MPT QUESTION #1

In re Rowan (February 2014, MPT-1) In this performance test item, examinees are associates at a law firm representing William Rowan, a British citizen, in an immigration matter. Rowan moved to the United States with his wife, a U.S. citizen, and became a conditional permanent resident of the United States. The couple recently divorced, and Rowan's ex-wife, Sarah Cole, actively opposes his continued residency in the United States. Acting pro se, Rowan filed a Petition to Remove Conditions on Residence; the immigration officer denied the petition, and Rowan seeks the law firm's assistance. Examinees' task is to draft a brief for the upcoming hearing before an immigration judge, arguing that Rowan married Cole in good faith and not solely to obtain residency, that the denial of Rowan's petition was not supported by substantial evidence, and that in fact, the totality of the evidence supports granting the petition. The File contains the instructional memorandum, guidelines for drafting persuasive briefs, a memorandum summarizing the client interview, an affidavit by Sarah Cole, and a memorandum describing evidence to be submitted at the immigration hearing. The Library contains selected federal statutes and regulations on the requirements for conditional residency and two federal Court of Appeals cases addressing the basic process and standards for seeking a waiver of the joint filing requirement as well as the substantial evidence standard of review.

MINNESOTA BAR EXAMINATION
FEBRUARY 2014
REPRESENTATIVE GOOD ANSWER
MPT 1

TO: Jamie Quarles

FROM: Examinee

DATE: February 25, 2014

RE: Rowan Brief

III Argument

The Law To Be Used To Resolve This Case Is Under 8 U.S.C. Section 1186a: Rowan Can Make A Showing That His Marriage Was In Good Faith

Under 8 U.S.C. Section 1186a(c)(1)(A) the alien spouse and the petitioning spouse must submit a petition for the removal of the conditional basis of permanent resident status. Section 1186a(c)(1)(A)(4) provides for what is known as the "hardship waiver": "The secretary… may remove the conditional basis of permanent resident status for an alien who fails to meet the requirements of paragraph (1) if the alien demonstrates that… (B) the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated and the alien was not at fault in failing to meet the requirements of paragraph (1).

Case law will be used to resolve the ambiguity surrounding the term "in good faith" to determine whether Rowan meets the requirements of the statute.

The Standard To Review This Case Is the Substantial Evidence Standard, Which Rowan Is Able To Meet

"Under the substantial evidence standard that governs our review of Section 1186a(c)(4) waiver determinations, we must affirm the BIA's order when there is such relevant evidence as reasonable minds might accept as adequate to support it, even if it is possible to reach a contrary result on the basis of the evidence." *Connor*.

With the above standard in mind, it is clear that Rowan has met the required burden to qualify for the waiver.

The Evidence Supports That Rowan Should Be Given The Waiver Because He Can Demonstrate That He And His Wife Entered Into Long-Term Leases, Served As Co-Signor For A Car Loan, Held Joint Bank Accounts, And Filed Joint Tax Returns.

“[The Petitioning Spouse] has the burden of proving that [he] intended to establish a life with [his] spouse at the time they married.” “If [he] meets this burden, [his] marriage is legitimate, even if securing an immigration benefit was one of the factors that led [him] to marry.” “But well-stated law requires us to access the entirety of the record.” *Hua*.

The above rules of law are taken from the *Hua* case from the 15th Circuit. *Hua*, was concerned with a Chinese citizen who married an American citizen of Chinese descent. Before the two year conditional admission period had ceased, the two divorced. Hua (the petitioner) alleged that her and her husband had a two-year courtship, were in frequent telephone contact whenever they lived apart, and that she visited her husband and lived with him and his parents under a three month visitor visa. Hua was also able to demonstrate that both her and her husband entered in joint health insurance policies, filed joint tax returns, opened joint bank accounts, entered car financing agreements, and secured a joint credit card. She was initially denied the waiver because the marriage occurred shortly before her visa was to expire, she submitted her application for permanent residency within two weeks of her marriage, and soon after the marriage she moved out of her husband’s home. The court in *Hua* was concerned with the close proximity of the timing between marriage and the application, and her quick exit from the marital home. However, the court looked at the “entirety of the record” and determined that she had met her burden of showing good faith. All the evidence of joint accounts and joint operations of the husband and wife overcame any problems regarding the timing. As such, the court ruled that Hua had satisfied the good faith marriage requirement.

The case at hand is very similar to *Hua*. In this case, Rowan and his wife have entered into numerous joint accounts and joint operations so as to satisfy the good faith requirement just as in Hua. When first moving to the United States, Rowan and Cole jointly entered into a lease; after that lease was up, they then entered into a subsequent two-year lease in a larger apartment. Furthermore, they each had health insurance as joint partners, and named one another as next of kin. They filed two joint tax returns and Rowan even served as a co-signor for a car loan for Cole. This evidence clearly shows that Rowan and Cole had entered into marriage in good faith. Rowan and Cole carried on as husband and wife because that is what they were and they were in a good faith marriage. What may be problematic is the fast courting and engagement period. However, Rowan has said that it was love at first sight and there is the testimony of Anna Sperling stating that Rowan moved to the United States “for love.” Although this court may be concerned with the timing of the marriage, the court should consider “the entire record;” that is to say, that this court also must consider the large showing of evidence that proves that Rowan entered into this marriage in good faith. He entered into loan agreements, longer term leases, and entered into the marriage in good faith. Therefore, this court should come to the same conclusion as the Hua court and hold that Rowan has met his burden of showing that he entered into the marriage in good faith, and thus grant his waiver.

<u>Rowan Can Demonstrate That He And His Wife Entered Into Marriage To Establish A Life Together And That His Subjective Intent Was Clear From The Actions He Took After They Were Married Despite His Wife's Affidavit To The Contrary.</u>

"To determine good faith, the proper inquiry is whether [husband] and [wife] intended to establish a life together at the time they were married." "The immigration judge may look to the actions of the parties after the marriage to the extent that those actions bear on the subjective intent of the parties at the time they were married." "Neither the immigration judge nor the BIA may substitute personal conjecture or inference for reliable evidence." *Connor*.

The above rules of law are taken from the *Connor* case. *Connor* was about an Irish national who married a co-worker while on a work permit. After 19 months of marriage they divorced because Connor (the petitioner) had taken a job in Alaska and while he was away for work, his wife carried on an extra-marital affair. During the hearing to determine if Connor should be allowed a waiver, his wife filed an affidavit opposing the waiver and stating that she believed he had only married her for the citizenship. At the hearing, Connor himself presents no witnesses. Although the evidence submitted by Connor of vehicle titles, joint life insurance, joint bills, and joint bank accounts, never appeared to have been filed, it was simply the applications. Also, Connor did not discuss the fact that he had children from a prior relationship. He did not mention it to the investigator and he did not seem credible during cross-examination at the hearing. The court in *Connor* held that the affidavit by his wife was not inadmissible hearsay, but was probative and fundamentally fair. Additionally, the court considered the affidavit and the evidence by Connor. The court ruled that because his own evidence appeared to never have been filed, that Connor had not met his burden of showing good faith. As such, the court held that he was not eligible for the waiver.

The case at hand is very different from the *Connor* case. Although Rowan's wife's affidavit will be considered, Rowan has made a better showing of evidence of good faith marriage. Rowan has shown real joint accounts, joint loans, and joint leases, showing that he and his wife were in a good faith marriage; Rowan has not just presented applications for the aforementioned items like in *Connor*; but he has shown that they were filed and were legitimate. As such, Rowan's marriage was legitimate and was entered into in good faith. Cole's affidavit stating otherwise, although probative under *Connor*; does not outweigh the evidence shown by Rowan. Cole specifically mentions that Rowan had inquired about a job in the states before they had decided whether or not to move back to the United States. Although probative, it seems clear that Cole wanted to move back to the United States at some point to not only finish her studies, but then also to look for jobs, which of course she was eventually able to secure. Rowan should not be punished for being proactive and looking for employment opportunities in his wife's home country. Furthermore, Rowan was unwilling to move to Olympia not because his marriage wasn't real, but instead because he had already moved once from Britain, and he also had a very good job where he was. Again, Cole's affidavit is probative and admissible, yet it does not outweigh the evidence from Rowan that the marriage was entered into in good faith. Therefore, this court should rule that, unlike in *Connor*, Rowan has met his burden of showing in good faith, despite his wife's affidavit, and that he should qualify for the waiver.

Conclusion

For the aforementioned reasons, this court should hold that Rowan has met his burden of proving the marriage was entered into in good faith and as such Rowan should be granted the waiver under Section 1186a(c)(4).

MPT QUESTION #2

In re Peterson Engineering Consultants (February 2014, MPT-2) Examinees' law firm represents Peterson Engineering Consultants (PEC), a privately held engineering consulting firm. The president of PEC has some concerns about the company's potential liability arising from employees' use of the Internet and other technology. The task for examinees is to draft a memorandum to the supervising attorney to be used in advising PEC's president regarding the company's policies on employee use of technology, which have not been updated since 2003. Specifically, examinees are asked to address what revisions should be made to PEC's employee manual to clarify ownership and monitoring of technology, to ensure that the company's technology is used only for business purposes, and to make the policies reflected in the manual effective and enforceable. The File contains the instructional memorandum from the supervising attorney, excerpts from the current employee manual, and a summary of a survey about technology in the workplace. The Library contains three cases from the Franklin Court of Appeal.

MINNESOTA BAR EXAMINATION
FEBRUARY 2014
REPRESENTATIVE GOOD ANSWER
MPT 2

TO: Branda Brown

FROM: Examinee

DATE: February 25, 2014

RE: Peterson Engineering Consultants

I. Potential liability for PEC as a result of employees' use or misuse of internet-connected technology.

i. Invasion of privacy.

As a private company, PEC is potentially subject to the tort claim by an employee for invasion of privacy. "[I]nvasion of privacy occurs when a party intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, if the intrusion would be highly offensive to a reasonable person." *Hogan*. In Hogan, a school teacher was discharged for what was determined to be a misuse of a school issued computer. The school argued that there was no expectation of privacy in the use of a computer when the computer was owned by the school. The Court of Appeals ultimately granted summary judgment for the school based on a lack of an expectation of privacy after reading the employee manual. It should be noted that the Court indicated that the manual, which specifically reserves the school "the right to monitor the use of such equipment at any time," could have been drafted clearer. The fact that the manual was also re-issued annually supported the school's position as well.

ii. Liability for employee's willful and malicious actions under the principle of ratification or the doctrine of respondeat superior.

a. The principle of ratification.

If an employee of PEC acts willfully and maliciously towards another individual, PEC could potentially be liable under a principle of ratification if PEC were to voluntarily elect to adopt the employee's conduct as its own. The failure to discharge an employee after knowledge of their wrongful acts may be evidence supporting ratification. *Fines*. In Fines, Fines' employer, Heartland, was accused of ratifying another employee's misconduct because of a delay in discharging said employee. Fines' claims against her employer were ultimately dismissed, due in part to Fines not bringing the complaint to the attention of her supervisor until the fifth day of the misconduct in addition to only a four day turn around in discharging the other employee.

b. The doctrine of respondeat superior.

Under the doctrine of respondeat superior, an employer can also be held vicariously liable for its employee's torts committed within the scope of the employment. *Fines*. In that case, the plaintiff must establish that the employee's acts were committed within the scope of employment. *Id*. Notably, an employee's tortious act may be within the scope of employment even if it contravenes an express company rule. *Id*. However, the employer is not liable if the employee "substantially deviates from the employment duties for personal purposes." *Id*. Heartland was again determined to lack liability under this theory, notably because the employee handbook stated that "use of office equipment for personal purposes during office hours constituted misconduct for which the employee would be disciplined." This provision put employees on notice that certain behavior was outside the scope of their employment.

iii. Liability for wrongful termination based on employee's discharge for violating company policy when the policy is either ambiguous or practically abandoned.

a. Ambiguous company policy.

PEC could potentially be liable for wrongful termination if that termination is made based on violation of an ambiguous company policy. In *Lucas*, Lucas was discharged for using company technology for personal use when the company policy used the words "should not" be used for personal use. Lucas argued that "should" implies a moral goal rather than a legal obligation. The ambiguity of the policy was determined to be an issue of fact for the trial court, but the Court of Appeals did offer some guidance. They stated that they would not distinguish between "should" and "shall," but they recommended the use of "must" and "must not." Lucas also cited Catts as another example of an unclear company policy regarding the personal use of company technology.

b. Abandonment of company policy.

Lucas also argued that her employer had effectively abandoned whatever policy it had written because it was common practice at the employer to engage in the personal use of email and the internet. *Lucas*. '[A]n employer may be assumed to have abandoned or changed even a clearly written policy if it is not enforced or if, through custom and practice, it has been effectively changed to permit the conduct forbidden in writing, but permitted in practice.

Id. This was also determined to be an issue of fact for the trial court, and was remanded accordingly.

II. Recommended changes and additions to PEC's employee manual.

i. Phone use.

The entire paragraph could be re-written to be clearer and more concise. One important change would be to remove the explicit language allowing for employees to make calls for incidental personal use. In Fines, the employer was specifically not held liable because of the provision stating that use of office equipment for personal purposes during office hours constituted misconduct. A provision like that puts the employee on notice that use of company technology is outside the scope of their employment. The provision in PEC's manual almost effectively encourages some level of personal use. If avoiding liability is a priority, that provision should be changed dramatically.

ii. Computer use.

The use of "may not" and "should" need to be replaced with "must not" and "must," as discussed in the Lucas case. This will help avoid ambiguity in the future. The language regarding PEC's ability to review any employee's use of any company-owned equipment with internet access could also be expanded. This provision should include something like "24 hours per day, 7 days per week," and it should also explicitly state that there is no expectation of privacy regarding the use of company-owned equipment or technology.

iii. Email use.

Similar to the change suggested in the phone section of the manual, the provision about permitting personal use of PEC's email system should be removed. Any language of that nature could effectively create an expectation of privacy a well as the right of an employee to use said property or technology for personal use. The employees may not respond well to such a change, but as previously stated, if avoiding liability is the number one priority, these changes must be made.

iv. General changes and recommendations.

The manual should restate the lack of an expectation of privacy when using company property and technology regardless of what property or technology is specifically being used. This would not only help avoid liability, but it would allow the manual to be more fluid with the ever-changing landscape of technology.

An additional provision needs to be added clarifying that any property or technology issued to an employee by PEC is owned exclusively by PEC. The provision as it stands under the computer section only specifically mentions equipment for use outside of the office. This needs to include all equipment regardless of where it is used.

Another provision needs to be added that encourages any employees aware of misuse of PEC property or technology to report the misuse to their supervisor or somebody of similar capacity. This will help place all employees on notice of the importance of appropriate use as well as help PEC avoid a potential claim regarding vicarious liability. The possibility of being discharged needs to be explicitly stated as a possible consequence for misuse of company property or technology.

“Must” and “must not” need to be used wherever possible rather than similar alternatives.

In an effort to avoid an assertion of abandoning company policy, the manual needs to be distributed at least on an annual basis. Additionally, PEC needs to implement some type of technology system that allows for the actual monitoring of how its property and technology are being used. The above-described changes will allow the employee manual to not only become clearer and more efficient, but also more effective.

Constitutional Law Question

A city ordinance required each downtown business to install high-powered halogen floodlights that would illuminate the property owned by that business and the adjoining sidewalks. A study commissioned by the city estimated that installation of the floodlights would cost a typical business about $1,000, but that increased business traffic due to enhanced public safety, especially after dark, would likely offset this cost.

A downtown restaurant applied to the city for a building permit to construct an addition that would increase its seating capacity. In its permit application, the restaurant accurately noted that its current facility did not have sufficient seating to accommodate all potential customers during peak hours. The city approved the permit on the condition that the restaurant grant the city an easement over a narrow strip of the restaurant's property, to be used by the city to install video surveillance equipment that would cover nearby public streets and parking lots. The city based its permit decision entirely on findings that the increased patronage that would result from the increased capacity of the restaurant might also attract additional crime to the neighborhood, and that installing video surveillance equipment might alleviate that problem.

The restaurant has challenged both the ordinance requiring it to install floodlights and the easement condition imposed on approval of the building permit.

1. Under the Fifth Amendment as applied to the states through the Fourteenth Amendment, is the city ordinance requiring the restaurant to install floodlights an unconstitutional taking? Explain.

2. Under the Fifth Amendment as applied to the states through the Fourteenth Amendment, is the city's requirement that the restaurant grant the city an easement as a condition for obtaining the building permit an unconstitutional taking? Explain.

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FEBRUARY 2014
REPRESENTATIVE GOOD ANSWER
MEE 1

Is the city ordinance requiring the restaurant to install floodlights an unconstitutional taking?

Under the 5th amendment as applied to the states through the 14th amendment, the government cannot take your property without just compensation. There are two ways which a taking might occur. Either the government takes all or a portion of your land for the government to use via regulation or statute (a regulatory taking), or the government deprives a property owner of all economic value of his property which in effect is also a taking.

Here, this would potentially fall under a regulatory taking. A taking could occur no matter how small the amount of land taken or commandeered for the government's use. In one case, even a small cable line was enough. However here, the government is not actually taking a part of the restaurant's land or directly installing something on the owner's land. It is only requiring downtown businesses to install floodlights on their own premises. A state or city may make regulations that would be in the interest of public health or safety under its police power. They are valid as long as the regulation is rationally related to a legitimate state interest. The burden would be on the challenger to show there is no conceivable basis for the state or city to make such a regulation, which is a tough burden to meet.

Here there was no regulatory taking and thus no violation of the takings clause. This was merely a regulation by the city under its police power to protect public health and safety. Here the purpose would be to increase safety and attract more foot traffic to the area after dark. This would be both beneficial to the city and to the businesses in the area and wouldn't be unduly costly to the businesses. As a result, the restaurant does not have a valid claim here.

Is the exaction required by the city in exchange for the permit to construct the addition to the restaurant an unconstitutional taking?

An exaction is a requirement to add or do something to private property in order to get a permit to build or add on to that property from the city. (Quid pro quo) An exaction will not be an unconstitutional taking if it has a legitimate purpose based on a public health or safety interest and the exaction is reasonable to alleviate a public health or safety concern which would be caused by the reason for the permit. Here the city is requiring the restaurant to grant an easement so the city can place surveillance cameras. This is not an unconstitutional taking. The city is not asking for a large portion of the property, only for a small easement to place some surveillance cameras. The purpose for placing the cameras would be to have surveillance of nearby streets and parking lots.

Additionally, the restaurant is wanting to expand its capacity so as to be able to accommodate all of its patrons at peak times. There is a legitimate public safety concern by the city that the increase in traffic might also attract more crime to the neighborhood. Placing surveillance cameras might help alleviate such a problem caused by increased traffic. Therefore, the city has a legitimate purpose for wanting the easement over the restaurant's property. The easement and placement of the surveillance equipment would be a reasonable way to alleviate any increased crime caused by the expansion to the restaurant, which was the purpose for which the restaurant was seeking the permit. Therefore, the requirement of an easement in exchange for the building permit is not an unconstitutional taking on the part of the city.

Trusts and Future Interests Question

Ten years ago, a testator died, survived by his only children: a son, age 26, and a daughter, age 18.

A testamentary trust was created under the testator's duly probated will. The will specified that all trust income would be paid to the son during the son's lifetime and that upon the son's death, the trust would terminate and trust principal would be distributed to the testator's "grandchildren who shall survive" the son. The testator provided for his daughter in other sections of the will.

Five years ago, the trustee of the testamentary trust purchased an office building with $500,000 from the trust principal. Other than this building, the trust assets consist of publicly traded securities.

Last year, the trustee received $30,000 in rents from the office building. The trustee also received, with respect to the securities owned by the trust, cash dividends of $20,000 and a stock dividend of 400 shares of Acme Corp. common stock distributed to the trust by Acme Corp.

Eight months ago, the trustee sold the office building for $700,000.

Six months ago, the son delivered a letter to the trustee stating: "I hereby disclaim any interest I may have in the income interest of the trust." On the date the son delivered this letter to the trustee, the son had no living children; the daughter had one living minor child.

A statute in this jurisdiction provides that "a disclaimer of any interest created by will is valid only if made within nine months after the testator's death, and if an interest is validly disclaimed, the disclaiming party is deemed to have predeceased the testator."

1. How should the rents, sales proceeds, cash dividends, and stock dividends received prior to the trustee's receipt of the son's letter have been allocated between trust principal and income? Explain.

2. How, if at all, does the son's letter to the trustee affect the future distribution of trust income and principal? Explain.

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REPRESENTATIVE GOOD ANSWER
MEE 2

1. The issue in this question is how asset gain should be categorized based on the identity of the asset producing the gain.

   In general, the identity of the property producing gain will determine whether that gain is allocated to the principal of the trust or to income. If the gain is considered principal, that principal is added to the existing principal of the trust. If the gain is considered income, the income will be paid out to the beneficiaries in accordance with the trust.

   As a general rule, the proceeds from the sale of real estate owned by the trust will be considered principal. In this case, the Trustee bought and sold an office building owned by the trust. Therefore, the $700,000 sale proceeds would be added to the principal of the trust. However, unlike the sale proceeds from the office building, rents received from any real property owned by the trust will be considered income, which will be distributed to the beneficiaries. In this case, the trustee received $30,000 in rents which would be considered income.

   In terms of the securities (investments) owned by the trust, cash dividends will be considered income and distributed to the beneficiaries. However, the stock dividend of 400 shares of Acme stock would be considered principal and would be added back to the principal of the trust.

   In general, the trustee may have the ability to reallocate whether some property of the trust is considered income or principal depending on the trust purpose as outlined by the settlor. For example, if the purpose was to provide income to the beneficiary and most of the property is considered principal, the trustee may be able to re-designate some of the property as income producing and thereby accomplish the primary purpose of the trust.

2. The issue in this case is whether a beneficiary can validly disclaim an interest in the trust against the primary purpose of the trust as outlined by the settlor.

   In general, an individual may disclaim a testamentary interest provided to him. This may create a situation in which the devised gift creates lapse and would be distributed in accordance with the jurisdictions anti-lapse statute. In this case, the jurisdictions anti-lapse statute indicates that a beneficiary will not be able to disclaim unless the interest is validly disclaimed within 9 months of the Testator's death. The son did not satisfy that condition, and therefore, he will not be able to validly disclaim his interest.

As a general rule, in order to modify a trust purpose, all the beneficiaries of the trust must be in agreement. This is true even when the interests in the trusts are not yet ascertained or have not been born. In this case, a trust was created with a primary purpose to provide income to the Son and a remainder interest in the Testator's grandchildren.

In this case, the Testator created a vested remainder subject to complete defeasance in the Testator's grandchildren who survive the Son. The Son has no children; however, there is one remaining grandchild of the Testator. Therefore, the income and principal must continue to be distributed according to the Testator's wishes.

Secured Transactions Question

On March 1, the owner of a manufacturing business entered into negotiations with a bank to obtain a loan of $100,000 for the business. The bank loan officer informed the business owner that the interest rate for a loan would be lower if the repayment obligation were secured by all the business's present and future equipment. The loan officer also informed the business owner that the bank could not commit to making the loan until its credit investigation was completed, but that funds could be advanced faster following loan approval if a financing statement with respect to the transaction were filed in advance. Accordingly, the business owner signed a form on behalf of the business authorizing the bank to file a financing statement with respect to the proposed transaction. The bank properly filed a financing statement the next day, correctly providing the name of the business as the debtor and indicating "equipment" as the collateral.

On March 15, the business owner had heard nothing from the bank about whether the loan had been approved, so the business owner approached a finance company for a loan. The finance company quickly agreed to lend $100,000 to the business, secured by all the business's present and future equipment. That same day, the finance company loaned to the business $100,000, and the business owner signed an agreement obligating the business to repay the loan and granting the finance company a security interest in all the business's "present and future equipment" to secure the repayment obligation. Also on that day, the finance company properly filed a financing statement correctly providing the business's name as the debtor and indicating "equipment" as the collateral.

On March 21, the bank loan officer contacted the business owner and indicated that the loan application had been approved. On the next day, March 22, the bank loaned the business $100,000. The loan agreement, signed by the owner on behalf of the business, granted the bank a security interest in all the business's "present and future equipment."

On April 10, the business sold an item of manufacturing equipment to a competitor for $20,000. This was the first time the business had ever sold any of its equipment. The competitor paid the purchase price in cash and took possession of the equipment that day. The competitor acted in good faith at all times and had no knowledge of the business's prior transactions with the bank and the finance company.

The business has defaulted on its obligations with respect to the loans from the bank and the finance company. Each of them has asserted a claim to all the business's equipment as well as to the item of equipment sold to the business's competitor.

Assume that the business owner had the authority to enter into all these transactions on behalf of the business.

1. As between the bank and the finance company, which has a superior claim to the business's equipment? Explain.

2. Do the claims of the bank and the finance company to the business's equipment continue in the item of equipment sold to the competitor? Explain.

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REPRESENTATIVE GOOD ANSWER
MEE 3

1) Bank v. Finance Company

As between the bank and the finance company, the bank has the superior claim to the business' equipment. The issue is which secured party has priority over the other due to timing in attachment and perfection of a valid security interest on the business' equipment.

Secured transactions are governed under Article 9 of the U.C.C. In order to fall under Article 9's provisions, the transaction must give rise to a security interest in a party. In order to be given superior rights, a creditor must be a secured party and generally whoever perfects the security interest first has priority over junior secured parties who perfected later. In order to have attachment the following must be present: (1) an intent of both parties to give a security interest in collateral to the creditor which can generally be done by the debtor providing a security agreement, or by possession or control; (2) the creditor must give value to the debtor (usually an advance or a loan; and (3) the debtor must have rights in the collateral (this is usually accomplished by the debtor retaining value in the goods). Here both parties have attachment and both bank and finance company are secured parties.

Bank and the business owner entered into an authenticated security agreement (signed by the debtor business owner) giving bank a security interest in all present and future equipment. The Bank gave value when it loaned the business owner $100,000. Finally, the business had rights in the collateral, the presently owned manufacturing equipment. Thus, the Bank satisfied all elements of attachment as a secured party. The Finance company too is a secured party. The business owner agrees to give a security interest in the manufacturing equipment to the finance company in order to secure the loan; this was evidenced by the authenticated security agreement. The finance company gave the business owner value, a $100,000 loan. Finally, the business has rights in the collateral; it owned its manufacturing equipment. Thus, finance company satisfies all elements of attachment and is a secured party.

If there are two or more secured parties who claim a security interest in a piece of collateral, generally the perfected party has priority. If both parties have perfected, then the first to perfect has priority. While attachment gives the secured party rights in the collateral as against the debtor, perfection gives the world notice that the secured party has rights in the collateral. There are several ways to perfect depending upon what the collateral is; the most common way to perfect is to file a financing statement with the appropriate state office, usually the secretary of state. There are formalities required when filing so that filing the financing statement is not seriously misleading and that third parties can have notice that a secured party has an interest. Here, it seems both parties went through appropriate means in which to file a financing statement. Bank filed a financing statement on March 1 and financing company filed a financing statement on March 15. However, perfection can never come before attachment. But, once attachment is achieved, the perfection date can relate back to when the financing statement was filed. Here, it was filed on March 1, bank's security interest attached March 21, and so the date will relate back to March 1.

Because Bank was the first to file its perfected security interest, it has priority in the business' equipment over financing company.

2) Equipment Sold to Competitor

The claims of the bank and finance company to the business' equipment continue in the item of equipment sold to the competitor. The issue is whether the competitor bought the equipment free and clear of the security interest or whether the security interest remains in the equipment despite the sale.

As a general matter, secured parties not only have a security interest in the collateral at the time the interest attached, but the secured party will have an interest in any proceeds from the collateral. For example, if the collateral was inventory and the debtor sold the inventory in the regular course of business, the secured party generally would no longer have a security interest in the inventory in the hands of the buyer, but would have a security interest in the proceeds in the hands of the seller-debtor. However, the manufacturing business does not seem to be a business that usually sells its equipment. In fact, equipment is a type of collateral that is used primarily for the business. Generally, a debtor cannot sell the collateral free and clear of the security interest, unless it is contemplated by the parties, it is a consumer good and sold to another consumer having no notice of a security interest (garage sale), or it is a buyer in the ordinary course of business (usually an inventory situation). Here, the manufacturing business falls into none of these categories. The fact that the competitor did not know of the prior transactions with the bank and the finance company and acted in good faith, does not protect it from the security interest that the bank and finance company have in the equipment.

Federal Civil Procedure Question

A builder constructed a vacation house for an out-of-state customer on the customer's land. The house was completed on June 1, at which point the customer still owed $200,000 of the $800,000 contract price, which was payable in full five days later.

On June 14, the basement of the house was flooded with two inches of water during a heavy rainfall. When the customer complained, the builder told the customer, "The flooding was caused by poorly designed landscaping. Our work is fine and fully up to code. Have an engineer look at the foundation. If there's a problem, we'll fix it."

The customer, pleased by the builder's cooperative attitude, immediately hired a structural engineer to examine the foundation of the house. On June 30, the engineer provided the customer with a written report on the condition of the foundation, which stated that the foundation was properly constructed.

Unhappy with the conclusions in the engineer's report, the customer then hired a home inspector to evaluate the house. The home inspector's report concluded that the foundation of the house had been poorly constructed and was inadequately waterproofed.

On July 10, the customer sent the builder the home inspector's report with a note that said, "Until you fix this problem, you won't get another penny from me." The builder immediately contacted an attorney and directed the attorney to prepare a draft complaint against the customer for nonpayment. Hoping to avoid litigation, the builder sent several more requests for payment to the customer. The customer ignored all these requests.

On September 10, the builder filed suit in federal district court, properly invoking the court's diversity jurisdiction and seeking $200,000 in damages for breach of contract. The customer's answer denied liability on the basis of alleged defective construction of the house's foundation.

Several months later, the case is nearly ready for trial. However, two discovery disputes have not yet been resolved.

First, despite a request from the builder, the customer has refused to provide a copy of the report prepared by the structural engineer who examined the foundation of the house. The customer claims that the report is "work product" and not discoverable because the customer does not intend to ask the engineer to testify at trial. The builder has asked the court to order the customer to turn over the engineer's report.

Second, the customer has asked the court to impose sanctions for the builder's failure to comply with the customer's demand for copies of all emails concerning construction of the foundation of the house. The builder has truthfully informed the customer that all such emails were destroyed on August 2. This destruction was pursuant to the builder's standard practice of permanently deleting all project-related emails from company records 60 days after construction of a project is complete. There is no relevant state records-retention law.

1. Should the court order the customer to turn over the engineer's report? Explain.

2. Should the court sanction the builder for the destruction of emails related to the case, and if so, what factors should the court consider in determining those sanctions? Explain.

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1) The Engineer's Report

At issue is whether the engineer's report was conducted in anticipation of litigation, and whether or not receiving the report would cause undue hardship for the contractor. As a general rule, work product is non-discoverable unless the party requesting the information can make a showing that they cannot reasonably obtain the information in any other way, that not receiving the information would cause an undue hardship on them, and that they would be unduly prejudiced by not receiving the report. Work product is considered any material that is produced in anticipation of litigation. It can be produced by an attorney or an agent of an attorney. Here, it appears that the customer was not anticipating litigation at the time the report was conducted. Rather, she was just trying to find leverage to avoid compensating the builder. The engineer's report was completed on June 30, and suit was not filed until September 10. Furthermore, the engineer was not an agent of the customer's attorney. It appears that the builder would be prejudiced by not receiving the report because it contains evidence that is helpful to his case, but he may be able to discover the report by sending a request to the engineer. Regardless, it appears that the report is not work product.

Therefore, the court should order the customer to turn over the engineer's report.

2) Sanctions for Destruction of Emails

At issue is whether a builder should be sanctioned for destroying discoverable material when litigation was foreseeable, if the material was destroyed as part of normal business practice. As a general rule, a party will not be sanctioned for destroying material that is otherwise discoverable, if that material is destroyed in due course and as part of a normal business practice. Nevertheless, parties have an absolute duty, as soon as they anticipate litigation, to save any and all material that is discoverable. Material is discoverable if it is relevant. It is relevant if it could possibly lead to the discovery of admissible evidence. Here, these emails are clearly relevant because there could be information contained within them that could lead to other evidence that could be admitted in court. Although the builder destroyed the emails in due course and as part of normal business practice, he probably could have anticipated litigation by the time he destroyed them. He destroyed them on August 2, before litigation had commenced. However, on July 10, the builder contacted an attorney regarding the matter. As a general rule, whenever an attorney becomes involved, litigation is anticipated. Therefore, the builder could have anticipated litigation at the time he destroyed the emails on August 2, and therefore destroyed them in spite of a duty to save the emails.

Therefore, the builder should be sanctioned.

Factors that the court should consider include whether he was acting in good faith at the time he destroyed the emails, whether he is otherwise cooperating and behaving in good faith, his ill will or malice, whether there is other poor misconduct on the part of the builder, and whether he truly contemplated litigation at the time of the destruction of the emails.

Criminal Law Question

A defendant was charged under state law with felony theft (Class D) and felony residential burglary (Class C). The indictment alleged that the defendant entered his neighbors' home without their consent and stole a diamond ring worth at least $2,500.

Defense counsel filed a pretrial motion to dismiss the charges on the ground that prosecuting the defendant for both burglary and theft would constitute double jeopardy. The trial court denied the motion, and the defendant was prosecuted for both crimes. The only evidence of the ring's value offered at the defendant's jury trial was the owner's testimony that she had purchased the ring two years earlier for $3,000.

At trial, the judge issued the following jury instruction on the burglary charge prior to deliberations:

> If, after consideration of all the evidence presented by the prosecution and defense, you find beyond a reasonable doubt that the defendant entered the dwelling without the owners' consent, you may presume that the defendant entered with the intent to commit a felony therein.

The jury found the defendant guilty of both offenses.

At the defendant's sentencing hearing, an expert witness called by the prosecutor testified that the diamond ring was worth between $7,000 and $8,000. Over defense objection, the judge concluded, by a preponderance of the evidence, that the value of the stolen ring exceeded $5,000. The judge sentenced the defendant to four years' incarceration on the theft conviction. On the burglary conviction, the defendant received a consecutive sentence of seven years' incarceration.

In this state, residential burglary is defined as "entry into the dwelling of another, without the consent of the lawful resident, with the intent to commit a felony therein." Residential burglary is a Class C felony for which the minimum sentence is five years and the maximum sentence is ten years of incarceration.

In this state, theft is defined as "taking and carrying away the property of another with the intent to permanently deprive the owner of possession." Theft is a Class D felony if the value of the item(s) taken is between $2,500 and $10,000. The sentence for a Class D felony theft is determined by the value of the items taken. If the value is between $2,500 and $5,000, the maximum sentence is three years' incarceration. If the value of the items exceeds $5,000, the maximum sentence is five years' incarceration.

This state affords a criminal defendant no greater rights than those mandated by the United States Constitution.

1. Did the trial court err when it denied the defendant's pretrial motion to dismiss on double jeopardy grounds? Explain.

2. Did the trial court err in its instruction to the jury on the burglary charge? Explain.

3. Did the trial court err when it sentenced the defendant to an additional year of incarceration on the theft conviction based on the expert's testimony? Explain.

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MEE 5

1. **The trial court did not err in denying the defendant's pretrial motion to dismiss on double jeopardy grounds.**

   Changes are multiplicitous and improper on double jeopardy grounds if the prosecution must necessarily prove the elements of one crime in order to prove the elements of a second crime. All the elements of the "lesser included offense" must be contained in the "greater."

   Under the state's law, the elements of burglary are (1) entry into (2) the dwelling (3) of another (4) without consent of the lawful resident, (5) with the intent to commit a felony therein. By contrast, the elements of theft in the state require the (1) taking and (2) carrying away of, (3) the property, (4) of another, (5) with the intent to permanently deprive the owner of possession.

   The court did not err in denying the defendant's pretrial motion to dismiss on double jeopardy grounds because the prosecution did not have to prove any of the elements of Theft in order to prove Burglary, and so the Theft charge was not a lesser-included offense of the burglary charge.

2. **The court erred in its instruction to the jury on the burglary charge.**

   The prosecution is required to prove every element of the crime charged beyond a reasonable doubt. Juries are not allowed to presume the presence of intent merely from the fact that the prosecution has proved other elements, but may infer intent from the circumstances of the crime. For example, a defendant's possession of burglary tools and sacks for transporting goods prior to a burglary could properly serve as evidence that the defendant had the intent to steal things from the house.

   Here, the court's jury instruction was in error because it allowed the jury to presume the defendant's intent if they found the other elements beyond a reasonable doubt. The jury was required to find each of the elements of burglary beyond a reasonable doubt, so the instruction was in error.

3. **The court erred when it sentenced the defendant to an additional year of incarceration of the theft condition based on the expert's testimony.**

   Under the rule of *Apprendi v. New Jersey*, all facts that increase the maximum sentence a defendant can face for a crime other than the fact of a previous conviction must be pleaded and proved beyond a reasonable doubt to a jury. The state criminal statutes provide that the maximum sentence for theft of items worth between \$2,500 and \$5,000 is three years' incarceration, but the maximum penalty increases to five years if the items are worth more than \$5,000. Under the *Apprendi* rule, the value of the items stolen must be pleaded and proved beyond a reasonable doubt because the defendant is exposed to a greater sentence if the total is more than \$5,000.

Here, the defendant could properly be convicted of stealing a diamond ring worth between \$2,500 and \$5,000 because the indictment alleged that the defendant stole a ring worth more than \$2,500 and the prosecution presented evidence at trial that she had purchased the ring for \$3,000. However, no evidence as to value was presented during the jury trial by the expert witness, who testified solely at sentencing. The judge not only allowed a fact that increased the defendant's exposure for sentencing to evade proof to the jury, but also applied a "preponderance of the evidence" standard instead of the "beyond a reasonable doubt" standard. The evaluation of the expert's testimony properly belonged to the jury under the "beyond a reasonable doubt" standard, and so the trial court's reliance on that testimony in sentencing the defendant to an additional year on the theft charge was in error.

Agency and Partnership Question

Five years ago, Adam and Ben formed a general partnership, Empire Partnership (Empire), to buy and sell antique automobiles at a showroom in State A. Adam contributed $800,000 to Empire, and Ben contributed $200,000. Their written partnership agreement allocated 80% of profits, losses, and control to Adam and 20% to Ben. No filings of any type were made in connection with the formation of Empire.

Three years ago, a collector purchased one of Empire's antique cars for $3,400,000. The collector was willing to pay this price because of Ben's false representation (repeated in the sales contract) that a famous movie star had once owned the car. Without the movie-star connection, the car was worth only $100,000. One month later, when the collector discovered the truth, he sued Adam, Ben, and Empire for $3,300,000 in damages. The lawsuit is still pending.

Two years ago, Adam and Ben admitted a new partner, Diane, to Empire in return for her contribution of $250,000. The three agreed to allocate profits, losses, and control 75% to Adam, 10% to Ben, and 15% to Diane. Before joining the partnership, Diane learned of the collector's claim and stated her concern to Adam and Ben that she might become liable if the claim were reduced to a judgment.

Following Diane's admission to Empire, the three partners sought to convert Empire into a limited liability partnership (LLP). Adam's lawyer proposed to file with State A a "statement of qualification" making an LLP election and declaring the name of the partnership to be "Empire LLP." Ben's lawyer stated that this would not work and that a new LLP had to be formed, with the assets of the old partnership transferred to the new one. In the end, the conversion was done the way Adam's lawyer suggested with the approval of all three partners.

One year ago, a driver purchased a vintage car from Empire LLP, based on the representation that the car was "fully roadworthy and capable of touring at 70 mph all day." The driver took the car on the highway at 50 mph, whereupon the front suspension collapsed, resulting in a crash in which the car was destroyed and the driver killed. The driver's estate sued Adam, Ben, Diane, and Empire LLP for $10,000,000. The lawsuit is still pending.

Although profitable, Empire LLP does not have resources sufficient to pay the collector's claim or the claim of the driver's estate.

Assume that the Uniform Partnership Act (1997) applies.

1. Before the filing of the statement of qualification,
   (a) was Adam personally liable on the collector's claim? Explain.
   (b) was Diane personally liable on the collector's claim? Explain.

2. After the filing of the statement of qualification, was Adam, Ben, or Diane personally liable as a partner on (a) the collector's claim or (b) the driver's estate's claim? Explain.

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<u>Before the filing of the statement of qualification was Adam personally liable on the collector's claim?</u>

The first issue is whether Adam was personally liable on the collector's claim. A general partnership exists when two or more people join together to form a business. Once a general partnership is formed, the partners take on liability of the partnership and the other partner(s). In other words, liability that arises out of the ordinary course of business is imposed first on the partnership, and if that partnership is unable to produce the funds necessary, the individual partners are liable for the amount of their contribution percentage. If one partner is obligated to pay more than their pro rata share of the partnership, they may seek contribution from the other partner(s). Here we have false representation on behalf of Ben. Even though Adam was not part of the misrepresentation, he is a partner in a general partnership and thus will be held personally liable for the collector's claim. Since Adam has a pro rata share of 80%, he will be responsible for 80% of the liability that the partnership assets cannot cover.

In conclusion, Adam will be personally liable on the collector's claim.

<u>Before the filing of the statement of qualification, was Diane personally liable on the collector's claim?</u>

The next issue is whether Diane is personally liable on the collector's claim. Under the UPA, a partner in a general partnership is liable for the acts of the other partners. However, when a new partner is added to the partnership, that new partner is only liable for the liabilities that arise after they join the partnership. New partners are not liable for the liabilities incurred before they become a partner. Here Diane joined the partnership after the collector claim arose. Therefore she will not be liable on the collector's claim because the liability was incurred before she became a partner. It does not matter that she was aware of the pending claim.

In conclusion, Diane will not be personally liable on the collector's claim.

<u>After the filing of the statement of qualification, was Adam, Ben or Diane personally liable as a partner on the collector's claim?</u>

The next issue is whether Adam, Ben and Diane are personally liable on the collector's claim following the filing. A limited liability partnership is formed by filing such under statute with the appropriate state office. It requires that the partnership name include LLP. These were both present here and a valid LLP was formed. The benefits of a LLP is that partners are not liable for the other partner's acts. They are liable only for their own negligence. However, a partnership cannot form into a LLP to avoid liability incurred while a general partnership. It only is a shield to liabilities incurred as a LLP. Here, Adam and Ben are still liable for the collector's claim because the liability was incurred when the partnership was still a general partnership. Just because they went to a LLP after the claim arose does not give them protection. Diane is not liable for the collector's claim because she was not a partner when the claim arose.

In conclusion, Adam and Ben are still liable for the collector's claim.

<u>After the filing of the statement of qualification, was Adam, Ben or Diane personally liable as a partner on the driver's estate's claim?</u>

The next issue is whether Adam, Ben or Diane is liable on the driver's estate claim? As stated above, a benefit of a Limited Liability Partnership is that there is no personal liability on the partners from the acts of the partnership of other partners. Here, the driver's estate claim arose after the partnership became a LLP. Therefore, the shield of the LLP applies to all of the partners. Therefore the estate of the driver will only be able to recover from the assets of the partnership. Now since the partnership does not have the assets to cover it, it may terminate the partnership, but that is another issue. Thus, none of the three partners will be personally liable on the driver's estate.

In conclusion, neither Adam, Ben nor Diane is personally liable on the driver's estate's claim.