court to decide the equitable distribution of marital property.

In this case, husband is a gambler who has been losing money continuously and acquiring debts, compromising the marital property. He is also disposing of joint property to pay for his gambling activities. That waste will be considered by the court in determining the equitable distribution of the marital property because it is an indication that Husband has been draining the marital assets.

Therefore, the court properly considered Husband's economic fault in determining equitable distribution of the marital property.

2.

a) The court should rule in favor of the continuance of child support for Son and maintenance for Wife.

Under DRL, child support is a fixed amount to be paid by the parents in case of divorce in order to contribute with a child's living expenses, education, and other necessities. Parents have the duty to support their children until they reach an age of 21 years. Child support could be agreed by the parties in a separation agreement or could be ordered by a court decree. The amount for child support can be modified if a change of circumstances occurs, but once it is established it should be paid until the child reaches 21 years or the child's death. A child who is not willing to foster the relationship with his father may not be deprived of child support. Nonetheless, the best interest of the child should always prevail as the standard of duty that a parent owes to his child.

In this case, Son does not foster his relationship with Husband, he makes no effort to communicate with Husband and he openly avoids to share with his father. However, it could be considered that Son is resentful because of Husband's behavior (like infidelities and gambling) and Son is not willing to share with Husband as Husband is trying to, but the best interest of the child should prevail and Husband has the duty to support Son despite not having the type of relationship that Husband would like to have with Son.

Therefore, the court should not rule in favor of the termination of child support for Son.

Maintenance is a payment of a fixed amount agreed by the parties or ordered by the court, which is going to be paid by a former spouse to the other as support for living expenses and other necessities, after divorce, at intervals. A maintenance may be agreed by the parties in a separation agreement or may be ordered by the court as consequence of a marriage dissolution. A maintenance will be paid for a determinate period of time as agreed between the parties or ordered by the court, or until the beneficiary gets married again or dies. Visitation rights can be demanded by the estranged parent and should be facilitated by the parent who has the custody.

of the children a wrongful interference with visitation rights may need the court intervention, but nonetheless, a problematic relationship with the former spouse that is receiving the maintenance support cannot be the basis to cease the maintenance payments.

b) The court may consider the possibility of termination of child support for Daughter

Under DRL, child support is a fixed amount to be paid by the parents in case of divorce in order to contribute with a child's living expenses, education, and other necessities. Parents have the duty to support their children until they reach an age of 21 years. Child support could be agreed by the parties in a separation agreement or could be ordered by a court decree. The amount for child support can be modified if a change of circumstances occurs, but once it is established it should be paid until the child reaches 21 years or the child's death. A child who is not willing to foster the relationship with his father may not be deprived of child support. Recent court decisions have ruled that a child who is not willing to maintain a proper relationship with her non-custodial parent may not be entitled to enjoy his support. In this case, Daughter may be found at fault for not having a relationship with her father in spite of his efforts, but it also can be assumed that given Husband's behavior his children are not too keen to share with him a normal daughter/son/father relationship. Nonetheless, the best interest of the child should always prevail as the standard of duty that a parent owes to his child and even though the court may consider the termination of child support for Daughter, the court will take a look at all the circumstances on its ruling.

Therefore, the court may consider the possibility of termination of child support for Daughter.

3. A court may cancel child support and maintenance only on the grounds explained in the answers above.

END OF EXAM

New York State Board of Law Examiners

ID: [REDACTED]
Question: 5
Exam Name: NYSBOLE_7-29-14_PM
Grade: _____

5)

1. Scott is entitled to recover medical expenses paid by Deb's insurance company, but Ed is not.

Under New York No-Fault Insurance, a driver may recover for injuries that he or third parties sustained in a motor vehicle accident (no motorbicycles) involving the insured vehicle even though the driver could be at fault, up to the amount of the \$50,000 and only for economic lost including medical expenses. However, No-Fault Insurance does not cover intoxicated drivers.

In this case, Ed was not the owner of the car and was not a passenger, but the driver who was totally intoxicated while driving Scott. Scott was the innocent passenger in a car covered by No-Fault Insurance. Scott may recover medical expenses from Deb's insurance company.

Therefore, Scott may recover medical expenses from Deb's insurance company.

2.

a) The court should denied Ed's motion to dismiss Lynn's complaint against him.

Negligence

Under common law, negligence is the failure to exercise the standard of duty that a reasonable prudent person would have exercise under the same sets of facts. To establish a prima facie case of negligence a plaintiff must establish:

- a) that a duty is owe to him
- b) that the defendant breached that duty
- c) that defendant's action was the actual and proximate cause of plaintiff's damages, and
- d) that he suffered damages as the result of plaintiff's action.

In this case, Ed has a duty not to cause damage to anyone. Ed as a driver, owes that duty to Lynn as a pedestrian. Ed breached that duty when he recklessly and knowingly "decided" to drive while intoxicated and failed to stop at the intersection striking Lynn as a result. Ed was the actual cause of Lynn injuries because "but for" Ed breach of his duty Lynn wouldn't have suffered the injuries. Ed was also the proximate cause of Lynn's injuries because it is foreseeable plaintiff if harmed by Ed's driving. Lynn also suffered damages because she was injured as the result of Ed failure to exercise a reasonable and prudent person standard of care. Because of the aforementioned reason the elements of negligent are satisfied and Lynn has a cause of action against Ed.

Therefore, the court should denied Ed's motion to dismiss Lynn's complaint against him.

b) The court should granted Deb's motion to dismiss Lynn's complaint against her.

Under common law, negligence is the failure to exercise the standard of duty that a reasonable prudent person would have exercise under the same sets of facts. To establish a prima facie case of negligence a plaintiff must establish:

- a) that a duty is owe to him
- b) that the defendant breached that duty
- c) that defendant's action was the actual and proximate cause of plaintiff's damages, and
- d) that he suffered damages as the result of plaintiff's action.

In New York the owner of an automobile is not liable for damages caused by another person using the owner's car unless the car's owner negligently entrusted the vehicle to an infant or a incompetent or a person lacking the capacity to drive safely.

In this case, Deb is the owner of the car, but she cannot be find guilty of negligence because when she loaned the car to Ed he wasn't intoxicated, so she did commit any negligent act or negligement entrustment.

Therefore, the court should granted Deb's motion to dismiss Lynn's complaint against her.

c) The court should denied Bill's motion to dismiss Lynn's complaint against him.

Under common law, negligence is the failure to exercise the standard of duty that a reasonable prudent person would have exercise under the same sets of facts. To establish a prima facie case of negligence a plaintiff must establish:

- a) that a duty is owe to him
- b) that the defendant breached that duty
- c) that defendant's action was the actual and proximate cause of plaintiff's damages, and
- d) that he suffered damages as the result of plaintiff's action.

In this case, as an alcohol seller Bill has a duty to any patron consuming alcohol in his premises. He should have stopped serving alcohol to Ed as soon as he noticed that Ed was heavily intoxicated. It would logic for Bill to assume that Ed was driving and that Ed, being so intoxicated as he was, would represent a threat to whoever he can encounter while driving. Bill is jointly and severable liable to Lynn's for her injuries, since Bill breached his duty of care while serving more alcohon to a patron who was already heavily intoxicated.

Therefore, court should denied Bill's motion to dismiss Lynn's complaint against him.

3. Meg cannot recover against Ed for emotional injuries.

Under New York law, Negligent Infliction of Emotional Distress (NIED) is an action in torts that occurs when the defendant's outrageous conduct causes intense emotional distress in a third party who observes the injuries suffered by a kindred as a result of defendant's conduct. Under common law two theories deal with negligent infliction of emotional distress, the bystander theory and the zone of danger theory. New York follows the zone of danger theory. For a plaintiff to establish a cause of action for negligent infliction of emotional distress he should prove that the plaintiff was in the zone of danger when the event occurred and as a result he is suffering physical symptoms.

In this case Meg, when Ed struck Lynn with the car, Meg was standing in her front yard, she witnessed the accident, but she was not in the zone of danger, she couldn't assert that she was in fear to be hit by the car. Meg allegedly is suffering emotional injuries, but the facts do not indicate that she suffered any physical symptoms as to the amount necessary to qualify of physical symptoms necessary to satisfy the elements of NIED.

Therefore, Meg cannot recover against Ed for emotional injuries.

4. The court should deny Ed's motion to dismiss

Under New York law, there is not intra-family immunity. A wife may sue a husband or a child may sue his parents for any harm suffered as a result of an intentional tort or negligent.

In this case, Scott can sue Ed, his father, for the injuries sustained as a result of Ed's negligence.

Therefore, the court should deny Ed's motion to dismiss Scott's complaint against him.

END OF EXAM

New York State Board of Law Examiners

ID: [REDACTED]
Question: 6
Exam Name: NYSBOLE_7-29-14_PM
Grade: _____

6)

Mr. Steve Glenn
Vice President of Human Resources
Signs, Inc

Dr. Mr. Glenn,

We have been retained by Ms. Linda Duram to assist her on her concern given the possibility of being terminated by Signs Inc., due to an absent of leave that Ms. Duram took to attend to her grandmother's sister funeral, even though she didn't obtain Signs' prior approval.

It is our sincerity intention to orientate Ms. Duran on her rights and obligations with her employer, Signs, and also to assist Signs in the best form possible to consider some important aspects of the Family and Medical Leave Act (FMLA) and to understand Ms. Duram's familiar situation.

In accordance with Section 7 of FMLA, the term "parents" means the biological parent of an employee, but FMLA also includes as a parent " an individual who stood in loco parentis to an employee when the employee was a son or daughter. Ms. Duram was indeed raised by her grandparents giving the unavailability of her biological parents. For a better understanding of Ms. Duram's family situation please review Ms. Duram's affidavit attached herein.

Giving the circumstances we have not doubt that Act, will consider Ms. Duram's grandmother as a "parent in loco parentis" with the same rights granted to a biological parent by this law.

FMLA, Section 2612, also establishes the leave requirements as follows: "Entitlement to leave... An eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

...(C) in order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition" (underline added)

Mrs. Emma Baston, Ms. Duram's grandmother, has a serious health condition (please see herein attached medical report) that makes necessary Ms. Duram's continuous support. For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment of physical or mental condition that involve inpatient care...or continuing treatment by a health care provider as defined in §825.115. Mrs. Baston health condition falls within the FMLA description.

Regarding the Employee notice requirements for unforeseeable FMLA leave, the act provides that: "(a) timing of notice. When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the

facts and circumstances of the particular case..."

In this case, Ms. Duram, properly informed Signs, the need for the leave of absent to attend to her grandmother's (parent in loco parentis) sister funeral. It's clear that Ms. Duram could not foresee when her

END OF EXAM