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In re Rowan

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In re Rowan

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Law Offices of Jamie Quarles
112 Charles St.
Franklin City, Franklin 33797

TO: Examinee
FROM: Jamie Quarles
DATE: February 25, 2014
RE: *Matter of William Rowan*

We represent William Rowan, a British citizen, who has lived in this country as a conditional permanent resident because of his marriage to Sarah Cole, a U.S. citizen. Mr. Rowan now seeks to remove the condition on his lawful permanent residency.

Normally, a married couple would apply together to remove the conditional status, before the end of the two years of the noncitizen's conditional residency. However, ten months ago, in April 2013, Ms. Cole and Mr. Rowan separated, and they eventually divorced. Ms. Cole actively opposes Mr. Rowan's continued residency in this country.

However, Ms. Cole's opposition does not end Mr. Rowan's chances. As the attached legal sources indicate, he can still file Form I-751 Petition to Remove Conditions on Residence, but in the petition he must ask for a waiver of the requirement that he file the petition jointly with his wife.

Acting pro se, Rowan timely filed such a Form I-751 petition. The immigration officer conducted an interview with him. Ms. Cole provided the officer with a sworn affidavit stating her belief that Rowan married her solely to obtain residency. The officer denied Rowan's petition.

Rowan then sought our representation to appeal the denial of his petition. We now have a hearing scheduled in Immigration Court to review the validity of that denial. Before the hearing, we will submit to the court the information described in the attached investigator's memo, which was not presented to the immigration officer. We do not expect Cole to testify, because she has moved out of state.

Please draft our brief to the Immigration Judge. The brief will need to argue that Mr. Rowan married Ms. Cole in good faith. Specifically, it should argue that the immigration officer's decision was not supported by substantial evidence in the record before him and that the totality of the evidence supports granting Rowan's petition.

I have attached our guidelines for drafting briefs. Draft only the legal argument portion of the brief; I will draft the caption and statement of facts.

Law Offices of Jamie Quarles
112 Charles St.
Franklin City, Franklin 33797

TO: Attorneys
FROM: Jamie Quarles
DATE: March 29, 2011
RE: Format for Persuasive Briefs

These guidelines apply to persuasive briefs filed in trial courts and administrative proceedings.

I. Caption
[omitted]

II. Statement of Facts (if applicable)
[omitted]

III. Legal Argument

Your legal argument should be brief and to the point. Assume that the judge will have little time to read and absorb your argument. Make your points clearly and succinctly, citing relevant authority for each legal proposition. Keep in mind that courts are not persuaded by exaggerated, unsupported arguments.

Use headings to separate the sections of your argument. In your headings, do not state abstract conclusions, but integrate factual detail into legal propositions to make them more persuasive. An ineffective heading states only: "The petitioner's request for asylum should be granted." An effective heading states: "The petitioner has shown a well-founded fear of persecution by reason of gender if removed to her home country."

Do not restate the facts as a whole at the beginning of your legal argument. Instead, integrate the facts into your legal argument in a way that makes the strongest case for our client. The body of your argument should analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished.

Finally, anticipate and accommodate any weaknesses in your case in the body of your argument. If possible, structure your argument in such a way as to highlight your argument's strengths and minimize its weaknesses. If necessary, make concessions, but only on points that do not concede essential elements of your claim or defense.

Law Offices of Jamie Quarles
112 Charles St.
Franklin City, Franklin 33797

TO: File
FROM: Jamie Quarles
DATE: November 25, 2013
RE: Interview with William Rowan

I met with William Rowan today. Rowan is a British citizen and moved to the United States and to Franklin about two and a half years ago, having just married Sarah Cole. They separated in April 2013; their divorce became final about 10 days ago. In late April, after the separation, Rowan, acting pro se, petitioned to retain his permanent residency status. After that petition was denied by the immigration officer, Rowan called our office.

Rowan met Cole in Britain a little over three years ago. He had been working toward a graduate degree in library science for several years. He had begun looking for professional positions and had come to the realization that he would have better job opportunities in the United States. He had two siblings already living in the United States.

He met Cole when she was doing graduate work in cultural anthropology at the university where he was finishing his own academic training as a librarian. He says that it was love at first sight for him. He asked her out, but she refused several times before she agreed. After several weeks of courtship, he said that he felt that she shared his feelings. They moved in together about four weeks after their first meeting and lived together for the balance of her time in Britain.

Soon after they moved in together, Rowan proposed marriage to Cole. She agreed, and they married on December 27, 2010, in London, England. Cole subsequently suggested that they move to the United States together, to which he readily agreed. In fact, without telling Cole, Rowan had contacted the university library in Franklin City, just to see if there were job opportunities. That contact produced a promising lead, but no offer. He and Cole moved to Franklin City at the end of her fellowship in May of 2011.

Rowan soon obtained a job with the Franklin State University library. He and Cole jointly leased an apartment and shared living expenses. At one point, they moved into a larger space, signing a two-year lease. When Cole needed to purchase a new car, Rowan (who at that point had the more stable salary) co-signed the loan documents. Both had health insurance

through the university, and each had the other named as the next of kin. They filed two joint tax returns (for 2011 and 2012), but they divorced before they could file another.

Their social life was limited; if they socialized at all, it was with his friends. Rowan consistently introduced Cole as his wife to his friends, and he was referred to by them as "that old married man." As far as Rowan could tell, Cole's colleagues at work did not appear to know that Cole was even married.

Cole's academic discipline required routine absences for field work, conferences, and colloquia. Rowan resented these absences and rarely contacted Cole when she was gone. He estimates that, out of the approximately two and a half years of cohabitation during the marriage, they lived apart for an aggregate total of seven months.

In March of 2013, Cole announced that she had received an offer for a prestigious assistant professorship at Olympia State University. She told Rowan that she intended to take the job and wanted him to move with her, unless he could give her a good reason to stay. She also had an offer from Franklin State University, but she told him that the department was not as prestigious as the Olympia department. He made as strong a case as he could that she should stay, arguing that he could not find another job in Olympia comparable to the one that he had in Franklin.

Cole chose to take the job in Olympia, and she moved there less than a month later. Rowan realized that he would always be following her, and that she would not listen to his concerns or needs. He told her that he would not move. She was furious. She told him that in that case, she would file for a divorce. She also told him that she would fight his effort to stay in the United States. Their divorce was finalized on November 15, 2013, in Franklin.

Rowan worries that without Cole's support, he will not be able to keep his job in Franklin or stay in the United States. He does not want to return to the United Kingdom and wants to maintain permanent residency here.

In re Form I-751, Petition of William Rowan to Remove Conditions on Residence

Affidavit of Sarah Cole

Upon first being duly sworn, I, Sarah Cole, residing in the County of Titan, Olympia, do say:

1. I am submitting this affidavit in opposition to William Rowan's Form I-751 Petition to Remove Conditions on Residence.

2. I am a United States citizen. I married William Rowan in London, England, on December 27, 2010. This was the first marriage for each of us. We met while I was on a fellowship in that city. He was finishing up his own graduate studies. He told me that he had been actively looking for a position in the United States for several years. He pursued me and after about four weeks convinced me to move in with him. Shortly after this, William proposed marriage and I accepted.

3. We decided that we would move to the United States. I now believe that he never seriously considered the option of remaining in Britain. I later learned that William had made contacts with the university library in Franklin City, Franklin, long before he proposed.

4. Before entering the United States in May 2011, we obtained the necessary approvals for William to enter the country as a conditional resident. We moved to Franklin City so that I could resume my studies.

5. During our marriage, William expressed little interest in my work but expressed great dissatisfaction with the hours that I was working and the time that I spent traveling. My graduate work had brought me great success, including the chance at an assistant professorship at Olympia State University, whose cultural anthropology department is nationally ranked. But William resisted any idea of moving and complained about the effect a move would have on our marriage and his career.

6. Eventually, I took the job in Olympia and moved in April 2013. While I knew that William did not like the move, I had asked him to look into library positions in Olympia, and he had done so. I fully expected him to follow me within a few months. I was shocked and angered when, instead, he called me on April 23, 2013, and informed me that he would stay in Franklin.

7. I filed for divorce, which is uncontested. It is my belief that William does not really care about the divorce. I believe now that he saw our marriage primarily as a means to get U.S. residency. I do think that his affection for me was real. But his job planning, his choice of

friends, and his resistance to my career goals indicate a lack of commitment to our relationship. In addition, he has carefully evaded any long-term commitments, including children, property ownership, and similar obligations.

Signed and sworn this 2nd day of July, 2013.

Sarah Cole

Sarah Cole

Signed before me this 2nd day of July, 2013.

Jane Mirren

Jane Mirren
Notary Public, State of Olympia

Law Offices of Jamie Quarles
112 Charles St.
Franklin City, Franklin 33797

TO: File
FROM: Victor Lamm, investigator
DATE: February 20, 2014
RE: Preparation for Rowan Form I-751 Petition

This memorandum summarizes the results of my investigation, witness preparation, and document acquisition in advance of the immigration hearing for William Rowan.

Witnesses:

— George Miller: friend and coworker of William Rowan. Has spent time with Rowan and Cole as a couple (over 20 social occasions) and has visited their two primary residences and has observed them together. Will testify that they self-identified as husband and wife and that he has heard them discussing leasing of residential property, purchasing cars, borrowing money for car purchase, and buying real estate, all together and as part of the marriage.

— Anna Sperling: friend and coworker of William Rowan. Has spent time with both Rowan and Cole, both together and separately. Will testify to statements by Cole that she (Cole) felt gratitude toward Rowan for moving to the United States without a job, and that Cole was convinced that Rowan "did it for love."

Documents (Rowan to authenticate):

— Lease on house at 11245 Old Sachem Road, Franklin City, Franklin, with a two-year term running until January 31, 2014. Signed by both Cole and Rowan.

— Promissory note for $20,000 initially, designating Cole as debtor and Rowan as co-signer, in connection with a new car purchase.

— Printouts of joint bank account in name of Rowan and Cole, February 1, 2012, through May 31, 2013.

— Joint income tax returns for 2011 and 2012.

— Certified copy of the judgment of divorce.

EXCERPT FROM IMMIGRATION AND NATIONALITY ACT OF 1952
TITLE 8 U.S.C., Aliens and Nationality

8 U.S.C. § 1186a. Conditional permanent resident status for certain alien spouses and sons and daughters

(a) In general

(1) Conditional basis for status: Notwithstanding any other provision of this chapter, an alien spouse . . . shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section.

. . .

(c) Requirements of timely petition and interview for removal of condition

(1) In general: In order for the conditional basis established under subsection (a) of this section for an alien spouse or an alien son or daughter to be removed—

(A) the alien spouse and the petitioning spouse (if not deceased) jointly must submit to the Secretary of Homeland Security a petition which requests the removal of such conditional basis . . . .

. . .

(4) Hardship waiver: The Secretary . . . may remove the conditional basis of the 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 (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1).

EXCERPT FROM CODE OF FEDERAL REGULATIONS

TITLE 8. Aliens and Nationality

8 C.F.R. § 216.5 Waiver of requirement to file joint petition to remove conditions by alien spouse

(a) General.

(1) A conditional resident alien who is unable to meet the requirements . . . for a joint petition for removal of the conditional basis of his or her permanent resident status may file a Petition to Remove the Conditions on Residence, if the alien requests a waiver, was not at fault in failing to meet the filing requirement, and the conditional resident alien is able to establish that:

. . .

(ii) The marriage upon which his or her status was based was entered into in good faith by the conditional resident alien, but the marriage was terminated other than by death . . .

. . .

(e) Adjudication of waiver application—

. . .

(2) Application for waiver based upon the alien's claim that the marriage was entered into in good faith. In considering whether an alien entered into a qualifying marriage in good faith, the director shall consider evidence relating to the amount of commitment by both parties to the marital relationship. Such evidence may include—

(i) Documentation relating to the degree to which the financial assets and liabilities of the parties were combined;

(ii) Documentation concerning the length of time during which the parties cohabited after the marriage and after the alien obtained permanent residence;

(iii) Birth certificates of children born to the marriage; and

(iv) Other evidence deemed pertinent by the director.

. . .

Hua v. Napolitano

United States Court of Appeals (15th Cir. 2011)

Under the Immigration and Nationality Act, an alien who marries a United States citizen is entitled to petition for permanent residency on a conditional basis. *See* 8 U.S.C. § 1186a(a)(1). Ordinarily, within the time limits provided by statute, the couple jointly petitions for removal of the condition, stating that the marriage has not ended and was not entered into for the purpose of procuring the alien spouse's admission as an immigrant. 8 U.S.C. § 1186a(c)(1)(A).

If the couple has divorced within two years of the conditional admission, however, the alien spouse may still apply to the Secretary of Homeland Security to remove the conditional nature of her admission by granting a "hardship waiver." 8 U.S.C. § 1186a(c)(4). The Secretary may remove the conditional status upon a finding, *inter alia*, that the marriage was entered into in good faith by the alien spouse. 8 U.S.C. § 1186a(c)(4)(B).

On September 15, 2003, petitioner Agnes Hua, a Chinese citizen, married a United States citizen of Chinese descent and secured conditional admission as a permanent United States resident. The couple later divorced, and Hua applied for a hardship waiver. But the Secretary, acting through a U.S. Citizenship and Immigration Services (USCIS) immigration officer, then an immigration judge, and the Board of Immigration Appeals (BIA), denied Hua's petition. Hua appeals the denial of the petition.

Hua has the burden of proving that she intended to establish a life with her spouse at the time she married him. If she meets this burden, her marriage is legitimate, even if securing an immigration benefit was one of the factors that led her to marry. Hua made a very strong showing that she married with the requisite intent to establish a life with her husband. Hua's evidence, expressly credited by the immigration judge and never questioned by the BIA, established the following:

(1) She and her future husband engaged in a nearly two-year courtship prior to marrying.

(2) She and her future husband were in frequent telephone contact whenever they lived apart, as proven by telephone records.

(3) Her future husband traveled to China in December 2002 for three weeks to meet her family, and she paid a 10-day visit to him in the United States in March 2003 to meet his family.

(4) She returned to the United States in June 2003 (on a visitor's visa which permitted her to remain in the country through late September 2003) to decide whether she would remain in the United States or whether her future husband would move with her to China.

(5) The two married in a civil ceremony on September 15, 2003, and returned to China for two weeks to hold a more formal reception (a reception that was never held).

(6) The two lived together at his parents' house from the time of her arrival in the United States in June 2003 until he asked her to move out on April 22, 2004.

Hua also proved that, during the marriage, she and her husband jointly enrolled in a health insurance policy, filed tax returns, opened bank accounts, entered into automobile financing agreements, and secured a credit card. *See* 8 C.F.R. § 216.5(e)(2)(i).

Nevertheless, the BIA cited four facts in support of its conclusion that Hua had failed to carry her burden: (1) her application to secure conditional permanent residency was submitted within two weeks of the marriage; (2) Hua and her husband married one week prior to the expiration of the visitor's visa by which she came to the United States in June 2003; (3) Hua's husband maintained an intimate relationship with another woman during the marriage; and (4) Hua moved out of the marital residence shortly after obtaining conditional residency. Hua's husband's extramarital affair led to cancellation of the reception in China and to her departure from the marital home.

We do not see how Hua's prompt submission of a conditional residency application after her marriage tends to show that Hua did not marry in good faith. As we already have stated, the visitor's visa by which Hua entered the country expired just after the marriage, so Hua had to do something to remain here lawfully.

As to the affair maintained by Hua's husband, that might offer an indication of Hua's marital intentions if Hua knew of the relationship at the time she married. However, the uncontradicted evidence establishes that Hua learned of the affair only after the marriage.

The timing of the marriage and separation appear at first glance more problematic. Ordinarily, one who marries one week prior to the expiration of her visitor's visa and then moves out of the marital home shortly after the conditional residency interview might reasonably be thought to have married solely for an immigration benefit.

But well-settled law requires us to assess the entirety of the record. A long courtship preceded this marriage. Moreover, Hua's husband, and not Hua, initiated the separation after Hua publicly shamed him by retaining counsel and detailing his affair at her conditional residency interview.

We conclude that the Secretary's decision lacks substantial evidence on the record as a whole, and thus that petitioner Hua has satisfied the "good faith" marriage requirement for eligibility under 8 U.S.C. § 1186a(c)(4)(B). Remanded for proceedings consistent with this opinion.

Connor v. Chertoff

United States Court of Appeals (15th Cir. 2007)

Ian Connor, an Irish national, petitions for review of a decision of the Board of Immigration Appeals (BIA), which denied him a statutory waiver of the joint filing requirement for removal of the conditional basis of his permanent resident status on the ground that he entered into his marriage to U.S. citizen Anne Moore in bad faith. 8 U.S.C. § 1186a(c)(4)(B).

Connor met Moore in January 2002 when they worked at the same company in Forest Hills, Olympia. After dating for about one year, they married in a civil ceremony on April 14, 2003. According to Connor, he and Moore then lived with her family until November 2003, when they moved into an apartment of their own. In January 2004, Connor left Olympia to take a temporary job in Alaska, where he spent five weeks. Connor stated that in May 2004, he confronted Moore with his suspicion that she was being unfaithful to him. After Moore suggested they divorce, the two separated in June 2004 and divorced on November 27, 2004, 19 months after their wedding.

U.S. Citizenship and Immigration Services (USCIS) had granted Connor conditional permanent resident status on September 15, 2004. On August 16, 2005, Connor filed a Petition to Remove Conditions on Residence with a request for waiver. *See* § 1186a(c)(4)(B).

Moore voluntarily submitted an affidavit concerning Connor's request for waiver. In that affidavit, Moore stated that "Connor never spent any time with [her] during the marriage, except when he needed money." They never socialized together during the marriage, and even when they resided together, Connor spent most of his time away from the residence. Moore expressed the opinion that Connor "never took the marriage seriously" and that "he only married [her] to become a citizen." Connor's petition was denied.

At Connor's hearing, the government presented no witnesses. Connor testified to the foregoing facts and provided documentary evidence, including a jointly filed tax return, an unsigned lease for an

apartment dated November 2003, eight canceled checks from a joint account, telephone bills listing Connor and Moore as residing at the same address, an application for life insurance, and an application for vehicle title. There was no evidence that certain documents, such as the applications for life insurance and automobile title, had been filed. Connor also provided a letter from a nurse who had treated him over an extended period of time stating that his wife had accompanied him on most office visits, and letters that Moore had written to him during periods of separation.

Other evidence about Connor's life before and after his marriage to Moore raised questions as to his credibility, including evidence of his children by another woman prior to his marriage to Moore. Connor stated that Moore knew about his children but that he chose not to list them on the Petition for Conditional Status and also that the attorneys who filled out his I-751 petition omitted the children due to an error. Connor testified that he did not mention his children during his interview with the USCIS officer because he thought that they were not relevant to the immigration decision as they were not U.S. citizens.

In a written opinion, the immigration judge found that Connor was not a credible witness because of his failure to list his children on the USCIS forms or mention them during his interview and because of his demeanor during cross-examination. The immigration judge commented on Connor's departure for Alaska within eight months of his marriage to Moore, and on the lack of any corroborating testimony about the bona fides of the marriage by family or friends. The immigration judge concluded that the marriage had not been entered into in good faith and denied Connor the statutory waiver. The BIA affirmed.

Under the substantial evidence standard that governs our review of § 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. We conclude that there was substantial evidence in the record to support the BIA's adverse credibility finding and its denial of the statutory waiver.

Adverse credibility determinations must be based on "specific, cogent reasons," which

the BIA provided here. The immigration judge's adverse credibility finding was based on Connor's failure to inform USCIS about his children during his oral interview and on the pertinent USCIS forms. Failing to list his children from a prior relationship undercut Connor's claim that his marriage to Moore was in good faith. That important omission properly served as a basis for an adverse credibility determination.

Substantial evidence supports the determination that Connor did not meet his burden of proof by a preponderance of the evidence. To determine good faith, the proper inquiry is whether Connor and Moore 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. Additional relevant evidence includes, but is not limited to, documentation such as lease agreements, insurance policies, income tax forms, and bank accounts, as well as testimony about the courtship and wedding. Neither the immigration judge nor the BIA may substitute personal conjecture or inference for reliable evidence.

In this case, inconsistencies in the documentary evidence and the lack of corroborating testimony further support the agency's decision. Connor provided only limited documentation of the short marriage. Unexplained inconsistencies existed in the documents, such as more addresses than residences. Connor provided no signed leases, nor any indication of any filed applications for life insurance or automobile title. No corroboration existed for Connor's version of events from family, friends, or others who knew Connor and Moore as a couple. Connor offered only a letter from a nurse, who knew him only as a patient.

Finally, Connor claims that Moore's affidavit was inadmissible hearsay, and that it amounted to unsupported opinion testimony on the ultimate issue. Connor misconstrues the relevant rules at these hearings. The Federal Rules of Evidence do not apply; evidence submitted at these hearings must only be probative and fundamentally fair. To be sure, Moore's affidavit does contain opinion testimony on Connor's intentions. However, the affidavit also contains relevant factual information drawn from firsthand observation. The immigration judge was entitled to rely on that information in reaching his conclusions.

It might be possible to reach a contrary conclusion on the basis of this record. However, under the substantial evidence standard, the evidence presented here does not compel a finding that Connor met his burden of proving that the marriage was entered into in good faith.

Affirmed.

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

1) MPT1 - Please type your answer to MPT 1 below

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When finished with this question, click Â to advance to the next question.
(Essay)

======== Start of Answer #1 (1194 words) ========

I. Caption

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

A. The totaility of the evidence supports granting Appellant Rowan's petition based on corroborating testimony and documentary evidence that Rowan entered the marriage in good faith.

A conditional resident may file a hardship waiver pursuant to 81 U.S.C. Section 1186a.(4)(B) if "the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1)." 8 C.F.R. Section 216.5(e)(2) states what kind of evidence is needed to consider whether an alien entered into a qualfiying marriage in good faith. The type of

evidence considered includes documentation related to the degree to which financial assets and laibilities of the parties were combined, documentation concerning the length of time during which the parties cohabitated after the marriage and after the alien obtained permenant residence, birth certificates of children born to the marriage and other evidence deemed pertinent by the director.

Here Rowan has sufficient evidence to show that he entered into the marriage in good faith in the form of both documentary and testimonial evidence. Rowan has documentary evidence related to the degree to which financial assets and liabilities of the parties were combined. Rowan and Ms. Cole leased a home together. The lease was for two years. This tends to establish that the two were establishing a life together. Further, unlike in Connor v. Chertoff (15th Cir. Court), where the court found unpersuasive a copy of an unsigned lease, here the lease is signed by both parties. Additionally, Rowan and Ms. Cole also entered into a financing agreement for the purchase of a new car. Additionally, they filed joint tax returns for the years of 2011 and 2012 and they maintained a joint bank account for over a year and a half. This type of evidence was found to be persuasive evidence of establishing a life together in Hua v. Naptolitano (15th Cir. 2011). There the Court pointed to evidence of joint health insurance, filed tax returns, joint bank accounts, entering into automobile financing agreements and securing a credit card as evidence of Hua establishing a life with her former husband.

Additionally, the couple was married for over two years as they married in December of 2010 and the divorce was not entered into until November of 2013. This was longer than Hua's marriage where the Court found the marriage was entered into in good faith

in Hua v. Naptolitano (15th Cir. 2011). Further, they lived together the entire time of their marriage. While Ms. Cole was away for work for part of that time, this should not be held against Rowan. Unlike in Connor v. Chertoff (15th Cir. Court), where the Court found the marriage was not entered into in good faith, it was Ms. Cole who traveled for work and not Rowan. Here, like in Hua, there were no children born to the marriage; however, that fact did not prevent the Court from finding that Hua meet her burden of entering into the marriage in good faith. Also, like in Hua, it was the US citizen spouse that sought the divorce and not the alien. Here Ms. Cole is the one who filed for divorce and not Rowan.

Additionally Rowan has testimonial evidence to support the fact that he entered into the marriage in good faith. A friend and co-worker of his, George Miller, has spent time with both Rowan and Ms. Cole on over 20 social occasions and has visited them at their home. Mr. Miller will testify that they self-identified as husband and wife and that he heard them discussing building a life together through engaging in activites such as leasing a residence, purchasing cars, borrowing money to purchase a car, and buying real estate. This testimonial provides the kind of evidence considered in granting a waiver pursuant to 8 C.F.R. Secion 216.5 (e)(2)(i). While Ms. Cole now states that she only believes Rowan entered into the marriage to gain citizenship this is contradicted by a friend and co-worker of Rowan, Anna Sperling. She will testify that Ms. Cole stated that she (Cole) felt gratitude towards Rowan for moving the US without a job, and that she was convinced that Rowan "did it for love." Further, even if part of Rowan's motivation for marriage was citizenship, that alone is insufficient to find that the marriage was not entered into in good faith pursuant to Hua v. Naptolitano (15th

Cir. 2011).

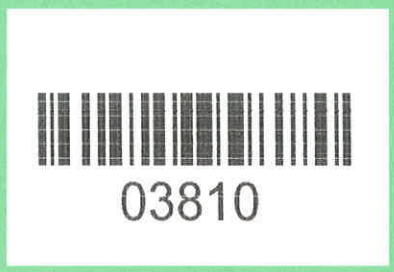
B. The denial of Appellant Rowan's hardship waiver was not supported by substantial evidence as the immigration officer only conducted an interview and reviewed an affidavit from Ms. Cole.

Pursuant to Connor v. Chertoff (15th Cir. Court) the substantial evidence standard governs review of Section 1186(c)(4) waiver determinations. The Court there stated that "we must affirm the BIA's order when there is such relevant evidence as reasonable mind might accept as adequate to support it, even if it is possible to reach a contrary result on the basis of the evidence." In that case the BIA reviewed some documents submitted by Conner, Conner's testimony, and Moore's affidavit concerning Connor's request for waiver. Here there is scant evidence that was used to make the determination to deny the waiver. All the evidence that was reviewed was an affidavit from Ms. Cole and an interview with Rowan. That alone does not appear sufficient to support the determination, especially in light of the documentary and testimonial evidence that Rowan can supply as detailed above. Additionally, one of the main factors the Court in Connor highlighted for upholding the BIA's decision was the credibility determination they made regarding Connor. They found Connor to not be a credible witness based on his failure to list his children from a previous relationship on his USCIS form or mention them during his interview and because of his demeanor on cross-examination. Here there is nothing in the record that shows that the BIA determined Rowan to not be a credible witness. Therefore, Rowan's situation is

distinguishable from Connor. Further, in Connor the court stated that the "proper inquiry is whether Connor and Moore intended to estblish a life together at the time they were married" and the court found that Conner did not meet his burden of proof by a preponderance of the evidence. Here there was not a lot of evidence used to make the BIA determination. Only an affidavit from Ms. Cole, who was upset the marriage was ending, and an interview with Rowan were considered. Additionally, Rowan is able to supply sufficient documentation that he entered into the marrigage in good faith as detailed above. This evidence would show by a preponderance of the evidence that Rowan did in fact enter into the marriage in good faith. Accordingly, the denial of the hardship waiver in this case is not supported by substantial evidence and the agency's determination in this case should be overturned or remanded to allow Rowan to present additionally evidence so that there is record on which an adequate decision can be made.

========== End of Answer #1 ==========

Applicant Number



MPT-2
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In re Peterson Engineering Consultants

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Lennon, Means, and Brown LLC
Attorneys at Law
249 S. Oak Street
Franklin City, Franklin 33409

TO: Examinee
FROM: Brenda Brown
DATE: February 25, 2014
RE: Peterson Engineering Consultants

Our client, Peterson Engineering Consultants (PEC), seeks our advice regarding issues related to its employees' use of technology. PEC is a privately owned, non-union engineering consulting firm. Most of its employees work outside the office for over half of each workday. Employees need to be able to communicate with one another, the home office, and clients while they are working outside the office, and to access various information, documents, and reports available on the Internet. PEC issues its employees Internet-connected computers and other devices (such as smartphones and tablets), all for business purposes and not for personal use.

After reading the results of a national survey about computer use in the workplace, the president of PEC became concerned regarding the risk of liability for misuse of company-owned technology and loss of productivity. While the president knows that, despite PEC's policies, its employees use the company's equipment for personal purposes, the survey alerted her to problems that she had not considered.

The president wants to know what revisions to the company's employee manual will provide the greatest possible protection for the company. After discussing the issue with the president, I understand that her goals in revising the manual are (1) to clarify ownership and monitoring of technology, (2) to ensure that the company's technology is used only for business purposes, and (3) to make the policies reflected in the manual effective and enforceable.

I attach relevant excerpts of PEC's current employee manual and a summary of the survey. I also attach three cases that raise significant legal issues about PEC's policies. Please prepare a memorandum addressing these issues that I can use when meeting with the president.

Your memorandum should do the following:

(1) Explain the legal bases under which PEC could be held liable for its employees' use or misuse of Internet-connected (or any similar) technology.

(2) Recommend changes and additions to the employee manual to minimize liability exposure. Base your recommendations on the attached materials and the president's stated goals. Explain the reasons for your recommendations but do not redraft the manual's language.

Phone Use

Whether in the office or out of the office, and whether using office phones or company-owned phones given to employees, employees are not to incur costs for incoming or outgoing calls unless these calls are for business purposes. Employees may make calls for incidental personal use as long as they do not incur costs.

Computer Use

PEC employees given equipment for use outside the office should understand that the equipment is the property of PEC and must be returned if the employee leaves the employ of PEC, whether voluntarily or involuntarily.

Employees may not use the Internet for any of the following:

- engaging in any conduct that is illegal
- revealing non-public information about PEC
- engaging in conduct that is obscene, sexually explicit, or pornographic in nature

PEC may review any employee's use of any company-owned equipment with access to the Internet.

Email Use

PEC views electronic communication systems as an efficient and effective means of communication with colleagues and clients. Therefore, PEC encourages the use of email for business purposes. PEC also permits incidental personal use of its email system.

* * *

NATIONAL PERSONNEL ASSOCIATION

RESULTS OF 2013 SURVEY CONCERNING COMPUTER USE AT WORK

Executive Summary of the Survey Findings

1. Ninety percent of employees spend at least 20 minutes of each workday using some form of social media (e.g., Facebook, Twitter, LinkedIn), personal email, and/or texting. Over 50 percent spend two or more of their working hours on social media every day.

2. Twenty-eight percent of employers have fired employees for email misuse, usually for violations of company policy, inappropriate or offensive language, or excessive personal use, as well as for misconduct aimed at coworkers or the public. Employees have challenged the firings based on various theories. The results of these challenges vary, depending on the specific facts of each case.

3. Over 50 percent of all employees surveyed reported that they spend some part of the workday on websites related to sports, shopping, adult entertainment, games, or other entertainment.

4. Employers are also concerned about lost productivity due to employee use of the Internet, chat rooms, personal email, blogs, and social networking sites. Employers have begun to block access to websites as a means of controlling lost productivity and risks of other losses.

5. More than half of all employers monitor content, keystrokes, time spent at the keyboard, email, electronic usage data, transcripts of phone and pager use, and other information.

While a number of employers have developed policies concerning ownership of computers and other technology, the use thereof during work time, and the monitoring of computer use, many employers fail to revise their policies regularly to stay abreast of technological developments. Few employers have policies about the ways employees communicate with one another electronically.

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Hogan v. East Shore School

Franklin Court of Appeal (2013)

East Shore School, a private nonprofit entity, discharged Tucker Hogan, a teacher, for misuse of a computer provided to him by the school. Hogan sued, claiming that East Shore had invaded his privacy and that both the contents of the computer and any electronic records of its contents were private. The trial court granted summary judgment for East Shore on the ground that, as a matter of law, Hogan had no expectation of privacy in the computer. Hogan appeals. We affirm.

Hogan relies in great part on the United States Supreme Court opinion in *City of Ontario v. Quon*, 560 U.S. 746 (2010), which Hogan claims recognized a reasonable expectation of privacy in computer records.

We note with approval Justice Kennedy's observation in *Quon* that "rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one *amici* brief notes, many employers expect or at least tolerate personal use of such equipment because it often increases worker efficiency." We also bear in mind Justice Kennedy's apt aside that "[t]he judiciary risk error by elaborating too fully on the . . . implications of emerging technology before its role in society has become clear." *Quon*.

The *Quon* case dealt with a government employer and a claim that arose under the Fourth Amendment. But the Fourth Amendment applies only to public employers. Here, the employer is a private entity, and Hogan's claim rests on the tort of invasion of privacy, not on the Fourth Amendment.

In this case, the school provided a computer to each teacher, including Hogan. A fellow teacher reported to the principal that he had entered Hogan's classroom after school hours when no children were present and had seen what he believed to be an online gambling site on Hogan's computer screen. He noticed that Hogan immediately closed the browser. The day following the teacher's report, the principal arranged for an outside computer forensic company to inspect the computer assigned to Hogan and determine

whether Hogan had been visiting online gambling sites. The computer forensic company determined that someone using the computer and Hogan's password had visited such sites on at least six occasions in the past two weeks, but that those sites had been deleted from the computer's browser history. Based on this report, East Shore discharged Hogan.

Hogan claimed that East Shore invaded his privacy when it searched the computer and when it searched records of past computer use. The tort of invasion 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.

East Shore argued that there can be no invasion of privacy unless the matter being intruded upon is private. East Shore argued that there is no expectation of privacy in the use of a computer when the computer is owned by East Shore and is issued to the employee for school use only. East Shore pointed to its policy in its employee handbook, one issued annually to all employees, that states:

> East Shore School provides computers to teachers for use in the classroom for the purpose of enhancing the educational mission of the school. The computer, the computer software, and the computer account are the property of East Shore and are to be used solely for academic purposes. Teachers and other employees may not use the computer for personal purposes at any time, before, after, or during school hours. East Shore reserves the right to monitor the use of such equipment at any time.

Hogan did not dispute that the employee policy handbook contained this provision, but he argued that it was buried on page 37 of a 45-page handbook and that he had not read it. Further, he argued that the policy regarding computer monitoring was unclear because it failed to warn the employee that East Shore might search for information that had been deleted or might use an outside entity to conduct the monitoring. Next, he argued that because he was told to choose a password known only to him, he was led to believe that websites accessed by him using that password were private. Finally, he argued that because East Shore had not

conducted any monitoring to date, it had waived its right to monitor computer use and had established a practice of respect for privacy. These facts, taken together, Hogan claimed, created an expectation of privacy.

Perhaps East Shore could have written a clearer policy or could have had employees sign a statement acknowledging their understanding of school policies related to technology, but the existing policy is clear. Hogan's failure to read the entire employee handbook does not lessen the clarity of the message. Perhaps East Shore could have defined what it meant by "monitoring" or could have warned employees that deleted computer files may be searched, but Hogan's failure to appreciate that the school might search deleted files is his own failure. East Shore drafted and published to its employees a policy that clearly stated that the computer, the computer software, and the computer account were the property of East Shore, and that East Shore reserved the right to monitor the use of the computer at any time.

Hogan should not have been surprised that East Shore searched for deleted files. While past practice might create a waiver of the right to monitor, there is no reason to believe that a waiver was created here, when the handbook was re-issued annually with the same warning that East Shore reserved the right to monitor use of the computer equipment. Finally, a reasonable person would not believe that the password would create a privacy interest, when the school's policy, read as a whole, offers no reason to believe that computer use is private.

In short, Hogan's claim for invasion of privacy fails because he had no reasonable expectation of privacy in the computer equipment belonging to his employer.

Affirmed.

Fines v. Heartland, Inc.

Franklin Court of Appeal (2011)

Ann Fines sued her fellow employee, John Parr, and her employer, Heartland, Inc., for defamation and sexual harassment. Each cause of action related to electronic mail messages (emails) that Parr sent to Fines while Parr, a Heartland sales representative, used Heartland's computers and email system. After the employer learned of these messages and investigated them, it discharged Parr. At trial, the jury found for Fines and against defendants Parr and Heartland and awarded damages to Fines. Heartland appeals.

In considering Heartland's appeal, we must first review the bases of Fines's successful claims against Parr.

In emails sent to Fines, Parr stated that he knew she was promiscuous. At trial Fines testified that after receiving the second such email from Parr, she confronted him, denied that she was promiscuous, told him she had been happily married for years, and told him to stop sending her emails. She introduced copies of the emails that Parr sent to coworkers after her confrontation with him, in which Parr repeated on three more occasions the statement that she was promiscuous. He also sent Fines emails of a sexual nature, not once but at least eight times, even after she confronted him and told him to stop, and Fines found those emails highly offensive. There was sufficient evidence for the jury to find that Parr both defamed and sexually harassed Fines.

We now turn to Heartland's arguments on appeal that it did not ratify Parr's actions and that it should not be held vicariously liable for his actions.

An employer may be liable for an employee's willful and malicious actions under the principle of ratification. An employee's actions may be ratified after the fact by the employer's voluntary election to adopt the employee's conduct by, in essence, treating the conduct as its own. The failure to discharge an employee after knowledge of his or her wrongful acts may be evidence supporting ratification. Fines claims that because Heartland delayed in discharging Parr after learning of his misconduct, Heartland in effect ratified Parr's behavior.

The facts as presented to the jury were that Fines did not complain to her supervisor or any Heartland representative until the end of the fifth day of Parr's offensive behavior, when Parr sent the emails to coworkers. When her supervisor learned of Fines's complaints, he confronted Parr. Parr denied the charges, saying that someone else must have sent the emails from his account. The supervisor reported the problem to a Heartland vice president, who consulted the company's information technology (IT) department. By day eight, the IT department confirmed that the emails had been sent from Parr's computer using the password assigned to Parr during the time Parr was in the office. Heartland fired Parr.

Such conduct by Heartland does not constitute ratification. Immediately upon learning of the complaint, a Heartland supervisor confronted the alleged sender of the emails, and when the employee denied the charges, the company investigated further, coming to a decision and taking action, all within four business days.

Next, Fines asserted that Heartland should be held liable for Parr's tortious conduct under the doctrine of respondeat superior. Under this doctrine, an employer is vicariously liable for its employee's torts committed within the scope of the employment. To hold an employer vicariously liable, the plaintiff must establish that the employee's acts were committed within the scope of the employment. An employer's vicarious liability may extend to willful and malicious torts. An employee's tortious act may be within the scope of employment even if it contravenes an express company rule.

But the scope of vicarious liability is not boundless. An employer will not be held vicariously liable for an employee's malicious or tortious conduct if the employee *substantially* deviates from the employment duties for personal purposes. Thus, if the employee "inflicts an injury out of personal malice, not engendered by the employment" or acts out of "personal malice unconnected with the employment," the employee is not acting within the scope of employment. *White v. Mascoutah Printing Co.* (Fr. Ct. App. 2010); RESTATEMENT (THIRD) OF AGENCY § 2.04.

Heartland relied at trial on statements in its employee handbook that office computers were to be used only for business and not for personal purposes. The Heartland handbook

also stated that use of office equipment for personal purposes during office hours constituted misconduct for which the employee would be disciplined. Heartland thus argued that this provision put employees on notice that certain behavior was not only outside the scope of their employment but was an offense that could lead to being discharged, as happened here.

Parr's purpose in sending these emails was purely personal. Nothing in Parr's job description as a sales representative for Heartland would suggest that he should send such emails to coworkers. For whatever reason, Parr seemed determined to offend Fines. The mere fact that they were coworkers is insufficient to hold Heartland responsible for Parr's malicious conduct. Under either the doctrine of ratification or that of respondeat superior, we find no basis for the judgment against Heartland.

Reversed.

Lucas v. Sumner Group, Inc.

Franklin Court of Appeal (2012)

After Sumner Group, Inc., discharged Valerie Lucas for violating Sumner's policy on employee computer use, Lucas sued for wrongful termination. The trial court granted summary judgment in favor of Sumner Group. Lucas appeals. For the reasons stated below, we reverse and remand.

Sumner Group's computer-use policy stated:

> Computers are a vital part of our business, and misuse of computers, the email systems, software, hardware, and all related technology can create disruptions in the work flow. All employees should know that telephones, email systems, computers, and all related technologies are company property and may be monitored 24 hours a day, 7 days a week, to ensure appropriate business use. The employee has no expectation of privacy at any time when using company property.
>
> Unauthorized Use: Although employees have access to email and the Internet, these software applications should be viewed as company property. The employee has no expectation of privacy, meaning that these types of software should not be used to transmit, receive, or download any material or information of a personal, frivolous, sexual, or similar nature. Employees found to be in violation of this policy are subject to disciplinary action, up to and including termination, and may also be subject to civil and/or criminal penalties.

Sumner Group discovered that over a four-month period, Lucas used the company Internet connection to find stories of interest to her book club and, using the company computer, composed a monthly newsletter for the club, including summaries of the articles she had found on the Internet. She then used the company's email system to distribute the newsletter to the club members. Lucas engaged in some but not all of these activities during work time, the remainder during her lunch break. Lucas admitted engaging in these activities.

She first claimed a First Amendment right of freedom of speech to engage in these

activities. The First Amendment prohibits Congress, and by extension, federal, state, and local governments, from restricting the speech of employees. However, Lucas has failed to demonstrate any way in which the Sumner Group is a public employer. This argument fails.

Lucas also argued that the Sumner Group had abandoned whatever policy it had posted because it was common practice at Sumner Group for employees to engage in personal use of email and the Internet. In previous employment matters, this court has stated that an employer may be assumed to have abandoned or changed even a clearly written company 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. Whether Sumner Group has effectively abandoned its written policy by custom and practice is a matter of fact to be determined at trial.

Lucas next argued that the company policy was ambiguous. She claimed that the language of the computer-use policy did not clearly prohibit personal use. The policy said that the activities "should not" be conducted, as opposed to "shall not."[1] Therefore, she argued that the policy did not ban personal use of the Internet and email; rather, it merely recommended that those activities not occur. She argued that "should" conveys a moral goal while "shall" refers to a legal obligation or mandate.

In *Catts v. Unemployment Compensation Board* (Fr. Ct. App. 2011), the court held unclear an employee policy that read: "Madison Company has issued employees working from home laptops and mobile phones that should be used for the business of Madison Company." Catts, who had been denied unemployment benefits because she was discharged for personal use of the company-issued computer, argued that the policy was ambiguous. She argued that the policy could mean that employees were to use only Madison Company–issued laptops and phones for Madison Company business, as easily as it could mean that the employees were to use the Madison Company equipment only for business reasons. She argued that the company could prefer that

[1] This court has previously viewed with approval the suggestion from PLAIN ENGLISH FOR LAWYERS that questions about the meanings of "should," "shall," and other words can be avoided by pure use of "must" to mean "is required" and "must not" to mean "is disallowed."

employees use company equipment, rather than personal equipment, for company business because the company equipment had anti-virus software and other protections against "hacking." The key to the *Catts* conclusion was not merely the use of the word "should" but rather the fact that the entire sentence was unclear.

Thus the question here is whether Sumner Group's policy was unclear. When employees are to be terminated for misconduct, employers must be as unambiguous as possible in stating what is prohibited. Nevertheless, employers are not expected to state their policies with the precision of criminal law. Because this matter will be remanded to the trial court, the trial court must further consider whether the employee policy was clear enough that Lucas should have known that her conduct was prohibited.

Finally, Lucas argued that even if she did violate the policy, she was entitled to progressive discipline because the policy stated, "Employees found to be in violation of this policy are subject to disciplinary action, up to and including termination . . . ." She argued that this language meant that she should be reprimanded or counseled or even suspended *before* being terminated. Lucas misread the policy. The policy was clear. It put the employee on notice that there would be penalties. It specified a variety of penalties, but there was no commitment or promise that there would be progressive discipline. The employer was free to determine the penalty.

Reversed and remanded for proceedings consistent with this opinion.

2) MPT2 - Please type your answer to MPT 2 below *(Essay)*

======== Start of Answer #2 (2096 words) ========

TO: Ms. Brown

FROM: Examinee

DATE: Febuary 25, 2014

RE: Peterson Engineering Consultants

I have examined relevant case law concerning the use and misuse of technology by employees and its potential impact on employers. I believe there are four areas in which PEC could be held liable for issues relating to employee use of technology, roughly grouped into two areas: employee caused liabilty and employer caused liability.

Employee Caused Liability

The first two areas in which PEC could be exposed to liability relate to the potential conduct of its employees. The legal doctrines of ratification and respondeat superior could allow the company to be held liable for actions by its employees, whether those actions are directed toward third parties or other employees.

Ratification is the process by which an employer retroactively accepts and ratifies the otherwise prohibited conduct of an employee. An example would be if a line employee of a sandwich shop who is not a manager or otherwise authorized to order product

called the shop's produce supplier to order cases of lettuce. While the employee was not authorized to make that order, if the owner or manager of the shop later accepted the delivery and paid for it, they could not later claim that the employee had done something wrong. They ratified his conduct. Even if they did not accept the delivery, if they failed to discipline or terminate the employee, it could be argued that they ratified his conduct. In *Fines v. Heartland, Inc.* (Franklin CoA 2011), an employee sued her employer because a fellow employee used the company provided email to sexually harrass and degrade her. She argued that because the company had delayed in terminating the offending employee, it had ratified his conduct and made it its own. While the facts in that particular case led the court of appeals to reject her argument, the point is still relevant: the company can, concieveably, be held liable if it does not act promptly to curb and disciplne employee misconduct. In *Heartland*, the conduct was toward a fellow employee, but it could equally be applied to a non employee third party.

Respondeat Superior is related to the concept of ratification, in the sense that it implies that an employer is liable for its employee's conduct. But with respondeat superior, no extra affirmation of the conduct, either by action or inaction, is necessary to establish liability. If the employee is acting "within the scope of employment," (*Heartland),* the employer is liable for the employee's tortious actions. As the Franklin Court of Appeal states in *Heartland*, "To hold an employer vicarious liable, the plaintiff must establish that the employee's acts were committed within the scope of the employment. An employer's vicarious liability muay extend to willful and malicious torts. An employee's

tortious act may be within the scope of employment even if it contravenes an express company rule." This liabilty, however, has limits. If the conduct of the employee is personal and "substantially deviates" from employment duties, the company will not be held liable. Thus, establishment of clear standards of what is and is not within the scope of employment is critical to avoid liablity in such cases. The tortious conduct by an employee can be directed towards a fellow employee, as argued in *Heartland*, or towards a non-employee third party.

Employer Caused Liability

The second two areas in which PEC could be exposed to liability relate to how it handles employee misconduct. Invasion of privacy and wrongful termination are common claims submitted by employees disciplined or terminated under technology use policies.

Invasion of privacy can be argued by an employee when he believes that the company wrongfully investigated or interfered with his private, non employment related conduct. In *Hogan v. East Shore School* (Franklin CoA 2013), the Franklin Court of Apepal stated that "The tort of invasion 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." In that case, Hogan, a teacher at East Shore, argued that when the school investigated his computer use and found that he had been using the computer for personal conduct (in

his case, gambling), that it acted tortiously. He argued that becuase his computer had a password, because the school had not monitored his conduct previously, and because the handbook was not clear, he had a reasonable expectation of privacy. While his claims were rejected by the Court, the lesson is clear: employers must be careful about what boundaries they set for technology usage and what employees are told about how those boundaries will be investigated and enforced.

Finally, wrongful termination can be argued by an employee when he believes that the company terminated his employment in contravention of company standards or state or federal law. In *Lucas v. Sumner Group, Inc.* (Franklin CoA 2012), the Court overturned a summary judgment in favor of Sumner Group, allowing a wrongful termination lawsuit to proceed. In that case, the terminated employee argued that the company fired her for inappropriate personal use of company technology based on an unclear and easily misunderstood section of the employee handbook. The court found that because of the unclear nature of the language of the section, it was a question of fact for a jury as to whether the section was unclear and the employee's firing was wrongful. Again, the lesson is clear: language must be clear and unmistakable when it comes to employee regulations concerning the use of technology.

Given the relevant legal precidents that could potentially concern PEC, and given the company President's stated goals, I have come up with recommendations as to how the handbook can be changed. As per your instructions, I have not drafted new language.

I shall discuss my recommendations in the order of the President's goals, and address the liability issues I discussed above as I go along.

1. Clarify Ownership and Monitoring of Technology

The current PEC employee manual addresses phones as either "office" phones or "company-owned phones given to employees." This is a good start, but it ought to be made expressly clear that all communications technology provided to employees, whether in the form of office equipment or mobile phones is expressly the property of the company. The same should be made clear for computer equpipment. The section on computer use states that "equipment is the property of PEC and must be returned if the employee leaves the employ of PEC..." This is a good start, but this language should be made stronger and make it clear that it applies to ALL technology distributed to employees by the company.

The current manual does not have any language in the sections concerning phone, computer, or email use regarding monitoring. It is clear from the company president's goals that he wishes to enforce standards with monitoring. This is an achievable goal and relates to the *East Shore School* case. The employee manual should make it expressly clear that all use of company provided technology, be it phone, computer, email, or otherwise is subject to monitoring, whether that use occurs in the office, the field, or in an employee's home. As per the Court's guidance in *East Shore School*, it should be made expressly clear that because the technology is provided by the

company for company business, the employee has no right or expectation to privacy for personal matters conducted with that technology. Further, in *East Shore School*, the Court noted that one of the reasons it rejected Hogan's argument for an expectation of privacy is that teachers are required to review and sign the employee handbook there (containing the school's technology use policies) each year. I would advise PEC to institute a similar policy where employees are required to reaffirm that they are aware of and will comply with company standards regarding the use of technology. The Court accepted an annual policy from East Shore School, and I would think such a policy would also be acceptable here, though i would not advise that they go more than a year without a review.

2. Ensure That The Company's Technology is Used Only for Business Purposes

This goal is perhaps the most important of the three, as it relates directly to the liability PEC could potentially be exposed to under ratification and respondeat superior. The company's current handbook is woefully inadequate to cover the company from claims based on those areas of law. The company must eliminate all mentions in the handbook that state that company property may be used for personal business. Without such a provision, it could be argued that even the limitations on respondeat superior the Court upheld in *Heartland* would not apply to PEC. That is because by directly authorizing personal use of technology, the company is essentially stating that the scope of employment is almost unlimited. It could also be argued that even if one could reasonably argue the difference between business and personal use from a

scope of employment perspective, the permissive language acts as an implied ratification of employee conduct.

PEC must make it expressly clear that company provided technology, be it phone, computer, or email is expressly and exclusively for business use. It must not waiver on this point. It must also outline a clear discipline policy that includes all levels of discipline for personal use of technology up to and including termination. It should also be made clear to the company president that this language is not, in and of itself, enough to shield the company from liability. As the arguments *Heartland* make clear, the company must actually and diligently *enforce* those policies. The company should keep its language concerning specific areas that are against company policy (including, currently: obscenity, sexually explicit material, and pornogrpahy) and should include language clearly restricting the use of technology as a tool for harrassing, threatening, degrading, or otherwise offending fellow employees or the public at large. If the company feels that other areas should be included, for example gambling (per the *East Shore School* case), they are more than welcome to include those, though such areas are reasonably covered by the prohibition against any non-business related activity.

3. Make the Policies Reflected in the Manual Effective and Enforceable

The best way to achieve this goal is through very clear and deliberate language. Care must be taken in the selection of even what seem like incidental terms. In the *Sumner Group* case, the Court noted that the language in the company policy, though it *could*

be read the way the compnay likely intended it, it could also be read another way. This created a question of fact for a jury in that case instead of a quick win by summary judgment for the company. In that case, the ruling turned on one sentence, "Madison Company has issued employees working from home laptops and mobile phones that should be used for the business of Madison Company." To a certain degree, the ruling turned on one word in that sentence, "should." In a footnote, the Court stated that it "has previously viewed with approval the suggestion from *Plain English for Lawyers* that questions about the meanings fo "should," "shall," and other words can be avoided by pure use of "must" to mean "is required" and "must not" to mean "is disallowed." This is a suggestion that PEC should take to heart when drafting new language. In this area of law, there is no such thing as language that is too clear or too express. They cannot go wrong by insisting on the clearest of terms possible, including "must" and "must not" instead of words like "should" or "should not." By being explictly clear, PEC will avoid the problems faced by Madison Company in *Sumner Group* and can much more clearly define and limit the scope of employment to avoid the potential for liability in cases like *Heartland*. It can even use such langugage to very clearly establish employee expectations to avoid the sort of claim brought up in *East Shore School*.

In closing, I would recommend that you advise PEC's president to revise the technology use section of the PEC employee handbook to reflect the company's desire to avoid the sort of legal problems I mentioned above. I would recommend clear standards that eliminate the use of company technology for personal use, that establish a clear disciplinary policy for the violation of those standards, and that avoid any soft or

potentially misconstrued language in the creation of those polciies.

Signed,

Examinee

======== End of Answer #2 ========

END OF EXAM

Applicant Number

03803

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MEE Question 1

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.

1) Please type your answer to MEE 1 below

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When finished with this question, click Â to advance to the next question.
(Essay)

======== Start of Answer #1 (703 words) ========

1)

The issue in this case is whether the city ordinance that requires a restaurant to install floodlights is considered an unconstitutional regulatory taking. If it is considered an unconstitutional regulatory taking, the government must retract the ordinance and the restaurant will not have to comply with the ordinance. Under the Fifth Amendment's taking clause, a taking one one by the government of private land for public use. The government must, in turn, pay the landowner appropriate just compensation. In this case, we first must ask if there was a taking. There are both regulatory takings and property takings. In a regulatory taking, as in this case, the government restricts or orders a landowner to comply with a certain mandate. The question to ask if it is a regulatory taking is whether a substantial portion of the economic value of the land is taken by the regulation. Additionally, we look to factors from the *Penn Central* test, such as: does the regulation restrict the primary use of the land? Does the government's benefit from enacting the regulation outweigh the burden to the landowner, whose land is being regulated?

First, this is a case when the taking is for the benefit of the public. The public would benefit from the increased protection from the lights, and it affects private land- the restaurant's land. In this case, it must be determined if the ordinance takes away a

substantial portion of the economic value of the land. The high-powered halogen floodlights would be used to eliminate property owned by the restaurant and the sidewalks, and would cost on average about $1,000. The restaurant, therefore, would have to invest around $1,000 of its own money to be in accordance with this ordinance. However, the facts also indicate that these lights would increase business traffic because the public would be safer after dark to walk around with the presence of lights on the sidewalks and leading up to the restaurant. This increase in business traffic would likely "offset the cost" of the lights. Under the assumption that the restaurant is making enough money that this expenditure would not severely damage it, the restaurant should be able to spend the $1,000 to comply with the ordinance, and this would not take away a substantial portion of the economic value of the land. The restaurant would be able to get the money they invested back by increase in business traffic. Therefore, because the economic value of the restaurant is not burdened by the ordinance, the regulation would not be considered an unconstitutional taking.

2)

The issue here is whether this exaction, where the city conditioned a permit approval upon the restaurant granting the city an easement, would be considered an unconstitutional taking. As stated above, the takings clause states that the government may take private land for public use if just compensation is given. Exactions exist when the government, in exchanse for granting a permit that excuses strict performance with a certain ordinance, can place conditions on the development of the landowner's land. An exaction will be upheld as long as the condition is roughly proportionate to the permit that is sought by the developer.

In this case, the government agreeed to grant the building permit to the restaurant on the condition that the restaraunt grant the city an easement over its land in order to install video surveillance equipment that would cover nearby public streets and parking lots. It must be determined if the condition of the easement is in rough proportionality to the building permit sought by the restaurant. Adding more space in the restaurant in order to seat more people may not be rougly proportionate to an easement granted for the condition of installing surveillance equipment. However, an argument could be made that because the restaurant is getting more seating, there will be more customers. Because more customers will be attending the restaurant, the surveillance equipment over the nearby streets and parking lots would aid in the safety of these new patrons, as well as existing patrons. In conclusion, because the safety of the restaurant's patrons could arguably bear a rough proportionality to getting more seating for the restaurant, the exaction will be considered a constitutional taking.

======== End of Answer #1 ========

MEE Question 2

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.

2) Please type your answer to MEE 2 below

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When finished with this question, click Â to advance to the next question.
(Essay)

======== Start of Answer #2 (719 words) ========

1. The trust income should be paid to Son. At issue is whether the profit from the sale of the office building should be considered part of the trust income. Trust income includes systematic or periodic payments generated from the trust principal in the ordinary course of its use. Trust income includes rents, cash dividends, and other income generated by the trust principal such as interest accrued on the principal or trustee's investments of trust principal. Son should thus receive the $30,000 from rents from the office building and the $20,000 from the cash dividend paid. Unlike rents, which accrue while trust holds the principal, the one time profit from the sale of the building will be included as trust principal because it will not qualify as "income" generated by trust principal. Instead the profit will be included as part of the trust principal to be reinvested so as to best effect the Testator's material purposes for the trust, income to support Son and provision for grandchildren after Son's death. Similarly, courts hold that 400 shares of Acme Corp. common stock from the stock dividends, unlike cash dividends, are part of the principal rather than income. Thus, Son will receive cash dividends on the stock from the stock dividend but not ownership of the stock dividend itself absent express provision by Testator which was not present here.

2. The future income and principal will not be paid until Son dies and will remain in the trust until such time. Son's disclaimer will not be effective pursuant to the statute because, it was made well over 9 months after Testator's death. Although the interest is created by a trust set up by the will could have been transferred and transfer his interest to his descendants because of Son's manifested intent to forego his future interests in trust income. Thus, Son's interest in future income could pass to his descendants or assignees if saved by an antilapse statute or he effectively transferred them, but since he has none they will accrue in the trust until principal is paid upon trust's termination. However, this is unlikely under the facts provided.

All interests of beneficiaries are descendable, devisable, and transferable absent specific trust provisions limiting such actions. The will here created and trust by transferring Testator's estate to a trustee to distribute in accordance with provisions provided by Testator. A trust may be created by a will when the trust is in existance or created contemporaneously with the will, the testator manifests an intent to create such a trust and appoints a trustee with definite and precise instructions to the trustee to benefit ascertainable beneficiaries. Here, Testator satisfied these by naming trustee, providing for transfer of principal and providing ascertainable beneficiaries. When a beneficiary's interest is disclaimed it passes to the substitute taker provided for in will upon the ending of the interests disclaimed or to Settlor [Testator's] or his estate. Here the trust names beneficiaries as those grandchildren who survive Son. Their interest in obtaining trust principal will vest once the condition is satisfied.

In situations where a class is named, such as here "grandchildren" the court applies the rule of convenience which states that the class will close at the end of the preceding estate and when the first member may validly claim his interest. At issue here is whether the class bequest satisfies the Rule Against Perpetutities [RAP] which requires the interest to vest within 21 years of a life in being at the time the interest is created. For testamentary trusts the perpetuities period begins when the interest is created, at the time of testator's death. Since Son was alive at this time and the grandchildren's interests will vest by the time Son dies, RAP is satisfied. However, although Son's interest [preceding interest] has ended, the condition that grandchildren survive Son has not yet been met and therefore no member [grandchild] is yet able to take and thus their interests have not vested. Although the will disclaiming party will be treated as predeceasing testator, this will not effect the trust condition that grandchildren survive Son. Once Son dies, the class will close and all grandchildren of Testator then alive will proportionately share the principal and any children born there after will not be entitled to any of the principal.

======== End of Answer #2 ========

MEE Question 3

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.

3) Please type your answer to MEE 3 below

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When finished with this question, click Â to advance to the next question.
(Essay)

======== Start of Answer #3 (810 words) ========

MEE Question Three:

(1) The Bank will have a superior claim to the equipment under the first-to-file-or-perfect priority rules that govern the secured party/secured party priority conflict in this case because the Bank was first to file a financing statement.

The issue is which secured loan, between two secured and perfected loans, gets priority.

Under UCC Article 9, a party can obtain a security interest in collateral. The process begins by "attaching" to collateral. Attachment governments the relationship between the debtor (the borrower/the one giving the collateral) and the secured party (the creditor/the one taking the collateral). In order to attach, the entities must: (1) agree that the secured party will take a security interest in the collateral (or gain possession or control); (2) the debtor must have right in the collateral; and (3) the secured party must give value. A security interest must properly describe the collateral that is being used as collateral, but the UCC provides that its definitions may generally be used (one such description is equipment). Once attached, the secured party then

"perfects" the security interest so as to inform the world of its interest in the debtor's collateral. Perfection cannot occur until attachment occurs. One method of perfecting, which applies to equipment (the collateral at issue here) is to file a financing statement. The debtor must authorize the creditor to file a financing statement and the financing statement must generally provide notice to what the secured party has attached to.

If multiple parties have perfected security interests, the priorities of the competing securities interests are compared. Several rules exist to compare priorities, but the most basic rule, which applies here, is the first-to-file-or-perfect priority rule. This rule states that the parties relative priorities are governed by the time at which each party perfected OR filed a financing statement, whichever occurred first.

Here, both Bank and Finance Company have valid security interests that are perfected. The Bank's lien on the debtor's property attached on March 22, when value was given ($100,000) and the Bank and the debtor signed the security agreement covering "present and future equipment." The facts indicate that the debtor owned the equipment so the debtor's rights in the collateral is not at issue. Because the financing statement was filed *prior to attachment*, the Bank's security interest perfected at the time the parties signed their agreement and the funds were provided. The Finance Company's lien attached on March 15, when it gave value and signed its financing statement. That same day, the Finance Company perfected its lien.

Although the Finance Company's interest attached and perfected FIRST, the BANK's security interest has priority BECAUSE the Bank was first to file against the

debtor's equipment. The rationale behind the rule is that the Finance Company should have investigated the debtor prior to making the loan and at that point the Finance Company could have discovered the Bank's financing statement. The UCC also acknowledges that lenders and receivers of collateral also need to time to make loans so rushing to provide value and sign security agreements is contrary to wise commerical practice. Under the UCC's priority rules, the BANK has a superior claim to the equipment.

(2) Both the Bank's and the Finance Company's claims on the equipment will continue in the item of equipment because no event occurred that could eliminate the liens.

At issue is what events can occur to eliminate the lien of a creditor on a piece of equipment sold by a debtor to a third party outside of the ordinary course of the debtor's business?

Under the UCC, generally speaking, security interests continue and travel with the secured property if the owner of the property changes. This rule, however, is subject to a few exceptions. Some exceptions include, among others: (1) the Buyer in the Ordinary Course of Business (BIOCB) exception; (2) the Garage Sale exception; and (3) waiver by the secured party. The BIOCB exception applies when a buyer buys collateral from a seller who is in the business of selling the collateral. In essence, this covers the sale of inventory to consumers. The garage-sale exception applies in consumer-to-consumer sales. Finally, a secured party can agree that the debtor can sell a piece of equipment.

Here, none of these exceptions apply. The BIOCB does not apply because the debtor sold equipment, not inventory. The facts specifically state that this is the first time the debtor has ever sold this type of equipment, clarifying that the debtor is not in the business of selling this type of equipment. The garage sale exception doesn't apply either because this was a business to business transfer, not a consumer to consumer. Finally, there is no indication that the Bank or Finance Company waived their rights prior to the sale.

Thus, both security interests will remain on the equipment, and buyer will take subject to them.

======== End of Answer #3 ========

MEE Question 4

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.

4) Please type your answer to MEE 4 below

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When finished with this question, click Â to advance to the next question.
(Essay)

======== Start of Answer #4 (734 words) ========

MEE Question Four:

(1) Yes, the court should order the customer to turn over the engineer's reports because they are discoverable and not otherwise protected by a privlege or by the Federal Rule of Civil Procedure (FRCP).

The issue is whether expert reports completed prior to trial can be protected from discovery request orders, when those reports contain otherwise discoverable information.

Under the FRCP, the first question is always whether the information sought to be discovered is relevant or potentially relevant to an issue or claim that could be raised at trial. Once satisfied with that, the next question is whether the discovery request is unduly burdensome, disproprorinate, or a means by which a party is harassing another party. These two steps are satisifed, then the information is generally discoverable and next question is whether another rule would prevent discovery. In certain situations, expert opinions are shielded from general discovery unless the requesting party can show extenuating circumstances. One such rule to expert opinions from experts who

will not testify at trial *if* the opinions are given in anticipation of litigation.

Here, the engineer's report qualifies as generally discoverable information and does not qualify as non-testifying expert opinion, and thus the court should order the customer to turn over the report. The engineer's report is highly relevant to a central issue in the pending litigation, namely whether the builder made a mistake in building the house (i.e., whether the builder breached). The request is not too broad or burdensome either, as based on the facts, its appears that the request for the report was specifically made. Thus, the question turns on whether the opinion can be shielded from discovery as an non-testifying expert opinion. The engineer's report was preformed well in advance of trial and well in advance of the expectation of litigation. The engineer was not providing trial strategy or anything similar to that. Because there was no anticipation or thought of litigation at that point and no trial strategy etc., the court will require the customer to turn over the report.

(2) This a close call, but the court likely should sanction the builder in some way.

Under the FRCP, sanctions for the destruction of evidence are not specifically enumated or listed, but courts generally have the power to sanction parties who ignore hold requests and destruction evidence (spoliation laws etc.). Courts typically consider several facts when making this determination, including: (1) the timing of the destruction (before trial, after trial); (2) how related the evidence is to the anticipated claims in litigation; (3) whether the destruction was intentional or in bad faith, and whether the destruction was according to a document retention plan; and (4) whether

the destroying party has notice of pending litigation.

Weighing these factors, the court will likely find that the court should sanction the builder. First, the timing of the destruction slightly weighs in favor of not sanctioning. The destruction here occurred *prior* to the complaint being filed. This means that no formal legal steps to initiate a lawsuit had occured which tends to show that sanctions are inappropriate. Second, this evidence is highly relevant and probative of potential issues that will be litigated in the case. The evidence concerned internal emails by the builder about the foundation, the central issue at trial. This weighs in favor of sanctioning. Third, no evidence exists that would tend to show bad faith in this destruction. Though courts generally say as a general matter destruction according to a document retention plan is "intentional" in a broad sense, the destruction here was on time (60 days from completion, June 1, was August 1) according to the company's internal retention plan. This weighs in favor of not sanactioning. Finally, however, the builder was clearly on notice that these emails would be relevant. The final correspondence between the builder and customer, prior to suit, occurred on July 10, *before* destruction, at that point the customer notified that they were done paying. At that point, the builder knew litigation was likely. This conclusion is reenforced because the builder itself initiated litigaiton, not the customer. This leads one to wonder whether the builder destroyed the evidence prior to filing suit on purpose. Waiting for the document-retention date to pass, destroying the evidence, and the filing suit.

Weighing all of these factors together, the court will likely determine that some sanctions are appropriate in this case.

======== End of Answer #4 ========

MEE Question 5

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.

5) Please type your answer to MEE 5 below

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When finished with this question, click Â to advance to the next question.
(Essay)

======== Start of Answer #5 (890 words) ========

1. No, the trial court did not err when it denied the defendant's pretrial motion to dismiss on double jeopardy grounds.

At issue is whether conviction for burglary and theft (larceny) violates the constitutional prohibition against double jeopardy. Double jeopardy involves a second prosecution or conviction of a defendant for the same offense arrising from the same facts or conduct, which the Constitution prohibits. There are exceptions such as the separate soverigns rule that allows subsequent prosecutions for the same criminal offense, but a conviction for an offense on the same facts and conduct bars additional convictions of the same offense or any lesser included offense based on the same facts and conduct.

Generally, theft and burglary are considered separate offenses and neither is considered to be a lesser included offense of the other (unlike robbery and theft). The specific test for whether a conviction for two separate offenses triggers double jeopardy is the Blockburger Test. Under this test, a criminal defendant cannot be convicted for two different offenses arrising from the same conduct and facts unless the two offenses charged each have one separate, independent element not contained in the other charge. Here, the jurisdiction's statutory definitions of the offenses each contain an

independent element that is not included in the other offense. Burglary is defined as (1) entering into the dwelling of another, (2) without consent, and (3) with an intent to commit a felony therin. Theft is defined as (1) taking and carrying away (2) the property of another with (3) the intent to permanetly deprive the owner of possession. The statutory charges indicate that each offense contains an independent element that is not contained in the other offense. Consequently, the Double Jeopardy clause does not bar the defendant from being convicted for both theft and burglary even though the offenses would be based on the same conduct and facts.

2. Yes, the trial court erred in its instruction to the jury on the burglary charge because it directed the jury to presume an element of the offense and violated the defendant's constitutional rights, which require the prosecution to proof every element of a crime beyond a reasonable doubt

At issue is whether the judge's instructions violated the constitution by instructing the jury to presume the defendant entered with intent to commit a felony therin if the jury finds that the defendent entered without the owners consent. The constitution provides that a person should not be convicted unless the prosecution meets the burden of proofing there is no reasonable doubt. The Federal Rules of Evidence reflect this constitutional requirement with the specific rules that a judge should not shift a burden of disproving an element of an offense or negating the requirement that the prosecution prove each element of an offense beyond a reasonable doubt. Here, the judge's instructions are a clear violation of the defendant's constitutional rights because the instructions allow the jury to presume one element of the offense (intent to commit a

felony therin) if it finds a separate element of the offense was proven beyond a reasonable doubt. Appellate courts would consider this to not be a harmless error and would be a more than adequate ground to reverse the conviction.

3. Yes, the trial court erred when it sentenced a defendant to an additional year of incarceration on the theft conviction based on the experts testimony.

At issue is whether a federal district court judge can increase a defendant's sentence after hearing additional evidence not presented to a jury on a statutory element such as increase a defendants' conviction from a misdemeanor to a felony offense based on an statutory element of the offense that must be proven and determined by a jury. Generally, federal judges may consider information not presented at trial when considering the appropriate sentence to impose on a defendant. Judges may consider personal characteristics of the defendant, behavior between indictment and conviction, family factors and hearsay evidence. A judge has wide discretion to consider this evidence when deciding to impose a sentence that is adequate but not more than neccessary and based on the Sentencing Reform Act's statutory factors and considering whether a variance or departure is needed.

Here, however, the judge heard evidence that beared on a statutory element on the crime and needed to be proven beyond a reasonable doubt at trial. The jurisdiction's statute provides that a Class D offense of theft is only a a misdeamnor if the value is proven to be between $2,500 and $5,000 and a felony if the value of the item exceeds $5,000. The only evidence presented at trial was that the owner testified she had

bought the ring for $3,000. While the prosecution could have presented evidence from the exper testimony at trial to prove that the value of the ring was $5,000 and the jury could have considered whether that was proven beyond a reasonable doubt or the judge could have considered evidence warranting an upward departure to impose a greater sentence, the judge cannot usurp the jury's role as fact finder of a statutory element of the offense and heighten the offense convicted from a misdemanor to an offense. Because it appears that the judge imposed an additional year of incarceration by finding that the defendant should have been convicted of felony theft, the judge erred.

======== End of Answer #5 ========

MEE Question 6

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.

6) Please type your answer to MEE 6 below
(Essay)

======== Start of Answer #6 (1261 words) ========

I. Ben had the authority to bind the partnership in the transaction with the collector.

The first issue is whether Ben, a partner, had the authority to make a contract to sell an antique automobile to the collector. A general partner has the ability to bind the partnership when the partner is carrying on in the ordinary course of business. A partner can have actual, implied, or apparent authority. A partner has actual authority where the other partner(s) or the partnership agreement specifically gives the partner the authority to act in a specific manner. A partner has implied authority to act in ways that are in the ordinary course of the business or that are incidental to the express authority of the partner. Apparent authority is not authority at all. Rather, it is a third party's perception of the authority of a partner. Apparent authority exists when a third party reasonable and without knowledge believes that a partner has authority to act in the manner in which he or she is acting. Where apparent authority exists, the partnership is bound to the third party.

Here, there is no partnership agreement. Ben only had 20% control of the partnership, but the business of the partnership was to buy and sell antique vehicles. Ben would likely have express and/or implied authority to enter into a contract with a collector for the sell of an antique car. It is doubtful, though, that Ben had the authority to lie in the

contract. However, apparent authority probably existed here. The collector was contracting iwth Empire through Ben to buy an antique car. He reasonably believed that Ben had the authority to act in the way in which Ben was acting. It is questionable whether the collector reasonably believed that the car was one that a famous movie car had driven or whether the collector had the duty to investigate the truth before buying the car. But he still reasonably believed that Ben had the authority to engage in the transaction based upon the nature of the business.

Accordingly, Ben had the authority to bind the partnership.

II. Adam can be held liable to the collector prior to the statement of qualification.

The next issue is whether Adam can be be held liable for the collector's claim against the partnership even though Adam was not personally involved in the transaction. All partners are jointly and severally liable for any obligation of the partnership. The partner can be individually liable for the obligations of his or her co-partners or the obligations of the partnership where the partner is joined and served in the lawsuit personally. A creditor can hold any partner liable for the entire amount of the damages individually, although a partner may have a right to contribution from the partnership or the other partner.

Here, Ben had authority to bind the partnership. Adam, as a partner in Empire, can be sued and held personally liable for all debts and obligations of the partnership and his

other partner, Ben. The only requirement is that the creditor sue Adam and provide service on Adam individually. The collector sued Adam, Ben, and the partnership. The facts do not indicate whether ADam was personally provided with service. If the collector sues Adam for the entire amount upon judgment, the collector will be able to recover the entire amount from Adam. Adam, though, can seek contribution from his co-partner and the partnership.

Assuming that Adam was personally served with the suit by the collector, he will be jointly and severally liable to the collector for any judgment arising from the obligation that resulted between Ben, Empire, and the collector for the purchase of the car.

III. Diane is not personally liable for partnership obligations incurred prior to her joining the partnership.

The next issue is whether Dianne will be personally liable for the collector's claim against the partnership, Adam, and Ben, that occurred prior to her joining the partnership. A new partner is not liable for the debts and obligations of the partnership or the other partnerships that arose prior to the partner joining the partnership. The time that matters is the time that the claim arose. Pendency of a lawsuit does not establish the liability for a new partner.

The collector's claim arose from a transaction that occurred between the partnership, Ben, and the collector three years ago. Dianne was not admitted as a new partner until

two years ago. Dianne was not a partner when the debt or obligation arose.

Thus, Dianne will not be held individually liable for the collector's claim against the partnership.

IV. The filing of the statement of the qualification was sufficient to establish Empire as an LLP.

The next issue is whether the filing of the statement of qualification was sufficient to protect Empire's partners as an LLP. A general partnership can elect to convert into an LLP. The LLP must provide the necessary information to the state's Secretary of State. The name must include the designation "LLP" or words that are basically the same, such as limited liability partnership. As soon as the filing of the statement of qualifications has been accepted by the state's secretary of state, the partnership acquires LLP status and limited liability from that point forward, provided any franchise fees are paid and all yearly or other requirements are satisfied.

Here, Empire filed a statement of qualification with State A. This statement provided that the partnership was now Empire, LLP. Accordingly, the general partnership was converted into a limited liability partnership in State A.

V. Adam and Ben only are individually liable on the collector's claim, even after attaining limited liability status.

The next issue is whether Adam, Ben, and Dianne are individually liable on the collector's claim as they have now converted the partnership into an LLP. Limited liability partnerships have limited liability after the point of formation and continuing so long as the LLP status attaches to the partnership. The policy behind limiting liability only after the point of formation is to ensure that general partnerships do not incur significant debts and obligations and then escape from those obligations by simply converting to an LLP at any time. This would create havoc in the state.

The collector's claim arose three years ago when Ben made the fraudulent representation about the car to the collector. Although the suit is still pending, the claim arose at the time of the wrong. The partnership converted to an LLP two years ago, after the collector's claim had arisen. Accordingly, the LLP status will not protect those partners of Empire at the time of the misrepresentation by Ben. Dianne is protected for the reasons stated above; Adam and Ben, though, are still individually liable to the collector.

VI. Only Empire LLP is liable for the driver's estate's claims.

The last issue to consider is whether Adam, Dianne, and Ben are personally liable for the driver's estate's claims. An LLP protects partners from personal liability for the debts and obligations of the partnership. That is where the term limited liability derives from--the partners are not individually liable. Once the LLP is formed, the partners are

protected from personal liability for all claims that arise during the existence of the LLP.

Here, the claim arose one year after Empire Partnership converted to Empire LLP. The partnership successfully converted. The LLP form of business protects Adam, Ben, and Dianne from individual liability.

Thus, because the partnership is a limited liability partnership, Adam, Ben, and Dianne are protected from personal liability for the driver's estate's claims.

======== End of Answer #6 ========

END OF EXAM