



February 2014 MEE Questions and Analyses



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Preface

The Multistate Essay Examination (MEE) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the questions and analyses from the February 2014 MEE. (In the actual test, the questions are simply numbered rather than being identified by area of law.) The instructions for the test appear on page iii.

The model analyses for the MEE are illustrative of the discussions that might appear in excellent answers to the questions. They are provided to the user jurisdictions to assist graders in grading the examination. They address all the legal and factual issues the drafters intended to raise in the questions.

The subjects covered by each question are listed on the first page of its accompanying analysis, identified by roman numerals that refer to the MEE subject matter outline for that subject. For example, the Federal Civil Procedure question on the February 2014 MEE tested the following area from the Federal Civil Procedure outline: IV.D., Pretrial procedures—Discovery (including e-discovery).

For more information about the MEE, including subject matter outlines, visit the NBCE website at www.ncbex.org.

Description of the MEE

The MEE consists of six 30-minute essay questions and is a component of the Uniform Bar Examination (UBE). It is administered by participating jurisdictions on the Tuesday before the last Wednesday in February and July of each year. The areas of law that may be covered by the questions on any MEE are Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Conflict of Laws, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Federal Civil Procedure, Real Property, Torts, Trusts and Estates (Decedents' Estates; Trusts and Future Interests), and Uniform Commercial Code (Negotiable Instruments and Bank Deposits and Collections; Secured Transactions). Some questions may include issues in more than one area of law. The particular areas covered vary from exam to exam.

The purpose of the MEE is to test the examinee's ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation. The primary distinction between the MEE and the Multistate Bar Examination (MBE) is that the MEE requires the examinee to demonstrate an ability to communicate effectively in writing.

Instructions

The back cover of each test booklet contains the following instructions:

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin.

You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise your answer, simply draw a line through the material you wish to delete.

If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions.

Read each fact situation very carefully and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.

Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your conclusions. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.

Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.

Answer all questions according to generally accepted fundamental legal principles unless your testing jurisdiction has instructed you to answer according to local case or statutory law.

NOTE: Examinees testing in UBE jurisdictions must answer according to generally accepted fundamental legal principles rather than local case or statutory law.

February 2014 MEE

▶ *QUESTIONS*

Constitutional Law

Trusts and Future Interests

Secured Transactions

Federal Civil Procedure

Criminal Law and Procedure

Agency and Partnership

CONSTITUTIONAL LAW QUESTION

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

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

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

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

TRUSTS AND FUTURE INTERESTS QUESTION

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

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

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

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

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

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

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

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

SECURED TRANSACTIONS QUESTION

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

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

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

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

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

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

1. As between the bank and the finance company, which has a superior claim to the business's equipment? Explain.
2. Do the claims of the bank and the finance company to the business's equipment continue in the item of equipment sold to the competitor? Explain.

FEDERAL CIVIL PROCEDURE QUESTION

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

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

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

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

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

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

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

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

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

1. Should the court order the customer to turn over the engineer's report? Explain.
2. Should the court sanction the builder for the destruction of emails related to the case, and if so, what factors should the court consider in determining those sanctions? Explain.

CRIMINAL LAW AND PROCEDURE QUESTION

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

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

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

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

The jury found the defendant guilty of both offenses.

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

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

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

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

1. Did the trial court err when it denied the defendant's pretrial motion to dismiss on double jeopardy grounds? Explain.
2. Did the trial court err in its instruction to the jury on the burglary charge? Explain.
3. Did the trial court err when it sentenced the defendant to an additional year of incarceration on the theft conviction based on the expert's testimony? Explain.

AGENCY AND PARTNERSHIP QUESTION

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

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

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

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

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

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

Assume that the Uniform Partnership Act (1997) applies.

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

February 2014 MEE

▶ *ANALYSES*

Constitutional Law

Trusts and Future Interests

Secured Transactions

Federal Civil Procedure

Criminal Law and Procedure

Agency and Partnership

CONSTITUTIONAL LAW ANALYSIS

(Constitutional Law IV.D.)

ANALYSIS

Legal Problems

- (1) Is the city ordinance requirement that businesses install floodlights a taking?
- (2) Is conditioning the approval of a building permit on the grant of an easement to install surveillance equipment a taking of property?

DISCUSSION

Summary

The ordinance requiring businesses to install floodlights is not a *per se* taking under *Loretto*, because it does not force a private landowner to allow a third party to enter and place a physical object on the land. Here, the city ordinance requires the business—not a third party—to install the floodlights.

The ordinance is likely not a regulatory taking under the *Penn Central* balancing test. While the ordinance will impose a cost on business owners, that cost may be offset by the expected increase in business due to the ordinance, and the ordinance does not appear to interfere with the owner’s primary use of the property as a restaurant.

The permit condition, however, is likely an uncompensated taking of property. While the condition has an essential nexus with the city’s legitimate interest in promoting public safety, the city has not made an individualized determination that the easement condition is roughly proportional to the possibility of increased crime due to the restaurant’s proposed addition. Thus, the permit condition likely violates the Fifth Amendment as applied to the states through the Fourteenth Amendment.

Point One (50%)

The ordinance requiring that businesses install floodlights is not a *per se* taking under *Loretto*. It is not a regulatory taking under the *Penn Central* balancing test because the cost of compliance with the ordinance may be offset by an expected increase in business and compliance does not interfere with the business’s primary use of its property as a restaurant.

The city ordinance requiring a business to install floodlights does not effect a *per se* taking of the sort described in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), because no property is physically taken by the government and the ordinance does not involve a physical invasion of private property by a third party.

Even though the ordinance does not constitute an occupation of the property by either the government or a third party, it is still subject to the three-factor balancing test under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), to determine whether it is a “regulatory taking.” Under *Penn Central*, a court must balance (1) “[t]he economic impact of the regulation on the claimant,” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations,” and (3) “the character of the governmental action.” *Id.* at 124. Here, each factor weighs against finding that the ordinance is a taking.

Constitutional Law Analysis

First, the ordinance requirement likely has a minimal economic impact on the restaurant. Compliance with the ordinance is estimated to cost \$1,000, and the city has found that businesses will likely recoup that cost in increased sales. Also, because the ordinance does not interfere with the operation of the restaurant, the owner may still earn a reasonable return on its investment in the property.

Second, the ordinance does not interfere with the business's investment-backed expectations. As in *Penn Central*, the challenged law does not interfere with the owner's "primary expectation" for use of the property—in *Penn Central*, as a railroad terminal, and here, as a restaurant. Further, the ordinance does not prevent the restaurant from expanding to meet the changing business environment.

Third, the character of the government action does not weigh in favor of a taking. While *Penn Central* does say that a "physical invasion" is more likely to pose a taking, *Loretto* suggests that the Court's main concern is with physical invasions by third parties. Also, like the landmark law challenged in *Penn Central*, the ordinance here "adjust[s] the benefits and burdens of economic life to promote the common good." *Id.* In *Penn Central*, the landmark law restricted development of the railroad terminal to promote the common interest in preserving historic landmarks. Here, the ordinance requires the businesses to install floodlights to promote the common interest in crime prevention and public safety.

Because the ordinance is clearly a valid exercise of the police power, it satisfies the takings clause's public-use requirement. *Kelo v. City of New London*, 545 U.S. 469 (2005).

In sum, all three factors weigh against finding a taking under the *Penn Central* balancing test.

Point Two (50%)

The permit condition may be unconstitutional as an uncompensated taking of property because the city has not made an individualized determination that the easement condition is roughly proportional to the impact of the restaurant's proposed addition.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court set forth the test for determining whether an exaction imposed by a government in exchange for a discretionary benefit conferred by the government, such as a condition on the approval of a building permit in this case, constitutes an uncompensated taking under the Fifth Amendment. The exaction is not a taking if (1) there is an "essential nexus" between the "public need or burden" to which the proposed development contributes and "the permit condition exacted by the city," *id.* at 386, and (2) the government makes "some sort of individualized determination that the required dedication is [roughly proportional] both in nature and extent to the impact of the proposed development." *Id.* at 391; *see also Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

Here, the city likely can meet the nexus requirement. In *Dolan*, the landowner sought to double the size of its business, which would have increased traffic on nearby roadways. In exchange for approving the development, the city sought an easement for a bike and pedestrian path. The Court found the required nexus between the easement and the city's "attempt to reduce traffic congestion by providing for alternative means of transportation." 512 U.S. at 387. Here, a similar nexus likely exists between the requested easement and the city's interest in crime prevention and public safety. Increased patronage and economic activity at the restaurant might attract additional crime to the area, and the requested easement to install surveillance equipment would attempt to address that increased crime.

The exaction here, however, may fail the second prong of the *Dolan* test—that the exaction be roughly proportional to the anticipated impact of the requested development. As noted, the city in *Dolan* claimed that a bike and pedestrian path was needed to offset the increase in traffic due to the proposed doubling of the business. The Court explained that the government must demonstrate that the additional traffic reasonably was related to the requested exaction and that the government must “make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.” *Id.* at 395. Here, the city did not carry its burden. The city simply speculates that increased patronage of the restaurant “might” increase crime, and that the surveillance equipment “might” alleviate this increased crime. Because the city has not made “some effort to quantify its findings” in support of the easement, it has not shown that the burden of the easement is roughly proportional to the benefits thought to flow from it.

Thus, the exaction appears to be an uncompensated taking of property in violation of the Fifth Amendment as applied to the states through the Fourteenth Amendment.

TRUSTS AND FUTURE INTERESTS ANALYSIS

(Trusts and Future Interests I.E.3., I.5.; III.A. & B.)

ANALYSIS

Legal Problems

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

(2)(a) Did the remainder interest in the trust accelerate and become immediately payable to the daughter's minor child upon the trustee's receipt of the son's letter, and, if not, how should the trustee handle the distribution of the principal in the future?

(2)(b) Following the trustee's receipt of the son's letter, how should the trustee distribute future receipts of income prior to the distribution of the principal?

DISCUSSION

Summary

Prior to the trustee's receipt of the son's letter, cash dividends and rents should have been allocated to trust income and were distributable to the son, the income beneficiary of the trust; sales proceeds and stock dividends should have been allocated to principal.

Because the son's letter to the trustee did not result in a valid disclaimer under state law (having been made more than nine months after the testator's death), the son is not deemed to have predeceased the testator. Because the son is still living, the class gift to the testator's grandchildren who survive the son has not closed and is not possessory; it will not become possessory until the son dies. The daughter's minor child, being the testator's only living grandchild, is not currently entitled to a distribution of trust principal. Trust principal will instead be distributable upon the son's death to the testator's then-living grandchildren or, if there are none, to the testator's then-living heirs.

As for future income, the trustee should either distribute the trust income to the son and the daughter as the testator's heirs, accumulate the income for future distribution to those individuals ultimately entitled to the trust principal, or distribute it to those presumptively entitled to the principal upon the son's death, i.e., the daughter's minor child.

Point One (45%)

Cash dividends and rents are allocable to income; sales proceeds and stock dividends are allocable to principal. Items allocable to income for the period prior to the son's attempted disclaimer were distributable to the son.

Receipts earned during the administration of a trust are allocable either to income or to principal. Almost all states have adopted the most recent or an earlier version of the Uniform Principal and Income Act (the Act), which specifies how such receipts should be allocated.

Under the Act, rents (UNIF. PRIN. & INC. ACT (2000) § 405; UNIF. PRIN. & INC. ACT (1962) § 3(a)(1)) and cash dividends received from a corporation (UNIF. PRIN. & INC. ACT (2000) § 401(b); UNIF. PRIN. & INC. ACT (1962) § 6(d)) are allocable to income and are distributable to the income beneficiary of the trust.

Sales proceeds (UNIF. PRIN. & INC. ACT (2000) § 404(2); UNIF. PRIN. & INC. ACT (1962) § 3(b)(1)) and dividends paid in the stock of the distributing corporation (UNIF. PRIN. & INC. ACT (2000) § 401(c)(1); UNIF. PRIN. & INC. ACT (1962) § 3(b)(4)) are allocable to principal and added to the principal of the trust.

Here, the cash dividends and office building rents should have been allocated to income and, until the trustee received the son's letter, should have been distributed to him as the sole income beneficiary of the trust. The stock dividend and proceeds from the sale of the office building should have been allocated to principal and held by the trustee for future distribution to the ultimate remaindermen of the trust.

[NOTE: The 2000 Uniform Principal and Income Act has been adopted in Alabama, Arkansas, Colorado, Connecticut, the District of Columbia, Hawaii, Idaho, Iowa, Kentucky, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, and West Virginia.]

Point Two(a) (45%)

Because the son did not disclaim within nine months of the testator's death, there is no valid disclaimer under state law. Therefore, the son is not deemed to have predeceased the testator. Furthermore, because of the express survivorship contingency in the will, the remainder in the trust does not accelerate and become distributable until the son in fact dies. When the son dies, the trust principal will be distributable to the testator's then-living grandchildren, or if none, then to the testator's then-living heirs.

When a trust remainder is given to a class, the class closes (i.e., no new persons can join the class) when there is no outstanding income interest, and at least one member of the class is then entitled to demand possession of his or her share of the remainder. This principle is called the rule of convenience. *See generally* HERBERT HOVENKAMP & SHELDON F. KURTZ, PRINCIPLES OF PROPERTY LAW 199–200 (6th ed. 2005). A class member may demand possession of his or her share of the remainder upon termination of the income interest only when the class member's interest is not otherwise subject to a condition precedent. *See id.*

When a beneficiary timely disclaims an interest in a trust, that beneficiary is treated as if he had predeceased the testator. Here, had the son disclaimed within nine months of the testator's death as required by the state statute, he would have been deemed to have predeceased the testator. This would have closed the class of remaindermen, and the testator's then-living grandchildren (i.e., the daughter's child) would have been entitled to the trust principal. However, under the state statute, the son's disclaimer was not timely because he did not disclaim within nine months of the testator's death. Thus, because the statute is inapplicable and the son is still alive, the class of grandchildren entitled to share in trust principal did not close.

Because, here, the statute is inapplicable due to the son's failure to comply with the statutory time requirements, then presumably the common-law rule allowing disclaimers (a/k/a renunciations) at any time should apply. Under the common law, if a life estate is renounced, the remainder interest accelerates and becomes immediately distributable to the remaindermen of the trust if the remainder is vested but not if the remainder is contingent. JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 844–845 (9th ed. 2013). Here, because the remainder is contingent upon there being grandchildren who survive the son, the remainder will not accelerate. It will remain open until the son dies, leaving open the possibility that additional grandchildren will be included in the class, or the daughter's child could fall out of the class because that child fails to survive the son.

And if none of the testator's grandchildren survive the son, the trust principal will be distributed to the testator's heirs living at the son's death.

Point Two(b) (10%)

Until the trust terminates, the trustee must continue to hold the trust assets. The distribution of income in the meantime is unclear. There are at least three possibilities. Income earned on the undistributed assets could be distributed to the son and daughter as the testator's heirs, accumulated and added to principal for distribution to the ultimate remaindermen, or distributed from time to time to those persons who are presumptively remaindermen.

When trust principal is not immediately distributable, the trustee must continue to hold trust assets until the ultimate remaindermen are ascertained. During this period, trust income will be distributed or retained according to any instructions contained in the trust instrument. *See WILLIAM M. MCGOVERN, JR., SHELDON F. KURTZ & DAVID M. ENGLISH, WILLS, TRUSTS & ESTATES § 10.2 (4th ed. 2010).*

Here, the testator did not specify what the trustee should do with trust income in the event the son's disclaimer did not comply with the state statute. There are at least three approaches. One approach would have the trustee distribute the trust income to the testator's heirs on the theory that the income represents property that was not disposed of by the testator's will and which thus passes by partial intestacy to the testator's heirs. A second approach would have the trustee accumulate trust income for distribution to the ultimate remaindermen. Under this approach, only those individuals ultimately entitled to the principal would share in the income. A third approach would have the trustee distribute trust income to those individuals who would be the remaindermen if the trust were to terminate when the income is received by the trustee; under this approach, trust income would be distributed to the daughter's minor child until another presumptive remainderman is born. This approach could result in individuals not ultimately entitled to principal, say because they do not survive the son, receiving income. It could also result in a disproportionate distribution of income among the individuals ultimately entitled to income.

[NOTE: Examinees should demonstrate a recognition and understanding of the income-allocation problem and the alternatives available to address that issue. There is no widely accepted solution to the problem. Examinees who cite any of these possible problem-solving approaches may receive credit.]

SECURED TRANSACTIONS ANALYSIS

(Secured Transactions I.B.; II.D., E. & F.; III.B.; IV.A., B. & F.)

ANALYSIS

Legal Problems

- (1)(a) What is the nature of the bank's claim to the business's equipment?
- (1)(b) What is the nature of the finance company's claim to the business's equipment?
- (1)(c) As between the bank and the finance company, whose claim to the business's equipment has priority?
- (2) Do the claims of the bank and the finance company continue in the item of equipment sold by the business to the competitor?

DISCUSSION

Summary

The bank and the finance company both have perfected security interests in the business's equipment. Even though the finance company's perfected security interest was created first, the bank's perfected security interest has priority because the bank's financing statement was filed before the finance company's financing statement. The security interests of the bank and the finance company continue in the item of equipment sold by the business to the competitor because their security interests were perfected and the competitor was not a buyer in ordinary course of business.

Point One(a) (25%)

The bank has a perfected security interest in the business's equipment.

The bank has met all criteria necessary for it to have an attached and enforceable security interest in the business's equipment. First, value must be given. UCC § 9-203(b)(1). This criterion is fulfilled by the loan made by the bank to the business. Second, the debtor must have rights in the collateral. UCC § 9-203(b)(2). Clearly, the business has rights in its equipment. Third, either the secured party must take possession of the collateral or the debtor must authenticate a security agreement containing a description of the collateral. UCC § 9-203(b)(3). The agreement that the business owner signed is a "security agreement" because it is an agreement that creates or provides for a security interest. UCC § 9-102(a)(74). By signing the security agreement, the business owner authenticated it. UCC § 9-102(a)(7). Therefore, all three criteria are fulfilled, and the bank has an enforceable and attached security interest.

A security interest is perfected when it has attached and when any additional steps required for perfection have occurred. UCC § 9-308(a). Generally speaking, the additional steps will either be possession of the collateral by the secured party or the filing of a financing statement with respect to the collateral. *See* UCC §§ 9-310, 9-313. In this case, the bank filed a financing statement naming the debtor and sufficiently indicating the collateral. The collateral indication is sufficient because it identifies the collateral by type of property. *See* UCC §§ 9-504, 9-108. The fact that the financing statement was filed before the security interest was created is

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not a problem. Even though the security agreement had not yet been signed, the business had authorized the filing of the financing statement in an authenticated record. UCC § 9-509(a)(1). Moreover, the financing statement may be filed before the security agreement is created. UCC § 9-502(d).

Point One(b) (10%)

The finance company also has a perfected security interest in the business's equipment.

The finance company's security interest is enforceable and attached for the same reasons as the bank's security interest. The loan from the finance company to the business constitutes value, the business has rights in the collateral, and the business owner has authenticated a security agreement containing a description of the collateral. The finance company's security interest is perfected because the finance company filed a financing statement with respect to it that provides that the business is the debtor and indicates that the collateral is equipment.

Point One(c) (30%)

The bank's security interest has priority over the finance company's security interest because the bank's financing statement was filed first.

As between two perfected security interests, the general rule is that the security interest that was the earlier to be either perfected or the subject of a filed financing statement has priority. UCC § 9-322(a)(1). While the finance company's security interest was perfected before the bank's (March 15 vs. March 22), the bank's financing statement was filed even earlier, on March 2. Thus, under the first-to-file-or-perfect rule of UCC § 9-322(a)(1), the bank's security interest has priority. No exceptions to the general rule apply here.

Point Two (35%)

A security interest in collateral continues notwithstanding its sale unless an exception applies. Because the security interests of the bank and the finance company were perfected and the competitor was not a buyer in ordinary course of business, no exception applies and the security interests of both creditors continue in the equipment sold to the competitor.

As a general rule, a security interest in collateral continues notwithstanding the fact that the debtor has sold the collateral to another person. UCC § 9-315(a)(1). Thus, unless an exception applies, the security interests of the bank and the finance company will continue in the item of equipment sold to the competitor.

A buyer of goods will take free of an *unperfected* security interest in those goods. *See* UCC § 9-317(a)(2). However, when the competitor bought the business's equipment, both the bank and the finance company had perfected security interests in the equipment.

A buyer can take free even of a perfected security interest in goods if the buyer is a "buyer in ordinary course of business." *See* UCC § 9-320(a). However, the competitor was not a buyer in ordinary course of business. To be a "buyer in ordinary course of business," a buyer must buy goods from a seller that is in the business of selling goods of that kind. *See* UCC § 1-201(b)(9). The competitor bought this equipment from a seller that is not in the business of selling goods of this kind, so the competitor was not a buyer in ordinary course of business with respect to these goods.

Because no exception applies, the security interests of the bank and the finance company continue even after the item of equipment was sold to the competitor.

FEDERAL CIVIL PROCEDURE ANALYSIS

(Federal Civil Procedure IV.D.)

ANALYSIS

Legal Problems

(1) Is a document prepared in the course of a contract dispute protected from discovery as “work product” when there is no evidence that the document was prepared in anticipation of litigation?

(2)(a) Is a party’s failure to provide relevant electronically stored information excused when the information was destroyed pursuant to a routine document retention scheme at a time when litigation was contemplated by the destroying party?

(2)(b) What sanctions should be imposed on a party for allowing the destruction of evidence that is relevant to potential future litigation?

DISCUSSION

Summary

The report prepared by the structural engineer is probably not work product and is thus discoverable. The engineer examined the foundation of the house at the customer’s request, and the engineer’s findings are potentially relevant to the customer’s claim that the foundation is defective. The report was not prepared in anticipation of litigation. The customer appears to have sought the engineer’s opinion in response to the builder’s offer to fix any problems with the foundation that an engineer might identify. Because the report was not prepared in anticipation of litigation, it is not protected by the work-product doctrine.

The builder should have taken appropriate steps to preserve evidence, including suspending its document retention program, as soon as it began planning for litigation—i.e., on July 10. Its destruction of potentially relevant material after that date was wrongful. However, a court is unlikely to impose severe sanctions on the builder because there are no facts indicating that the builder acted in bad faith and the customer can prove that the foundation is defective without the destroyed emails.

Point One (40%)

The customer must turn over the engineer’s report because it was not prepared in anticipation of litigation.

In general, a party to a lawsuit in federal court “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” FED. R. CIV. P. 26(b)(1) (2009). This includes the right to inspect and copy documents in the other party’s possession. FED. R. CIV. P. 34(a)(1). Here, the customer hired a structural engineer to examine the foundation of the house. The engineer’s report on the foundation is likely to include information that would be relevant to the customer’s claim that the foundation was defectively constructed.

The so-called “work product” rule allows a party to refuse to turn over “documents . . . that are prepared in anticipation of litigation or for trial” by that party’s representative, including

a consultant. Thus, if the customer had hired the structural engineer to prepare a report “in anticipation of litigation,” that report might not be discoverable. *See* FED. R. CIV. P. 26(b)(3).

In this case, however, the customer hired the engineer to evaluate the foundation of the house as part of the customer’s negotiation with the builder concerning the house’s flooding problem. The builder told the customer that the house’s landscaping was the reason for the flooding, and the builder told the customer, “Have an engineer look at the foundation. If there’s a problem, we’ll fix it.” The customer appears to have acted in response to that statement. There is no indication that the customer anticipated any kind of legal action at the time that the structural engineer was hired. Accordingly, the structural engineer’s report is discoverable and the court should order the customer to turn it over.

[NOTE: If an examinee concludes that the structural engineer’s report was prepared in anticipation of litigation, then the examinee should also conclude that the report is not discoverable. Documents prepared in anticipation of litigation do not need to be disclosed to an adverse party unless that party can demonstrate a “substantial need” for the documents and an inability to obtain substantially equivalent information without “undue hardship.” FED. R. CIV. P. 26(b)(3)(A)(ii). Furthermore, a report prepared by an expert who is not expected to testify is not discoverable in the absence of “exceptional circumstances” making it “impracticable” to obtain the information in another way. FED. R. CIV. P. 26(b)(4)(D)(ii). The builder probably cannot make these showings here, unless the engineer’s report deals with circumstances that have since changed. There is no evidence that the structural engineer would have had access to any information or facts that the builder would not already know as a result of its construction and subsequent inspection of the house. In addition, if necessary, the builder could ask the court for permission to arrange for a further inspection of the house by a structural engineer hired by the builder. *See* FED. R. CIV. P. 34(a)(2). Accordingly, if an examinee concludes that the report was prepared in anticipation of litigation, the examinee should also conclude that the builder is not entitled to see the report.]

Point Two(a) (30%)

Because the builder anticipated that it might be involved in litigation concerning its contract with the customer, the builder acted wrongfully in destroying emails that were relevant to the house’s construction, even though the emails were destroyed pursuant to a routine document retention plan.

As noted above, a party to a lawsuit in federal court “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” FED. R. CIV. P. 26(b)(1). This includes emails and other electronically stored information. FED. R. CIV. P. 34(a)(1)(A). Here, the customer has requested all the builder’s emails pertaining to work done on the foundation of the house. Ordinarily, the builder would be obliged to turn over this information, which is relevant to the customer’s defense that the house’s foundation was poorly constructed.

Unfortunately, the emails in question no longer exist because the builder destroyed them on August 2.

In general, spoliation of evidence (destruction or alteration of evidence) is improper if the party who destroyed or altered the evidence “has notice that the evidence is relevant to litigation or . . . should have known that the evidence may be relevant to future litigation.” *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001). It is improper for a party to destroy electronic information relevant to pending litigation, even if the destruction occurs before there is any request or order seeking the information. *See, e.g., Leon v. IDX Sys. Corp.*, 464 F.3d 951 (9th Cir. 2006) (plaintiff’s intentional destruction of computer files warranted dismissal even

though spoliation occurred before order compelling discovery). Similarly, the duty to preserve evidence applies to a party who anticipates litigation, even if litigation has not yet been commenced. *See* THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 70, cmt. 14a (2d ed. 2007).

The builder destroyed the emails on August 2. At that time, the builder knew that litigation was a possibility because the builder had already directed its attorney to prepare a draft complaint for possible filing. Knowing that litigation was a possibility, the builder had a duty to take steps to preserve evidence, including the emails in question. *See generally Fujitsu Ltd.*

In this case, the builder's destruction of the emails was pursuant to a routine document retention plan. The Federal Rules provide expressly that, in the absence of "exceptional circumstances," parties should not be sanctioned for the loss of electronically stored information when the loss occurs pursuant to "routine, good-faith operation of an electronic information system." FED. R. CIV. P. 37(e). However, when a party anticipates litigation, "it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

Thus, the builder's destruction of potentially relevant emails at a time when it knew that litigation was a possibility was improper. It had a duty to preserve evidence, and it breached that duty.

[NOTE: Because courts have used different words to describe the test for when evidence must be preserved, an examinee's precise formulation of the test is not critical.]

Point Two(b) (30%)

In determining appropriate sanctions for spoliation, courts consider both the level of culpability of the spoliating party and the degree of prejudice the loss of evidence has caused the other party. Here, the builder's destruction of evidence does not appear to have been willful, nor is it likely to pose a significant obstacle to the customer's defense. Any sanctions imposed by the court should be modest.

Federal courts have inherent power to control the litigation process and can sanction misbehavior, including spoliation, even when there has been no specific violation of the Federal Rules of Civil Procedure. *See generally Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (discussing court's inherent power to control the litigation process). The range of available sanctions is broad. It can include such sanctions as the payment of expenses incurred by the other party as a result of the destruction of the evidence, an instruction to the jury authorizing it to draw an adverse inference from the destruction of the evidence, a shifting of the burden of proof on the relevant issue, or even judgment against the responsible party. *See, e.g., Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (adverse inference); *Silvestri v. General Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001) (possibility of dismissal). *Cf.* FED. R. CIV. P. 37(b)(2)(A) (listing remedies for failure to comply with discovery obligations).

In determining appropriate sanctions for spoliation, courts consider both the level of culpability of the spoliating party and the degree of prejudice the loss of evidence has caused the other party. Many courts impose severe sanctions (such as an adverse-inference instruction or the entry of judgment against the spoliating party) only when there is evidence of bad faith in the form of an intentional effort to hide information. *E.g., Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) (spoliation sanction requires intentional destruction out of desire "to suppress the truth"). However, other courts have said that negligence in preserving evidence can

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support an adverse-inference instruction. *See Residential Funding*, 306 F.3d at 108 (negligence enough under some circumstances).

Although a court might well order an evidentiary hearing on the issue of sanctions, the facts presented do not seem appropriate for severe sanctions. First, the evidence was destroyed pursuant to the builder's standard document retention plan, and there is no evidence that the builder deliberately failed to suspend its usual procedures with the purpose of allowing the destruction of evidence. Second, the loss of this evidence will not severely hinder the customer's presentation of his case. The central issue is whether the foundation of the house was properly constructed. If the construction job was poorly done, the customer can present evidence, derived from inspection of the premises, to prove that point. The customer can also depose witnesses about any issues that arose during construction.

Under the circumstances, a court is not likely to impose particularly severe sanctions, although it might shift the burden to the builder to show that the foundation was properly constructed, or it might require the builder to reimburse any expenses the customer incurs to discover and prove the facts about issues or disputes that arose during construction of the foundation.

[NOTE: The result reached by the examinee is less important than the examinee's recognition that (a) a range of sanctions is available to the court and (b) the appropriate sanction depends both on the culpability of the builder and the prejudice suffered by the customer.]

CRIMINAL LAW AND PROCEDURE ANALYSIS

(Criminal Law and Procedure II.A. & D.; V.E. & F.)

ANALYSIS

Legal Problems

- (1) Did charging the defendant with both theft and burglary constitute double jeopardy?
- (2) Did the jury instruction violate the due process clause either by relieving the prosecution of the burden of proving the element of intent or by shifting the burden to the defendant to disprove that element?
- (3) Did the sentence imposed in this case for the theft conviction unconstitutionally deprive the defendant of his right to a jury trial on the issue of the value of the stolen item?

DISCUSSION

Summary

The trial court properly denied the defendant's pretrial motion to dismiss the charges on double jeopardy grounds. The defendant may be charged with, and convicted of, both theft and burglary. Each of the charges has an element that the other does not. Neither charge is a lesser-included offense, nor are they multiplicitous. Thus, charging both theft and burglary does not violate double jeopardy.

The jury instruction on the burglary charge was constitutionally flawed. It could have been reasonably understood by the jury as either (1) an irrebuttable conclusive presumption (which relieved the prosecution of proving the element of intent and removed the issue from the jury) or (2) a rebuttable mandatory presumption (which unconstitutionally shifted the burden of proof on an element of a charged offense from the prosecution to the defendant).

Because the four-year sentence imposed by the judge was based on the judge's finding, by a preponderance of the evidence, that the value of the stolen ring exceeded \$5,000, the sentence violates the defendant's right to a jury determination, beyond a reasonable doubt, of the value of the ring.

Point One (30%)

Charging the defendant with theft and burglary did not constitute double jeopardy.

The Double Jeopardy Clause of the Fifth Amendment provides that a person shall not be twice put in jeopardy for the "same offense." Thus, the question is whether the elements of the theft charge are wholly contained in the burglary charge or vice versa. If the elements of the lesser charge (theft) are not wholly contained in the greater charge (burglary)—i.e., if each charge requires proof of a fact that the other does not—then convicting the defendant of both crimes would not violate double jeopardy even when the two offenses occurred at the same time and are thus arguably part of the "same transaction." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). See also *Albernaz v. United States*, 450 U.S. 333, 344 n.3 (1981); *United States v. Dixon*, 509 U.S. 688, 704 (1993).

Here, theft and burglary each require proof of an element not required for the other crime. Burglary may be defined differently in different jurisdictions. However, it almost invariably requires entry into a building or dwelling of another with the specific intent to commit a felony therein, and the crime of burglary is complete upon the entry into the building or dwelling with such intent. *See, e.g., Cannon v. Oklahoma*, 827 P.2d 1339, 1342 (Okla. Crim. App. 1992). In contrast, theft, which also may be defined differently in different states, almost invariably requires the taking and carrying away of an item of personal property belonging to another with the intent to steal or permanently deprive the owner of possession.

Here, the “taking” or “stealing” element is not contained in the definition of burglary, and the “entry” element of burglary is not contained in the definition of theft. Because theft is not a lesser-included offense of burglary and burglary is not a lesser-included offense of theft, charging the defendant for both burglary and theft did not violate double jeopardy and the court properly denied the defense motion on those grounds. *Yparrea v. Dorsey*, 64 F.3d 577, 579–80 (10th Cir. 1995), *citing Blockburger*, 284 U.S. at 304.

Finally, the defendant’s motion to dismiss all the charges on double jeopardy grounds was improper because, if both charges were for the same offense, the motion should have requested dismissal of one charge, not both.

Point Two (35%)

The jury instruction on the burglary charge violated the Due Process Clause because it created either (1) an irrebuttable conclusive presumption (which relieved the prosecution of proving the element of intent and removed that issue from the jury) or (2) a rebuttable mandatory presumption (which unconstitutionally shifted the burden of proof on an element of a charged offense to the defendant).

The Supreme Court has interpreted the Due Process Clause of the U.S. Constitution to require that the prosecution prove all elements of an offense beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). The burden of proof cannot be shifted to the defendant by presuming an essential element upon proof of other elements of the offense, because shifting the burden of persuasion with respect to any element of a criminal offense is contrary to the Due Process Clause. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The crime of burglary includes entry into a building or dwelling with the specific intent to commit a felony therein. The requirement that the prosecutor prove, beyond a reasonable doubt, that the defendant had this specific intent distinguishes burglary from general-intent crimes like trespass. *See Sandstrom v. Montana*, 442 U.S. 510, 523 (1979).

Here, the jury was instructed that if, “after consideration of all the evidence presented by the prosecution and defense, you find beyond a reasonable doubt that the defendant entered the dwelling without the owners’ consent, you may presume that the defendant entered with the intent to commit a felony therein.” This instruction was unconstitutional because it created either an irrebuttable conclusive presumption or a rebuttable mandatory presumption.

A conclusive presumption is “an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption.” *Id.* at 517. Here, the jurors were instructed that once the prosecutor established that the defendant entered the neighbors’ house without consent, they “may presume” that he intended to commit a felony therein. The jurors may have reasonably concluded from this instruction that if they found that the defendant intended to enter his neighbors’ home without permission, they must further find that he entered with the specific intent to commit a felony therein. Because this instruction could operate as a conclusive

irrebuttable presumption by eliminating intent “as an ingredient of the offense,” it violated due process by relieving the prosecution of the burden of proof for this element. *Id.* at 522.

In the alternative, the jury instruction could have been reasonably understood to create a rebuttable mandatory presumption, which “tells [the jury] they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.” *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157 (1979). The due process problem created by rebuttable mandatory presumptions is that “[t]o the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption’s constitutional validity is logically divorced from those facts and based on the presumption’s accuracy in the run of cases.” *Id.* at 159.

Unlike irrebuttable conclusive presumptions, rebuttable mandatory presumptions are not always *per se* violations of the Due Process Clause. However, the Supreme Court of the United States has held that jury instructions that could reasonably be understood as shifting the burden of proof to the defendant on an element of the offense are unconstitutional. *Francis v. Franklin*, 471 U.S. 307 (1985). Here, the argument that the jury instruction operated as a rebuttable mandatory presumption is supported by the fact that the judge also instructed the jury to “consider[] . . . all the evidence presented by the prosecution and defense.” However, even if the instruction created a rebuttable mandatory presumption, it would be unconstitutional because it shifted the burden to the defense on an *element* of the offense. *Sandstrom*, 442 U.S. at 524; *Mullaney*, 421 U.S. at 686.

[NOTE: Whether an examinee identifies the jury instruction as containing a “conclusive” or “mandatory” presumption is less important than the examinee’s analysis of the constitutional infirmities.]

Point Three (35%)

The trial court violated the defendant’s Sixth Amendment right to a jury trial on an essential element of the offense when it found, by a preponderance of the evidence, that the ring was worth over \$5,000 and increased the defendant’s sentence based on this finding.

In the statutory scheme under which the defendant was tried and convicted, a Class D felony theft is defined as theft of item(s) with a value between \$2,500 and \$10,000. The jury found that the value of the diamond ring was at least \$2,500 and convicted the defendant of felony theft. However, at sentencing, the trial court made a separate finding, by a preponderance of the evidence, that the value of the ring was greater than \$5,000. Following the statute’s two-tiered sentencing scheme, the judge then imposed on the defendant a sentence that was one year longer than the maximum that would otherwise have been allowed.

The judge’s sentence was unconstitutional because it violated the defendant’s Sixth Amendment right to a jury trial on this question. The Supreme Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt” because “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed [because] such facts must be established by proof beyond a reasonable doubt.” *Id.* The Court reaffirmed *Apprendi* in *Blakely v. Washington*, 542 U.S. 296 (2004), holding that the “‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Id.* at 303 (emphasis in original). In *United States v. Booker*, 543 U.S. 220 (2005),

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the Court relied on *Blakely* and *Apprendi* to conclude that protecting a defendant's Sixth Amendment right to a jury trial required that "[a]ny fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 244.

Thus, in order to constitutionally increase a sentence above the statutory maximum of three years, the *jury* must have found beyond a reasonable doubt that the value of the ring exceeded \$5,000. Here, the court made the finding based on an appraisal proffered by the prosecutor only at sentencing, and the judge's finding was by a preponderance of the evidence rather than beyond a reasonable doubt.

AGENCY AND PARTNERSHIP ANALYSIS

(Agency and Partnership V.A. & C.; VI.)

ANALYSIS

Legal Problems

- (1) Is a partner in a general partnership personally liable on a claim arising from misrepresentations by another partner made in the course of the partnership business?
- (2) Does a newly admitted partner in a general partnership become personally liable on existing claims against the partnership?
- (3) After the filing by a general partnership of a statement of qualification as a limited liability partnership, are the partners personally liable as partners on (a) an existing claim against the general partnership and (b) a claim against the partnership that arose after the filing?

DISCUSSION

Summary

Adam and Ben formed a general partnership, under which they were jointly and severally liable for obligations of the partnership. Thus, Adam was personally liable for misrepresentations by Ben made in the ordinary course of the partnership business.

Upon joining the general partnership, Diane became personally liable for the obligations of the partnership arising after her admission, but not for obligations pre-existing her admission, such as the collector's claim.

By filing a statement of qualification, the three partners properly elected limited liability partnership status. As partners in an LLP, none of the three partners is personally liable as a partner for partnership obligations arising after the election, such as the claim by the driver's estate. The election, however, does not change their personal liability on pre-existing claims that arose before the election, such as the collector's claim.

Point One (30%)

As a general partner of Empire, a general partnership, Adam became personally liable on the collector's claim, a valid claim against the partnership that arose because of Ben's wrongful act in the ordinary course of the partnership business.

When the collector's claim arose, Empire was a general partnership composed of Adam and Ben. Under UPA (1997) § 306(a), partners of a general partnership are liable jointly and severally for all obligations of the partnership. Under UPA (1997) § 305(a), the partnership could become obligated for the loss caused to the collector as a result of the misrepresentation by Ben, provided he was acting in the ordinary course of the partnership business. Because there was no statement that limited his partnership authority, Ben as partner was "an agent of the partnership for the purpose of its business." See UPA (1997) § 301(1). Ben's misrepresentation to the collector, even if intentional, appears to be in the ordinary course of the partnership's business of dealing

Agency and Partnership Analysis

in antique cars. Thus, Ben's wrongful act created a partnership obligation for which Adam was jointly and severally liable.

[NOTE: Generally, a partnership creditor must "exhaust the partnership's assets before levying on a judgment debtor partner's individual property where the partner is personally liable for the partnership obligation" as a result of his status as a partner. UPA (1997) § 307 cmt. 4. As the UPA comments explain, this places Adam more in the position of guarantor than principal debtor on the partnership obligation. *Id.*, cmt. 4. Although an examinee might discuss this point, the call focuses on whether Adam is personally liable, not how the liability might be enforced.]

Point Two (30%)

Because the collector's claim arose before Diane joined Empire, Diane did not become personally liable on the claim.

Diane was admitted to Empire when it was a general partnership and after the collector's claim arose. While the general rule under UPA (1997) § 306(a) is that the partners of a general partnership are liable jointly and severally for all obligations of the partnership, there is a special rule for partners who are admitted during the duration of the partnership. Under UPA (1997) § 306(b), a person admitted to an existing partnership is not personally liable for any partnership obligations incurred before the person's admission. Because Diane was admitted to Empire after the collector's claim arose, Diane is not personally liable on the claim.

Diane's knowledge of the pre-existing claim and her stated concern about becoming liable on the collector's claim do not change her personal nonliability to the collector. Although partners who have a liability shield can assume liability to third parties through private contractual guarantees or modifications to the partnership agreement, Diane's stated concern constituted neither a guaranty to the collector nor "an intentional waiver of liability protections." See UPA (1997) § 306, cmt. 3 (describing methods for waiver of liability protections under § 306(c) applicable in limited liability partnerships).

At most, Diane will lose her investment in the partnership as a result of the collector's claim. Although Diane did not become personally liable on the collector's claim when she joined the partnership, the \$250,000 she contributed to the partnership is "at risk for the satisfaction of existing partnership debts." UPA (1997) § 306 cmt. 2.

Point Three (40%)

Filing the statement of qualification was effective to elect limited liability partnership status. Despite this new status, Adam and Ben remain personally liable on the collector's claim, which arose before the election. But as partners in an LLP, neither Adam, Ben, nor Diane is personally liable as a partner on the driver's estate's claim, which arose after the election.

Under UPA (1997) § 1001, a general partnership can make an election and become a limited liability partnership—if the partners approve the conversion by a vote equivalent to that necessary to amend the partnership agreement and the partnership then files a statement of qualification that specifies the name of the partnership, its principal office, and its election to be an LLP. Here the partners agreed unanimously—sufficient to amend their agreement under UPA (1997) § 401(j)—and the statement of qualification was filed. In addition, the name of Empire LLP properly included an appropriate ending, "LLP." See UPA (1997) § 1002.

Although another way to effectuate a "conversion" (as suggested by Ben's lawyer) is to form a new LLP and transfer the assets of the old general partnership to the new LLP, the

method used here (approval by the partners and the filing of a statement of qualification) is also sufficient to create LLP status.

Thus, Empire became Empire LLP as of the date of filing of the statement of qualification. *See* UPA (1997) § 1001. What effect did this have on the collector's claim, which predated the filing? According to UPA (1997) § 306(c), an obligation incurred while a partnership is an LLP is solely a partnership obligation. As the collector's claim predated the LLP, Adam and Ben remain personally liable on the collector's claim. Diane, on the other hand, was not personally liable on the collector's claim, either before or after the filing of the statement of qualification. *See* Point Two above.

The driver's estate's claim arose after Empire became Empire LLP. Under UPA (1997) § 306(c), an obligation incurred while a partnership is an LLP is solely a partnership obligation. Thus, Adam, Ben, and Diane *as partners* are all protected from personal liability on the driver's estate's claim. But there may be *personal liability* if any of them was negligent or otherwise acted wrongfully by not informing the buyer of the bad suspension that caused the accident.



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