

SELECT ANSWERS
to the
JULY 2007
NORTH CAROLINA
BAR EXAMINATION

\$30.00

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Essay Questions and Selected Answers

July 2007 North Carolina Bar Examination

This publication contains the essay questions from the July 2007 North Carolina Bar Examination and one or two answers for each question selected by the grader.

These answers received good scores and were written by applicants who passed the examination. The handwritten answers were typed as submitted, being edited as little as possible, and without correcting errors in spelling, grammar or punctuation.

These published answers are representative of the general quality of answers that merited the particular score on that question. They are intended to provide the applicant with examples of the various quality of answers and the standards employed by the graders in scoring the examination.

Since the scoring of the essay examination is based upon the relative scale rather than an absolute scale, the average answer on one question may have been better or worse than the average on another question.

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Harry executed a deed and gave it to Sam Lawyer, with instructions to deliver it to Harry's girlfriend, Sue upon Harry's death. The deed contained the following language.

“To Sue and her heirs so long as this property is used for noncommercial purposes and no longer.”

One year and seven months later Harry died, at which time Sue received the deed and recorded it.

Sue took out a mortgage and built a home on the land. Five years later, she sold the property to Home Mart, who constructed a store on the land. Part of Sue's consideration for the deed was a condition that Home Mart assume the unpaid balance of her mortgage.

QUESTIONS:

1. Is the deed to Sue valid?
2. Can Home Mart use the property as a store?
3. What happens to Sue's mortgage?

Answer A to Question 1

1. The deed to Sue is valid.

In North Carolina, an deed of an interest in land must comply with the statute of Frauds, it must be written. The deed needs to be recorded to be good against third parties, but the deed does not need to be recorded to be good as between the parties. There is one exception to this rule in North Carolina however. In North Carolina, a gift deed must be recorded within two years or it becomes absolutely void, even as between the parties. In North Carolina a deed must be delivered to be good. Delivery can be proven by the grantor's intent to deliver the deed and if the grantor gives the deed to a third party to hold until a condition occurs, North Carolina recognizes delivery - this is a conditional deed that is recognized under North Carolina law. In

Here, the deed from Harry to Sue was in writing and satisfied the statute of frauds. This deed was a conditional deed as Harry gave the deed to his lawyer to deliver to Sue at his death. It is not a problem that this condition was an oral condition. Here there was proper delivery of the deed. Even though Harry did not deliver the deed to Sue, he "delivered it" for purposes of meeting that requirement when he gave it to the third party, the lawyer, in order to and with the intent that it good to Sue at his death. This is a proper conditional deed with adequate delivery.

Sue recorded the deed from Harry one year and seven months after Harry died, so even though this is a gift deed, because it was recorded within two years, it is valid.

Therefore, the deed to Sue is valid.

2. No, Home Mart cannot use the property as a store.

A deed "to A and her heirs" creates a fee tail under the common law. However, in North Carolina, by statute, it is converted into a fee simple in favor of the grantee "A". A fee simple

determinable is created if the grantor gives a gift of land "as long as". Under a fee simple determinable, the grantor retains a possibility of reverter in the land and if the condition is breached, the grantor automatically reclaims title to the land. As of October 1, 1995 North Carolina statute states that such a condition will become invalid if it does not occur within 60 years. Also, a person can only properly sell the interest that he or she has in a property.

Here the deed "to Sue and her heirs so long as this property is used for noncommercial purposes and no longer" creates a fee simple determinable in Sue. Harry, or Harry's estate after his death, retains a possibility of reverter in the land. When Sue sold the land to Home Mart she could only sell the interest she had in the land, a fee simple determinable. Home Mart would have known this from a search of the records. So Home Mart only had a fee simple determinable in the property and the moment that they used the land for noncommercial purposes, the land automatically reverted to Harry's estate and Home Mart was thereafter trespassing on the land. Home Mart's only option now is to hope that Harry's estate doesn't bring an action for ejectment - if they do not Home Mart might eventually be able to acquire the land through adverse possession but only if they possess it adversely, visibly, openly and notoriously, and continuously for 20 years.

Therefore, Home Mart cannot use the property as a store and remain the rightful owners of the property.

3. Sue's mortgage ends when Home Mart uses the land for a commercial purpose, however, both she and Home Mart will remain personally liable on the loan amount.

Under North Carolina law, a person can only mortgage the property interest that she has, and no more. Also, a buyer of land is not generally personally liable on a mortgage on that land unless

they specifically assume the mortgage. Even when a buyer does specifically assume a mortgage, the original mortgagor remains personally liable on the loan amount unless there is novation.

As stated above, Sue received a fee simple determinable by deed from Harry. Therefore, all that Sue could mortgage was her interest in the property - all she could mortgage is a fee simple determinable. When that interest ended, when Home Smart used the land for noncommercial purposes, the mortgagee no longer had a mortgage on the land. However, Sue is still personally liable for the amount of the loan, as is Home Smart. Home Smart specifically assumed the mortgage making them liable. However, the facts do not state that there was a novation (which is where both the mortgagor and the new mortgagee agree to release the original mortgagee) and therefore, Sue remains personally liable.

Therefore, the mortgage on the property ended when the land was used for noncommercial purposes but Sue and Home Smart are still personally liable for the amount of the loan.

Answer B to Question 1

1. To transfer title to property in North Carolina, a grantor must both execute a valid deed and physically deliver it, for some period of time, to the grantee - there must be transmutation of possession. It is possible to condition the delivery of a deed, so that the physical possession is not given until the occurrence of some event. This does not invalidate the deed, even if that event is the death of the grantor, so long as there is actual transmutation of possession. Note, that were a deed is a deed of gift, it is entirely void unless recorded within 2 years of its creation. Also, there is a presumption that in recording, there was valid delivery to the recorder.

Here, Sue did not receive possession of the deed till Harry's death, but she did receive possession of the validly executed deed. As such, there was delivery and a transfer of title when Harry's attorney gave the deed to Sue. In addition, since this was a deed of gift (there was no value exchanged here), Sue had to record within 2 years of the deed's creation. She satisfied that condition by recording a year and seven months after the deed was created and given to the attorney for Sue. In addition, Sue benefits from the presumption of delivery via recording the deed..

2. No, Home Mart can not use the property as a store.

When transferring property to another, a grantor can place certain conditions on that property's use, even when transferring a fee interest. There are several forms of these conditions, which are known as defeasible fees, including fee simple determinables, fee simples subject to a condition subsequent, and fee simples subject to an executory interest. The various types of defeasible fees are created based on the language used in the grant by which the property is transferred. For instance, words like "so long as" and "until" can create fee

simple determinables. Fee simples subject to condition subsequent require a direct statement of the power of the grantor and his heirs to re-enter the property: Where valid language is used to create a fee simple determinable or other defeasible fee, certain events can trigger the transfer of the property to another party. For instance, in a fee simple determinable, the happening of the condition causes reversion to the grantor or his estate. In NC, under statute, such a condition must occur within 60 years of the creation of the defeasible fee - after that 60 year period, the happening of the condition has no effect and the owner can maintain the property.

Here, there is a fee simple determinable. The proper language - Sue and her heirs "so long as this property is used for noncommercial purposes" creates that interest and a possibility of reverter in Harry and his heirs. Since there is a defeasible fee in existence here, it has an effect on subsequent purchasers of the property. When someone passes property, she is only able to pass the interest in it that she has. Since Sue only has a fee simple determinable, subject to the possible reverter to Harry or his heirs, that is all she was able to transfer to Home Mart. As a result, Home Mart is just as subject to the restriction imposed by the defeasible fee as Sue was when she transferred the property. Because of the effect of the fee simple determinable, as soon as Home Mart built a store on the property and violated the restriction in the deed, reversion to the estate of Harry occurred. It should be noted that Harry's heirs should act to ensure that Home Mart is timely removed from the property - the transfer of title to them was automatic and started time ticking on possible adverse possession by Home Mart.

3. The mortgage to Sue becomes unsecured as a result of the operation of the fee simple determinable. However, both she and Home Mart remain personally liable to the lender.

As noted above, when transferring property to another, one is only able to convey what one has. A mortgage is a conveyance of an interest in real property in security for a debt. As such, a mortgagor is only able to transfer what interest she has to the mortgagee. The mortgagee/lender's interest in the property is limited to the interest held by the mortgagor, and occurrences (like the operation of a defeasible fee condition) that operate to destroy the interest of the mortgagor affect the mortgagee. However, it is important to note that mortgages also result in personal obligations for debtors - they are merely secured by land. As such, the loss of land as security does not cause the end of personal liability. In addition, where a subsequent purchaser of realty assumes a mortgage (rather than taking property subject to it), he too becomes personally liable on the mortgage debt.

Here, Sue took out a mortgage. In addition to subject her interest in real property (a fee simple determinable) to a security interest, she subject herself to a personal obligation. When the interest she had in the real estate ended, her personal liability on the mortgage did not end. Home Mart took the property and assumed the mortgage, hence becoming personally liable as well. When Home Mart lost its interest in the land due to the operation of the defeasible fee, however, the interest in land in which the lender had secured its mortgage disappeared. The lender can not maintain security when a reversion occurs because the estate from which it derived its security ceased to exist. As such, the lender here no longer has any security in the property - it is held in fee simple and (as far as we know) is unencumbered. However, because both Sue and Home Mart are personally liable on the loan, the lender is not without recourse in the event of default.

It should be noted that in the event the original deed to Sue was invalid because there was no delivery during the life of the grantor, this same result would befall the mortgagee - this is again because Sue would not be able to give any interest better than what she had in the

property. If she had none at all because the deed was no good, then the mortgagee would be unsecured and she would be personally liable along with Home Mart.

Trina Teller, a long-time employee of the First National Bank of Thomasville, Davidson County, North Carolina was arrested on January 15, 2006 on charges of embezzling \$82,000.00 from the Bank. Prior to her arrest and during the course of the investigation of the missing funds by Bank security personnel, Ms. Teller was questioned by a security officer. No *Miranda* warnings were given to Ms. Teller at any time by the security officer.

In a written statement given to the security officer, Ms. Teller admitted to embezzling the funds over a three year period of time. In her written statement, Ms. Teller claimed that she was the victim of a blackmail scheme. According to Ms. Teller, the blackmailers had pictures of her in a "compromising position" with a man who was not her husband. They threatened to send the pictures to her husband unless she provided them with certain amounts of money. According to Ms. Teller, every time she was contacted, she was asked for more money, which she provided.

After her arrest and prior to trial calendared for June 10, 2006, in Superior Court, Davidson County, the District Attorney notified Cleveland Wilkes, the attorney for Ms. Teller that he intended to use only portions of the written statement during the upcoming trial. The portions to be used would not include any reference to the blackmail allegations.

Attorney Wilkes timely filed a motion to suppress his client's statement based upon the violation of his client's Fifth Amendment privilege against self-incrimination. Attorney Wilkes also timely filed a motion, in the alternative, to require the District

Attorney to introduce the entire statement of his client, or none of it, rather than selected portions.

After a hearing, on the defendant's motions, the Superior Court denied both motions.

QUESTIONS

1. Did the court commit reversible error by denying the motion to suppress the statements of the Defendant?
2. Did the Court commit reversible error by refusing to order the District Attorney to introduce the entire statement, not selected portions?

Answer A to Question 2

1) No, the court did not commit reversible error by denying the motion to suppress the statements of the Defendant.

In a criminal trial, a Defendant's 5th Amendment rights limits the types of statements the government can use against him. Under the exclusionary rule, confessions obtained in violation of the Miranda warnings are not admissible against a Defendant for substantive purposes, but can be used to impeach him. However, Miranda warnings are only required to be given when there is custodial interrogation. Custodial interrogation is generally determined by whether a person feels free to leave, or is in police custody but not under arrest. Interrogation is usually defined as any action by the police that reasonable to elicit a response. It applies when there is government action, which is defined as action by the police, detectives, or other agents thereof. A private security guard is not a government actor unless he is deputized with the power to arrest.

Here, Miranda warnings were not required before Teller's statements were made. Teller was questioned by a security officer who does not appear to be a government actor. There is no indication that he was deputized with the power to arrest, nor was he acting as an agent of the police. The investigation was conducted by "Bank security personnel" during their own investigation and prior to Teller's arrest. She was not in the police stationhouse, nor was she handcuffed or in the back of a police car (situations that would lead to a finding of custodial interrogation). Although the questioning was interrogation, it was not "custodial interrogation" within the meaning of the 5th Amendment. Therefore, it was not error to deny the motion to suppress.

2. The Court did commit reversible error by refusing to order the District Attorney to introduce the entire statement.

In, North Carolina, the "completeness" rule requires that when part of a piece of evidence is introduced, the other side can require the introduction of the full piece of evidence if to do otherwise would be misleading or incomplete. In order to be reversible error, the error must have been relevant and prejudicial to the defendant's defense. The crime of embezzlement consists of the following elements: (1) the defendant was an agent and had a fiduciary duty to provide over property of the principal, (2) the defendant received property in the course of her fiduciary duties, and (3) knowing that the property was not hers, she converted the property for her own use or for that of a third party. Duress is an affirmative defense for embezzlement.

Here, the introduction of Ms. Teller's redacted statements would be misleading and incomplete if she is not allowed to introduce the entire statements because it omits the information about her defense of duress. Thus the Court committed error by refusing to order the district attorney to introduce the entire confession. In addition, the evidence was relevant and prejudicial because the excluded statements were relevant as to whether the defendant was under duress at the time of the offenses. These facts could have a material influence on a reasonable juror on whether duress was present and thus the district attorney should have been required to introduce the entire statement.

Answer B to Question 2

(1) No the court did not commit reversible error by denying the motion to suppress the statements of the defendant.

Every defendant has a 5th amendment right against self-incrimination. A policeman (a government actor) must read a defendant the Miranda warnings before any interrogation may begin. Miranda is given once a person is "in custody". Being "in custody" has been defined as when someone is not free to leave the police's presence. After Miranda is given, if the defendant asks for a lawyer or to stop questioning, all questions from the police must stop. Furthermore, if questions continue and a confession is given, the confession will not be allowed at trial. Confessions must be voluntarily given and not given under coercion.

First, on these facts, before even asking if the interrogation was proper, a question arises as to whether the security officer is classified as a policeman. There are no facts showing that he has been deputized by local police department, nor that he is a member of the police force. Instead, he is only the Bank security personnel. This means that Ms. Teller was not in the presence of a government actor and therefore, the Bank Security officer had no responsibility to give her Miranda warnings. Further, there are no facts indicating that Ms. Teller was not free to leave the area as she was being questioned. It appears her confession was voluntarily given to the security officer.

Therefore, because the confession happened prior to her arrest, before she was in custody, and was not questioned by a government actor - such as a policeman, a deputized safety officer, or other state actor- there was no violation of her 5th amendment right. Therefore the court did not commit reversible error by denying the motion to suppress the statements of Ms. Teller.

Wendy and Henry were married July 4, 1993. They have two children. Henry owns a 50% interest in an insurance brokerage business that he started in 1984. He developed a unique insurance product in 1988, which caused his business to earn millions of dollars in commissions beginning in 1991. He and his partner, Bill, work very hard and have hired persons to work with them who have contacts with bankers and insurance company executives. This has helped them sell their product. They are quite generous in sharing their commissions with these people. The business has an excellent reputation for honesty, dependability, and hard work.

Henry left Wendy in 2003 for her best friend. Wendy filed an action in the Wake County District Court at the end of 2003 asking for equitable distribution of the marital property. At trial the parties stipulated that Henry's share of the insurance business was worth \$20,000,000.00 on the date of their marriage, July 4, 1993. They further stipulated that on the date of separation, July 3, 2003, his 50% share of the business had a net fair market value of \$110,000,000.00.

Wendy contends that all the increase in the value of the business during the marriage is marital property. Henry contends that all the appreciation of the business during the marriage is his separate property.

QUESTION

Is the increase in value in Henry's business during the marriage separate property or marital property?

Answer A to Question 3

3. The increase in value of Henry's business during the marriage is marital property.

In North Carolina, separate property is property owned individually by the spouse prior to the marriage, property received during the marriage personally by third parties. Marital property is property which the parties owned together during the marriage, property they acquired during the marriage, or property which has increased in value due to marriage. North Carolina takes the partnership view of marriage. Each spouse is deemed to have worked towards a successful marriage. Increases in value of separate property during the marriage which are due to active work by one spouse in which they took time away from the marriage to increase the value in are deemed marital property. Passive increases in separate property which happened via market forces are deemed to remain separate property. Additionally, the value of one spouse's business is property which is taken into consideration when the court distributes property via equitable distribution.

In this situation Henry's company had a value of \$20 million at his marriage. After, 10 years of marriage it increased in value to \$110 million. The court will have to determine if this \$90 million increase is due to active work by Henry or passively via market forces. The court will have to hear evidence presented by both parties on these issues and make findings of fact in regard to their determination. The court will have to look at what increase in the value is a result of the market forces. This could include the need for the product Henry created prior to marriage. Whether it has become more useful or whether it is more desirable based on external forces that are beyond Henry's control. These factors would go to a passive increase in value. Additionally, they will have to determine whether the increase is due to Henry's hard

work and taking away time from the marriage. Henry and his partner Bill have both worked hard to build

the company. They have hired great people to sell the product and they are generous in sharing a commission. They have established an extremely successful company which is well known and respected. In order to create a company such as this Henry probably had to work extremely hard and devote a significant amount of time to his business. These are all factors which show that Henry has taken time away from the marriage to help build a successful company.

As a result of all of the factors, the increase in Henry's company is most likely a result of his hard work and taking time away from the marriage. This would be deemed to be an active increase in his separate property and the court would most likely find it was marital.

Answer B to Question 3

The increase in value in Henry's business during the marriage is marital property.

In North Carolina, equitable distribution is the method utilized by the courts to divide both marital and divisible property. The theory behind equitable distribution is that marriage is a partnership. The court must inventory all assets, categorize them as marital, separate or divisible, value them, and divide them appropriately. When making an equitable distribution, the court considers all relevant factors including the parties' contributions during the marriage, income, earning potential, and economic fault. North Carolina also employs the source of funds rule. This rule states that property will retain the character of the source of its original funds. Separate property is that property which is brought into the marriage by the parties, or which is inherited or received as a personal gift during the marriage. Separate property is further characterized in North Carolina when it increases in value during the marriage. When separate property increases in value due to the active participation of the spouse, the increased value of the property is considered marital property. Conversely, when separate property increases in value during the marriage by passive forces (such as market forces), such property remains separate property because it was not increased by the labor of the marriage. Marital property is all property acquired during the marriage, through the "labor" of the marriage.

Here, when Henry began his business, it was clearly separate property. Henry began his business, of which he owns a 1/2 interest, in 1984. This was nine years before his marriage. He increased the value of that business by a new development in 1988 and was seeing the benefits of his labors by 1991, still before his marriage. Even during his marriage, under the source of funds rule, the business was Henry's separate funds.

However, the increase in value in Henry's business that occurred during the marriage is marital property, and not separate property. Even after Henry and Wendy married in 1993, Henry continued to work at his business. Henry's work in the business caused the business value to increase. This was clearly an active increase because Henry continued to hire new individuals, work hard with his partner to secure banking and insurance contacts, sell products, and expand his business. His work and income derived from his active work in the business during the marriage, is considered marital property because it was for the benefit of the marriage. In addition, in North Carolina, even though Wendy may not have worked at Harry's business per se, Harry's work and earnings at the business, including the value of his goodwill and good reputation in the business, were for the benefit of the marriage, are considered to be fruits derived from the labor of the marriage. Similarly, any earnings Wendy may have made at a job would be considered marital property, even if she had held the job prior to the marriage.

Therefore, the increase in Henry's business during the marriage until the date of separation are marital funds, and his 50% share is therefore divisible with Wendy.

Tex Industries, a Delaware corporation with its chief executive office in Greensboro, NC, owns manufacturing plants in VA, SC and GA. Tex Industries borrows \$10,000,000 from SmartBank and secures the loan by the grant of a security interest in all of Tex Industries' inventory and equipment, and 950 certificated shares of registered IBM common stock. The security interest is evidenced by a written security agreement signed by Tex Industries' president and the loan and the grant of the security interest to secure the loan are approved by Tex Industries' board of directors.

On the day the loan closes, SmartBank takes possession of the IBM common stock and files a financing statement in the Office of the North Carolina Secretary of State. The financing statement describes SmartBank's collateral as "all of Tex Industries' present inventory and equipment and all inventory and equipment acquired in the future by Tex Industries". The financing statement also describes the IBM common stock by reference to each share's certificate or registration number. The collateral description used in the financing statement is identical to that used in the security agreement signed by Tex Industries' president.

Several years after the loan closes, Tex Industries files a Chapter 7 bankruptcy. The bankruptcy trustee, after reviewing SmartBank's security interest, notifies SmartBank that in the trustee's opinion, SmartBank's security interest is not properly perfected in Tex Industries' IBM common stock, or Tex Industries' inventory or equipment.

QUESTION:

Is SmartBank's security interest perfected in Tex Industries' IBM common stock, and Tex Industries' inventory and equipment?

Answer A to Question 4

4. Yes as to the IBM Common stock, and No as to the inventory and equipment.

Security interests in personal property are governed by Article 9 of the Uniform Commercial Code (UCC), which NC has adopted. Personal property includes goods and intangible property, such as investment property (stocks). To obtain a security interest in personal property, Article 9 requires 3 things: (1) that there is a signed (or authenticated), written security agreement which accurately describes the collateral at issue. This description may use Article 9 terms, such as "equipment", "inventory", but may not say "all assets." (2) that the secured party give value to the debtor--this is usually the loan proceeds. Value given may also be a loan given in the past--past consideration is OK in article 9, and (3) that the debtor have rights in the assets which he is granting a security interest in. This means a debtor can not grant a security interest in property he does not own. If all these three things occur, then there is a valid security interest in the property in favor of the secured party. It is acceptable for parties to grant rights to property acquired in the future, although those rights will not vest until the debtor actually gets those rights in the property (since that is the 3rd element--to have right in the asset).

Although the security interest is effective as between the secured party and the owner of the property, the security interest does not bind the rest of the world. So for a secured party to protect its interest and gain priority over other interests in the property (buyers, later lenders, etc.), the secured party must perfect its interest. The method of perfection depends on the type of personal property--it depends on the classification given the property in Article 9. Equipment and inventory are both classified as "goods." In order to perfect a security interest in goods, the lender may either perfect by possession (actually possess the property) or by filing a

financing statement. A financing statement is a statement meant to give notice to third parties of a security interest in a piece of property. The financing statement (FS) must be filed in the Secretary of State's office in the state where the debtor (owner of property) is located. For individuals, that individual is located where he/she lives. For a corporation, the corporation is located in the state in which it is incorporated. In addition to the debtor's name, the FS must also contain a description of the property. This description may be very generic though---"all assets" will do. Or the description may be as specific as the secured party would like. For investment property (stock), Article 9 provides that a party may perfect by possession or control. Possession is, obviously, possessing the investment property itself. Or the party may perfect by control--meaning the debtor basically gives the secured party control over the property--they have the right to sell it, vote it, etc. Once a party has met all the requirements for a security interest, and followed the correct rules for perfection, that security interest is perfected.

Here, Tex Industries is the debtor. Tex Industries validly executed a security agreement in favor of SmartBank. The security agreement was signed by the president and authorized by the board, so it is a valid grant of security. At the time, Tex had rights in its current IBM stock, inventory, and equipment. Smart Bank loaned money to Tex, so value was given. All three requirements of a security interest have been met, so SmartBank has a valid security interest in the collateral at issue, including any equipment and inventory acquired after the original security agreement per the after-acquired clause. However, the issue here is attachment. As to the IBM common stock, this stock is classified by article 9 as investment property. To perfect a security interest in investment property, the secured party must perfect by possession or control. Either method gives notice to 3rd parties. Here, SmartBank actually took

physical possession of the 950 shares of stock. Since SmartBank had possession of the stock, they were perfected to the stock. The FS they filed is immaterial to their perfection.

As to the inventory and equipment, which are classified as goods in article 9-the most common way to perfect a security interest in goods is by filing a FS. The FS must include the debtor's name and a description of the collateral--here the FS included an accurate description of the collateral, and presumably had Tex Industries name on it. However, the FS was located in the wrong place. FS should be filed in the state where the debtor is located. For corporations, that means their state of incorporation. Here, Tex is a Delaware corporation--it was incorporated in Delaware. It does not matter that its chief executive office is in NC or that it has plants in other states. For purposes of FS, it is located in Delaware. But SmartBank filed the FS in North Carolina. Since the FS is located in the wrong place, it does not perfect the security interest of Smart Bank. Filing in the wrong state gives notice to no one, so Article 9 does not recognize this as effective to file a FS. So, the FS is ineffective and the security interest in the inventory and equipment and unperfected.

In conclusion, the security interest in the IBM common stock is validly perfected, but the security interest in the inventory and equipment is unperfected since there was never a valid financing statement filed.

Answer B to Question 4

4. Yes, SmartBank's security interest is properly perfected in Tex Industries' common stock because of possession, but is not properly perfected with respect to the inventory and equipment because the financing statement (UCC-1) was filed in the wrong secretary of state's office.

North Carolina has adopted a version of Article 9 of the Uniform Commercial Code. Article 9 governs security interests in personal property. A security interest in personal property is a consensual lien on personal property that is securing a payment or performance of an obligation. A security interest is created through the process of attachment. Attachment occurs when there are rights in the property of a debtor, the debtor secures those rights with another party in a security agreement, and value is given by the other party. A security interest then becomes enforceable and the other party is now a secured party. The process of perfection is the process the secured party must go through to give notice to the rest of the world of the security interest in that property and to retain its position of property in the personal property. Perfection is garnered through five different methods: filing a financing statement (a UCC-1), through possession, through control, through automatic perfection, and through other state laws or federal laws that are applicable to the particular collateral. A filed financing statement can be supergeneric (such as say "all assets") or can have the exact language of the security agreement and is still proper. The financing statement must be filed in the proper office where the debtor is registered as an organization and would most likely be filed at that particular state's Secretary of State's office and is effective for five years. Possession is another form of perfection and it is properly obtained when the secured party takes possession of the described collateral and perfection remains until possession is relinquished.

In the facts, SmartBank lends 10,000,000 to Tex Industries. To get a property security interest in collateral given to secure that payment obligation, attachment must occur. The first step of

attachment is for the debtor to have rights in particular collateral. From the facts, Tex Industries has rights in inventory, equipment, and 950 certificated shares of IBM common stock (investment property). Furthermore, the second step is that a security agreement be signed as to that collateral and the value that will be given. A security agreement was properly signed evidencing the property as inventory, equipment, the common stock, and contained an after-acquired property clause in the property that would also revolve in and out as inventory or equipment. Value is the third step and it was given by SmartBank in the form of 10,000,000. A security interest has thus been created and is enforceable because the steps of attachment have occurred.

Next, SmartBank must assert perfection in the items to retain priority and to give notice to the rest of the world of the security interest in the collateral. Perfection and priority can be asserted in inventory and equipment through the filing of a financing statement (a UCC-1). The filed financing statement can be supergeneric (such as "all assets) and still be valid. It may also contain the same language as was in the security agreement. From the facts, the financing statement SmartBank filed contained the exact language of the security agreement and that is proper. However, a financing statement is valid and gives proper notice to the rest of the world only if it is filed in the proper filing office. The facts state that Tex Industries is a Delaware corporation. Even though the chief-executive-office is located in Greensboro, North Carolina, since the corporation is a Delaware corporation, only proper notice would be given to all future parties that might want to know of the interest, if the financing statement was filed in Delaware. The facts inform us that the financing statement with respect to the inventory and equipment was filed in the North Carolina Secretary of State's office. This is the wrong place to

file and thus the security interest in the property remains with respect to the inventory and equipment, but there is not proper perfection in the collateral.

Furthermore, SmartBank not only filed as to the common stock, but it took possession. Possession is a proper method of perfection for tangible common stock such as certificated securities, a form of investment property under Article 9. As long as Smart Bank retains possession of the common stock, it will be properly perfected as against other subsequent parties that might later claim an interest. Therefore, the trustee's opinion is wrong with respect to the perfection of the common stock.

Thus, SmartBank's security interest in the common stock is properly perfected because of possession, but is not properly perfected with respect to the inventory and the equipment.

Acme Elementary School is a public school operated by a North Carolina County School Board. Thomas Troublemaker was in the second-grade class, which had one teacher (Ms. Salem) and one teacher's assistant (Ms. Winston) assigned to it. The school principal is Ed Educator.

On August 1, 2005, Thomas became disruptive during storytime by yelling at other students and kicking the leg of a nearby table. Ms. Salem placed Thomas in "time out" for 30 minutes. The next day, Thomas repeatedly kicked the table and threatened other students during storytime, and he was again placed in "time out" for 30 minutes. A few days later, Thomas kicked one of the other children during one of his outbursts at storytime. In response to this incident, Mr. Educator met with Thomas' parents on August 10 to discuss his behavior and possible suspension, and then he discussed the situation with Ms. Salem and Ms. Winston. Mr. Educator, Ms. Salem, and Ms. Winston agreed to allow Thomas to continue in that class, as opposed to moving him to a special class for "problem children."

On August 20, 2005, Thomas had another outburst during storytime. Ms. Winston was supervising the class while Ms. Salem made her daily exit to smoke a cigarette outside. Ms. Winston asked Thomas to sit down and be quiet several times, but he refused to obey. She tried to ignore Thomas' behavior by continuing with storytime until Thomas suddenly turned over the table where the children were seated. The table fell on the hand of another student, Mary, and crushed three of her fingers. A few minutes later, Ms. Salem returned from her "smoke break" and took Mary to the hospital. Ms. Winston placed Thomas in "time out" and reported the incident to Mr. Educator. Thomas was

expelled for the remainder of the school year. Mary has undergone numerous surgeries to repair the damage to her hand and ultimately had the fingers amputated.

Mary, through her Guardian Ad Litem, and Mary's parents have now filed suit against the school board, and also against Ms. Salem, individually, Ms. Winston, individually, and Mr. Educator individually.

QUESTIONS:

1. The school board has moved for Summary Judgment. Should the court grant this motion?
2. What claims, if any, may Mary's guardian ad litem and her parents maintain against Ms. Salem, Ms. Winston, and Mr. Educator in their individual capacities?

Model Answer Question 5

1. Yes, unless the school board has purchased liability insurance regarding the tortious acts of its agents.

N. C. § 115 C-42 provides that a North Carolina public school board, such as the Board operating Acme Elementary School, is a governmental entity and is ordinarily entitled to assert governmental immunity as a defense to claims for bodily injury caused by the negligence of its agents acting within the scope of their agency for the Board. However, this statute also provides that the Board's immunity will "be deemed to have been waived" if the Board obtains liability insurance covering such claims. It is significant that such a waiver applies only to the extent the Board is indemnified by its insurance coverage. Clearly Mr. Educator, Ms. Salem and Ms. Winston are agents of the Board acting within the scope of their authority. Thus, the Board has no immunity to the claims by Mary's guardian ad litem and her parents to the extent the Board has liability insurance.

For Mary's guardian ad litem and her parents to allege a proper claim for relief in their complaint against the Board, it appears they should affirmatively allege that the Board has obtained liability insurance and thereby waived its governmental immunity to the extent of the insurance coverage.

But for the doctrine of governmental immunity, the possible negligence of the Board's agents acting within their authority on behalf of the Board, as described below in the answer to the next question, would be imputed to the Board. Thus, the Board would have vicarious liability to Mary and her parents for the damages they sustained, but only to the extent of any liability insurance covering the Board with respect to such liability.

2. Mr. Educator, Ms. Salem and Ms. Winston, as the principal, a teacher and a teacher's aide at Acme Elementary School, each had a duty to exercise reasonable care for the education and safety of each student committed to their care, including Mary. Mr. Educator's duty, in his role as principal, was to all students at Acme Elementary. Ms. Salem's and Ms. Winston's duty as teacher and teacher's aide was to all students in their class.

Given the several occasions of serious and escalating misconduct by Thomas, including his kicking of a fellow student, Thomas' presence in the classroom presented a foreseeable risk of harm to the other students.

Mr. Educator, as principal, was arguably negligent in deciding not to place Thomas in the special class for problem children. If it is assumed that he was negligent, it is likely his negligence was a "but for" and proximate (i.e. foreseeable) cause of Mary's injury by Thomas.

However, under the doctrine of qualified immunity, Mr. Educator as principal was arguably a public officer acting in a discretionary capacity (as compared to a public employee acting in as ministerial capacity). Thus, he is immune from claims by Mary and her parents. Ms. Salem and Ms. Winston, to the contrary, were arguably acting as public employees in a ministerial capacity, and they are not protected by the doctrine of qualified immunity.

Ms. Salem may well have been negligent as the teacher in charge by not doing more to encourage Mr. Educator to place Thomas in the special class, and also by leaving the class for Ms. Winston to supervise at story time, the usual occasion of Thomas' outbursts, for nothing more than a smoking break.

Ms. Winston, who observed Ms. Salem place Thomas in time out as a means of controlling his outbursts, may well have been negligent as the teacher's aide by ignoring Thomas' outburst when it began in her presence at story time.

It is likely that the negligence of Ms. Salem and Ms. Winston was a "but for" and proximate (i.e. foreseeable) cause of Mary's injury when Thomas turned over the table on her.

Thus, Mary's Guardian Ad Litem has made out a case to recover of Ms. Salem and Ms. Winston for Mary's injury, and her parents have made out a case to recover of them for Mary's medical expenses and lost earnings during her minority

Answer A to Part 2 Question 5

(2) Mary's Guardian Ad Litem has a claim against Ms. Salem, Ms. Winston, and Mr. Educator for negligence.

Government actors can be liable for their negligent actions. However, government actors that are in positions of decision making and management are allowed governmental immunity from actions that arise while they are acting in their duties. Government workers who are not in decision making roles but instead carry out the work of the decision makers are not protected by governmental immunity. Here, Ms. Salem and Ms. Winston are not protected by governmental immunity because they are not in decision making roles. Ms. Salem is a teacher and Ms. Winston is an assistant teacher. Their role is to educate the students and is not to make decisions about how the school is run. In contrast, Mr. Educator is in a decision making role. Mr. Educator is the principal of the school and principals make decisions and perform managerial tasks of hiring and firing teachers and policies that the school should follow. Because Mr. Educator is in a policy making and decision making role he is protected by governmental immunity.

Because Ms. Winston and Ms. Salem are not protected by governmental immunity, Mary's Guardian Ad Litem has an action against both of the teachers for negligence. To be liable for negligence the following four elements must be found: duty, breach of duty, causation and damages. Everyone owes each other a duty of reasonable care from foreseeable risks. Also, a duty can be established because of a person's relationship with the plaintiff. One relationship that can give rise to a duty is a teacher student relationship. A teacher owes a student reasonable care in protecting the student from foreseeable harm. A breach of duty occurs when a defendant fails to exercise the reasonable care that he or she owes the plaintiff. Causation must be proved that the damage was the proximate cause and the actual cause of the negligence. Also, there must be

Here, Ms. Winston and Ms. Salem, as Mary's teachers, owed Mary a duty of reasonable care to protect her while she was at school because of their special teacher student relationship. Ms. Winston and Ms. Salem breached their duty because they failed to use reasonable care in protecting Mary. Here, Ms. Winston and Ms. Salem knew of Thomas's repeated outbursts in class. Ms. Salem had witnessed Thomas being disruptive during story time and being aggressive to other students. Thomas had yelled at students and kicked tables repeatedly. Thomas had also threatened other students during story time. On another occasion Ms. Salem had witnessed Thomas kick another child during one of his outbursts. Ms. Salem knew that Thomas was aggressive and had the potential to harm other students. Ms. Winston also knew of Thomas' aggressive behavior because Ms. Winston discussed it with her and they had discussed it. Because they knew that Thomas had the potential of hurting other students they should have removed him from the class which is what a reasonably prudent person would have done after continuous incidents of harm to the students. Instead Ms. Salem and Ms. Winston allowed Thomas to stay in the class which was unreasonable. Also, Ms. Salem further acted unreasonable by leaving Ms. Winston alone in the class with Thomas while she went to smoke, knowing that there was the potential that Thomas could act out and injure other students. Because Ms. Salem and Ms. Winston failed to remove Thomas from the class which a reasonable person would have done they breached their duty of care to Mary. Causation can also be proved. The negligence of Ms. Salem and Ms. Winston was the actual cause of Mary's injuries. If Ms. Salem and Ms. Winston would have removed Thomas from class Mary would not have gotten hurt. Also the negligence was the proximate cause of Mary's injuries. Proximate cause is measured by whether it was foreseeable that the harm could be caused by the defendant's negligent actions. Here it is foreseeable that not

removing a disruptive and threatening child would cause harm to other students. The reason for removing a child from class is to keep the other children out of harms way. This is also evidenced by the fact that Ms. Salem, Ms. Winston and Mr. Educator had discussed moving him out of the class since he was problem child. Damages are easily proved, Mary hurt her fingers and had numerous surgeries trying to fix her hand and eventually had to have her fingers removed.

Because Ms. Winston breached their duty of care that they owed Mary they are liable for negligence.

Answer B to Part 2 Question 5

2. Mary's guardian ad litem and her parents may maintain claims in tort for the negligence of Ms. Salem, Ms. Winston, and Mr. Educator in their individual capacities, though they are more likely to be successful against Winston and Salem than Educator.

As noted above, state and local governments have, when undertaking government functions, immunity from tort liability unless such immunity is waived. The same does not extend to employees of such government bodies in their individual capacities in general. A government employee can be individually liable for his tortious acts committed pursuant to his job duties. However, a government official - someone tasked with discretionary functions rather than ministerial ones - is granted tort immunity when acting in his official capacity. The distinction between ministerial functions and discretionary functions that separates government employees from government officials can be a hard one to draw at times, but it can have an important effect in determining who is liable for what conduct. Ministerial functions tend to be of the sort that do not require discretion - repetition of tasks and the carrying out of assigned duties. Discretionary functions involved independent thought and involving the setting of policy and making of decisions that set the course of government conduct.

An action for negligence may be maintained where there is a duty owed to the plaintiff by the defendant, that duty is breached, this breach is the actual (but for) and proximate cause of harm, and damages result. A duty of care is owed to all foreseeable plaintiffs - all those that could foreseeably be hurt by one's acts or omissions.

As to Ms. Salem, the teacher out on her smoking break, Mary and her representatives have their best chance for victory in a negligence action. As a teacher, Salem owed a duty of care to all of her students. Beyond that general duty to those foreseeable plaintiffs, Salem was aware of the

special risk posed by Thomas, who had caused disturbances only a few weeks before of a sort that could hurt other children in the classroom. Salem's duty of care owed to the students was breached when she left the class room to smoke while working. Her absence from the classroom could arguably be called the actual and proximate cause for the accident that occurred - she was not there to supervise Thomas and left the classroom short staffed. While Thomas knocked the table over suddenly, his conduct was foreseeable to Salem, who had recently been dealing with his disruptive behavior. Because damages resulted from this foreseeable conduct, Salem could likely be found liable for negligence.

There is also a good negligence case against Winston. The facts indicate that she ignored Thomas when he began to misbehave. In light of his prior conduct, this is arguably a breach of her duty of care to the other children, including Mary. Winston could likely have foreseen Thomas's conduct due to his prior behavior but chose to ignore him when he began to make trouble in Salem's absence. This breach arguably caused, actually (but for her failure to deal with Thomas, he would not have hurt Mary) and proximately (based on his prior behavior, this act was foreseeable), the injury suffered by Mary.

The negligence case against Educator is strong also because he was a key player in the decision to not remove Thomas to another classroom. However, of any individual defendant involved, he seems most likely to be protected by governmental tort immunity because of his position as school principal. As a principal, Educator was vested with discretion in carrying out his task of educating the school's children. He is able to exercise his discretion to determine the sort of instruction provided, the placement of students, the discipline of students, etc. This puts him in a different position than that of the teachers Winston and Salem whose function is more ministerial in nature. Because of this, Educator

may be able to take advantage of governmental tort immunity as a government official. If that is not available, however, a tort action could certainly be brought against him. He had a duty of care to the students in that classroom by virtue of his position as principal. Mary could surely argue that he breached that duty of care by letting a known trouble-maker stay in the class. The failure to remove Thomas resulted in his ability to harm Mary by knocking over the table - causation can be shown. Again, there are damages. Because Educator potentially breached his duty of care to Mary by allowing Thomas to stay in the classroom, he could be found liable for negligence.

Mary could very likely maintain a negligence cause of action against Salem. Her violation of her duty to care was the most egregious of the three and the most likely to support a successful action. Negligence could be found against Winston also - she decided to ignore Thomas instead of removing a known trouble-maker when he began to act up. While Educator is also arguably negligent because he allowed Thomas to stay in the normal classroom instead of the special problem child class, it is possible that he will be able to assert public official tort immunity due to his status and discretion as principal. As a result, the weakest case of negligence is against him.

Carl, who had recently graduated from business school started a company, ABC, Inc., with two other business school classmates, Allison and Brad. Pursuant to ABC's Articles of Incorporation, ABC is authorized to issue 1,000 shares of common stock, 100 shares of which are issued and outstanding, with Allison owning 60% and Brad and Carl each owning 20%. Pursuant to a Shareholders' Agreement among Allison, Brad, Carl and ABC, and as noted on the front of each of their share certificates, the shareholders are restricted from transferring their shares of ABC without first offering the shares to be purchased by ABC. Carl wants to sell his shares to Donna, Carl's friend from high school, who will meet Allison and Brad for the first time next week.

QUESTIONS:

1. Is the restriction on transfer enforceable so that ABC can acquire Carl's shares, or can Carl sell his shares to Donna?
2. If ABC does acquire Carl's shares, what would be the number of issued and outstanding shares and what would be the percentage of ownership of the shareholders after the transaction?

Answer A to Question 6

1. Yes, the restrictions on the transfer are enforceable.

The issue in this situation is whether shareholders can enter a shareholders agreement to restrict transfer of the shares (including requiring a call option). In general, shareholders can create contractual restrictions that limit the transferability of shares as long as (i) the restriction is for a legitimate purpose; (ii) the restriction is clearly noted on the face of the shares; and (iii) the restriction is not unconscionable in operation. There are a variety of legitimate purposes for restricting transfer, including retaining the nature of the corporation and limiting holders in an effort to qualify for registration exemptions, among others. Whether the purpose was legitimate is a question for the court.

In this case, the restriction was a right of first refusal, which is a type of restriction that may be found to have a legitimate purpose. While Allison and Brad have not articulated the purpose, there is an indication that these business school friends view the shareholder relationship as very personal between them. As such, unfettered ability to transfer could materially impact the nature of the corporation. Further, Carl proposes to sell to Donna, who Allison and Brad do not even know. Such a transfer may well disrupt the operation of the corporation. When the corporation is very closely held, as it is here, and the shareholders have a relationship, courts have been willing to find that the restrictions are legitimate.

The restriction was noted on the face of the ABC stock, so there is no issue of lack of notice.

Finally, the court can disallow an otherwise legitimate transfer restriction if its operation is unconscionable. For instance, if ABC was permitted to repurchase the shares at a fixed amount that is substantially less than the offer by Donna, the court could deem that the

overall operation of the restriction is unconscionable. In this case, however, there is no indication that the operation is unconscionable.

Based on the factors outlined above; the transfer restrictions seem to be enforceable and ABC has the right of first refusal to repurchase the shares.

2. Issued - 80; outstanding - 80; Allison 75% (60 of 80), Brad 25% (20 of 80) - assuming that ABC incorporated in NC

The underlying issue in this situation is the impact of a share repurchases by a North Carolina corporation. North Carolina has abolished the treasury stock classification. Treasury stock generally refers to shares repurchased and then held by the corporation. If a state that retains the treasury stock classification, those shares do not reduce the number issued and outstanding. Instead, they are owned by the corporation itself. By abolishing the treasury stock classification, North Carolina treats any repurchases as reductions in the amount of issued stock. Instead of separately holding as T-shares, the corporation merely increases the amount of shares authorized but unissued. In either NC or a T-Stock jurisdiction, the repurchase of shares has no bearing on the amount authorized.

In this case, ABC repurchased 20 shares of the 100 issued and outstanding. Presuming ABC is a NC corporation, these shares merely revert to authorized but unissued and the total number of issued and outstanding shares drops from 100 to 80 to reflect the purchase.

The repurchase has no impact on the amount of share ownership of the other parties, but does impact their percentage owned. Prior to the repurchase, Allison held 60% and Brad held 40%. In NC, ownership percentages are based on the percentage of issued and outstanding

shares. As such, Allison must have 60 shares and Brad 20. Now that only 80 shares are outstanding, Allison has 75% ($60/80$) and Brad has 25% ($20/80$).

Answer B to Question 6

1. The restriction is valid. ABC can acquire Carl's shares.

In North Carolina, restrictions on transfer may be held valid, but they are narrowly construed. To be held valid, the restriction must be reasonable and for a valid purpose, the restriction must be conspicuously stated on the stock certificates subject to the restriction, and enforcement must not be unconscionable.

Here, the facts state that the share certificates each contain a notation that the certificate holder is not to transfer the certificate without first offering the shares to be purchased by ABC corporation. The real issue is whether the restriction is reasonable and for a valid purpose. The assumed purpose of the restriction is to allow Allison, Brad, and Carl the option of retaining their level of control of the corporation. This is probably a valid purpose, considering the fact that the corporation is a startup company started by classmates, who, much like partners in a general partnership, want a say over who else may be given a significant level of control over their newly formed ventures.

The restriction is likely also to be considered reasonable by a court. It is not an absolute restriction (though being absolute doesn't necessarily invalidate a restriction), but rather operates like a right of first refusal. In the event Allison or Brad are unwilling to buy Carl's shares, he is free by the terms of the restriction to transfer them to Donna.

There is nothing else to suggest that the restriction is otherwise "unconscionable." Shareholder Agreements can be validly entered into between shareholders for the purpose of maximizing their control. Though the most common agreement shareholders enter into with one another is an agreement to vote their shares a certain way, this agreement entered into by

these shareholders is consistent with the purposes for which Shareholder Agreements are typically allowed, and again, does not constitute an absolute restriction.

2. The percentage ownership would be as follows: Allison would have 75% ownership, Brad will have 25% ownership. There will be 80 total shares issued and outstanding. There will be 920 authorized shares.

A corporation's authorized shares are the shares that it is allowed to issue to shareholders. A corporation's outstanding shares are the authorized shares that corporation actually has issued to the shareholders and which the shareholders currently retain. When a corporation repurchases its shares, such shares are no longer outstanding, but are authorized for future issuance. Upon ABC's purchase of Carl's 20 shares, the number of shares outstanding is reduced from 100 to 80. Of these 80 shares, Allison owns 60, or 75%. Brad owns the other 20, or 25%. Carl's repurchased shares are still authorized, which increases the number of shares that are authorized, but not outstanding, to 920.

Attorney Zelda Zealous is handling a products liability claim for Luckless Consumer. Consumer was blinded when a glass bottle of Acme catsup exploded in his hands as he was tapping the bottom to start the flow of catsup. Attorney Zealous has not yet filed suit, but she has had extensive correspondence with Acme's attorney, Dan Defensor.

Zealous believes her client's accident was due to a defective bottle furnished by Acme's supplier, Shatterproof. Zealous has obtained the names and home phone numbers of several present or former Acme employees who may have knowledge about prior incidents in which Shatterproof bottles exploded or shattered unexpectedly. These individuals include: (1) Robbie Rankenfeil, a janitor at Acme who reportedly has been assigned by Acme's maintenance manager on numerous occasions to mop the plant floor after catsup bottles shattered while being filled on the production line; (2) Amelia Royale, Acme's catsup bottling plant manager; and (3) Rhonda Resigned, who quit two weeks ago as Acme's vice president of operations and now works for an Acme competitor. In her former position at Acme, Resigned worked closely with Dan Defensor to develop a strategy for responding to Consumer's claim.

Zealous reasonably believes the information these individuals possess will be invaluable in her efforts to settle Consumer's claim without the expense of litigation. She would like to contact them without informing Defensor: she is concerned they will not tell her what they know if Defensor gets wind of her plans and talks to them first.

7(2)

QUESTION:

Which, if any, of the three present or former Acme employees may Zealous interview without Dan Defensor's consent, without violating the North Carolina Rules of Professional Conduct?

Answer A to Question 7

Zealous may interview Robbie but not Amelia or Resigned without violating the Rules of Professional Conduct. This is an ethics question.

It is a violation of the rules of professional conduct for an attorney to communicate with a person represented by counsel without opposing counsel's knowledge and consent. When a corporation is the party being represented, an attorney may not speak with managerial or high level employees or employees involved in the litigation without consent of opposing counsel. Additionally an attorney may not speak with a person unrepresented by counsel other than to suggest to them that they should seek counsel.

Here Amelia is the manager for the catsup bottling plant. She may have some very helpful information regarding the potential case and would be no doubt very helpful to Zealous. However, even though suit has not yet been filed, Zealous has had extensive correspondence with Acme's attorney and litigation is likely only a short time away. Additionally Amelia is a manager and not a lower level employee meaning any statements Amelia makes would likely be binding on Acme. This could result not only in liability for Acme but also in potential personal liability to Amelia (although admittedly less likely.) If she can bind Acme then she is represented and Zealous may not contact her and if she cannot bind Acme then there is a possibility she would be seen as unrepresented and again Zealous would not be able to contact her but to suggest to her that she should seek counsel. Taking these facts into consideration, especially Amelia's potential role within the litigation and her role within Acme, Zealous should not contact Amelia as it would most likely be in violation of the rules of professional conduct.

In regards to Resigned, Zealous must not and should not contact her. Not only was Resigned a high level officer at Acme, but she worked very closely with Defensor in developing a strategy to defend against Consumer's claim. She was represented by counsel in her former position (Defensor as counsel for the corporation) and would most likely be represented by the same counsel in regards to this suit and her actions while in employ at Acme. Again, like Amelia her statements could potentially bind the corporation and result in potential liability for Acme and possibly herself (making her also either represented by Defensor or unrepresented in her personal capacity - in either case Zealous would be prohibited from communication.)

With respect to Robbie, he is not a higher level employee and therefore shouldn't fall under the rule prohibiting Zealous from interviewing him. He most likely would not have privileged information or be in the position to bind the company to any statements he made to Zealous. Also it is unlikely he would have any personal liability in the case making him an unrepresented potential litigant. However, Zealous probably should refrain from speaking with Robbie as a matter of professional conduct outside the rules. Zealous has had significant contact with Defensor and a suit is likely looming making any contact Zealous may have with lower level employees at Acme, although maybe technically proper, very suspicious.

While Zealous may technically contact Robbie, it is probably the best decision not to and to rely instead on appropriate discovery mechanisms.

Answer B to Question 7

1. Zealous may interview Rankenfeil without Defensor's consent.

Generally, under the North Carolina Rules of Professional Conduct, an attorney representing a party cannot contact an opposing party without the opposing party's attorney's consent. This rule applies as well in the corporate realm to those employees in the corporation who have the power or ability to bind the corporation and/or make it liable to another. However, there are several exceptions to this rule when dealing with parties who are or have been employed by a corporation being sued.

The first exception is that the rule does not apply to a low level employee, precisely because that party cannot bind a corporation to any particular liability. The actions of a low-level employee rarely will make a corporation directly liable.

In this case, Rankenfeil is a janitor at Acme whose job it is to mop the floor. While Rankenfeil might be able to provide some evidence of misdeeds on the part of Acme, he himself does not have the power to act for the corporation such that it would make Acme liable in tort to another. Therefore, because Rankenfeil is a low-level employee, Zealous may interview him without Defensor's consent (although Zealous should inform Rankenfeil that Zealous is not disinterested and is advocating for another client, because it appears from the evidence that Rankenfeil does not have representations).

2. Zealous may not interview Royale without Defensor's consent. Royale is a high level employee serving as a plant manager. Royale could directly make Acme liable by her actions, and therefore Zealous must get Defensor's consent before he interviews Royale.

3. Zealous may not interview Resigned without Defensor's consent even though Resigned no longer works for Acme. Once a party has been fired, it no longer has the power to bind its corporate employer. If Resigned was still working at Acme she would be off-limits for interviews because her previous position vice president of operations, giving her the power to bind Also, Defensor is the corporation's attorney and therefore represents Acme as an entity, and does not represent the employees individually. However, because Resigned substantially participated in developing a strategy for responding to Zealous's client's claim, she cannot be interviewed without the consent of Defensor, because Resigned is treated like a client of Defensor. Therefor, Resigned may not be interviewed without Defensor's consent.

Greg Grower (“Grower”) is a sweet potato farmer in Johnston County, North Carolina. In March 2006 Grower answered a telephone call from Bob Buyer (“Buyer”), who was the president of Tater Products, Inc. (“TP”) in Smithfield, North Carolina. Buyer asked Grower how many sweet potatoes Grower expected to produce during the upcoming 2006 growing season. Grower responded that he expected to produce “4,000 tons, more or less.” Buyer then offered to purchase “all the sweet potatoes you produce during the upcoming 2006 growing season for a price of \$250 per ton.” Grower agreed to sell all his sweet potatoes to TP for the price proposed by Buyer. Buyer accurately confirmed the terms of TP’s offer in a memorandum dated April 1, 2006 and typed on TP’s letterhead. Buyer wrote his initials by hand next to his typed name on the memorandum and placed the memorandum in TP’s files. Grower never signed or received a copy of Buyer’s memorandum.

On November 1, 2006 Grower hauled his harvest, consisting of 4,300 tons of sweet potatoes, to TP’s manufacturing plant in Smithfield, North Carolina. TP refused to take delivery of any of Grower’s sweet potatoes. As a result, Grower was forced to sell his sweet potatoes elsewhere at prices substantially below \$250 per ton.

In January 2007 Grower filed a lawsuit in Superior Court, Johnston County alleging that TP had breached its agreement to purchase Grower’s 2006 sweet potato crop. Grower’s complaint alleged that TP’s breach had caused him to incur damages in excess of \$100,000. TP’s answer denied that TP had ever entered into a contract with Grower. In response to Grower’s discovery requests, TP turned over Buyer’s April 1, 2006 memorandum to Grower.

QUESTION:

Can Grower enforce the agreement against TP?

Answer A to Question 8

Yes, Grower can enforce the agreement against TP.

At issue is whether there is a sufficient writing under the Statute of Frauds to enforce the contract.

Contracts for the sale of goods are governed by the Uniform Commercial Code section 2, rather than by the common law of contracts. Goods are any movable, personal property. The Statute of Frauds requires all contracts for the sales of goods for \$500 or more to be in writing. Under the Uniform Commercial Code, the writing must contain the signature of the party to be bound, the quantity, and sufficient information to show there was the intent to form a contract. A signature can be any marking intended to authenticate the document. The signature of both parties is not required. An outputs contract is a contract to purchase all the goods produced by a manufacturer. While the quantity is not expressly stated, it is considered a sufficient identification of quantity. Good faith in the amount of production is implied. If there is not a writing signed by both parties, if the parties are merchants, the plaintiff can instead submit a confirmatory memorandum signed by the plaintiff and sent to the defendant (who the plaintiff is seeking to bind to enforce the agreement against) confirming the offer, and that will eliminate the signature requirement of the other party if the other party received it and did not object within 10 days. Farmers are considered merchants in North Carolina.

Here, the potatoes are goods, governed by the Uniform Commercial Code. The goods are worth more than \$500 because Grower estimated 4,000 tons of potatoes at \$250 per ton. Thus, a writing was required. There is a sufficient writing in this case. The original agreement formed by Buyer's offer and Grower's acceptance over the telephone was oral, and would be insufficient. However, Buyer then sent the confirmatory memorandum on April 1, 2006. This accurately

contained the terms of the agreement, which is sufficient to show the intent to form a contract because they discussed the purchase of all the potatoes grown. The quantity requirement was also fulfilled because the contract was an outputs contract, which is an accepted description of quantity. This was an output contract because buyer agreed to purchase all the potatoes grown by Grower. There was also a sufficient signature. TP did sign the memorandum when Buyer, the president, initialed by his typed name. This was intended to authenticate the document. Thus, it was sufficient to be a signature. Since TP is the party Grower is seeking to bind to the contract in court, only TP's signature is required, and Grower's signature is not.

Also, Grower tendering 4,300 pounds of potatoes was not a breach of the duty of good faith implied in the output contract because it was within the reasonable range of Grower's initial estimation communicated to Buyer. Thus, Grower is entitled to enforce the agreement and recover his \$100,000 damages. Contract damages are generally the value the party expected to receive on the contract. Grower also attempted to mitigate damages as required by reselling the potatoes, although he had to sell for less.

If the court were to find the signature was not sufficient to create a writing, the confirmatory memorandum exception would not save Grower despite the fact Grower was a merchant because Grower did not send the confirmatory memorandum. The confirmatory memorandum must be sent by the plaintiff seeking to hold the defendant to the contract, which was not the case here. Also, Grower never received the memorandum and so could not object in 10 days. However, since the signature is sufficient, it is not necessary to use this exception.

Therefore, Grower can enforce the agreement against TP because there is a sufficient writing.

Answer B to Question 8

Yes, Grower can enforce the agreement against TP.

Contracts for the sale of goods are controlled by Article 2 of the Uniform Commercial Code, as adopted by North Carolina. This transaction is within the scope of the good because crops are considered goods.

Under Article 2, an output contract is not illusory (i.e., it does contain the elements of mutual consent and consideration) and does not fail for lack of specificity. Thus, TP could not argue that the alleged contract with Grower is invalid because it was a contract for all the sweet potatoes that Grower will produce.

Rather, the issue here is whether the contract is enforceable under the Code's statute of frauds. Under the Code's statute of frauds, a contract for the sale of goods worth more than \$500 dollars must be in writing to be enforceable. This contract easily meets the dollar requirement. Thus, the only issue is whether there is either a sufficient memorandum or an exception to satisfy the statute of frauds. In order to satisfy the requirement, the writing must state the quantity and must be signed by the party against whom enforcement is being sought.

Here, the contract is one for output, which, as earlier stated, is sufficient for the quantity term under the Code. TP will argue that the alleged contract took place over the phone, and is thus invalid under the statute of frauds. The issue is whether the subsequent memorandum prepared by Buyer is a sufficient writing to overcome this objection. More specifically, the issue is whether Buyers initials next to his name on the memorandum are sufficient to be a signature despite the fact that the memorandum was never sent to Grower. The initials will be a sufficient signature under the Code, which allows a wide variety of marks to satisfy the signature requirement. Thus, there is a

writing which contains the quantity term and has been signed by Buyer, who, as discussed below, is an agent of TP, the party against whom enforcement is being sought.

TP may argue that Grower produced 4,300 tons sweet potatoes, not 4,000. This argument would be self-defeating, as it would admit the existence of the contract (an exception to the statute of frauds if made under oath, such as in a deposition) but would likely fail anyway given the size of the variance and the size of the overall contract amount.

In addition, it is clear that TP will be bound by Buyer's signature in this instance, as Buyer probably had actual authority, either express or implied, but in any case had apparent authority by virtue of his position as president of TP to bind TP on the contract.

Therefore, Grower can enforce the agreement against TP.

Judy Jones experienced shortness of breath and chest pains and went to Dr. Ralph Rooter. After conducting tests, Dr. Rooter recommended to Judy that he perform coronary angioplasty to clear blockages in her coronary arteries and said that in one artery, he would insert a stent (basically, a hollow tube) to keep the artery clear. Judy agreed to proceed.

Dr. Rooter performed the surgery. When Judy returned to Dr. Rooter's office for a scheduled follow-up visit, an x-ray revealed that the stent had collapsed and the artery in which it had been inserted now was completely blocked.

Dr. Rooter told Judy: "I'm very sorry about the collapsed stent. We are going to have to perform another coronary angioplasty in order to replace the failed stent." Dr. Rooter also told Judy that, "I will perform the corrective surgery at no cost to you, and also will cover the hospital charges associated with the procedure." As Judy left Rooter's office, one of his colleagues, Dr. Spillzit, asked her if she was OK. Judy explained what Dr. Rooter had told her and Dr. Spillzit said: "Good. He told us that he mistakenly used a stent from a pile that he knew were defective. I'm glad he agreed to absorb the cost."

Judy went to another doctor, who performed corrective surgery at a different hospital and did charge her for the procedure.

As soon as Judy had recovered from the second surgery, she went to see "MedMal" Swaggert, an attorney specializing in medical malpractice cases. She told MedMal that she believed Dr. Rooter had been negligent in his treatment with regard to the collapsed stent. She said that Dr. Rooter's own words would prove that Dr. Rooter was negligent and had committed malpractice.

MedMal told Judy that, in his opinion, she would not be able to rely in court on either Dr. Rooter's statements to her at the follow up office visit or on Dr. Spillzit's testimony about what he had heard Dr. Rooter say. MedMal told Judy he did not believe these statements would be admissible evidence to prove negligence.

QUESTION:

1. Did MedMal give Judy correct advice as to the admissibility of Dr. Rooter's apology and offer to perform another angioplasty to remove the failed stent and replace it with a new one at no cost?
2. Did MedMal give Judy correct advice as to the admissibility of Dr. Spillzit's testimony about what Dr. Rooter told him?

Answer A to Question 9

1. Yes MedMal is correct, and Dr. Rooter's apology and offer to replace the stent at no cost are not admissible.

In NC, the general rule is that hearsay, an out-of-court statement introduced to prove the truth of the matter asserted, is inadmissible. However, NC recognizes party admissions as an exception to this general rule. A defendant's out-of-court statement is generally admissible against him, whether or not he is available and regardless of whether the statement was against his interest at the time that he made it. Still though, plaintiffs are not always able to introduce a defendant's statement against [him](#). NC recognizes several policy-based rules under which party admissions will not be admissible. First, an offer made by the defendant to pay expenses, medical or other, is not admissible to show negligence or guilt of the defendant. Second, evidence of subsequent remedial measures undertaken by the defendant may not be used to prove negligence of the defendant. These rules are based on the policy that it is more important to encourage generosity and safety than it is to allow plaintiffs to introduce their opponent's statements or acts.

In this case, Rooter offered to remove the stent and he offered to remove it for free. His offer to remove is analagous to a subsequent remedial measure, and is inadmissible on those grounds. Additionally, his offer to remove it for free is in substance an offer to pay for the medical expenses of Judy, and is also [inadmissible](#). NC has determined that the policy of encouraging generosity and taking safety precautions trumps the plaintiffs interest in using relevant evidence in cases like these, and that is why Judy will not be able to introduce Rooter's statements.

2. No MedMal was incorrect, and Dr. Spillzit may testify as to what Rooter told him. As noted above, NC recognizes the hearsay exception of party admissions, and out-of-court statements made by a defendant may be used against him, regardless of his availability at trial and whether or not the statement was against his interest when he made it. While Rooter's statement is clearly hearsay because it is offered to prove that he was negligent by mistakenly using a defective stent, it is admissible because it is a party admission. Rooter admitted to Spillzit that he had mistakenly and negligently implanted a defective stent into Judy. This statement may now be used against Rooter by Judy in order to prove its truth, and thus to prove that he was negligent.

Answer B to Question 9

1. MedMal was correct that Judy would not be able to use Dr. Roofer's apology and offer to perform a second surgery at no cost.

2. MedMal was not correct that Judy would not be able to use Dr. Spillzit's testimony as to what Dr. Roofer had to say because it was an admission.

1. The evidence code does not allow into evidence offers to pay the medical bills of another or offers of settlement. The public policy behind this is that offers to assist in the payment of medical bills and settlements in general should be encouraged.

North Carolina has expanded the inadmissibility of offers to pay medical bills to other offers of payment. In addition, North Carolina has a specific statute which makes an apology of a medical doctor and an offer to perform free treatment as specifically inadmissible in an action of medical liability against the doctor. Accordingly, Dr. Roofer's apology and offer of free surgery will not be admissible in any action against him.

2. The federal evidence code treats the admission of a party as nonhearsay. In North Carolina admission of a party is also admissible as an exception to the hearsay rule..

Here, the statement of Dr. Spillzit about what Dr. Roofer had to say is clearly an admission on the part of Dr. Roofer and is certainly relevant. It would also be considered as hearsay in many jurisdictions. Hearsay is an out of court statement by the declarant while not testifying at trial or at a court hearing offered to prove the truth of the matter asserted. Because it is an admission by a party, Dr. Roofer, as to the cause of her failed operation it is clearly an admission of a party and is admissible in any action of malpractice by Judy against him.

Visions Style, LLC has its principal place of business in Murphy (Cherokee County). Visions Style is in the business of designing, producing and selling recreational clothing.

In 2000, Visions Style employed Sean Smith as a sales representative. Sean was assigned exclusive responsibility for developing business in all of the North Carolina counties located east of Interstate 95. Between 2000 and April 30, 2007, Sean developed significant business for Visions Style, particularly with customers in the coastal counties. Sean resigned abruptly on May 1, 2007.

Shortly after Sean resigned, Visions Style learned that Sean, who was living in Dare County, had formed a North Carolina limited liability company in March 2007; New Horizons, LLC; and that Sean was soliciting orders for New Horizons in northeastern North Carolina from customers of, and in direct competition with, Visions Style.

The principal place of business for New Horizons is in Manteo (Dare County), five hundred miles from Murphy. Summer Jones, who also lives and works in Dare County, is the office manager for New Horizons.

On June 8, 2007, Paul Hall, an attorney, filed a civil action in Cherokee County on behalf of Visions Style against both New Horizons and Sean, seeking to recover damages for misappropriation of trade secrets and unfair and deceptive trade practices. Both defendants were properly served on June 12, 2007.

On July 17, 2007, Mr. Hall signed a subpoena issued by him to Summer. The subpoena is in proper form and contains all necessary information. The Dare County Sheriff properly served the

subpoena by hand delivery to Summer on July 20, 2007. The subpoena directs Summer to appear for a deposition in Murphy (Cherokee County) at 10:00 a.m. on August 3, 2007 and to produce certain business records of New Horizons. Proper notice of the deposition was also given on July 17, 2007, by mailing a copy to the attorney appearing on behalf of the defendants.

QUESTIONS:

1. Is Summer required to respond to the subpoena?
2. What are Summer's options for responding to the subpoena?

Answer to Question 10

1) Summer must respond to the subpoena.

Rule 26(b)(4) of the North Carolina Rules of Civil Procedure outlines the scope of discoverable matters. In order to be discoverable, a matter sought to be discovered need not be admissible in and of itself, but must be reasonably calculated to lead to the discovery of admissible information.

The subpoena for a deposition of Summer, and for her business records is central to the issues at stake in an action for misappropriation of trade secrets and unfair and deceptive trade practices. Rule 45 of the North Carolina Rules of Civil Procedure governs the issuance and procedures of subpoenas. A subpoena must be signed by the issuing party, and must state the time and place where the recipient must appear. In addition, the recipient must be given 10 days' notice to appear for a deposition, and all parties to the case must be notified.

The subpoena in question gave Summer more than the requisite 10 days' time period in which to respond. In addition, the facts state that it was in the proper form, contained all necessary information, and that notice was given to Visions Style, her employer. Consequently, the subpoena is valid, and Summer must respond, or be faced with contempt.

2) With regard to her appearance at the deposition, Summer must ultimately appear.

However, she may move, pursuant to Rule 26, for a motion to grant extra time to respond to the subpoena. Rule 26 contains provisions that allow a party to request relief from discovery when it is unduly burdensome in relation to the case, or imposes an undue hardship.

Certainly, the prospect of a thousand-mile round trip constitutes undue hardship to Summer. In the interests of justice, she should be granted more time to plan the trip. Furthermore,

she could ask that the deposition be conducted in a neutral site, so that she would not have to travel all the way to Murphy.

Summer can move to quash the subpoena with regard to the business records requested. The proper way for Visions Style to request these documents is not through a subpoena to Summer, but by addressing a Request for Production of Documents to New Horizons itself. These requests are properly made only to parties within the case, and would require New Horizons to send copies of the records within 30 days. A subpoena to a non-party is only proper when the matter is not properly discoverable through recourse to the parties in the case. Summer is an employee of New Horizons, and she is merely a custodian of the business records. She cannot be expected to produce business records that she does not own. Were she to do so, her job security would certainly be put at risk. The subpoena should therefore be invalidated with regard to the business records.

In 1980, Testatrix, a resident of Halifax County, North Carolina, made a will with the following provision:

All my shares in Testatrix Properties, Inc. shall be equally divided between my husband and my daughter Paula (the only one of my children who ever has worked in this family business). The residue of my estate shall be divided equally among my husband and my other two children, Anne and Bill, and their heirs. In the event my husband predeceases me, then all my shares in Testatrix Properties, Inc. shall go to Paula, and the residue of my estate shall be equally divided between Anne and Bill and their heirs

In 1985, Testatrix and her husband were divorced. After the divorce, she did not change her will.

Anne had a long history of mental illness. In 1998, Anne stabbed Testatrix to death, under the mistaken impression that Testatrix was a demon. Tried for the murder of her mother, Anne was found not guilty by reason of insanity. Both of her siblings testified at the trial that Anne did not comprehend what she was doing. After several years in the psychiatric unit of John Umstead Hospital, Anne was released and, apparently recovered, moved to Carteret County, North Carolina, where she now lives.

Testatrix died in 2006. Paula and Bill, both of whom were still living in Halifax County at the death of Testatrix, probated the will in Halifax County. Anne contacted the executor and asked that her "intestate share" of the property be distributed to her.

-11(2)-

QUESTION:

What, if anything, should each of the three children receive?

Anne: _____

Bill: _____

Paula: _____

Answer A to Question 11

1. Anne will recover $\frac{1}{4}$ of the shares in Testatrix Properties, Inc. and $\frac{1}{2}$ of the residue of Testatrix' estate if husband's gifts are simply revoked by operation of law and fall in residue.

If slayer is a person who is found guilty of willful and unlawful killing or procurement of killing of the decedent, who pled guilty or was indicted and pled solo counterdere, or who was found to have killed the decedent in a civil action brought within 2 years from the death or if a criminal action was brought within 90 days from the final judgment whichever is longer. Under North Carolina statute a slayer cannot take under a will or under Intestate Succession Act. However, in July 2006, the slayer statute was amended and a person who is found not guilty of willful and unlawful killing of decedent by reason of insanity will not be a slayer and can take under a will or intestacy.

Here, Anne was found not guilty of killing Testatrix by reason of insanity. Thus, she is not a slayer and can take under a will. In 1985, when Testatrix and her husband were divorced, his gift was revoked by operation of law and fell into residue. Only if a gift to a class is made it would be shared between takes of the same class. Here it was not a class gift- it was made to be equally divided between Testatrix' husband and Paula; thus husband's gift fell into a residue. Paula may argue that Testatrix' intent was that if the husband cannot take his share ($\frac{1}{2}$ of shares in Testatrix' property) shall go to her. She may argue that language "In the event my husband predeceases me" must have the same effect as divorce which revokes husband's shares by operation of law. Thus, Paula will argue that she is entitled to all the shares in Testatrix' Properties, Inc. Otherwise Paula, will only be entitled

to ½ shares in Testatrix' properties. Also, husband's shares in the residue will be revoked by operation of law and equally divided between Anne and Bill.

Thus, if Paula is successful arguing that Husband's revoked share as a result of divorce should be treated as if he predeceased Testatrix, she will take all the shares in Testatrix Properties. But if not, his share from gift will fall in the residue and Paula will only get ½ while Anne and Bill will take ¼ each. Also, if Anne and Bill successfully argue that divorce would revoke husband's share by operation of law and would treat the devise as if Husband predeceased Testatrix, then they will be entitled to ½ residue each which is in conformity with Testatrix' testamentary intent: "In the event my husband predeceases me then all my shares in Testatrix Properties, Inc. shall go to Paula and the residue of my estate shall be equally divided between Anne and Bill and their heirs."

Thus, Paula will get all shares in Testatrix' Properties, INC and Anne and Bill will divide the residue in equal shares." if divorce is treated as if

Answer B to Question 11

Anne: 1/2 of the residue of Testator's (T) estate.

North Carolina's slayer statute provides that anyone who wrongfully and voluntarily kills another is treated as predeceasing the testator. Here Anne stabbed T to death, however, she was acquitted by reason of insanity. Although a criminal conviction is not required for the slayer statute to become operative (indeed, the slayer statute only requires that the unlawful killing be established by a "preponderance of the evidence"), the killing must still have been voluntary. Here Anne's killing of T was not voluntary, as demonstrated by the testimony of her siblings and by the fact of her acquittal by reason of insanity. NC follows the M'Naghten test for criminal insanity and holds that one is insane if she lacks the requisite capacity to know wrongfulness of her actions or the nature and quality of her acts. Further, NC's defense of insanity places the burden of demonstrating his/her insanity on the accused. Here, the court held that Anne met her burden and lacked the requisite mental capacity to kill the testator, and thus acquitted her by reason of insanity. Thus, it will not be established that Anne "voluntarily" killed T, and, thus, NC's slayer statute would not treat Anne as predeceasing T. Thus Anne could take her residuary share under the will. Not that the fact that she requested her "intestate" share is irrelevant, children do not have the option of an elective share or anything similar, and thus she will simply take her share of the residuary.

Bill: Bill will take 1/2 of the residuary estate.

If Anne were to be treated as a voluntary killer, then Bill would take the entire residuary. NC does not follow the old common law rule of "no residue of a residue") and he would take Anne's share if she were to have predeceased T and not have left issue (if she had left issue, because she is a lineal descendant of T's grandparent's (here their granddaughter), her issue would take her

share). Because Anne is not treated as predeceasing T because the slayer statute does not apply to involuntary killings, however, Bill will split the residue with Anne as directed in the will. Paula: Paula will take all of the stock in Testatrix Properties.

In North Carolina, divorce revokes all bequests and devises in a will by operation of law. Here, when T and her husband divorced, the provision to him is deemed revoked by operation of law. T's bequest to her husband and daughter was a gift to individuals (not a class) and thus if one of the gifts failed, it would ordinarily fall into the residue (and thus the husband's 1/2 share would have thus passed half to Anne and half to Bill as the residuary takers). However, here the will provided that if the husband should predecease T, then his share should go to Paula. It appears that in such a situation, the ex-husband should be treated as predeceasing the testator, and should thus pass as intended to Paula. H

Able was observed by Federal Agents driving Baker and another companion to a location where Baker bought chemicals (crystal and other materials) that could be used to manufacture methamphetamine. The agents knew that just a few days earlier, Able had also purchased similar ingredients. The agents followed Able and Baker to Charley's home where they observed the men entering the residence with the purchased materials. Able and Charley had known each other for about three weeks and Able had visited Charley's home on several occasions and spent a night there. All three were known to have been involved in past methamphetamine labs. After observing the home for an hour, the agents detected the familiar pungent odor the materials made when mixed and heated. They knew that if this mixture reached the boiling point, it would explode and destroy the house and anything in that block. The block contained three buildings: Charley's house, an empty locked warehouse and a middle school in session. The agents entered the home without a warrant, found the gas heated pot and detained Able and Baker, after finding Able hiding in Charley's bedroom. The heat was turned off and the agents left the house and obtained a warrant so they could conduct a further search of the home.

Able, Baker and Charley were indicted for crimes arising out of the evidence obtained in the search of the home. Baker and Charley pled guilty and the jury convicted Able on all counts.

Able appealed. He challenged the court's denial of his motion to suppress the evidence obtained during the warrantless search of Charley's home and further asserted that the court erred in finding that circumstances justified the agents' entry into Charley's residence.

QUESTIONS:

1. Does Able have standing to object to the search of Charley's house?
2. Did the court err in denying Able's motion to suppress the evidence obtained by the government's warrantless entry into Charley's home?

Answer A to Question 12

1. Yes, Able has a standing object to the search of Charley's house.

The Fourth Amendment prohibits unreasonable searches and seizures. In general, to be reasonable, the search must be pursuant to a warrant based on probable cause. The Fourth Amendment is directly applicable to the States and made applicable to the federal government via the due process clause of the 14th Amendment. To have standing, there must be government action and a reasonable expectation of privacy. To be reasonable the defendant must have a subjective expectation of privacy that is objectively reasonable.

Here, there was a government action. Further, Able had a reasonable expectation of privacy. More specifically, Able had Charley for several weeks, visited Charley's house several times, and spent a night at Charley's house. Thus, Able had a subjective expectation of privacy at Charley's home. Further, based on the number of times Able had been in Charley's home during those few weeks and the fact that he spent a night there, Able's expectation of privacy was objectively reasonable. Therefore, Able had a standing to object to the search of Charley's house.

2. No, the court not error in denying Able's motion to suppress the evidence obtained by government's warrantless entry into Charley's home.

Generally, in order to enter a person's home, a warrant is required, One exception to the warrant requirement is where exigent circumstances exist.

Here, there were exigent circumstances that permitted the warrantless entry into Charley's house. The agent's knew that Able and Baker had bought chemicals that could be used to manufacture methamphetamine and that they took the chemicals into Charley's

house. The agents also smelled the familiar pungent odor of the materials when mixed and heard and knew that, if the mixture reached the boiling point, it would explode. Because a school was nearby and was in session, exigent circumstances existed. Namely, the facts that the explosion of the chemicals could result in the injury or even death of children at the school created exigent circumstances justifying the warrantless entry into Charley's home.

Further, once in the home, the agents terminated the exigent circumstances by turning off the heat and then left the house. Note that the temporary detention of the occupants until a warrant is obtain is permissible in order to prevent destruction of evidence. The evidence was thereafter seized pursuant ti a valid warrant based on probable cause. As such, there was no 4th Amendment violation.

In sum, the court did not error in denying Able's motion to suppress because the warrantless entry into Charley's house was justified by exigent circumstances. Further the agents left the house as soon as the emergency was terminated and returned to seize the evidence with a valid warrant in compliance with the requirements of the 4th Amendment.

Answer B to Question 12

1. Abel has standing to object to the search of Charlie's home.

To have standing to assert one's right to be free from unreasonable searches and seizures, he must present a cognizable injury. The injury that Abel would claim, or the he would claim to have been violated, is his right to privacy. If this were a case where Abel was objecting to the search of Charlie's person or luggage. Abel would not have standing because he has no reasonable expectation of privacy in Charlie's luggage or person. However, Abel in this case is objecting to the search of Charlie's home. Abel was a frequent guest within the house and kept his own property within the house. Therefore, Abel has a reasonable expectation of privacy in Charlie's house and Abel has standing to challenge the search.

2. The court did not err in denying the motion to suppress the evidence obtained from the search of Charlie's home.

Absent a warrant supported by probable cause, the police may not search or seize an individual or his belongings. The home is an especially protected area and any invasion of the privacy of one's home will be closely scrutinized.

However, when a officer believes that probable cause exists and reasonably believes that criminal activity is ongoing, he may briefly detain a person and conduct a limited search to disconfirm his suspicion.

Here, officers witnessed Abel and Baker purchase meth ingredients and both were known to deal meth. They also witnessed the two enter Charlie's home on multiple occasions and all were known to work with meth labs. Furthermore, the officers smelled meth being manufactured within Charlie's home (presumably from a lawful distance).

A reasonable officer in their position would reasonably believe that probable cause existed to arrest three men.

Absent exigent circumstances, officers must knock and announce before entering a home to effectuate an arrest. Exigent circumstances were present here. The officers smelled meth being cooked which posed a serious threat to the nearby middle school. Because meth labs are unstable and likely to explode without warning, time was of the essence. Because the officers had clear and articulate facts that a reasonable officer would believe constituted probable cause and because exigent circumstances existed which posed an immediate threat of harm to the public, the officer did not take fruit from a poisonous tree and the evidence is admissible.