February 2014 Bar Examination Sample Answers

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Question 1 - Sample Answer # 1

1. (a) The $2,000,000 farm and the $500,000 family home would be deemed trust res, or property owned by her revocable trust at her death. These are the only two items that she had physically transferred to the trust at the time of her death.

(b) If no taxes, commissions, or other expenses are to be paid by the trust, the value of the trusts two charitable bequests would be $750,000 each for a total of $1,250,000 (half of the trust's assets). As Mary was survived by three nephews, the directive of the trust allowed for them each to get an equal share of the other half of the trust assets (1/3 each of $1,250,000).

(c) To fund these bequests, Mary gave sole discretion to Able as the successor Trustee to make distributions in cash or in kind, or partially in cash and partially in kind, however he sees fit. Given that the trust assets are properties with great value, he may sell the trust assets to get cash to make the distribution equally from there, or if he and the other nephews wanted to keep the house and/or farm, they could likely buy out the other beneficiaries if they so chose and Able decided, in his discretion, that would be feasible.

2. (a) All of the remaining assets, with the exception of the farm and Mary's home which were a part of the trust would be pass through intestacy since Mary did not leave a will.

(b) Under Georgia's Intestacy Statute, since Mary did not have a surviving spouse, children, parents, or siblings, her nephews are the next in line to take. As such, it will no longer be split into half for each of Mary's pre-deceased brothers and then divided to the nephews (per capita/per stirpes), instead, each nephew will take an equal 1/3 share of the remaining total assets (less the farm and house).

3. (a) The Georgia Superior court of the county in which the property or defendants lie would be a proper court to have jurisdiction over the claims to the now defunct art museum. The court would likely apply the doctrine of cy pres to fulfill the trust wishes. The court will apply cy pres in the event of a charitable trust in order to prevent the gift from lapsing if the trust beneficiary no longer exists. The court will normally try to find a replacement charitable trust with a similar trust purpose.

(b) **Mary's Church:** While a good cause, it is not very similar to the purpose of the gift to

the art museum. They are already receiving a significant balance from the trust, but it is a cause Mary supports as noted by her other bequest.

Natural History Museum: I believe the Natural History Museum most closely identifies with Mary's original bequest to the art museum. It is the most similar of those vying for the trust assets of the four. It's purpose is likely to preserve historical significance of valuable pieces and works for the future enjoyment and education of the general public--a goal very similar to that of the art museum.

Bankruptcy Trustee: The city owned the art museum, so they could argue that Mary was ultimately gifting the funds to them; however this is not a charitable purpose and a court would not likely find it consistent with Mary's original wishes and purpose.

Three Nephews: The nephews may argue that they are the reasonable beneficiary because they are Mary's closest living kin; however, a court would likely find this would not uphold the charitable trust purpose Mary had in mind. The court will try to come as close as possible to the settlor's original intent.

4. Ethical issues involved in the attorney's drafting of Mary's revocable trust and his related estate planning advice mainly involve his competency. The facts stated that he had just passed the bar and this was the first revocable trust document he had prepared, lending to the fact the was not very experienced in this area, especially in regards to a complicated and valuable trust such as this. Any lawyer is considered competent for the purpose of practicing law; however, he/she must be willing to either decline work until proficient in the area, advise the client at no charge (for his additional studies/learning) he will become competent in the area, or with the client's consent, he will partner with a more knowledgeable attorney in the specific practice area. It seems, given the complexity of this trust, the last option would have been a wise decision. Additionally, the attorney knew she had significant assets and did not advise her to draft a will, he just nodded his head in agreement when she said she no longer needed one since she transferred everything to the trust.

Question 1 - Sample Answer # 2

1. (a) The property owned by the trust would be the farm and the home because Mary signed and recorded deeds transferring them into the trust. Although Mary signed a memo of her intent to transfer all of her other assets into the trust, she did not actually transfer any of them. Therefore, all of the other items, the stock portfolio, bank accounts, certificates of deposit, Lexus, personal property and the rental home remain Mary's personal property and are not a part of the trust.

(b) The value of the trust at the time of Mary's death was $ 2,500,000 between the farm and the home. The trust stated that the charities were to split ½ of the trust so therefore each charity would receive 1/4 of the total trust. The three surviving nephews were to split ½ of the trust. The nephews would each receive 1/3 of the remaining ½.

(c) The easiest way for the bequests to be funded would be by selling the property and dividing the proceeds in accordance with the trust. Therefore, each beneficiary would receive cash. The Trustee could also partition the property and deed a portion of the property to each beneficiary of the trust.

2. (a) The remaining assets would be a part of Mary's intestate estate because she died without a will. That would include the stock portfolio ($1,000,000), bank accounts from her husband ($500,000), Certificates of Deposit ($400,000), the Lexus ($50,000), personal property from her husband ($50,000), the rental home ($400,000), her bank accounts ($60,000) and her property ($40,000).

(b) Because Mary died intestate, without a will, her estate would be divided among her intestate heirs. Since Mary died without a spouse, children or surviving parents, her estate would go to her siblings equally. Mary had two brothers and therefore, each would be entitled to ½ of her estate. Since both brothers predeceased Mary, their share of the estate gets passed to their heirs. Since one brother had 2 sons, Able and Bob would share in their father's ½ of the estate and therefore, they would each receive 1/4 of the entire estate. Since Cain is the only surviving child of the other brother, he would take the entire ½. The total amount of the assets in the estate are $2,500,000. Therefore, Cain would take $1,250,000 and Able and Bob would each receive $625,000.

3. (a) Since the city where the museums are and the place where Mary died are the same, the Superior Court in the county where that is located would have jurisdiction over the claims. Jurisdiction could also be found in the county where the farm is if that is a different county.

(b) Church- the strength of the claim of the church to receive the trust bequest is that Mary included the church in the original trust and therefore clearly wanted the church to receive money from the trust. The weakness is that if Mary wanted the church to get all the portion delegated to the charities that she would not have included the museum or would have had a provision in the trust that in the event the museum was no longer in existence, that all of the bequest was to go to the church.

Local Natural History Museum -the strength is that the court will look to the intention of the creator of the trust and will try to fulfill that intention when the original intention is no longer

viable. In this case, Mary wanted the bequest to go to a local museum and since this is the only other local museum, the bequest should go to it. The weakness is that even though it is the only other local museum, Mary intended for the bequest to go to an art museum and this is a natural history museum so they don't quite have the same purpose.

City-the strength of the argument is that the city owned the museum which the original bequest was left to and therefore should receive that benefit. The weakness is that Mary wanted the bequest to fund an art museum and not to pay off the city's creditors.

Nephews-the strength is that the nephews are Mary's only surviving heirs and the remaining ½ of the trust was left to them. The weakness is that if Mary wanted them to receive a larger portion of the trust she would have established the trust that way. Also there are anti-lapse statutes in place to ensure Mary's intentions are followed.

4. First, the question states that the attorney had passed the bar but was not clear if he had been sworn in. If not, he is not authorized to practice law in Georgia, which includes drafting the trust and giving estate planning advice. Second, the attorney used a revocable trust that was from Florida. He must be sure that it meets the requirements for Georgia and cannot simply rely on the language and form of the other trust. Since he has not drafted a trust before, he has the obligation of doing his due diligence in researching the criteria. He can do this by simply researching on his own or consulting with an attorney who has experience in trusts. He should make sure to inform Mary of his novice in this area so that she can obtain other counsel if desired. Third, he should have advised Mary to either transfer all of the assets into the trust or to make a Will. Looking at the trust and memo and saying nothing is still an ethical violation because he should have known that those things were needed in order to protect Mary's wishes and intentions.

Question 1 - Sample Answer # 3

1. (a) The farm and home would likely be the only assets to be included as part of Mary's revocable trust. The creation of a trust requires a settlor, trustee, beneficiary, specific and identifiable trust property (res) and intent to create a trust (shown by specific and enforceable duties for the trustee). In this case, Mary would be the settlor and trustee (the nephew is successor trustee). The charities and nephews would be beneficiaries of the trust. The trust property must be specific and identifiable, and requires a present interest in the property. Here, the facts indicate that Mary properly executed and recorded the deeds transferring her interest in the farm and home to the trust; that is sufficient. Whether the trust contains enforceable duties of the trustee is not clear from the facts. If it does, a trust has been created. If it does not, the trust will fail. The remaining property likely will not be included in the trust because Mary simply executed a memo stating that it was her ***future intention*** to transfer the rest of her assets into the trust. A trust requires a present property interest; a promise to transfer a property interest in the future is insufficient. Accordingly, it is unlikely that this property will constitute the readily identifiable property that a trust requires, and would not be included in the trust.

(b) The value of the trust's two charitable bequests would be half of the trust assets, which is $1.25 million (farm is worth $2 million and home is worth $500,000). The value of the trust's bequests to the beneficiaries would be 1/3 of the $1.25 million, because all three nephews have survived her. Note, however, that Able, as successor trustee, may need to appoint an independent trustee in order for him to reach trust assets as a beneficiary under Georgia law.

(c) The bequests would likely be funded by either granting proportionate property interests in the specific property to each beneficiary as fee simple estates. If issues were to arise with the sharing of the property as co-tenants among the beneficiaries, they could seek to be bought out, for partition in kind, or a complete sale and proportionate distribution of the proceeds.

2. (a) Assuming that the trust was invalid due to failure to state specific property (other than the farm and home), Mary's intestate estate would include her husband's stock portfolio, bank accounts, Certificates of Deposit, year-old Lexus, and tangible personal property (worth $2 million total). Her intestate estate wold also include the rental home, bank account, and the furniture, furnishings, jewelry and personal effects (worth $500,000 total). None of Mary's assets would pass through her probate estate because she did not create a valid will. A will requires a writing, signed by the testator, witnessed by 2 witnesses, and signed by 2 witnesses. Mary created no such writing, and as a result, all of her property not in the trust ($2.5 million) would pass intestate.

(b) The individuals that would inherit Mary's probate estate are her nephews, Able, Bob and Cain. If the decedent dies without any surviving lineal descendants or surviving parents, the decedent's siblings will take from the decedent's estate per capita, and the siblings' children will take per stirpes. But in Georgia, if the decedent's siblings have all predeceased, the decedent's nieces and nephews will take equal shares of the decedent's estate. In this case, Mary died with no surviving lineal descendants or parents, and her siblings have both pre-deceased her. As a result, Mary's three nephews will take equal shares (each 1/3) of Mary's $2.5 million intestate estate.

3. (a) The Superior Court would have jurisdiction to decide the claims over the bequest to the now defunct Georgia art museum, because the Georgia Superior Court has exclusive jurisdiction over cases involving title to land. Here, the art museum would be claiming title to the trust property, which is the farm and home. As a result, the suit involves title to land and belongs in the superior court.
In deciding who would be the recipient of the bequest to the art museum, the court will apply the cy pres doctrine. The cy pres doctrine applies where the trust beneficiary no longer exists. The court will look to the settlor's intent and substitute another charitable beneficiary that is most closely aligned with the settlor's original intent.

(b). The church may argue that because it is already a trust beneficiary, it was Mary's intent for the trust to benefit the church. On the other hand, Mary's specifically chose to include the art museum, which arguably serves a different purpose than the church. Accordingly, using cy pres to benefit the church may not be in line with Mary's intent. Local history museum has a strong argument that it was Mary's intent to benefit the arts and museums, and it is the appropriate cy pres beneficiary. But it is not owned by the city, and Mary may have intended to benefit the city. The bankruptcy trustee could argue that Mary intended to benefit the city, and that providing to the city's creditors is most in line with her intent. This seems unlikely to prevail because the cy pres doctrine is used for a substitute charitable purpose. The nephews can argue that they should take as they were named beneficiaries under the trust. But cy pres is meant to substitute another charity.

4. A lawyer must be competent in his representation of a client. Competency requires the requisite knowledge, skill, and time for the representation. A lawyer may become competent, if he is not already, by gaining the knowledge and skill through study (with no cost to the client) or by associating with an attorney that is competent (with the client's consent). Here, the friend's son may not be competent to have prepared a trust. He just passed the bar exam and has only drafted one other trust. In addition, the trust he drafted appears to be identical to the first trust, thus indicating that he did not tailor the trust to his client's needs.

In addition, the lawyer could be liable because his conduct implied to Mary that she did not need a will. Had the attorney been competent, he would have known that the trust was invalid as to much of Mary's property and a will was required. A lawyer has a duty to zealously represent his client, and the simple nodding back to Mary in response to her statement may not satisfy this high standard.

QUESTION 2 - Sample Answer # 1

1. (a) The issue is whether Charlie had an enforceable contract with Brian to repair the bridge. An enforceable contract requires mutual assent in the form of an offer, acceptance of that offer, and sufficient consideration. Brian's initial email offering to repair Charlie's bridge for $20,000 was an offer, which Charlie rejected in his response when he said $20,000 was too high. Charlie then counter-offered Brian $10,000, which Brian then rejected. The rejection was unequivocal, as Brian refused to take less than $20,000. Brian's statement, "if you want me to fix your bridge, send me a contract for my approval," should probably not be construed as another counteroffer because it did not create a power of acceptance in Charlie. He merely invited Charlie to send him further offers if he wanted Brian to fix his bridge. Because there was no outstanding offer, Charlie's email "accepting his terms" did not operate as an acceptance, and there was no enforceable contract. It should be noted that if there was an offer, Charlie's email would have created a contract under the mailbox rule, even though Brian accepted an offer from Charlie's neighbor before the contract from Charlie arrived.

(b) Because Charlie did not have an enforceable contract with Brian, he should not proceed against him for the difference in price with Brian and the contract with Ronnie. However, assuming that Charlie and Brian did have an enforceable contract for repair of the bridge, Charlie would be able to point to the contract with Ronnie in calculating his expectation damages for breach of contract (because Brian did not perform by undertaking the repairs for Charlie). Expectation damages seek to put a party in the place he would be had the contract been performed. If Ronnie ultimately fixed the bridge for $30,000, Charlie would be entitled to the $10,000 difference in the two contract prices.

2. The issue is whether Charlie must pay Ronnie the additional $5000, which the parties verbally agreed on following the second flood. As an initial matter, the parol evidence rule bars evidence of prior written or prior or contemporaneous oral statements to modify the terms of a fully integrated agreement. The bridge repair contract with Ronnie contains a merger clause stating that the contract constitutes the parties' entire agreement, and that the contract could not be modified except by a writing signed by both parties. The parol evidence does not bar evidence of Charlie and Ronnie's oral modification because it happened after the execution of the initial written contract. Because this is a service contract that can be completed within a year, the original contract does not fall within the statute of frauds. The merger clause notwithstanding, no writing is needed to evidence the modification.
Accordingly, whether Charlie must pay the extra $5000 depends on whether there was sufficient consideration for the modification as required under common law. Adequate consideration, a necessary component of an enforceable contract, consists of either a legal benefit to the promisor or a legal detriment to the promisee. Under the pre existing duty rule, agreeing to undertake a task that one was already legally obligated to do (by prior contract or otherwise) is insufficient consideration. However, courts have not strictly enforced this rule by construing the new agreement as involving a different or additional performance than that initially agreed upon. Here, the parties had not contemplated the second flood which resulted in $10,000 in extra damage to the bridge and washed out Ronnie's repairs. Agreeing to the additional performance required by the second flood may be considered sufficient to constitute adequate consideration to support the modification.

Nevertheless, even if the oral modification is found to be unenforceable, Ronnie may be able to recover the reasonable value of the benefits that he conferred on Charlie by doing the additional repairs under a restitutionary theory.

3. The issue is whether Charlie must pay Thurman the final payment despite the fact that Thurman installed the wrong size pipe. In contracts not for the sale of goods, including construction contracts, a party is only excused from performing due to the other party's breach if that breach was material. If the breach was not material and the breaching party substantially performed his contractual obligations, the innocent party may not withhold performance (in this case, payment for services) but may still sue for the damages caused by the breach. Here, whether Charlie must perform under the contract depends on whether Thurman's breach was material. In repairing Charlie's access road, Thurman re-contoured the road, cut in a ditch, and installed a pipe to carry runoff water under the road. Thurman's repair work was satisfactory except for his installation of a 20-foot pipe with a 15-inch diameter instead of a 25-foot pipe with a 20-inch diameter. The facts do not state that the precise length and diameter of the pipe was crucial to its purpose, or otherwise that the actually installed pipe did not carry the runoff water under the road. Under these facts, a court is likely to find that Thurman's breach was not material and that Charlie was not justified in withholding the $2000 final payment as a result. This is particularly true because the costs of tearing out the pipe and redoing the whole job is probably unreasonably high in comparison to any decrease in value of the property from the wrong pipe.

QUESTION 2 - Sample Answer # 2

1. (a) No, Charlie did not have an enforceable contract with Brian to repair the bridge. Under Georgia law, parties to a contract enter into an agreement, by mutual assent, supported by consideration before contract exists. The primary issue in Charlie's negotiations with Brian is the evidence supports a finding that there was a lack of mutual assent between Brian and Charlie.

At the end of the negotiations and after the first offer from Brian, which was rejected expressly and by implication through Charlie's counteroffer, Brian once again made a counteroffer to Charlie by writing "I am sorry it is $20k or nothing. If you want me to fix your bridge, send me a contract for my approval." Although Brian referenced a price from earlier in negotiations, this counteroffer from Brian was not unconditional. Brian solicited an offer/counteroffer from Charlie and placed a condition on any possible agreement that Charlie needed to send Brian a contract for Brian's approval. Although Charlie wrote back "I accept your terms. A contract follows" Charlie did not actually accept any valid offer to enter into a contract. He merely acknowledged that he understood what was necessary (condition precedent) for him to make an offer/counteroffer to Brian.

Charlie actually made a counteroffer to Brian by sending Brian a contract for Brian's approval. Brian accepted the offer from Charlie's neighbor before he even received the new offer from Brian.

(b) Although the decision is Charlie's, I would not recommend that he proceed in an action against Brian for the difference in the price he would have paid Brian and the price he agreed to pay Ronnie. As stated in the answer above, a court is unlikely to find an enforceable written agreement between the parties due to a lack of agreement and lack of mutual assent.

Charlie also has little support for an action in quasi contract, little support for any tort claim and little support for an action for any type of equitable recovery. There is little evidence to support a finding that Charlie reasonably relied, in any meaningful way on any representation or statement by Brian.

2. Yes. Charlie will likely be required to pay up to $5000 as damages to Ronnie. Although Ronnie bore the risk of loss at the time of the second flood, because under Georgia law contractors retain the risk of loss during construction projects, this will likely be negated by a finding that Ronnie and Charlie either entered into an agreement to modify the original contract price because he arguably waived the contractual provision requiring amendments be in writing or, under quasi-contract or equitable theories, because Ronnie relied to his detriment on Charlie's promise to pay the increased price.

Ronnie could argue that , after the second flood, he offered to amend the contract price in his agreement with Charlie and Charlie expressly accepted his offer to modify the contract. Charlie said he would pay the increased price. A court could find that this constituted an agreement whereby Ronnie made an offer and Charlie accepted the offer and could find consideration in the continued construction of the bridge and the increased

price. Ronnie could effectively argue that Charlie waived the provision of the contract requiring amendments to be in writing by agreeing to the new price and knowingly allowing Ronnie to complete the project under the proposed new terms.

Ronnie could also attempt to recover under quasi-contract theories and estoppel theories. Ronnie should argue that there was an agreement to modify the price term of the contract between the parties, he reasonably relied on that agreement and Charlie's representation that Charlie would pay the new price, and, as a result of his reliance, he suffered a detriment. Although Ronnie might not be able to recover the full $5,000 simply because the parties agreed to a $5000 increase in price, Ronnie might be able to recover the value of his improvements to Charlie's property and the value of his work.

3. Charlie is likely obligated to pay Thurman some, if not all, of the final payment despite the pipe size error. Under the facts presented, Thurman substantially performed on his contract with Charlie. A party substantially performs when it adequately performs all of the material terms of a contract, even if there is a slight variation in materials used. If a court finds that the pipe size was a material term of the contract, Thurman might be liable for value of the repair to the access road with the 20-inch pipe less the value of the repair with the 15-inch pipe. Thurman could also just repair and replace with the right pipe within a reasonable time to cure his performance defect. If the contract terms prevent Thurman from recovering, he might seek equitable recovery against Charlie for the value of his work on Charlie's property.

Question 2 - Sample Answer # 3

1. (a) Probably not. Charlie and Brian likely did not have an enforceable contract. A contract requires and offer and acceptance. An offer is an unequivocal manifestation of an intent to enter into a deal, and the offeror dictates the terms of acceptance. However, the contract is not formed until the offeree has actually accepted. Here, Charlie initially invited an offer from Brian, and Brian offered to fix the bridge for $20K. Charlie rejected the offer, however, and instead counter-offered $10K. The rejection of the offer and extension of the $10K counter-offer effectively put the ball in Brian's court, and Brian rejected that offer. The issue is whether Brian's response thereafter that only $20K would be acceptable was actually an offer, or whether he had extended an invitation to Charlie to offer him $20K. If the email was an "offer," then under the mailbox rule, Charlie's sending the contract would have constituted acceptance as of the moment he put the contract in the mail under the mailbox rule.

Under the circumstances, however, the email response was likely an invitation for an offer, because it stated that Charlie would need to "contract for approval" before they could move forward. This suggests that he was not quite ready to deal, but rather wanted to see a contract and approve it first. Therefore, they did not have an enforceable contract.

(b) Because of my conclusion that they did not have a contract, Brian should likely not proceed against Charlie for the difference in price between the contract with Ronnie and the contract with Brian. Nevertheless, I acknowledge that there is merit to both arguments (whether they had a contract), and, therefore, pursuing such an action would not be frivolous.

(2) The issue here is whether Charlie and Ronnie's verbal agreement constitutes an enforceable promise. If it was an effective modification of the contract, then it will be enforceable. If not, Ronnie may still be able to recover on a theory of quasi contract or promissory estoppel.

Here, the merger clause provides that the entire agreement is in the written contract and requires that it cannot be amended except by writing signed by both parties. This clause is enforceable and a Georgia court is likely to uphold it. Because the oral modification did not comport with the terms of the merger clause, the contract does not require that Charlie pay the additional $5,000. Nevertheless, Ronnie can likely still recover it based on a theory of promissory estoppel or quasi-contract. Under promissory estoppel, a party's otherwise unenforceable promise may be enforced if the other party reasonably and foreseeably relied on the promise, and if allowing the promise to go unfulfilled would result in unjust enrichment. Similarly, quasi-contract allows for enforcement where a person has rendered performance or partial performance based on a non-enforceable promise, but one on which the person reasonably and foreseeable relied. It also requires a finding of unjust enrichment.

Here, promissory estoppel may apply because Charlie promised to pay the extra $5,000. Ronnie relied on that promise. His reliance on that promise was foreseeable for several reasons. First, as they were already in a contract, Charlie had a duty of good faith to Ronnie with respect to contract matters. Additionally, because Ronnie and Charlie had

been dealing in the past, Ronnie could reasonably and foreseeably have relied on that record of past dealing (i.e. the initial contract phase). Finally, it was foreseeable to Charlie that Ronnie would rely on the promise because Charlie clearly intended for Ronnie to finish the work on the bridges, and the promise of extra money was negotiated after an unforeseen event to effectuate finishing the repairs. Unjust enrichment will be the crucial factor here. Given the additional damage, unjust enrichment should be easy to meet. Essentially, Ronnie is having to repair an additional $10,000 of damage caused by an outside circumstance after he had already begun a repair, and he only demanded an extra $5K for the work. Under these circumstances, promissory estoppel would likely allow Ronnie to pay even in the absence of an actually enforceable contract.

Similarly, quasi-contract may apply here because Ronnie had already performed by repairing the additional damage in reasonable and foreseeable reliance on Charlie's promise of additional money. Unjust enrichment would likely result if Charlie did not have to pay the additional $5,000, as explained above.

(3) Whether Charlie is obligated to pay Thurman will depend on the nature of Thurman's breach. That is, whether it was material. The contract here specified the size pipe to be used, and Thurman installed one that was smaller. This undoubtedly was a breach, as the installed pipe does not conform with the contract terms. However, it will likely be material only if the smaller pipe affects the value or performance of the repaired road. As Thurman completed construction, he is likely entitled to payment of some amount. But if the smaller pipe resulted in damages, Charlie can probably reduce the amount of payment by the damages. If this results in the pipe being totally nonfunctional or not up to a code or ordinance, he can likely require that Thurman replacement the entire thing with the correct size pipe for the original contract price of $3K. In any event, Charlie will have to prove that the breach is material and then may be able to withhold payment if it was.

Question 3 - Sample Answer # 1

TO: Senior Partner
FROM: Examinee
DATE: February 25, 2014
RE: Murder Appeal

This memo will address the issues that Senior Partner has asked me about.

Should the prosecution's rebuttal evidence of the Defendant's pre-custodial statement have been excluded as hearsay?

Yes. Hearsay is an out-of-court statement, made by the declarant, to prove the truth of the matter asserted. Hearsay is not admissible unless an exception applies. Exceptions include admissions, statements with legal effect, and testimonial prior consistent or inconsistent statements (prior consistent statements may be introduced to rehabilitate a witness, and prior inconsistent statements need to have been given under oath in a proceeding in which the opposing party had ample opportunity to cross-examine the declarant). Furthermore, a statement will be allowed if it is otherwise hearsay but it is not being introduced for a hearsay use: In other words, if the statement is not being introduced to prove the truth of the matter, it may be admitted as long as its admission does not violate other court rules, such as lack of relevance.

The statement does not appear to fall under a hearsay exception. Moreover, the statement arises from a police report, and police reports themselves may not be admitted in a criminal case.

The prosecution's rebuttal evidence of the Defendant's pre-custodial statement should have been excluded as hearsay.

Did the trial court err in restricting the Defendant's cross examination of the prosecution's firearms expert?

Yes. The purpose of cross examination is to question the testimony that the opposing party introduced through direct examination of its witness. Here, the prosecution was allowed to show, through expert testimony (therefore testimony that would likely be given great weight by the jury, as the testimony is from a witness that the Court has accepted as an expert), the angle of the gun fired and that the gun would have required several pounds of force to be fired. Obviously, this testimony, if true, seriously increases the chance that the Defendant is guilty of murder. Therefore, cross examination of this expert was very important to the Defendant's case, and the Court nevertheless restricted the Defendant's cross examination, even though such cross examination was surely well within the scope of what the State introduced through its expert witness.

Moreover, the Court restricted the Defendant's cross examination on a Daubert ground, stating that Daubert does not apply to criminal cases. Here, the relevant legal principle from Daubert is of the scientific and technical reliability of tests, and, presumably the State's expert witness relied on such tests in the testimony. Moreover, the relevant Daubert test is not subject to restriction under whether its principles arise in a criminal or in a civil

case: It is allowed in criminal and civil cases.

The Court erred in restricting the Defendant's cross examination of the prosecutions's firearms expert.

Was the police investigator's testimony regarding his written report hearsay, and should it have been excluded?

As discussed above, police reports are inadmissible hearsay, as police reports do not fall within an exception to the hearsay rule. However, if the police officer could not presently recall the events in question, he could have been shown the police report to refresh his memory, but that report could not have been introduced into evidence (absent a showing that the police officer still could not recall what the report was supposed to refresh his memory of, but only then on the Past Recollection Recorded Exception, upon a showing that the report had been "adopted" by the officer, and that it did indeed show what the officer could no longer recall).

However, as to the technician's written report, the expert testimony is allowed, and that report, while itself not admissible, might show similar things that the testimony would show. Of course, the expert testimony would have to arise from tests or methods that other experts in the field use.

Could trial counsel have objected on any other basis to the police investigator's testimony regarding the contents of his written report?

Yes. Trial counsel should have objected on the ground that the expert's testimony was unfairly prejudiced to the defendant, and that prejudice outweighed the probative value of the expert testimony. The evidence was prejudicial because it clearly suggested that the gun had been intentionally fired at the Defendant's wife, and that gun was the gun under the Defendant's bed. The Defendant showed that he had been asleep when the gun went off, and the State's witness' testimony nevertheless went to the gun's intentional firing without even so much as laying a proper foundation for introducing testimony that the gun was taken out from under the Defendant's pillow and intentionally fired in the first place.

Should the Defendant's objection to sending the dowel rod out with the jury have been sustained?

No. The dowel rod was demonstrative evidence, and, as such, was to be introduced only for the State's explanation of how the bullet entered the victim's head. The dowel rod was inserted through the pillow during the police officer's testimony to supplement the police officer's testimony and to provide a visual. The dowel rod actually has nothing to do with the evidence that was found at the crime scene. Accordingly, the Court should not have permitted the dowel rod to go out to the jury.

Question 3 - Sample Answer # 2

To: Senior Partner
From: Applicant
Re: Defendant's Trial

You have asked me to prepare a memorandum of law addressing certain evidentiary objection's during our Defendant's trial.

I. Prosecution Rebuttal Evidence

The first issue is whether the prosecution's rebuttal evidence should have been excluded as hearsay. It was hearsay and it should have been excluded. Under the Rules of Evidence in Georgia, hearsay is an out-of-court statement offered in court to prove the matter asserted. The defendant's statement about his activities that night would get be admissible as statements of a party, or admissions. Even if they fall into the definition of hearsay, they will always be admissible and are not regarded as hearsay evidence. The testimony may also be considered impeachment evidence because its prior inconsistent evidence by the Defendant. Defendant claims at trial that he heard a noise and grabbed his gun to investigate and returned to a dead wife. The investigators's report, however, shows that the defendant initially testified that he did not take the gun with him when he investigated the house. In Georgia, hearsay evidence may come in as impeachment and substantive evidence if the evidence is of a prior inconsistent statement. The inconsistent statement here does seem material--how the murder weapon discharged and how and by whom it was used. However, in order to get evidence in this way, the testifying witness must have an opportunity to deny or explain his answer. The facts do not indicate that this happened in the trial, thus, the police incident report is hearsay, and should have been excluded.

II. Daubert In Criminal Cases

The trial court did err in denying cross-examination. The trial judge is correct in that the Daubert case and its protocols for an evidentiary hearing to establish the bonafides of an expert's testimony is inapplicable to criminal trials in Georgia. However, in Georgia, cross-examination is wide open and not limited to the direct examination (like other jurisdictions and the Federal Rules). The defense sought to impeach the expert's testimony. In Georgia, an expert may give his opinion if the subject matter of that opinion relates to some specialized knowledge involving some technical skill or scientific trade and that opinion will help the trier of fact come to a resolution in matters of fact. Here, the prosecutor's expert was allowed to testify to his knowledge of firearms and how they operate or do not operate. If the expert was qualified, then the defense attorney already had his opportunity to attack the experts experience and qualifications. That, however, does not preclude the defense attorney from poking holes in an expert's conclusions and methods. As a result, the trial court likely erred in stopping the cross-examination. The better practice would have been to sustain the objection as to the applicability of Daubert.

III. Investigator's Written Report

The Investigator's report is hearsay. It should have been excluded. Hearsay evidence may still be admissible if it falls into certain exceptions. It seeks to bring in out of court statements to prove the matters in which they assert--namely that the Defendant. These statements are coming from a police investigator's incident report. The contents of the police investigator's incident report are hearsay--because they are being offered to prove what the investigator put down was actually what happened. However, the contents may fall into a hearsay exception. The incident report might be a business record kept by the police in their daily course of business. However, the prosecution would have had to lay the foundation for a business record. In fact, police investigative reports cannot fall under this exception in criminal cases. In addition, since the investigator was testifying, the incident report might have been refreshing recollection--which allows any document to be used to assist a testifying witness remember something that they once remembered but now forgot. Again, this requires foundation where the prosecution would have had to show that the investigators forgot his testimony. The document used in his case may be anything that can refresh. The contents of the incident report might also come as past recollection recorded evidence--which as a hearsay exception, applies when the testifying witness cannot remember what they wrote in the past when it was fresh in their mind and they knew to be true. Even with the document at hand, the testifying witness cannot remember so the evidence is read into the record. This is also inapplicable. However, a witness cannot simply testify from a document on the stand. Outside of these ways to get in the evidence, the contents would be deemed hearsay and the testimony based on them inadmissible.

IV. Objections To Police Investigator's Testimony

One objection is that a witness cannot testify directly from a written document on the stand. Also, defense counsel might be able to raise a Confrontation Clause issue with the report. The Confrontation Clause protects criminal defendants from testimonial evidence presented against them if they do not have the opportunity to confront such evidence. Here it seemed that defendant did have an opportunity to cross-examine the witness on the contents of the report. Trial counsel could have also objected to the incident report as a prior inconsistent statement because there is nothing in the evidence to indicate that defendant was given the opportunity to either explain or deny that he made a different statement then the one he made at trial. At trial, of course, defendant had grabbed his gun and went to investigate, raising the inference that someone else shot his wife.

V. Dowel Rod

The objection to sending the dowel rod should have been sustained. The dowel rod was not physical evidence gathered from the defendant's house and properly authenticated. The pillow itself was physical evidence and if the prosecution could show that it was the pillow from the night of the shooting then it could come in. However, the dowel rod was demonstrative evidence showing the trajectory of the bullet prepared by the police investigator. Demonstrative evidence may be used, if the foundation is laid that its similar and like the conditions present at circumstances at issue--here at the night of the murder. However, demonstrative evidence may not go in with the jury.

Question 3 - Sample Answer # 3

1. No, the defendant's pre-custodial statement should not have been excluded as hearsay because it was otherwise admissible. Specifically, hearsay is an out of court statement admitted for the truth of the matter asserted. Here, the defendant's pre-custodial statement was hearsay because it was an out of court statement and was being admitted for the truth of the matter asserted, but it should not have been excluded on the basis that it was hearsay because it qualified as an admission by a party opponent. Admissions by a party opponent are statements that are made by a party to the case, in which case such statements are admissible. They need not be against interest in order to be admissible. In fact, admissions by a party opponent are always admissible. Additionally, it should be noted that since it was a pre-custodial statement there will not be any issues with Miranda. Furthermore, if hearsay is being offered for some non-hearsay purpose then it may be admissible. For instance, since the pre-custodial statement was being introduced on rebuttal, it is likely that the prosecution was trying to use the statement to impeach the defendant's trial testimony since the statement differed from the testimony at trial. This would be a proper use of hearsay at trial because prior inconsistent statements are admissible. However, one usually has to confront the witness about the statement and give them an opportunity to explain, which doesn't appear to have happened in this case. Nevertheless, although hearsay, it should not have been excluded because it was an admission by a party opponent.

2. No, Daubert does not apply in criminal trials in GA, only in civil trials. However, the criminal court does require that there be some level of scientific reliability to be admissible. Dauber does apply to criminal trial under the Federal evidence rules, which require that an expert's opinions be based on reliable principles and methods, which typically means those generally accepted by the scientific community. While GA has adopted a majority of the Federal evidence rules as of 2013, it has not adopted the use of Daubert in criminal trials. Therefore, the trial court did not err in limiting the cross-examination of the firearms expert on the basis that Daubert is inapplicable in criminal trials.

3. Assuming this question is referring to the police investigator's testimony as to his incident report and not his testimony regarding the report of the crime scene technician in paragraph two, the incident report was hearsay. Hearsay is when an out of court statement is being offered for the truth of the matter asserted. Here, the incident report was being offered for it's truth. However, it is possible that the officer's testimony can come in if it qualifies under some other exception or non-hearsay use. For instance, the statement in the report by the defendant could qualify as an admission by a party opponent which is an exception to the hearsay rule and thus the officer's testimony as to this statement would be admissible. Additionally, it appears that the officer's testimony, at least with regard to the defendant's statement, could have qualified for admission as a prior inconsistent statement because it was different from what the defendant testified to at trial. In GA, prior inconsistent statements are admissible for both their substantive and impeachment use. Thus, this statement may have been introduced by the prosecution as a prior inconsistent statement on rebuttal to impeach the defendant's trial testimony. However, you usually have to give the party being impeached the opportunity to admit, deny, or explain the prior inconsistent statement which it does not appear was done in this case. However, it still appears that the officer's testimony would have qualified as an admissible admission by

a party opponent. Further, the incident report may have qualified under the public records exception and thus would have been admissible even though hearsay. Finally, it is possible that the court could have applied the past recollection recorded exception. This exception requires that the declaring have personal knowledge, that the writing was made at a time when the information was fresh in the witness's mind, and that the declaring acknowledge that this is in fact the writing that was made. Here, all of those requirements are met.

4. Trial counsel could have also objected to the officer's testimony regarding the contents of the officer's incident report on the basis that such testimony violates the best evidence rule. This rule requires that before a witness may testify to the contents of a writing, the writing itself, or a copy, must be produced. Here, the officer was allowed to testify to the contents of the writing without first having to produce the writing which violates the best evidence rule. Or on the basis that the defendant was not given an opportunity to admit, deny, or explain the inconsistent statement.

5. Yes, I believe that the defense's objection to sending the dowel rod and pillow out with the jury should have been sustained. Generally, only actual evidence from the crime may be provided to the jury during deliberations. The dowel rod, in this case, was not part of the actual evidence from the crime and instead was used as part of an investigative technique by the crime scene technician to determine the trajectory of the bullet. This should not have been sent back with the jury because it was not actual evidence from the crime. Additionally, the presence of the dowel rod poses the additional problem that jurors may be tempted to try and conduct their own "trajectory investigations" during deliberations now that they the dowel rod and the pillow in the jury room. This would certainly taint the jury verdict if such action were to occur.

Question 4 - Sample Answer # 1

1. Ethical propriety of filing the complaint without investigating & responsibilities as to an investigation and continued litigation.

An attorney has a duty to the court to ensure that he files meritorious claims, and abstains from engaging in any fraud on the court or on opposing parties. An attorney also has an obligation to act competently, which requires an attorney to determine that his client's lawsuits are not frivolous or intended to unduly harass an opposing party. In all aspects, an attorney must act reasonably while still protecting the rights of his client.

Here, P's counsel did not engage in a complete investigation of the facts underlying the personal injury lawsuit prior to filing the lawsuit. This is because counsel only had two days in which to prepare and file the complaint, in order to satisfy the applicable statute of limitations. As running afoul of a statute of limitations can have dire consequences for a client, it was imperative that P's counsel file the complaint immediately. P's counsel did not file the complaint completely without basis. Rather, he reviewed the Georgia Motor Vehicle Accident Report, which presumably gave a general overview of the accident and attendant damages. Thus, as P's counsel engaged in as much due diligence as was possible within the 2 days prior to the running of the statute of limitations, he acted reasonably and ethically when filing the complaint.

P's counsel's obligations did not end there; however. Rather, P's counsel was subsequently obligated to engage in a meaningful investigation of the facts underlying the complaint, to make sure that the lawsuit was filed without an improper purpose. Here, P's counsel investigated the merits of the claim after filing the complaint, and made the decision not to dismiss. As an investigation appears to have been promptly done after the complaint was filed, P's counsel acted ethically. In the event that the investigation uncovered facts that contradicted the complaint or established that the lawsuit was not meritorious, P's counsel would have been obligated to disclose such information, amend the complaint, and even dismiss if necessary (or withdraw).

2. Ethical propriety of contacting, flying, and interviewing Clarence without notifying D & ruling on Protective Order.

Attorneys are not ethically allowed to contact parties that are represented by counsel. This normally includes employees of an opposing party. However, this prohibition does not extend to individuals who are not represented by counsel, and are not employees of an opposing party.

Here, P's counsel contacted Clarence in order to interview him concerning the accident that is the subject of ongoing litigation. . Clarence is not represented by counsel, so P's counsel is not prohibited from contacting him on account of representation. Similarly, Clarence is not an employee of Hauling Freight, though he was an employee at the date the accident occurred. It appears clear that Hauling Freight does not consider Clarence to be its employee currently, nor does it contend that it represents Clarence. If it did, then Hauling Freight certainly would have known where Clarence lived, and would have been in contact with him concerning this lawsuit. There is accordingly no prohibition preventing P's counsel

from directly contacting Clarence to obtain a witness interview.

In addition, there is no prohibition that prevents P's counsel from paying for Clarence's transportation and likely lodging in GA while the witness interview occurs. P's counsel was not paying Clarence for testimony, rather, he was covering reasonable expenses. There is also nothing improper about visiting the scene of the accident, or about taking a recorded statement. Furthermore, there is nothing improper about noticing Clarence's deposition. P's counsel was simply developing P's case and preparing for the deposition when taking the witness interview, as is required of an attorney.

Accordingly, as P's counsel did not violate any ethical obligations (though it may have been more courteous of counsel to contact opposing counsel first), the Court should deny the Motion for Protective Order. Regardless, P's counsel will likely be able to elicit the same testimony from Clarence at deposition and not run afoul of any protective order. Further, even in the absence of a protective order, Hauling Freight's counsel will still be able to object to the previous declaration during the witness interview on substantive grounds at trial.

3. Ethical propriety of D's subpoena to college, non-existence hearing, without notice to P & P's recourse.

A subpoena may be issued in order to obtain documents from a third party (note: in GA, a request for production is sufficient to obtain such documents, unlike in federal court where a subpoena is required). The subpoena must be served on the opposing side. This is practically because the opposing side may have grounds to move for a protective order, or to quash the subpoena prior to the production date. Thus, it was unethical for D's counsel to subpoena college registrar documents without serving that subpoena on P's counsel.

It was furthermore unethical for D's counsel to advise the college that a hearing would occur if the college failed to produce the transcript, when there was no such hearing set or even contemplated. That is an attempt to strong arm the college into producing documents in order to avoid a costly and time consuming personal appearance, and is inappropriate. D's counsel did not intend to have a hearing, and that is evident from the fact that D's counsel already had another hearing at the same time and date of the hearing set forth on the subpoena. D's counsel acted improperly when sending the subpoena.

There are a couple of avenues that P can pursue in order to obtain recourse. First, if P's counsel discovers the subpoena, he may be able to prevent production by filing a Motion for Protective Order or Motion to Quash. The deadline by which to respond to the subpoena should be extended and should run from the date P's counsel obtained notice of the subpoena. P's counsel should also request that D and D's counsel be sanctioned for their malfeasence. Second, if the transcript is actually produced, P's counsel should move to exclude the transcripts as they were improperly obtained. P should also request sanctions as set forth above.

Question 4 - Sample Answer # 2

1. Typically counsel should investigate claims before filing them to determine whether the claim is valid or frivolous. But in this case it was reasonable for the attorney to file without investigating in order to file by the statute of limitations deadline. Even with the limited time period, counsel was able to review the accident report and make some limited determination concerning the validity of the claim. Like any attorney, counsel has a continuing duty to investigate and determine the claims are valid or withdraw the complaint. Thus, counsel must continue to investigate the claims, conduct a thorough investigation of the validity of the claims, and take steps to withdraw from representation or convince the client the claim is invalid and withdraw the complaint. Continuing to pursue the claim would be unethical and could subject the attorney to sanctions.

2. Counsel's interview of Clarence without Defendant's knowledge was ethically acceptable. Clarence did not represent the defendant at that time, was not employed there, and did not have any further connection with the Defendant. Clarence was not a representative or agent of the Defendant and Defendant's counsel did not represent him. Nor was there any indication that Clarence was represented by counsel. Employees may be represented by counsel if they were involved in the accident. Here, however, Clarence was not directly involved, just a passenger, and without further involvement he is simply a witness to the event. Both Defendant and Plaintiff may have direct access to witnesses, as long as the witnesses are not compelled to speak to counsel if they do not wish to and are not represented by counsel. Here, Clarence does not appear to have counsel and he was willing to testify and assist Plaintiff's counsel. Therefore, contacting him without the Defendant's knowledge was proper. The accident scene is a public place, fully accessible by anyone, so taking Clarence there would not be improper. Taking a recorded statement would also be proper. The judge should deny the Motion for a Protective Order because Plaintiff's interview of Clarence was not unethical or privileged. Plaintiff complied with his duty to notify Defendant of the deposition time and place. Counsel should also disclose the payments made to Clarence to the Defendant. Otherwise, counsel's behavior is ethical and acceptable.

3. It is not ethical for the Defendant's attorney to subpoena a witness for a hearing without notifying opposing counsel in advance. A subpoena is not a discovery device and should not be used to conduct a "fishing expedition" into the Plaintiff's background. If the transcript is relevant to the Defendant's case (which it could be, depending on Arthur's disability) or could produce relevant evidence in discovery, the Defendant should properly request these documents in discovery rather than using a subpoena. Furthermore, the subpoena was improper because it did not reference a valid proceeding. The court would not have the authority to exercise the subpoena without an appropriate proceeding. Plaintiff could move to quash the subpoena or the information discovered in the subpoena if the registrar complied with the subpoena without Plaintiff's knowledge. If the registrar complies with the subpoena and sends the transcript to the Defendant, the plaintiff could prevent disclosure of the evidence through a motion in limine to exclude the evidence, based on a rule of evidence, such as irrelevance or its relevance is substantially outweighed by the danger of unfair prejudice. Some hearsay rules may also apply, although the transcript is probably admissible as a business record.

Question 4 - Sample Answer # 3

1. Plaintiff's counsel did not breach any ethical duties or standards by filing the complaint for damages prior to having conducted any investigation into the facts. In this case, the statute of limitations was about to run and the attorney had only two days in which to file a complaint. Attorney did not file the complaint without any investigation or actual knowledge of the facts, instead, he did have some knowledge of the incident, which he gathered by reviewing the accident report. There is no requirement that an attorney must conduct a full fledged investigation before they file a complaint, although ideally that is the course that an attorney would like to follow. Here, there simply wasn't enough time to conduct additional investigation other than to read the accident report and file a complaint. When an attorney files a complaint in GA, they sign it and simply affirm that it is not being brought for any improper purpose. And that requirement is met here. The attorney was not filling the complaint for any improper purpose. It should be noted that in GA even though the attorney is required to sign the complaint and aver to certain things, there is no mention of any particular sanctions if an attorney were found to have violated this rule. This is very different from the Federal rules, which are very specific as to what the attorney is swearing to when he signs the complaint and provided detailed sanctions which are often enforced if an attorney is found to have violated the federal rule. Furthermore, if the attorney is concerned about his actions in filing the complaint without having the opportunity to conduct additional investigation, he could always file an amended complaint as soon as possible as a matter of right anytime before trial, or attorney could voluntarily dismiss the case (with Arthur's guardian's consent) prior to the defendant answering and then under Georgia's renewal statute the attorney would have the remaining statute of limitations period or six months, whichever is longer, to refile as a matter of right. This means that even though the statute of limitations period had run in this case, attorney would still have six months to re-file and the dismissal of the previous claim could not be used against the plaintiff in the second case.

Regardless of which avenue counsel takes, he has an obligation to be a zealous advocate for his client and has a continuing obligation to conduct a proper investigation on behalf of his client. Counsel also has a duty of candor to the court, which means he has a duty to be honest and forthright with the tribunal at all times.

2. I believe that under GA law, the court should deny the protective order. Unlike in federal court, in GA there are no initial mandatory disclosures, such as people who may have relevant information about the crime. Both counsels have a right to track down witnesses, interview them, collect information, revisit the accident scene, etc. without contacting the other side before hand, unless the person being interviewed etc is the opposing party, in which case counsel's permission is required. This is all part of the investigation of a client's case. More formal inquires such as depositions do require that you notify the other party, which counsel did prior to taking Clarence's deposition.
Additionally, it does not appear that plaintiff's attorney was trying to pull a fast one on the defense because defense counsel knew that plaintiff's attorney was looking for Clarence, since plaintiff's attorney had contacted the defense about Clarence's location, and plaintiff's attorney did notify the defense that it had located Clarence and provided the defense with his location, as well as noticing their deposition, thus defense was not prejudiced by the plaintiff's counsel's actions and has an equal opportunity to investigate the matter

themselves. Therefore, there is no reason to grant the protective order. This would be a different answer if Clarence had still been an employee of Hauling Freight, in which case, plaintiff's counsel would have had to notify Hauling prior to flying Clarence out and interviewing him because Hauling is a defendant and Clarence as an employee would have been considered an agent of Hauling. However, since Clarence was fired for reasons unrelated to the accident, I do not believe that the plaintiff's counsel had to notify defense counsel before it took any of the actions it did. Therefore, I think that the protective order should be denied. Even if the protective order is granted by the court and Clarence's prior recorded statement is excluded, there is nothing to prevent the P's counsel from gathering the same information through the deposition or from calling Clarence as a witness at trial.

3. Here, defense counsel has probably violated some ethical rules by failing to notify plaintiff's counsel of the subpoena of the registrar and for subpoenaing the registrar for a non-existing hearing. The plaintiff is entitled to notice of subpoenas in a case, particularly when it is a subpoena for an alleged hearing and requesting that a non-party produce certain documents. Additionally, the fact that defense counsel knows that the subpoena is for a non-existent hearing is violative of the attorney's ethical obligations. This is taking action for an improper purpose and also violates the duty of candor. If all the defendant wants is to get the documents then all the defense had to do in GA would be to file a request for production of documents with the non-party, a subpoena is not required in GA.

Assuming that the registrar produced the transcript at or before the non-existent hearing, plaintiff's counsel could file a motion exclude the evidence or a protective order due to the defense counsel's violations in order to ensure that the defendant does not gain some unfair advantage by acting unethically. In the alternative, plaintiff's counsel could seek to have the transcripts turned over to them immediately as well. It is unclear what relevance Arthur's college transcripts have in this case, so it is possible that plaintiff's counsel will not want to bother with the process of trying to have the evidence excluded or otherwise limited in use.

In addition to trying to get the transcripts kicked out, plaintiff's counsel should report the defense counsel to the Georgia Bar for his ethical violations and abuse of the process.

MPT 1 - Sample Answer # 1

III. Legal Argument

A. THE IMMIGRATION OFFICER'S DECISION IN THIS CASE WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD BEFORE HIM AS A WHOLE AND MR. ROWAN HAS SATISFIED THE 'GOOD FAITH' MARRIAGE REQUIREMENT.

The record in this case establishes that Mr. Rowan was married to Ms. Cole in good faith and unfortunately the couple has irreconcilable differences which lead to their divorce. Mr. Rowan is able to show that his application for waiver should have been granted based upon the requirements set forth in 8 CFR § 216.5(2). I have specifically listed those requirements and the applicable facts below:

(i) Mr. Rowan has provided documentation relating to the degree to which the financial assets and liabilities of the parties were combined by providing documentation of his and Ms. Cole's lease on a house, promissory note for $20,000, printouts of their joint bank account, and Joint tax returns. See Lamm Report.

(ii) Mr. Rowan has provided documentation relating to the length of time that they cohabitated after the marriage. See Affidavit of Ms. Cole.

(iii) Other evidence by way of witness statements that announce that the couple announced to others that they were married, and lived as a married couple for many months prior to the divorce. Furthermore, Ms. Cole's

According to the above cited code the application must be considered as a whole to determine if Mr. Rowan and Ms. Cole entered into the marriage in good faith. Furthermore, The cases of *Hua v. Napolitano,* and *Connor v. Chertoff* bracket for the court how to make such a determination. Both cases instruct that a determination of whether the marriage was entered into in good faith is to be viewed by the totality of the evidence and circumstances. Here, the investigator has only considered a few portions of the entire evidence, but even what was considered is sufficient to establish that the marriage was entered into in good faith. The record is silent as to any evidence that would suggest that Mr. Rowan had any ulterior motives for marrying Ms. Cole with the exception of the statements of Ms. Cole herself. The statements of Ms. Cole that Mr. Rowan had a "lack of commitment to the relationship" or that he "carefully evaded any long-term commitments, including children, property ownership, and similar obligations" are not supported by the record. Mr. Rowan was not married to Ms. Cole for any length of time that one would normally expect to see the couple setting down firm roots, having children, buying a home, and establishing careers. Furthermore, Ms. Cole admits that she was "shocked and angered" when Mr. Clole stood his ground and refused to quit his job to follow her. She admits that she "fully expected" that he would follow her. Ms. Cole admits that Mr. Rowan's objection to moving was because he was afraid that it would have a negative impact on the marriage and his career. See Affidavit of Ms. Cole. Mr. Rowan has stated that she told him that if he refused to move with her so that she could pursue her goals, she would fight his establishing permanent residency. She now seeks to use the United Stated Government and Mr. Rowan's desire for permanent citizenship as a tool to exact her revenge on her ex-husband

as she attempted to use it to attempt to coerce him to move. Had Mr. Rowan gone with Ms. Cole under such duress the chances are high that they would be divorced today anyway. Reading the record as a whole the investigator should have concluded that this was a marriage much like any other, where two people met, fell in love, made mutual concessions, and eventually stopped making those concessions and grew apart. There is nothing to suggest that Mr Rowan had some other motive besides his love for Ms. Cole.

B. THE TOTALITY OF THE EVIDENCE IN THIS CASE SUPPORTS GRANTING MR. ROWAN'S PETITION

First, the Mr. Rowan met the requirement for "Timely Petition and Interview for Removal of Condition" and the conditions for "Waiver of Requirement to File Joint Petition" as set forth in 8 USC § 1186a.(c)(4)(B) and 8 CFR § 216.5. Mr. Rowan is able to demonstrate that he has met all three elements of this code section which are as follows:

(1) His marriage to Ms. Cole was entered into in good faith as discussed above.

(2) The qualifying Marriage has been terminated by legal divorce. See Lamm Report (Certified copy of judgment of divorce).

(3) Mr. Rowan was not at fault in failing to meet the requirements of paragraph (1) because Mr. Rowan is no longer married to Mrs. Cole and he cannot force her to "jointly" file the petition on his behalf.

Second, Mr. Rowan has met his burden that he intended to establish a life with his spouse at the time he married her. *Hau v. Napolitano.* In the Hau case the court weighed the evidence and the preponderance of evidence established that Hau acted in good faith in entering the marriage. Here, Mr. Rowan likewise acted in good faith and can show many of the same things that the court in Hue relied upon in making its decision. Rowan can show that he was engaged and married prior to ever coming to the United States, that the decision to move to the united states was made by the couple. Ms. Cole admits that the two lived together, announced their selves as married, made joint purchases, and held joint accounts. She further admits that they moved to Franklin so the she could resume her studies. Furthermore, that she wanted to move to Olympia to follow her goals. Finally, Ms. Cole admits that she filed for divorce, not Mr. Rowan. See Cole Affidavit. Therefore, the evidence most strongly suggests that Mr. Rowan intended to be married, was married, remained faithful and continued to live with Ms. Cole as a married couple until she filed for divorce.

Finally, the evidence suggests that this marriage was entered into in good faith. Under the substantial evidence standard that governs the review of waiver determinations, there is such relevant evidence that reasonable minds might accept as adequate to support it. *Connor* (15 Cir. 2007). Like in Connor, Mr. Rowan met and married a citizen of the United States, and that marriage ended in divorce. However, Mr. Rowan has provided ample evidence that the marriage was entered into in good faith by the showing that he had entered into many agreements, and had peacefully cohabitated with Ms. Cole during their marriage. In contrast Connor provided only limited documentation with unexplained inconsistencies, and no indication that they made any major purchases or held joint

contracts. Mr. Rowan is able to show that he was making such purchases and entering into such agreements as would suggest that the couple intended to remain a couple for an extended time.

To Conclude, Mr. Rowan has met all necessary requirements, and has provided sufficient evidence to establish that he entered into the marriage with good faith and his appeal should be granted on the grounds that there is insufficient contrary evidence to make a showing that Mr. Rowan acted in bad faith. Reasonable minds can differ but Mr. Rowan has met the substantial evidence standard.

MPT 1 - Sample Answer # 2

TO: Jamie Quarles
FROM: Examinee
RE: Matter of William Rowan

Brief: Appeal of Denial of I-751 Petition to Remove Conditions on Residence of William Rowan

I. Petitioner Met the Burden of Proof for Removal of Condition and therefore Denial was in Error.

(A) Applicable Law for Petition:
Under 8 USC §1186(a), a conditional basis for the status of an alien admitted for permanent residence can be removed by a timely petition and interview for the removal of the condition. This can be achieved by both the alien spouse and a petitioning spouse jointly submitting the petition to the Secretary of Homeland Security and which requests the removal of the conditional basis. However, in situations where one spouse does not consent to the removal of the alien-spouse's condition and does not wish to jointly submit to the removal of the condition, the alien spouse can petition on his own behalf via a Hardship Waiver under 1186a(c)(4). In doing so, the alien spouse may remove the conditional basis of his permanent resident status by demonstrating that: a) his or her qualifying marriage was entered into in good faith, but was terminated (other than by death of the other spouse), and b) that he was not at fault in failing to meet the requirements of jointly filing a petition in paragraph 1) of 1186(a).

Under 8 C.F.R. 216.5, in determining whether to grant a resident alien's petition via Hardship Waiver, the director shall consider evidence that the marriage was entered into in good faith by: (I) documentation of the degree of financial assets and liabilities of the parties combined, (ii) documentation concerning the length of time the parties cohabited, (iii) birth certificates of children born to the marriage, and (iv) other evidence deemed pertinent.

(B) William Rowan Met the Burden of Proof in Establishing a Hardship Waiver by Providing Substantial Evidence That His Marriage was In Good Faith

For Mr. Rowan to successfully establish that he has met the requirements necessary for a Hardship Waiver under USC §1186(c)(4), he must show that he was not at fault in being unable to jointly file a petition with his now divorced spouse under 1186(a), and he must show that the marriage upon which his status was based was entered into by good faith on his part. Mr. Rowan has the burden of proving the good faith marriage requirement by a preponderance of evidence. Connor v. Chertoff (15 Cir. 2007). Mr. Rowan must present evidence that he "intended to establish a life with his spouse at the time [he] married [Ms. Cole]" (Hua v. Napolitano)(15 Cir. 2011)). Mr. Rowan has provided substantial evidence that he entered into his marriage with Ms. Cole with the intent to establish a life with her, and was not solely for any immigration benefit.

In support of his Petition, Mr. Rowan provided the testimony of two witnesses, George Miller and Anna Sperling. Mr. Miller testified that Mr. Rowan and Ms. Cole held each other out to others as being husband and wife, and he had heard them discussing leasing property together, borrowing money for car purchases, and buying real estate as part of their marriage. Ms. Sperling testified that she overheard that Ms. Cole felt gratitude for Mr. Rowan in moving to the U.S. and that he "did it out of love." Furthermore, Mr. Rowan provided documents in support of his good faith marriage such as a lease signed by him and Ms. Cole, a promissory note co-signed by Ms. Cole, and evidence of a joint bank account and joint tax returns he had with Ms. Cole.

In evaluating whether the Board of Immigration Appeals improperly denied Mr. Rowan's petition for Hardship Waiver, the Court should look to see if there was such relevant evidence as reasonable minds might accept as to support their denial, even if it were possible to reach a contrary result on the basis of such evidence (Connor v. Chertoff). In this circumstance, the BIA's decision lacked the substantial evidence to show that Mr. Rowan did not marry in good faith. The only substantive evidence to show that Mr. Rowan had ulterior motives for his marriage, is in the Affidavit of Ms. Cole. It was her testimony that Mr. Rowan evaded long term commitments, and his primary reason for marriage was because he had been actively looking for a position in the U.S. for several years. Furthermore, Ms. Cole and Mr. Rowan were apart for long periods of time due to Ms. Cole's employment. In Connor v. Chertoff, the Court held that the alien spouse spending a majority of his time away from his wife and other evidence of his lack of commitment evidenced that his marriage was not entered into with the intent to establish a life with his spouse, and therefore was not in good faith. Connor presented evidence of joint checking accounts, and co paying bills with his spouse in support of his showing good faith, as well as testified on his behalf. However, the Court determined the Connor was not a credible witness because of his failure to list his children on the SCIS forms. Furthermore, he did not have any corroborating witnesses, and provided no signed leases or applications of life insurance in both spouses names. Therefore, the Court upheld the BIA's decision.

In the present case, Mr. Rowan's Petition can be distinguished from that of Connor. Mr. Rowan provided his own testimony to the marriage as well as providing corroborating witnesses. His testimony contradicts that of Ms. Cole's in that he was only marrying for purposes of employment. In his Interview, he admits that he was looking for a job opportunity in Franklin City, but received no offer before entering into the marriage and moving to the U.S. There is nothing in Mr. Cole's interview, or his petition to suggest that he was lying as in the case of Connor. Furthermore, Mr. Cole provided evidence of a lease co-signed with Ms. Cole as well as a promissory note, in addition to evidence of a joint bank account. Although, Ms. Cole stated that the two often didn't spend time together, this was admittedly due to her demanding job requirements, as opposed to in Connor where the petitioner simply did not spend time with his spouse because he did not appear to be taking the marriage seriously. The evidence suggests that Mr. Rowan and Ms. Cole divorced not because Mr. Rowan was disinterested in the marriage, but because Ms. Cole's differences in job employment and the offer she received to movie to Olympia. Although Mr. Rowan expressed his discontent with leaving the job he had acquired, it should be noted that at that point, he had already committed to an apartment lease and loan with Ms. Cole which shows that he wanted to spend his life with her at the time he had moved to Franklin. Ms. Cole's testimony that Mr. Rowan married for reasons outside of intending to stay with her, is contradicted by her own statement which was overheard by

Ms. Sperling, in which she admitted that she was convinced that Rowan "did it for love" (referring to the marriage). Ordinarily, this would be considered hearsay, but in Connor v. Chertoff the Court affirmed that the Federal Rules do not apply to evidence admitted at hearings (such evidence only need to be probative and fair). Finally, even though the fact that Mr. Rowan applied for his conditional residency soon after his marriage proposal, the Court has held that this alone does not tend to show that the marriage was not entered into in good faith (see Hua v. Napolitano). The Court, in reviewing the BIA's decision, should assess the entirety of the record when determining whether petitioner met the burden of proof (Id). In conclusion, the record will show that Mr. Rowan presented substantial evidence that his marriage was entered into in good faith and therefore he should be allowed a hardship waiver pursuant to §1186(a)

MPT 1 - Sample Answer # 3

III. The Petitioner's Application for a "Hardship Waiver" Should be Granted Based on Petitioner's Good Faith in Entering Marriage and Lack of Fault in Divorce.

As a general rule, an alien spouse obtains permanent resident alien status only on a conditional basis. 8 USC § 1186a. To have their conditional status removed, the resident alien and their spouse must jointly petition to the Secretary of Homeland Security, 8 USC § 1186c. However, the law allows gives the Secretary discretion to remove the conditional basis of the resident alien upon the alien showing: 1) they entered the marriage in good faith; 2) and the resident alien was not at fault in the parties divorce and subsequent inability to jointly apply. 8 USC § 1186(c)(4).

In reviewing waiver determinations under the statute, an appellate court applies the substantial evidence standard. Connor v. Chertoff. Consequently, if there is "such relevant evidence [that] reasonable minds might accept as adequate to support it," the decision should be affirmed, even if it were possible to reach a different result. Id. The petitioner has the burden to establish that he intended to establish a life with Ms. Cole at the time she married him. Hua v. Napolitano. "If [he] meets this burden, [his] marriage is legitimate, even if securing an immigration benefit was one of the factors that led [him] to marry." Id. William Rowan both entered into his marriage to Sarah Cole in good faith and was not at fault in their later divorce, and consequently, the Secretary should grant his Hardship Waiver for permanent residency.

A. Petitioner Has Shown Good Faith Based on Financial, Social, and Other Actions Taken During Marriage, and Was Not at Fault in the Divorce.

William Rowan married Sarah Cole in good faith with full intent to create a life with her. "To determine good faith, the proper inquiry is whether [the parties] intended to establish a life together at the time they were married." Connor. In making the determination of parties' good faith, the reviewing judge may consider such factors as the actions of the parties after the marriage to show subjective intent, financial actions taken by the parties, and testimony about their courtship and life together while married. Id.

In Connor, the Court of Appeals upheld a denial of petitioner's application for permanent resident status, because he did not provide sufficient corroborating support and evidence of his good faith, nor did he dispel the adverse finding regarding petitioner's credibility. In Connor, the petitioner presented evidence of unfiled financial documents (lease, applications for life insurance and car title) as support for their good faith in marriage. However, the court found his omission of reference to previously sired children in both his written application and in a subsequent interview to be evidence that he was not a credible witness. Further, the court found that the petitioner failed to overcome his lack of credibility because he did not provide corroborating testimony.

In Hua, the Court of Appeals reversed a denial of permanent resident status of a Chinese national after the petitioner established good faith in entering the marriage. Hua. There, the petitioner presented evidence of a lengthy courtship including visits to each other's country of residence, a consideration to reside in either parties' home country, cohabitation for approximately one year, and joint account and financial activity during the marriage.

To show subjective good faith in entering the marriage, petitioner must establish that, when he entered the marriage, he intended to establish a life together. Petitioner has met this burden. William Rowan will testify that when he saw Sarah Cole, it was "love at first sight." He asked her out immediately, and the two began dating a few weeks later. The two met in the fall of 2010 and married on December 27, 2010. While the length of the parties' courtship was not lengthy and cuts against petitioner's argument, his subsequent actions during the marriage establish his good faith. See Connor ("The immigration judge may look to the actions of the parties after the marriage to the extent those actions bear on the subjective intent of the parties at the time they were married.")

After the two were married, Cole suggested they move to the United States to pursue her career. While it is true that Rowan did inquire about potential jobs in the US before their marriage, he had valid reason to do so. He had family living in the States and believed that there were better job opportunities for him here. Further, if he had received a job opportunity in the States, he could have obtained a work VISA rather than seek marriage. Having already lived together for six months, the two parties moved to the US in May 2011 and lived together until their separation in April 2013. Cole frequently traveled for work and based on her travel, the two were apart for about seven months of their marriage. This was through no fault of Mr. Rowan, and he resented her absences from their home.

While they were living together, they held themselves out to friends as being married. Witnesses will testify that they frequently socialized with the couple, visited their residences, and will further testify that they self-identified as husband and wife. Another friend of the couple, Anna Sperling will also testify that Cole was grateful for Rowan moving to the US without a job and that she was convinced that he "did it for love." Further, in a sworn affidavit, Sarah Cole has stated that, "I believe now that he saw our marriage primarily as a means to get U.S. residence. *I do think that his affection for me was real*." (emphasis supplied) Cole Affidavit.

The parties also took financial actions that indicate a good faith interest in marriage. They signed a two year lease on a house in Franklin City. Rowan co-signed a $20,000 loan for Ms. Cole. They had joint bank accounts and filed joint tax returns. They shared living expenses and named each other as next of kin in their health insurance policies. George Miller will also testify that they considered buying real estate together. Ms. Cole believed that Rowan has avoided long term commitments including property ownership and similar obligations, but the evidence suggests otherwise. Further, due to her travel schedule, likelihood of a move to another city, and other reasons, Rowan may have had justification for not wanting to buy a house or start a family yet.

Ms. Cole initiated discussions of moving to another city, which Rowan opposed, as was his right as an equal partner in the marriage. Rowan believed the two, in the best interests of both of them, should remain in Franklin City. Both had jobs there, and they had a stable life with friends. Married couples can disagree about the course and future of their families without creating an assumption that the opposing spouse is acting in bad faith. Upon Cole's insistence the couple move and against the desires of her husband, she moved to Olympia shortly after presenting him with the opportunity. After he refused to move, she immediately filed for divorce.

William Rowan's activities after he married Sarah Cole indicate that he married her in good faith and had every intention of remaining married to her. He was in love and her actions and placing priority in her job affected his feelings in the marriage. He entered the marriage in good faith and was not primarily at fault in the resulting divorce. For these reasons, his hardship application should be granted.

B. The Secretary's Decision was not Supported by Substantial Evidence in the record.

In Hua, the Court of Appeals reversed a denial of permanent resident status of a Chinese national after she presented evidence of a lengthy courtship, consideration by the parties to live in either the US or China, cohabitation for more than a year, and joint accounts and financial activity during marriage. Hua. The government raised concerns about the timing of petitioner's application vis-a-vis their marriage, the timing of the marriage in relation to the expiration of petitioner's VISA and the fact that Hua moved out of the marital home. The Court addressed each of these concerns in kind and found that petitioner met her burden based on a review of the entirety of the record. Id. The court also found important the fact that petitioner's husband initiated the separation and divorce, and not the petitioner. Id.

In reviewing the entirety of the record, there is insufficient information to support the Secretary's denial of William Rowan's hardship application. As established above, he entered the marriage in good faith. While it is true that seeking permanent resident status may have been a factor in Rowan's marriage to Cole, Hua established that such a marriage can still be legitimate.

The only evidence to support the Secretary's decision is the shortness of their courtship, Cole's testimony, and his refusal to move to Olympia. All have been addressed above. However, Rowan produced ample evidence to support his application. For these reasons, the Secretary's decision should be reversed.

MPT 2 - Sample Answer # 1

To: Brenda Brown
From: Examinee
Date: Feb. 25, 2014
Re: Peterson Engineering Consultants

Our client, Peterson Engineering Consultants, is considering revising its technology use policies in light of the results of a recent survey concerning computer use at work. Peterson would like us to determine when it can be held liable for its employees use or mis-use of its internet-connected technology. It would also like us to recommend changes and additions to its current policies. Peterson's goals include: (1) clarifying ownership of equipment, (2) clarifying monitoring policies, (3) ensuring technology is only used for business purposes, and (4) ensuring that its policies are effective and enforceable.

Circumstances in Which PEC Can be Held Liable for its Employees Use or Misuse of Inter-Connected Technoloy

Peterson may be held liable to third parties for its employees acts that were committed while using company equipment. Such liability is normally found through (1) ratification or the (2) doctrine of respondeat superior.

In order to be held liable to a third party through ratification, Peterson would have to adopt the employees conduct, which can be established by a failure to discharge an employee within a reasonable amount of time. *Fines.* The 15th Circuit has found that a four-business-day turn around for an IT investigation into the use of work email is acceptable. Although Peterson does not necessarily need an internal policy setting forth a deadline by which it must investigate potential misconduct relating to use of its computers, Peterson should attempt to ensure it can make such an investigation within a similar time frame (four business days). *Fines.*

Under the doctrine of respondeat superior, an employer is vicariously liable for its employee's torts committed within the scope of employment. *Fines*. However, an employer will not be subject to liability if the employee "substantially" deviates from his employment duties for personal purposes. *Fines*. Accordingly, Peterson's computer policies should be very clear about the type of use that is permissible and impermissible. This should give Peterson the ability to argue in Court that an employees misfeasance is so outside the bounds of the employees job description that the doctrine of respondeat superior does not apply.

Peterson may also be subject to liability to its employees purely on the basis of monitoring its own computer/electronic equipment. Peterson is a private company and could be subject to tort suits for an invasion of privacy. In contrast, *public* employers are subject to the privacy right set forth in the Fourth Amendment, a higher standard than *private* employers. [Footnote: Similarly, First Amendment protections regarding the restriction of an employee's speech do not apply to private companies. *Lucas*.] The tort of invasion of privacy "occurs when a party intentionally intrudes . . . upon the solitude or seclusion of another or his private affairs or concerns, if the intrusion would be highly offensive to a

reasonable person." *Hogan*. However, if Peterson follows the guidelines/recommendations set forth below, it should lower its risk of any "invasion of privacy" claim against it.

Recommended Changes and Additions to the Employee Manual

The following constitute a list of proposed additions to or changes of the existing Peterson policies concerning use of Peterson-owned computer equipment. In the event Peterson decides to adopt these changes, we recommend that further review be given to the exact wording of the policy, as any ambiguity may result in adverse legal decisions. *See Catts*.

1. Block and/or Ban Social Media and Recreational Websites and Personal Email

Peterson should block/ban social media and recreational websites. This would ensure that its employees are more productive at work, and spend less time than the average employee engaging in social media/shopping/sports browsing during work time. This would address Peterson's concerns as set forth in the informal survey.

2. Clarify "incidental" use

In the event that Peterson does not want to block or ban recreational sites and email, it must clarify what "incidental" use means. As set forth above, ambiguous statements can be fatal to restrictions contained in policies. Examples of improper v. proper conduct would be useful.

3. Install monitoring software to track content, keystrokes, time spent, electronic usage and disclose such monitoring

Peterson should install monitoring software on its computers/cell phones/equipment to ensure that it is able to effectively enforce its standards. Peterson should also advise its employees of the same. Such new standards will meet Peterson's goal of clarifying monitoring of its equipment. These standards should also include a well-defined scope of "monitoring." Although it may not be necessary to go into detail concerning the mechanics of monitoring, the Fifteenth Circuit has expressed a preference for a defined standard. *Hogan*.

4. Disclose that computers without monitoring software may be searched

Similar to recommendation number seven, Peterson should advise that even without monitoring, the work-supplied equipment may subsequently be searched/examined. This would meet Peterson's goals of ensuring its polices are effective and enforceable, as well as clarifying its monitoring standards. Again, in *Hogan,* the 15th Circuit advised that it would have been preferable (though not required) if the employer at issue warned its employees that it had the ability to search work-provided computers prior to doing so. Thus, out of an abundance of caution, we would recommend including such a disclosure in Peterson's new policy.

5. Restrict use of computers/equipment to business

Peterson should revise its policy manual to explicitly restrict the use of computer equipment to business use. This would satisfy its stated goal of ensuring that business use is the only use allowed. It would also set forth a clear ground upon which Peterson could punish or even fire an employee on the basis of personal use of equipment.

This restriction may also assist Peterson in potential lawsuits wherein a third party is trying to hold Peterson liable for the acts of its employees. For example, in *Fine*, the Court found that a company policy restricting computer use to business purposes allowed an employer to avoid liability under the respondeat superior doctrine because the policy made clear that any misuse was outside the scope of the employees duties. Thus, as the subject employees misuse of the employer's computers was purely personal and violated the use policy, the employer could not be held liable to the damaged third party.

This restriction would also provide nearly a complete bar to any invasion of privacy tort actions. For example, in *Hogan*, the computer policy stated that the subject computers were not to be used for personal purposes at any time. Based on that language, the Fifteenth Circuit found that there was no expectation of privacy attendant to the use of the subject computers. Accordingly, any personal use of the computer was open to the employer , and any search of the computer did not constitute a tort or violate any laws. The *Hogan* court accordingly approved of the search and of the firing of the employee who used the computer personally.

However, Peterson should be advised to consider whether such a draconian standard will actually benefit the company and its employees. Indeed , the Supreme court has even recognized that personal use of work-owned equipment "often increases worker efficiency. *Ontario v. Quon.* It is of importance to all businesses, including Peterson, that its employees work efficiently and productively. In order to ensure that Peterson's employees are still productive after the implementation of the above-recommendations, we should recommend continual monitoring, likely through surveys, to ensure that the recommendations are neither too strong nor too weak.

6. Actual Enforcement of Policies & Set Terms

In order to ensure that its policies are given full effect and remain enforceable, Peterson must regularly enforce these policies. Indeed, if Peterson were to "abandon" its policies through custom and practice, it effectively changes the policy to permit the forbidden conduct. *Lucas.* Thus, Peterson must actually enforce these rules in practice. In the event that the rules become unenforceable, Peterson should change the policies in writing, rather than abandoning them in practice.

It may be beneficial for Peterson to have specific guidelines concerning *potential* punishments for malfeasence, or specific times a review of the monitoring software may occur. Setting forth punishments would not prevent immediate termination. *Lucas.* In addition, Peterson should, at minimum, have a term setting forth that any non-enforcement decisions are made on a case by case basis and do not constitute an abandonment or waiver of the policy in any way. *See Fines.* This term should be noted conspicuously and

should probably be placed right before the employee's signature block.

MPT 2 - Sample Answer # 2

To: Brenda Brown
From: Examinee
Date: February 25, 2014:
RE: Peterson Engineering Consultants

Memorandum

1. Legal Bases Under Which PEC Could Face Liability

(a) Actions of PEC Employees

There are some bases of liability PEC could face as a result of the actions of its employees. Tort theory has always allowed employers to face liability for damages caused by employee actions taken within the scope of employment. This standard still applies in the current digital age.

The first possible basis of liability is vicarious liability for the willful and malicious acts of an employee. According to Fines v. Heartland, Inc. ("Fines"), an employer may be held liable for its employee's willful and malicious actions if the employer ratifies those actions. An employer ratifies employee actions when the employer voluntarily elects to adopts the employee's conduct by treating it as its own. A claim of ratification must be supported by evidence, potentially including evidence that the employer failed to fire the offending employee. Using company e-mails for improper purposes could potentially pass liability to PEC, so it is important to guard against this with good policy.

The second possible basis of liability for employee actions is that of respondeat superior. This action is related to the one above, in that it is also based on vicarious liability. As Fines explains, the doctrine of respondeat superior holds an employer vicariously liable for employee torts if those torts are committed within the scope of employment. It is possible to extend the liability to an employee's willful torts, so long as they are committed within the scope of employment. A deviation from a company rule does not necessarily remove the acting employee from his or her scope of employment. Rather, the deviation from a rule must be substantial in that it goes outside employee duties and into personal purposes. As a result, PEC should make sure its policies are complete and comprehensive.

(b) Actions of PEC Itself

In addition to potential liability for employee actions, PEC could face liability for its own. While some applicable precedent in our jurisdiction mentions First Amendment claims, PEC does not have to concern itself with this; First Amendment claims apply only to government employers, which PEC is not.

More relevant would be claims based on the wording of and omissions from PEC's employee manual. The first possible claim is that PEC monitoring of computer use is a tortious invasion of privacy. According to Hogan v. East Shore School ("Hogan"), an 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." Since computer use monitoring could potentially include examination of e-mails and web browsing, this concern is relevant to PEC. The best way to avoid this liability is included in the discussion below. Additionally, in the absence of clear policies, it is possible that PEC could face a wrongful termination suit from an employee who unknowingly committed a violation.

2. Recommendations For Changes To The Manual That Would Minimize Liability

The president stated three goals in evaluating the PEC policies. This memo will address each of these in turn, and explain the appropriate recommendations. In closing, this memo will recommend additions to the manual beyond the president's inquiries.

(a) Clarifying Ownership of PEC Computers

In order to clarify the ownership of computers used by PEC employees, the best approach would be one similar to that illustrated in Lucas v. Sumner Group, Inc. ("Lucas"). The company in the Lucas case had text in its employee handbook dedicated to the ownership of the devices. Specifically, it clarified that the devices are "company property." Currently, the PEC has language that refers to PEC ownership hidden within a longer sentence. I would recommend even more specific language that appears at the beginning of the relevant section in emphasized print, such as, "**All computers, mobile phones, and other electronic devices issued to PEC Employees are the property of PEC.**" This would avoid a complaint similar to the one in Hogan that found fault with policies being hidden within other texts. Additionally, it would eliminate any ambiguity caused by the complicated grammar of the current sentence.

(b) Ensuring Use for Business Purposes Only

In order to prohibit personal use of PEC computers, there should be clear, specific language indicating the policy. I would recommend adding a section to the Computer Use and E-mail Use portions of the manual, clearly prohibiting personal use. For example, "Use of this device is strictly limited to PEC Business. Violations of this policy will result in [a punishment deemed appropriate]." I would also add clear policies regarding social networking, online shopping, and other activities. The National Personnel Association summary indicated that a large percentage of employees spend work time on these activities. Having clear policies on the matter should help reduce the problem.

Ensuring Enforceability

For your policies to be effective and enforceable, they must be clear and complete. The first recommendation for achieving this goal would be to make sure that this section of the manual is situated prominently. In the event that an employee simply "skims" a manual, she will be less likely to miss this important section. While, as the Hogan case states, a failure to notice a policy rests with the employee herself, ensuring that the section is adequately noticeable serves to stop potential issues before they arise.

Further, as the Lucas court stated, the terms must be "as unambiguous as possible." Use imperative adverbs, rather than permissive. In other words, in the current Computer Use, section, the language should be altered to be more direct. The first sentence would be more effective if it was something to the effect of, "PEC employees who are given equipment for use outside of the office do so with the understanding that the equipment is the property of PEC. It must be returned if the employee leaves the employee of PEC, whether voluntarily or involuntarily."

Additionally, it would be more clear to replace "PEC may review any employee's use" with "PEC reserves the right to review any employee's use." The language as it stands could indicates that PEC has not yet decided whether it will review activity. As stated in Lucas, a common company practice can override ambiguous written rules, so it is important to be clear. An employee could argue that the language appears uncertain, and she has never been monitored in the past, so she assumed PEC decided against a monitoring policy. Further, as expressed in Hogan, PEC should give its employees adequate notice that monitoring of their activities is possible. Somewhere in this section, PEC should emphatically indicate that PEC employees have no expectation to privacy as to their activities on PEC devices. This addition would substantially reduce the privacy concern discussed in Section 1.

(d) Additional Recommendation

In addition to the adjustments discussed above, PEC should consider adding a section specifically denouncing use of PEC equipment for the purpose of harassment or other improper reasons. As the Fines case indicates, e-mail is a very powerful tool for sexual harassment, defamation, and other wrongful conduct. Therefore, PEC should add a new section with a title similar to "Conditions of Use." This section should explain a clear prohibition against use of PEC devices for wrongful conduct, including but not limited to harassment and defamation. This section should include a clear explanation of the discipline process for reports of improper conduct. As indicated in Fines, a short delay in termination is permissible for investigation purposes. However, it would be wise to put all employees, including potential victims, on notice of how the investigation works, how long it takes, and the levels of discipline that could result.

Finally, PEC should be diligent in frequently updating and reissuing its computer and e-mail policies. Considering the dynamic nature of business communications, policies might have to be adjusted for new and updated technologies. Additionally, as explained in Hogan, re-issuing the manual on a regular basis (annually, in Hogan) puts employees on continued notice of PEC's policies and procedures.

MPT 2 - Sample Answer # 3

To: Brenda Brown
From: Examinee
Date: February 25, 2014
RE: Peterson Engineering Consultants

Brief Statement of Facts

Employees at PEC rely on the use of technology to effectively conduct business on a daily basis. Specifically, the employees use PEC-issued technology to communicate with one another, the home office, and clients, and to access information, reports, and other documents over the internet. Recently, PEC has become concerned regarding the risk of liability associated with employees misusing company-owned technology and loss of productivity.

Goals in Revising the PEC Employee Manual

The purpose of this memo is to address potential liability issues for PEC with respect to its employees' use of company technology and provide recommendations with respect to revising the PEC Employee Manual in order to (1) clarify ownership and monitoring of technology, (2) ensure that the company's technology is used only for business purposes, and (3) make the policies reflected in the manual effective and enforceable.

Legal Bases under which PEC Could be Held Liable for Employees' Use or Misuse of Technology

Because PEC is a privately-owned company, there is a low probability of liability for claims of invasion of privacy under the Fourth Amendment and infringement on freedom of speech under the First Amendment. The First and Fourth Amendments apply only to public employers.

Tort of Invasion of Privacy

However, there is the possibility that an employee could have an invasion of privacy tort claim, to which PEC could be liable. See Hogan v. East Shore School. 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. Hogan. In Hogan, a teacher who had been fired from a private school for misuse of the school-provided computer sued the school for invasion of privacy. The issue was whether the teacher had a reasonable expectation of privacy in using the computer. The Franklin Court of Appeal held that there was no reasonable expectation of privacy and thus, no invasion of privacy.

In making its determination, the court examined the policies in the school's employee handbook and its custom of enforcement. While the court admitted that the school could have written a better policy, using clearer language, requiring signatures, including definitions and warnings, the handbook sufficiently notified the teacher that "the computer,

computer software, and account are property of East Shore (the school), and that East Shore reserved the right to monitor the use of the computer at any time." This meant that the teacher should have had no reasonable expectation of privacy.

As a side note, the court in Hogan noted that past practice on non-enforcement might create a waiver of the right to monitor.

Torts by Employees

An employer may be held liable for torts committed by its employees, such as defamation and sexual harassment (among others), through ratification or respondeat superior (vicarious liability). Under the doctrine of ratification, an employer may be liable for an employee's willful and malicious actions if the employer voluntarily elects to adopt the employee's conduct. Essentially, the employer is treating the employee's conduct as its own. Fines v. Heartland. The failure to discharge an employee after knowledge of his or her wrongful acts may be evidence that supports ratification. Fines.

An employer can be held vicariously liable for its employee's torts committed within the scope of employment under the doctrine of respondeat superior. For the employer to be vicariously liable, the torts must have been committed by an employee within the scope of his employment. The term "within the scope of employment" includes actions even in contravention of an express company rule. Fines v. Heartland. However, an employer will not be vicariously liable for an employee's malicious or tortious conduct if the employee substantially deviates from the employment duties for personal purposes. Id.

Wrongful termination

If the employee manual does not clearly provide for the possible causes of termination, an employer could be liable for wrongful termination if it fires an employee for a reason not listed in its manual. In Lucas v. Sumner Group, Inc., an employee fired for violating the company's policy on computer use, sued the company for wrongful termination. The employee had used company internet, computer, and email system for personal use while at work and also off the clock. The issue was whether the policy was unclear as to restricted activities and the consequences of those activities. The Franklin Court of Appeal found that the policy was clear enough and remanded the employee's appeal to trial court. In making its determination, the court stated that when employees are to be terminated for misconduct, employers must be as unambiguous as possible in stating what is prohibited. Lucas. The court declined to make findings, it simply remanded the case to the trial court.

The Lucas court did, however, leave clues useful for our purposes. The court noted that even if a company policy exists, an employer may be assumed to have abandoned or changed even a clearly written policy if it is not enforced or if, through custom and practice, it has been effectively changed to permit the conduct forbidden in practice.

Recommendations

Based on a review of the PEC Employee Manual, taking into consideration the possibilities for incurring liability as stated above, please see the following recommendations.

1. Clarify Ownership and Monitoring of Technology

One way to clarify ownership would be to include a broad statement addressing that the ownership of the PEC-issued technology, using "shall" where possible instead of "should" or "should understand." It should unequivocally state that any technology issued by PEC is company property and remains company property during and after employment, and at all times (24 hours a day, 7 days a week, etc.). There should also be a definition of what "technology" includes so that the employee has proper notice. Included in the definition should be any hardware or accessories issued by PEC, but also software, internet, wireless, etc. If it is preferred, there could be multiple definitions for instruments and channels of technology. The point is that you want to be clear that PEC has ownership of it all to prevent any claims of invasion of privacy.

Once ownership is properly established, the manual should clearly and unambiguously state that PEC retains a right to monitor the technology at any and all times, including emails, deleted items, internet search history, and the like. Use stronger language than "may review," reserve a right to review. Furthermore, it should expressly say that employees should have no reasonable expectation of privacy with respect to company-issued technology (again to prevent claim of invasion of privacy). Furthermore, it would not be a bad idea to set up a systematic monitoring system to enforce the monitoring to prevent claims that the policy has been abandoned or is no longer in practice.

2. Ensure Company Technology Used Only for Business Purposes

There should be clear and unambiguous language as to the scope of use of PEC-issued technology. Again, using words such as "will," "must," or "shall" are clearer than words like "should" or "might." Rather than including a list of what employees may not use the internet for, I recommend using clear language that prohibits any non-business use, and state that non-business use "includes but is not limited to" any listed items. The point is that you do not want to close the list of prohibitions but rather leave it open. This will serve to guard against wrongful termination claims.

3. Make Policies Effective and Enforceable

To prevent any claim for wrongful termination, it should be clear what is not allowed and the consequences for prohibited actions. Any disciplinary reviews or procedures should be laid out so the employee is on notice as to what is expected and what will happen if he or she fails to abide by the handbook. Also, have the employees sign a statement acknowledging their understanding of the policies related to the technology. This adds to further aid in enforcing the policy handbook in the future.

Please review the above recommendations, and do not hesitate to contact me with questions.