NEW YORK STATE BAR EXAMINATION
FEBRUARY 2014 QUESTIONS AND ANSWERS

QUESTION-ONE

Carl and Jennifer were divorced in 2012. As part of the judgment of divorce, Jennifer was granted possession of their home in Albany and custody of their then three-year-old son, Sam. Carl was awarded broad visitation rights, including one night during the work week, alternate weekends and holidays, and one month during the summer.

Carl took full advantage of every possible opportunity to be with Sam, visiting with him during the week and spending the summer month and many weekends and holidays with Sam at Carl's house on a lake 20 miles outside of Albany. Carl had purchased the lake house from Owner in 2001 as a vacation home before he was married, and he now lives there permanently while employed as the manager of a local business.

Jennifer, a lawyer, was laid off from her position as an associate in a law firm shortly after the divorce. After unsuccessfully searching for law work for over one year, Jennifer was beginning to face serious financial problems. Unable to afford the family home, Jennifer had to move in with her parents in their small apartment. Jennifer was recently offered a position in a law firm in Rochester, which is a three-hour drive from Carl's house outside of Albany.

Jennifer has made an application in Supreme Court to modify the divorce judgment to permit her to move with Sam to Rochester so that she can accept the new job offer. She is willing to modify the visitation arrangements by extending Carl's holiday and summer vacation visitation periods. Carl has opposed the application because it would curtail his ability to see Sam during the week and on many weekends. He insists that Jennifer can earn sufficient income by staying in Albany and working at more than one lower-paying non-legal job. Sam is upset about the move because he loves to spend as much time as possible with his father at the lake and because he will miss all of his new friends at kindergarten.

Carl's lake house had been part of Owner's property when Carl bought it in 2001, and Owner retained the adjoining property. The lake house at that time had received its water for many years from its own pump house next to the lake which, according to land records filed with the County Clerk, remained on Owner's property. The deed of sale to Carl contained no mention of the pump house. Carl has relied on that pump house for his water supply and has maintained it since the time of purchase, although Owner has paid for all of its major repairs. Owner has just informed Carl that he will be removing the pump house to create a beach area at the lake for the private use of Owner's family. Carl then will have to take out a $10,000 home improvement loan to dig his own well in order to access a water supply for his house.

(1) How should the Court rule on Jennifer's application to move with Sam to Rochester?

(2) May Carl lawfully prevent Owner from removing the pump house:

(a) By claiming an implied easement to use the pump house?

(b) By claiming a prescriptive easement to use the pump house?

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First Answer to Question One

1. The issue is whether the Court in its discretion can grant the custodial parent rights to move notwithstanding the substantial interference with the visitation right of the non-custodial parent.

The issue of child visitation is one which is set out in detail in the parties divorce judgment and determined in detail at that time. The Court has been given powers under Domestic Relations Law to permit a custodial parent to move interstate notwithstanding the fact that it may substantially interfere with the visitation rights of the non-custodial parent. The Court will be guided in its discretion by a variety of factors, including most importantly the fundamental principle of the best interests of the child. Other factors the Court may consider in its discretion include for example, whether the move is motivated for health reasons, whether the move will provide the divorced family a fresh start, whether the move is motivated by financial need, a new job offer, the underlying motivation of the parent who is objecting to the move (i.e. is the motion being brought in good faith by the opposing parent), the desires and expressed preferences for the child as well as the ability for the other parent to continue their visitation rights and the extent and severity of the interruption of those rights. The fact that the non- custodial parent may lose their rights or experience a reduction in their visitation rights is not determinative in and of itself. In considering the best interests of the child, the Court may look into factors such as the age of the child, the ability to re-adjust, whether alternate familial support networks will be made available and other related issues of best interest. The Court may also appoint a guardian for the child to look out for best interests in matters of child custody.

In this case, Sam is relatively young (only in kindergarten) and his preferences and the fact that he is upset by the move will probably be afforded little weight. The Court is likely to focus its attention on this application on the fact that J is unable to afford the family home and is facing serious financial problems which will seriously jeopardize her ability to look after S.

The Court will also look into the fact that she has found an alternate job offer already in Rochester and that it is likely to be in S's longer-term best interest that he move to Rochester and build his life in financial security. Further, whilst C's visitation is reduced and he will spend less time with S, the Court will likely find that S is nonetheless (a) still only a 3 hour drive away from C's house; and (b) J has offered to modify visitation arrangements by extending visitation periods in the holidays. In fact, the strongest argument for C's case to oppose the move is that his rights have been reduced and/or that S would prefer to see his dad as much as possible, but both of these are not compelling for the reasons discussed, and as weighed against J's needs and financial situation.

The Court in its discretion should grant J's application for S to move with J to Rochester.

2. The issue is whether C may claim either (a) an implied easement or (b) a prescriptive easement

An easement is a property right that permits the use of another's land. There are 4 types of affirmative easements - easements by grant (express writing), easements by prescription, easement by implication and easements by strict necessity. An easement will generally consist of

a dominant (the land that is benefitted by the easement) and servient estate (the land that is burdened by the easement). An appurtenant easement (one that benefits the land) will benefit and burden all successive holders of the land. If an easement cannot be established by law on these grounds - and absent an ability to show an easement by estoppel or part performance in reliance on the principles of equity - the right to use the land will be a mere license, revocable at whim by the licensor. An easement by estoppel can be shown here (to rebut the statute of frauds argument) if the user can demonstrate detrimental reliance on the use of the easement and e.g. took significant work to develop/create the easement and ensure its continued use.

(a) The issue is whether there is an implied easement based on the pre-existing use of pump house and C's reasonable necessity of use.

An implied easement will be implied by law by the Courts if the claimant can show that there was (1) a common owner (2) a pre-existing use (3) that is reasonably apparent from an inspection of the property, which (4) benefits the dominant estate and is (5) reasonably necessary. The Courts will look at the intent of the implied and see whether when conveying the land, an implied easement of use was an implied part of the conveyance. An implied easement by strict necessity is similar in that it requires a common owner but the use must be absolutely necessary (i.e. the servient estate must be landlocked).

There is a common owner as the lake house was once part of O's property. The use of the pump house is reasonably necessary as it is essential for C to pump water and use water. It is not sufficient for an easement by strict necessity however as the facts tell us that C has an alternative to dig his own well for a water supply. This would negate an easement by strict necessity as C's use of O's land is then merely convenience. The use of the pump house may be reasonably apparent from an inspection of the property in appreciating that the water supply of the house comes from the adjoining waterfront lake. Further, the use of the pump house benefits the servient estate because it provides it with access to water. An argument could be made that the intent of the parties in conveying would be that the continued use of the pump house for access to water for the servient estate is a reasonable necessity that is implied in the facts. The fact that this occurred for 10 or so years may also weigh in to show that the O intended this water-sharing arrangement as a necessary element of the sale of the realty. The weakness in C's claim would be that there appears to be a ready alternative available - digging his own well. Whilst this will incur an additional cost to him of $10k, this is not a consideration for the Court in terms of finding the existence of an easement (although it may be relevant in determining whether the use is "reasonable" if this cost is e.g. prohibitive relative to the value of the land). The Courts would be more concerned with the interference of O's right to the use and enjoyment of his property - namely creating a bench area for the private use of his family and whether the servient estate should be burdened by an easement that prohibits his rights to do what he wants with his property.

C may assert an easement seeking to prevent O from removing the pump house and his continued use/access to water on the basis of implied easement but on balance this is not likely to be a strong claim. An implied easement by strict necessity does not however arise on the facts as the access to the pump house is merely convenient.

(b) The issue is whether there is a prescriptive easement to use the pump house given C's continuous, notorious and open use of the pump house for a period of 10 years

A prescriptive easement can be created if a party openly, notoriously and continuously uses the servient estate for a period of 10 years. The use does not have to be exclusive (unlike adverse possession claim). In NY, by Statute and contrary to the approach of common law/many other States, the use must also be under an objective good faith claim of right to use the land for any claim of right that is made after July 7 2008. Any claim that ripened before this period may not need to prove a good faith claim as the statute may not operate retroactively. The continuous and open use must not necessarily be exclusive, but there must be present an element of hostility. The lack of hostility can tend to negate against any claim for easement as it implied a permissive use and an analogy of a relationship more akin to a license (revocable at whim) rather than a proprietary right to use the land (a prescriptive easement).

C has used the pump house since he brought the property in 2001 and thus meets the statutory prescriptive period of 10 years. As the claim ripened after July 7 2008, there may be an issue on the facts here as to whether there is a good faith claim of right to a prescriptive easement claim as the use of the pump house in light of the fact that C appears to recognize O's right to the pump house. O paid for all the major repairs and that there is no mention of the pump house in the deed. The basis for C's right to use however could be argued to be in good faith and objectively reasonable on the basis that it is necessary for him to pump water for his home. The open and continuous use of the pump house is clear on the facts as C used the pump house for water for many years. Whilst the fact that this shows a lack of exclusive use will not defeat C's claim (as exclusivity is not required), there appears to be a distinct lack of hostility on the facts. This relationship - without any further facts -appears to be more of a license relationship where the Owner has permitted C to enter his property and use the pump house. This could also be evidenced by O's belief that he may simply revoke the right at whim and his unilateral decision to build a beach area. C's use of the pump house appears to be entirely permissive and more cognizable to a license. (As this license was not documented in writing, it is revocable at whim.) C does not appear to have a strong claim for an easement by prescription.

C's claim for a prescriptive easement to use the pump house is likely to fail.

Easement by estoppel

It is worth briefly noting that an easement by estoppel is also unlikely to be available to C as although he undertook efforts in maintaining the water supply (and is faced with a significant cost in home improvement), his acts are not likely to be considered sufficient to unequivocally refer to his right to use the land. Again, C's use is merely permissive.

Second Answer to Question One

1. The issue is on what grounds a court may modify a judgment for divorce, to the extent that it will affect custody and visitation rights.

Under NY DRL, a court may modify a divorce judgment where there is a substantial change of circumstances. Where custody and child visitation issues are involved, the court must apply the 'best interests of the child' or BIC test as the predominant factor. Relevant factors to consider when determining what is in the best interests of the child include: the parents' respective incomes, family connections, loss of earning capacity/benefits, the ability of the child to have regular and consistent contact with both parents, and any other factor that the court determines is relevant. Ultimately, the question is whether the child's best interests are served by keeping the custody/visitation arrangements as they stand, or agreeing to the modification.

Here, Carl is clearly a good father, who spends a considerable amount of time with his son Sam. Sam is a young child, who benefits from having close and continuous contact with his father, who is situated only 20 miles away. The effect of Jennifer's proposal on Sam would mean that he is no longer able to spend one night during the work week with Carl, and will lose many of the alternate weekends that they spend together, due to the 3 hour drive. This would be partly mitigated by Jennifer's proposal to extend Carl's holiday and vacation visitation periods. Sam has also just started kindergarten and has made friends there.

Jennifer, however, has suffered a significant change in circumstances. She has unsuccessfully searched for work as a lawyer for over a year, and has had to move out of the family home and in with her parents into a small apartment. Not only would this have knock-on financial consequences for Sam, as his mother is unable to provide for him as well, but Sam has also had to leave his family home, and moved into a much more confined space. Rochester is within the same state as Albany, and whilst a 3 hour drive is not as convenient as 20 miles away, it is sufficiently close that Sam would still be able to have regular contact with his father.

Financially, Sam would be much better off, and psychologically, Jennifer would probably be a better parent if she is able to practice her profession, rather than take a low paid non-legal job to stay in Albany. Being of kindergarten age, Sam would also adjust and make new friends quickly.

On balance, due to Jennifer's significant change in circumstances, it is probably in Sam's best interest that the court does modify the divorce judgment and allow Jennifer to move with Sam to Rochester, incorporating as well, Jennifer's proposed increased visitation rights for Carl.

2. (a) The issue is whether Carl may successfully claim an implied easement to the pump house.

Under the EPTL easements may be created by express grant, necessity, implication or prescription. An easement can be appurtenant (i.e. benefitting the dominant tenement) or in gross (i.e. provide rights in the servient tenement, unrelated to use and enjoyment of the dominant tenement). They can also be affirmative or negative. The easement in question here would be an affirmative easement appurtenant to Carl's property, because the property benefits from the access to the pump house (in addition to Carl personally).

Implied easements are created when (a) a single tract of land is divided, (b) immediately prior to the division, the right or use in question was enjoyed by the owner, (c) it was intended by the parties on partition that such use would continue, (d) the owner of the servient tenement has relied on this, and (e) such use is reasonably necessary for the servient owner's use and enjoyment of the servient land.

In this case, the lake house was originally part of the Owner's undivided property when Carl purchased it in 2001, so the first element is satisfied. The second element is satisfied because immediately prior to Carl's purchase of the lake house, the lake house had received its water from the pump house. The third and fourth elements are satisfied because Carl has maintained the pump house, continued to use it for 12/13 years and has maintained it. Removal of the pump house will result in significant expenditure for Carl to source another water supply.

However, it is doubtful that the fourth element has been satisfied. Whilst providing a significant amenity to Carl, Carl would not be left without access to water - it is not 'reasonably necessary' for the use and enjoyment of the servient tenement. In light of this, Carl's claim that he has an easement by implication would likely fail.

(b) The issue is whether Carl may claim an easement by prescription.

Easements by prescription arise where the owner of the servient tenement has made (i) actual (ii) continuous, (iii) open and notorious and (iv) hostile use of the relevant right on the dominant tenement for (v) the relevant statutory period. In NY, the statutory period for adverse possession and easements arising by prescription is 10 years.

Although Carl only moved to the lake house permanently in 2012 (previously it was a holiday home), his use of the pump house has been actual and continuous for the relevant statutory period. It has also been open and notorious, in the sense that it has not been hidden in any way, and Owner knew of it. In fact, Carl has maintained the pump house since his purchase of the lake house in 2001, and Owner clearly knew of Carl's use, as he otherwise would not have informed Carl of his plans. Carl's use of the pump house, however, has not been hostile - that is Carl's use has been with Owner's consent and permission. For this reason, Carl's claim for an easement by prescription would fail.

At best, Carl has had a license to use the pump house, which Owner is free to revoke at any time.

QUESTION-TWO

Nick consulted with his long-time attorney, Attorney, regarding his plan to open a restaurant and his desire to protect his personal assets in the event the restaurant failed. Attorney formed a limited liability company (LLC) on Nick's behalf and represented LLC in negotiating a long-term lease and obtaining a liquor license. Nick asked Attorney if he would loan money to the venture. Attorney agreed to loan LLC the sum of $100,000. Nick asked Attorney to prepare the loan documents, and Attorney drafted an interest-bearing promissory note, which was secured by an assignment to Attorney of the restaurant's lease. Attorney had Nick sign the note both personally and as the sole member of LLC.

In preparation for the grand opening of the restaurant, Nick asked his cousin, Sam, who operates a nightclub, to purchase wine for the restaurant from Sam's own liquor supplier. Nick told Sam to buy 25 cases of wine, but not to spend more than $100 per case. Without disclosing to Supplier that he was acting on behalf of LLC, Sam ordered 25 cases of wine at a cost of $200 per case to be delivered to the restaurant. Nick served the wine at the grand opening. When Supplier invoiced Sam for $5,000, Sam told Supplier that he should send the invoice to LLC. Supplier did so, but Nick refused to pay, stating that he did not authorize the purchase at $200 per case.

Angry that neither Nick nor Sam would pay his bill, Supplier told his friend, Officer, a police detective, that Sam was a drug dealer. Officer commenced an investigation into Supplier's tip by placing Sam under surveillance during which time he observed known drug users frequenting Sam's residence. During the investigation, Officer was told by Informant, a confidential police informant, that he had been at Sam's residence the previous day and had seen a large quantity of cocaine and several handguns in the kitchen. Informant, who had given Officer reliable information in the past, admitted to Officer that, while he was at Sam's residence, he had purchased a small quantity of cocaine from Sam. Informant took Officer to the residence. Officer knew, based on his investigation, that Sam owned the residence and a car parked in the driveway.

Officer knocked on Sam's front door. Officer saw Sam peer through a window adjacent to the door, and Officer displayed his police shield to him. After knocking again and hearing a commotion inside, Officer entered through the unlocked front door and found Sam in the kitchen attempting to climb out of a window. He observed several bags of cocaine and a handgun lying on the kitchen table. Officer apprehended Sam and placed him under arrest. Officer read Sam his rights and seized the cocaine and handgun as evidence. Sam was charged with criminal possession of a controlled substance and possession of an illegal firearm.

Sam filed a motion challenging his arrest without a warrant and seeking to suppress the evidence Officer seized. At the hearing on Sam's motion, Officer testified that, based on his investigation and the information given to him by the confidential informant, he believed that Sam illegally possessed a controlled substance and firearms. Officer testified that Sam's furtive conduct led him to believe that Sam was armed and that Sam was likely to destroy the contraband and escape if he was not immediately arrested.

(1) Under the Rules of Professional Conduct, did Attorney act properly by entering into a business transaction with Nick?

(2) (a) Is Sam liable to Supplier for the cost of the wine? (b) Is LLC liable to Supplier for the cost of the wine?

(3) (a) Prior to going to Sam's house, did Officer possess sufficient information to obtain an arrest warrant?

(b) Was Officer's warrantless arrest of Sam lawful and should the evidence be suppressed?

First Answer to Question Two

1. Did Attorney act properly under the ROPC when he entered into the business transaction with Nick?

The issue is whether the attorney acted properly when he entered into a business transaction with Nick by loaning him money for the restaurant. In New York, the conduct of lawyers is governed by the Rules of Professional Conduct (ROPC). Transacting business with clients creates an inherent conflict of interest, which lawyers should avoid. Under the Model Rules, it is a disciplinary violation for any attorney to enter into a business transaction with a client unless the client gives informed consent in writing. Additionally, this informed consent requires the attorney to provide the client with an explanation of the desirability of the client obtaining the advice of outside counsel, and give the client an opportunity to do so. In addition, the transaction must be fair to the client.

Here, Attorney violated the ROPC when he entered into the business transaction with Nick. First, it does not appear that the client gave informed consent in writing. Second, it does not appear that Attorney gave Nick the opportunity to consult independent counsel. However, even if he had done so, Attorney likely would have still been in violation of the ROPC because the transaction was not fair to Nick. Nick's stated goal in procuring Attorney's representation was to limit his personal liability should the restaurant fail. Because Attorney required that client sign the note personally, this defeat's client's goal in the representation to limit his liability by making him personally liable upon default.

Therefore, the attorney has violated the ROPC.

(2) Liability for the wine

(a) Is Sam liable to Supplier for the cost of the wine?

This is a contract for the sale of goods, governed by the UCC. A valid contract must have offer, acceptance, and consideration. As a contract for the sale of goods of more than $500, the contract must be in writing signed by the party to be charged, and must include a quantity term. There is an exception for goods that have been delivered under the terms of an oral agreement. The issue presented is whether an agent for an undisclosed principal can be liable when the seller is not

aware that the buyer was representing a principal. Under agency law, agents are generally not liable for contracts entered into on behalf of their principals.

However, this requires that the opposing party have knowledge that the agent is operating in his capacity as an agent and under the authority of a principal. An agent can act on behalf of an undisclosed principal. However, the agent will remain liable to the opposing party under the contract because they have entered into the contract with the agent personally without knowledge (or reason to know) that the agent is acting on behalf of a principal.

Here, Sam did not disclose to supplier that he was acting on behalf of LLC. The supplier likely had prior dealings with Sam in his operation of the nightclub; therefore supplier had no reason to believe that Sam was acting as an agent for LLC. The contract was with Sam personally, and not with him on behalf of any other person or entity. Therefore, Sam will be liable under the contract to supplier.

However, Sam may be able to assert the statute of frauds as a defense. The facts state that supplier did not send an invoice until after the wine was consumed. This was not a confirmatory memo as described in the UCC, because it was sent after delivery of the goods. There does not appear to be a signed writing. However, since the goods have been delivered and used, the contract will be enforced as an exception to the SOF.

(b) Is LLC liable to supplier for the cost of the wine?

The issue presented is whether the principal of an undisclosed agent is liable on a contract when the agent has exceeded the scope of his authority. Normally, principals are liable for contracts entered into by agents on behalf of the principal. However, this is limited to when the agent is acting within the scope of his authority. Authority can be either express, implied, or apparent. Express authority is granted by the words or conduct of the principal directing the agent to do engage in a certain act or acts on behalf of the principal. This can be general authority to do things necessary for the completion of the agency, as in the case of the GM of a business, or it can be specific authority, as in the case of a real estate broker tasked with finding the purchaser for a piece of property. Implied authority is authority granted by conduct of the principal to agent. Apparent authority is granted by actions of the principal to third parties that make it reasonable to believe that there is present the existence of an agency relationship. When an agent is given the express authority to enter into a specific transaction on behalf of the principal and the agent exceeds the scope of this authority, he will be liable unless the 3rd party had reason to believe that the principal granted such authority.

Supplier likely cannot hold LLC liable for the cost of the wine. Since there was an undisclosed principal, supplier cannot rely on apparent authority to hold LLC liable under the contract. LLC specifically limited Sam's authority to purchase wine up to $100 per case. When Sam exceeded that authority and purchased the $200 wine, he went outside the scope of his authority. Therefore, LLC will likely not be liable under the K.

3. (a) The issue is whether Officer had information sufficient to obtain an arrest warrant. An arrest warrant must be issued by a neutral magistrate upon a showing of sufficient facts to

provide probable cause that the person to be arrested committed the crime. Probable cause requires production of facts supporting a finding that it is more likely than not that the person to be accused committed the crime. Probable cause can be based on an informants tip if there is sufficient corroboration. Under Aguilar-Spinelli, a confidential informant's tip must be reliable, which can be shown if the informant provided reliable tips in the past.

Here, the officer obtained a tip from Supplier, who was a friend of Officer. Next, the officer set up surveillance and found that known drug users went to his residence. Then, a reliable informant told officer that he observed cocaine and handguns at Sam's house. All together, a neutral magistrate provided with this information could conclude it was more likely than not that Sam committed the crimes of selling cocaine and possession of handguns. Thus, this information was sufficient that Officer would have probable cause sufficient to obtain an arrest warrant.

(b) The issue is whether officer's warrantless arrest of Sam violated his 4th amendment rights, requiring suppression of the evidence. The 4th Amendment protects the right of individuals from unreasonable searches and seizures. A search is unreasonable if it violates a reasonable expectation of privacy (REP), and there is not a warrant or exigent circumstances. Evidence obtained in violation of the 4th must be suppressed, and any evidence derived therefrom must be suppressed as fruit of the poisonous tree (absent inevitable discovery, which is not applicable). Warrants must be based on probable cause. A person can be arrested without a warrant if an officer observes a person engaged in illegal activity. However, In New York, an arrest of a person in their home without a warrant is almost always a 4th Amendment violation. When there is probable cause that a person is committing a crime in their home sufficient to get a warrant, a warrant must be obtained to arrest that person in their home.

Since Sam was in his home when he was arrested, this was a violation of his 4th amendment rights and therefore the evidence must be suppressed based on the fruit of the poisonous tree doctrine. The fact that the cocaine and handguns were in plain view when officer entered the house will not be a valid argument to admit the evidence under plain view doctrine, because the officer did not view the evidence from a lawful vantage point. Thus, the arrest and evidence should be suppressed.

Second Answer to Question Two

1. The issue is whether an attorney may ethically enter into a business transaction with a present client and loan the client money for the business venture.

Under New York's Professional Responsibility Rules (PRR), failure to comply with the rules may subject the lawyer to discipline, and to a malpractice action by a client. Under the PRR, a lawyer may not loan money to a client, unless it is pursuant to a contingency fee and seek to advance litigation fees, or the lawyer takes the case pro bono.

Here, Lawyer was consulted by Nick (Client) to protect his assets on a restaurant venture which Client sought to establish. In preparing the LLC, Client asked the lawyer to loan him money for the LLC, and the attorney agreed to loan the LLC $100,000 secured by an interest-bearing promissory note, for the purpose of setting up the business. Here, Lawyer acted contrary to the

rules because the Lawyer is not allowed to loan money to a Client pursuant to the PRR unless those are advanced for litigation purposes in a contingency fee agreement which is not the case here because there is no litigation involved.

However, under the PRR while as a general rule lawyer may not enter into a transaction with a client, a lawyer may enter into a transaction with a client if the transaction is reasonable and fair to the client, the lawyer and client agree in writing to the terms of the transaction, and the lawyer advises the client that the client should seek independent counsel for the transaction.

Here, Lawyer entered into the transaction with Client by loaning $100,000 to the LLC which he set up for the Client and secured it with an interest-bearing promissory note, which was also secured by an assignment of the lease agreement of the restaurant. The lawyer was responsible for the preparation of the loan documents, and Lawyer and Client executed the loan note between them personally and on behalf of the LLC. Here the Lawyer's actions violate the PRR because the lawyer knew that the Client wanted to protect himself from liability in the event the business fails, yet the lawyer still made the Client sign a note which made him personally liable. Moreover, the Lawyer failed to advise the Client to seek independent counsel to review the transaction and make sure that it was fair and reasonable to the client because there is no mention that the lawyer made such requirement and Client simply relied on his lawyer's advice in entering into the contract. Finally the lawyer knew that the transaction was not fair because the lawyer obtained an interest-bearing promissory note which would require Client to pay interest on the amount provided, and because the failure to return the loan will subject the Client to personal liability.

Therefore, the Lawyer did not act properly, and has in fact violated the PRR in entering into the loan agreement with Client.

2. (a) Whether an agent of an undisclosed principle is liable on contracts he enters for the client.

Under NY Agency and Partnership Law (APL), as a general rule an agent is not liable for the contracts he enters on behalf of the principle. However, the APL holds the Agent liable when the principle is not disclosed, or when the agent exceeds the scope of the agency. Moreover, as a general rule an agency is express when the principle gives the agent authority to take specific limited actions. For the agency to be created there must be Assent, Benefit, and Control of the agent by the principle.

Here, Nick (N) asked his cousin Sam (S) to purchase wine for the restaurant from a supplier that S used for his nightclub. In doing so an agency relationship was created because N assented to S being his agent, the relationship was for the benefit of N, and N controlled S. Moreover, N gave specific requirements to S to purchase 25 cases of wine at a price no more than $100 per case. S had express authority to act on behalf of the LLC, but exceeded his scope when he agreed to purchase 25 cases of wine at $200 per case. Furthermore, S did not inform the supplier that he was acting on behalf of the LLC and therefore, the LLC was an undisclosed principle.

Therefore, because S exceeded his scope of the express authority given, and because he was acting as an agent to an undisclosed principle, S is liable for the cost of the wine personally.

(b) The issue is whether the undisclosed principle is liable to a supplier when the agent has breached the scope of the agency.

Under the APL, an undisclosed principle is not liable to a third party, when the contract entered by the agent is beyond the scope of the agency, and the agent has modified the terms of the agency power.

Here, and as noted above, the LLC was an undisclosed principle of S who was the agent. S was given limited authority to purchase 25 cases for not more than $100 per case. S the agent modified the terms and went beyond the scope of the representation because S entered into an agreement to purchase 25 cases at $200 per case knowing that his authority was not to spend more than a $100 per case. S modified the contract before asking N, the sole member of the LLC, if the LLC would accept the 25 cases of wine at $200 per case. S did not do so and was not therefore authorized to enter into that agreement with supplier.

Therefore, because S exceeded the scope of his representation and modified the agreement terms, the LLC is not going to be bound by the agreement with the supplier and would not be liable to pay.

3. (a) Whether an officer has probable cause to obtain an arrest warrant pursuant to an informant's tip.

Under NY Penal Law (NYPL), an arrest warrant will be provided if there are sufficient facts for a neutral and detached magistrate to determine probable cause exists that a crime is being committed and that the accused is the person who committed the crime. In NY, when the information is based on an informant, the information must satisfy the Aguilar-Spanelli test which the officer must establish in the warrant application the veracity and reliability of the informant, and the basis of the knowledge of the informant. The officer may corroborate the basis of the knowledge of the informant based on surveillance and observations made by the officer.

Here the Officer placed Sam (S) under surveillance and was able to see known drug dealers coming and going from S's house. the initial tip by supplier, was not sufficient because there is no indication that the supplier had a reliability and veracity required because Supplier, in fact was a friend of the officer and told him S was selling drugs simply because he was angry with S and Nick as a result they did not pay for the alcohol. However, in addition to the surveillance, Officer received additional information showing that S was dealing drugs because a confidential police informant that has given Officer reliable information in the past provided Officer with information that S was selling cocaine from his house.

Therefore, using the information from the second informer and the surveillance of Officer, the information would be sufficient to establish the reliability and veracity of the second informant, and establish that probable cause would exist for an arrest warrant.

(b) The issue is whether the evidence obtained from a warrantless arrest in Defendant home be suppressed based on an unlawful arrest.

Under the US Constitution the house is given additional protection, and an officer may not arrest an accused without having obtained an arrest warrant, and absent exigent circumstances. Exigent circumstances include destruction of evidence, or that the accused may flee, or if the attorney is on hot pursuit, or the officer renders aid in the location pursuant to an emergency. Evidence obtained based on an unlawful arrest is subject to the exclusionary rule under the 5th amendment and may be suppressed.

Here, Officer had probable cause to obtain a warrant but he did not do so. Officer should have obtained an arrest warrant because there was no indication that S would flee or that S even knew of the investigation and surveillance of him. Moreover, there is no evidence that exigent circumstances existed to enter because Officer was not on hot pursuit of S, and did not fear that S was endangering anyone in the area (as evident by the fact that Officer knocked and announced his presence). Also there was no fear that evidence will be destroyed because as mentioned S did not know that Officer was investigating him, and in fact first became aware that Officer was there when Officer showed up at the house and knocked and announced his presence.

However, because Officer had probable cause to arrest S outside his house for the drugs based on the information he had, there is an independent ground to arrest S which will therefore negate suppressing the evidence. Therefore, the cocaine that was in plain view should not be suppressed because probable cause existed to arrest S and the fact that S tried to escape is ground to have entered the house.

Therefore, the arrest might be unlawful but the evidence should not be suppressed.

QUESTION-THREE

Owner owns a number of commercial buildings in New York City and leases one of his small buildings to Len, who operates a retail sporting goods store there. The written lease between Owner and Len commenced on June 1, 2010, expired on May 31, 2013, and provided for a monthly rent of $5,000. At the end of the lease term, no new lease was signed, but Len remained in possession of the building. Len continued to pay the monthly rent of $5,000 through August 2013, but he has not paid rent since that time although he remains on the premises and continues to operate the store.

Owner was experiencing financial difficulties and desperately needed money to maintain his buildings. Dom is a real estate developer and owns property adjacent to the building Owner leased to Len. In September 2013, Dom discussed with Owner a proposed contract for sale of the air rights to empty space above Owner's building. Acquiring the air rights would allow Dom to construct a building on his own property that would be taller than zoning regulations would otherwise allow. In return for the air rights, Dom would pay Owner $250,000.

Shortly thereafter, Dom presented a draft contract to Owner, who said he would need to discuss the contract with his attorney. However, Dom said that he needed Owner to sign the contract immediately and that he did not have time for Owner's attorney to review the contract. Not wanting to lose the opportunity to obtain the money, Owner signed the contract.

Owner subsequently learned that Dom had entered into contracts with other area building owners for similar air rights but had paid those building owners substantially more for those air rights than Dom agreed to pay Owner. Owner would now like to have the contract declared void as unconscionable.

On November 1, 2013, Len sent a written purchase order to Athletic Co., a manufacturer of sports equipment, for 2,000 basketballs to be delivered to the store on or about December 1, 2013. The terms of the purchase order called for payment in full upon delivery.

On December 1, 2013, Athletic Co. delivered 2,000 footballs, instead of basketballs, to Len's store. Len immediately had the footballs placed in a locked storage facility behind Len's store and notified Athletic Co. that he was rejecting the footballs. Athletic Co. told Len that the footballs would be picked up within a week. However, the footballs were stolen three days later. Subsequently, Athletic Co. told Len that it would hold Len liable for the loss of the footballs.

Last month, Len told Owner he intends to vacate the premises within 60 days. Owner has now informed Len that his payment of the rent in June 2013 extended the lease for another three-year term and that Len will be liable for all unpaid rent during this period.

(1) Should Owner be able to void the contract with Dom on the ground of unconscionability?

(2) Is Len liable to Athletic Co. for the loss of the footballs?

(3) For what period of time, if any, can Owner collect rent from Len?

First Answer to Question Three

1. The first issue is whether the contract between Owner (O) and Dom (D) should be voided on the grounds of unconscionability, even though both are sophisticated business parties.

A contract, which is formed by implied or express terms, acceptance of those terms, consideration underlying the basis of the bargain, and an offer inviting acceptance, can be voided on a number of grounds: infancy, intoxication, mental incapacity, fraud, unconscionability, mutual mistake, undue influence, equitable estoppel, duress, illegality, statute of frauds, and by parole evidence showing that no contract was ever entered into, or that an express or implied condition precedent to the contract never occurred. The defense of unconscionability can be raised when there is evidence of procedural and substantive unconscionability. Procedural unconscionability occurs when a contract is unfairly entered into using high pressure tactics, and the contracting party is left with no meaningful choice other than to sign the contract, or important terms are in fine print that are not reasonably apparent. Substantive unconscionability arises when the terms of the contract are unfairly one sided and favor one party more than the

other. Generally, a court will not void a contract on the grounds of unconscionability if both parties are sophisticated business people that are expected to employ their business acumen, as well as the employment of attorneys before entering into a contract that could possibly endanger their rights and interests. Here, O maintains multiple buildings, and O is a real estate developer. Both are sophisticated business people, and there is no evidence that D's request to sign the contract immediately substantively or procedurally impaired O's right to ask his attorney whether it was a smart choice to enter into such an agreement - such high pressure tactics are not expected to work on a savvy person who enters into multiple contracts yearly. Therefore, O should not be able to void the contract with D on the ground of unconscionability.

2. The second issue is whether Len (L) is liable to Athletic Co. (AC) for the loss of the footballs after he became a bailee and used reasonable precautions to store the goods.

A contract concerning the sale of goods is governed by UCC Article 2. Under Article 2, a seller must deliver a "perfect tender" to the buyer, otherwise, the buyer may completely reject the tender, subject to certain limitations: when the contract is an installment contract, and each installment is separately delivered and pair for; when it is commercially impracticable for the seller to send a perfect tender, when the seller has an objective reasonable good faith belief that the buyer will accept non-conforming goods and if he does not, has a reasonable time (even after the contract date) to send conforming goods, and lastly, if prior to the contract date the seller sent non-conforming goods, he has up until the time of the contract execution date to complete full and proper performance. A buyer, upon receipt of a non-conforming shipment, may reject the goods for non-conformity, revoke acceptance upon discovery of a latent defect, cover and sell goods for a reasonable price in good faith, and recover for incidental and consequential damages. The buyer must immediately give the seller notice of his rejection, or within a reasonable time; otherwise, he loses the ability to reject the goods and recover damages. After a buyer rejects, he must keep the seller's goods in a reasonably safe condition and comply with any of the seller's instructions as to how to preserve them. If the goods are perishable, the buyer must in good faith attempt to sell them before they rot. When a buyer retains possession of the seller's goods and he does not have title, this creates a bailor-bailee relationship. When this type of relationship arises for the benefit of the bailor, the bailee owes a slight degree of care; if the benefit is for both bailor and bailee, the bailee must exercise reasonable care in storing the bailed goods, and in the case where the goods are retained solely for the benefit of the bailee, the bailor owes the highest degree of care that the goods should not be lost, stolen, or ruined. No writing is necessary when the relationship is for less than a year. An exception to the statute of frauds is where a bailee promises to obtain insurance for the bailed goods and fails to do so.

Here, L properly rejected the footballs, goods which are non-conforming since they were not basketballs, by giving notice to AC within a reasonable time. He became a bailee of AC's goods because he only retained possession, and not title, and acted reasonably by storing the footballs in a locked storage facility. However, because this bailment arrangement benefited AC, the maximum amount of care that L owed was reasonable care, which he exercise by locking the goods up so that no one could access them - although he may have also hired a security guard to guard the locker, this high degree of reasonable care was not required of him. Therefore, Len would not be liable for the loss of the footballs, and AC will be forced to bear the loss.

3. The last issue is the period of time for with O can collect rent from L.

Under NY tenancy law, a tenancy of years, or a periodic tenancy is created when a lease is signed by the party to be charged, and the term extends for over a year. Such a lease is subject to the statute of frauds. A tenancy of years is for more than one year and ends without notice to either party. A periodic tenancy is a month to month tenancy that requires at least 30 days' notice before it is ended. A tenancy at will is terminable by either party at any time, but in NY there must be at least 30 days' notice by the party terminating the lease given to the other party. Under Common law, a landlord had an option to renew the original lease when a tenant remained in possession. Under New York law, when a lease ends and the tenant continues to occupy the premises, only a periodic tenancy is created if the landlord accepts rent, and all rules applying to periodic tenancies and their termination apply to the lease. A tenant who remains in possession after the lease ends and refuses to pay rent is deemed a holdover tenant, and a landlord can commence an action against him for the fair market value of the lease, as well as consequential damages for losing any future tenants as a result of the prior tenant's refusal to move.

In this case, a periodic tenancy was created between O and L after L remained in possession of the building at the end of the lease, and O accepted L's rent in June. O can collect rent from Len from the period of the lease term ending (June), until February 2014, since L told O that he intended to vacate within 60 days, giving the required 30 day notice that he will vacate on the first of February. Under Common law, the landlord had an option to renew the original lease when a tenant remained in possession, but this is not the law followed in NY today. Therefore, O can collect rent from Len for every month he stayed over his original lease, as long as L gives him 30 days' notice before he moves out.

Second Answer to Question Three

1. The first issue is whether Owner can have his contract with Dom voided on grounds of unconscionability.

The law of contracts in New York is governed by the General Obligations Law (GOL.) The forming of a contract requires an offer, an acceptance, and consideration, although the adequacy of consideration is generally not contemplated by the courts, unless the consideration is illusory or fraudulent. A valid contract also must not have any defenses to its enforcement. A party to a contract may petition the court to have the contract declared unenforceable because of unconscionability. Unconscionability arises where a contract between two parties is so grossly unreasonable and unfair as to be unenforceable on its terms. The courts, when evaluating whether a contract should be voided for unconscionability can choose to void the entire contract or choose to void just the terms that render the contract unconscionable. In order to find a contract unenforceable, the court must look to procedural unconscionability and substantive unconscionability. Procedural unconscionability refers to the manner in which the contract was executed, and here the Courts will look to, for example, the amount of time given to the parties to read and understand the contract, whether a party was given adequate time to have the contract examined by his or her attorney if requested, whether the party was pressured into signing when this was against his will. In terms of substantive unconscionability, the courts will look to the very terms of the contract, and see whether or not the terms are vastly more favorable to one

party over another. The courts may also consider whether there was an unequal bargaining power between the two contracts.

In this case, Dom and Owner contracted for a sale of air rights above Owner's building. Owner was experiencing severe financial difficulties and desperately needed the money. On receipt of the contract, he expressed desire to discuss the contract with his attorney, but Dom would not allow this, and Owner subsequently accepted to be bound by the contract because he needed the money. Here, there are some elements of procedural unconscionability because Dom did not allow Owner to have the contract reviewed by his owner, and stated that he needed the contract signed immediately and did not have time to wait for Owner's attorney. It is unlikely that a sale for air rights above someone's property could be disadvantaged by the property owner's wish to have the contract reviewed, and thus the temporal element gives rise to an inference procedural unconscionability. It should be noted however that Owner did not insist on having his attorney review the contract.

As previously stated, in looking for substantive unconscionability, the courts will look to the unequal bargaining power between the parties, and any terms that are vastly more favorable to one party than the other. Here, Dom agreed to pay owner $250,000 for the sale of his air rights. Thus, there was valid consideration, as the adequacy of consideration will generally not be subject to judicial scrutiny because the courts often prefer to defer to the wishes of contracting parties. However, Owner subsequently learned that Dom had entered into contracts with other area owners for similar rights but had paid those owners more money. This is the primary basis for Owner's wishing to void the contract. While selling property to an individual at a substantially lower price than to others may generally give rise to a claim for substantive unconscionability, the courts would also look to whether there was an unequal bargaining power between the parties. Here, there is nothing to suggest that Dom knew of Owner's financial difficulties, or that he used his knowledge of such difficulties to induce Owner's entry into the contract. Additionally, there was a period of time between Dom's offer of $250,000 and the delivery of the contract where Owner could have researched to see whether $250,000 was a good price for the sale of his air rights, however he did not do this until after the contract had already been signed. Thus, Owner has a weak claim for substantive unconscionability.

Accordingly, Owner will likely not be able to void his contract on the ground of unconscionability as while there were some elements of procedural unconscionability, they do not seem to have been motivated by a desire of Dom to take advantage of Owner's fragile financial state. In looking to substantive unconscionability, there does not seem to have been an unequal bargaining power between the parties. Dom was not aware of Owner's financial state and Owner had an opportunity to consult his attorney, or other building owners, in advance of the contract to discuss whether the price was fair.

2. The second issue is whether a buyer bears the risk of loss when a seller ships non-conforming goods.

As this contract between Len and Athletic Co is for 2,000 basketballs, it is a 'goods' contract and for that reason will be considered under the terms of the Uniform Commercial Code (UCC.) The UCC provides that contracts for the sale of goods valuing over $500 must be in writing in order

to satisfy the Statute of Frauds, although merchants may avoid this by the use of a confirmatory memo. The UCC provides that in a single goods shipment (as opposed to an installment contract, where parties will contract to send multiple shipments of goods), the goods must satisfy a 'perfect tender' rule. This means that a seller must ship perfectly conforming goods before or by the time stipulated in the contract. Any breach of the perfect tender rule is a breach of the contract. The UCC recognizes that this sometimes leads to harsh punishments for sellers who ship non-conforming goods and so in cases where a seller has shipped non-conforming goods and there is time remaining to perform on the contract, the seller will be able to ship conforming goods, provided they arrive by the date stated in the contract. A buyer may always choose to accept non-conforming goods, either by accepting the goods expressly, engaging in actions that are inconsistent with the ownership of somebody else, or failing to reject the goods within a reasonable time. This will still constitute a breach on the seller's part, although damages will be less than what they otherwise would have been. A buyer may of course immediately reject non-conforming goods under the perfect tender rule.

Where a seller ships non-conforming goods with no time left on the contract to tender perfect goods, this will be a material breach of the contract. The UCC in some cases allows for additional time to perform on the contract, but only for sellers who have dealt with the particular buyer before and who ship non-conforming goods having seasonably notified the buyer that the goods are being sent as an accommodation. In these cases, the UCC will allow a commercially reasonable time for the seller to ship goods that conform to the 'perfect tender' rule.

The allocation of the risk of loss in a UCC contract depends on whether the parties are merchants, and whether or not the goods were conforming. When a merchant seller ships conforming goods, the risk of loss passes to the buyer upon physical receipt of the goods, because the seller is deemed to be the one most able to control the goods until the buyer receives them. However, where a seller ships non-conforming goods and the buyer does not accept them, the risk of loss remains on the seller. In these circumstances, the buyer becomes a bailee of the goods, and while the buyer does not bear the risk of loss, as a bailee they are required to take reasonable care of the goods until the seller reclaims them. The buyer is usually required to abide by any instructions given by the seller as to when and how they will reclaim the goods.

Here, there is no indication that Len and Athletic Co have engaged in business with each other before, and so there is nothing that Athletic Co could have relied on that would have allowed it to ship non-conforming goods by the date listed on the contract (delivery was to be made on or about December 1, and the goods were delivered on December 1.) The UCC will still recognize a contract as valid where the date for delivery is not specified exactly, and in cases such as this one, where delivery is to be made 'on or about,' they will impose a reasonable time restriction. Here, it is conceivable that the courts could choose December 1 as the ultimate date for delivery. Regardless of the date of delivery, the goods shipped by Athletic Co were non- conforming and there is nothing to suggest that they were sent as an accommodation, or that Len was notified of the fact that non-conforming goods were being sent. Accordingly, the risk of loss does not pass from Athletic Co to Len even though Len is in physical receipt of the goods. However, Len is required, as a bailee, to exercise reasonable care over the goods. Here, Len placed the footballs in a locked storage facility close to his principal place of business. There is no indication that Len was aware of a risk of this facility being broken into, nor that he placed the footballs there

carelessly or recklessly. Accordingly, Len has discharged his duty to act with reasonable care in relation to these non-conforming goods and the risk of loss will remain on the seller. Therefore, Len is not liable to Athletic Co for the loss of the footballs.

3. The third issue is whether, and for how long, a landlord may collect rent from a holdover tenant.

New York property law provides for a number of different types of tenancies. The type of tenancy initially held by Len in Owner's property was a commercial tenancy for years, which is a tenancy for a specific amount of time and which comes to an end expressly on the last date of the lease. Here, Len's tenancy for years expressly ended on May 31, 2013. When a tenant remains in the building past the expiration date of a tenancy by years, a new tenancy for years does not automatically start. The landlord and the tenant would be required to execute a new lease in order for this to happen. Rather, New York law provides that where a tenant 'holds over,' a landlord has a few options. They may choose to evict the tenant by bringing an action for eviction pursuant to the RPAPL, or they may choose to accept rent from the tenant. A landlord cannot engage in self-help to evict the tenant himself (e.g. by changing the locks) or he will be liable to the tenant for treble damages. When the landlord accepts rent from a holdover tenant, this creates an implied periodic tenancy, and this tenancy lasts from month to month. It does not automatically convert into any other type of tenancy simply on the basis of the tenant's remaining in the landlord's property and paying rent. Where there has been no dispute as to the rent, the tenant is required to pay the same amount of rent as he did before, here $5000 a month. In a tenancy for years, where a tenant abandons the lease before the time is up, the Landlord may either accept the abandonment, or hold the tenant liable for unpaid rent throughout the rest of the tenancy. A landlord in New York has no duty to mitigate their damages after a tenant breaches the lease contract.

Accordingly, Len has a month to month periodic tenancy in Owner's building now, and not another three year tenancy for years, because Len and Owner did not expressly agree to another lease, and Owner has not yet initiated eviction proceedings against Len. Where a tenancy is month to month, notice of intent of either party to end the lease term must be given in the month preceding the date of the month on which rent is due (i.e. where the rent is payable March 30, notice must be given prior to March 1. Where the rent is payable February 15, notice must be given prior to January 15.) Here, Len gave 60 days' notice of his intention to vacate which satisfies the requirements for notice for an intent to vacate in a periodic tenancy. Accordingly, because this was a periodic tenancy and not a tenancy for years, Len's notice was valid and he is not liable to Owner for any unpaid damages.

QUESTION-FOUR

Wendy was granted an order of protection against her estranged husband, Hank, directing him to stay away from her and her residence in T Town. The order of protection was duly filed with the T Town police department. One morning shortly thereafter, Hank telephoned Wendy and told her that he was leaving his place of business and was coming over to her house to "discuss their relationship." Hank's place of business was thirty minutes from Wendy's house.

Wendy immediately called the T Town police department's emergency phone number and told the operator that Hank was on his way to her house in violation of an order of protection and she feared for her safety. The operator assured Wendy that there was at that moment a police car on patrol in Wendy's neighborhood and told her "I'll send the police car right over to your house." However, the operator inadvertently reversed the house numbers in writing down the street address and gave the police the wrong address. The police went to that wrong address, and while they were there Hank arrived at Wendy's house, kicked in the door, confronted Wendy and assaulted her.

Wendy then got away from Hank, ran out the back door, and climbed over a four-foot high fence that surrounded the backyard of her neighbor, Ned. While racing across Ned's yard, Wendy injured her leg when she stepped into an unprotected hole that Ned had dug earlier that day in anticipation of the delivery of a small tree to be planted the next day. The police then arrived and apprehended Hank.

After filing a notice of claim against T Town, Wendy timely brought an action against T Town and Ned seeking damages for her physical injuries which she alleged were caused by their acts of negligence.

(1) Can T Town be held liable for damages for injuries to Wendy caused by (a) the assault by Hank at her home and (b), assuming liability for the assault, her stepping into the hole in Ned's backyard?

(2) Can Ned be held liable for damages for injuries to Wendy caused by her stepping into the hole in Ned's backyard?

First Answer to Question Four

1. (a) The issue is whether T Town's failure to comply with its promise to take action for preventing Hank to assault Wendy would render T Town liable for negligence.

Usually a government department will not be liable for services that are only provided by public services, or when a government official has to apply his or her discretion when a decision has to be made. Also, a government official, such as the police, will not be liable for damages caused by his or her negligence while working on the scope of his or her employment and when the action is deemed reasonable. However, a police officer has a public duty to a plaintiff when the officer promises he will take action, the police officer knows that failure to take action may result in damages of the plaintiff, the plaintiff seeking action relied on the police officer and as a failure of acting of the police officer the plaintiff suffers damages. For a prima facie case of negligence, the plaintiff must show by a preponderance of the evidence that defendant owed him a duty of care, breached that duty, and the breach was the actual and proximate cause of the damages suffered by the plaintiff.

Here, T Town police department's emergency phone received a call from Wendy asking for help as her ex-husband will probably breach an order of protection and she did fear for her life.

Police, by mistake, directed a police car to the wrong house even though Wendy provided them with the correct address. The police had a duty to protect Wendy from the threat Hank was causing and they breach that duty by not paying specific attention to important details, such as what was the number of Wendy's house. The reasonableness of the duty of care is measured upon the relationship of the parties. Here, the relationship grants an upmost duty of care as the T Town police department's emergency phone number has been created to prevent these type of accidents. Moreover, an officer that was authorized to talk on behalf of T Town police department promised Wendy that he would send a police car right over to her house as the car was close to the house. The operator would probably know that failure to send the police car Wendy could suffer damages as she said she was fearing for her life. Wendy relied on this promise as she didn't move from her house. If she had not relied on the promise she could have left the premises and escape from Hank before he arrived. Therefore, Wendy's reliance on the promise directly caused her to be assaulted by Hank. As the result of T Town's mistake, Wendy was assaulted by Hank, as the facts state.

Therefore, the operator breached his duty towards Wendy and therefore he was negligent on his conduct. T Town will be vicariously liable for the operator's conduct. In New York, the principal will only be liable for the negligent actions of his employees when they were authorized to act in such a way. Here, it would be clear to say that operator's duties on his job were to assist people being in peril, and act to prevent any damage to that person. Therefore, T Town can be responsible for Wendy's injuries.

(b) The issue is whether an unforeseeable action would breach the chain of causation limiting liability on T Town for the injuries of Wendy.

As stated before, to have a prima facie case of negligence, the breach of duty must be the actual and proximate cause of the damages suffered by the plaintiff. When different events happen in between the breach of duty and the damages in which the plaintiff incurred, the question relies on if such damages were foreseeable. Usually, criminal acts break the chain of negligence and the first person who was negligent would not be negligent for damages incurred after the criminal act happened.

Here, it was not foreseeable for the operator that his actions would cause Wendy to get injured because there was a whole on the fenced land of the neighbor. Moreover, a criminal action occurred when Hank arrived to Wendy's house and assaulted her.

Therefore, T Town would not likely be responsible for the injuries of Wendy caused by her stepping into the hole in Ned's backyard.

2. The issue is whether Ned would be liable for Wendy's injuries caused by her stepping into the hole that was dug in anticipation of the delivery of a small tree in Ned's backyard.

As stated before, a person to be liable for negligence should have a duty of care towards the plaintiff, have breached that duty of care, the breach of that duty caused actually and proximately the injury of the plaintiff and plaintiff suffer damages as a result of the defendant's negligence.

In New York, there is no distinction between a trespasser, a licensee or an invitee, except for analyzing reasonableness and foreseeability. In New York, a landlord or person in possession of land must take reasonable care to people that can enter the land, and defendant must take reasonable precaution while conducting activities on the land.

Wendy, in order to recover for damages for Ned's alleged negligence should show that negligence was on Ned's part by a preponderance of the evidence. Here, Ned dug a hole with the purpose of planting a tree on the next day. The tree had to be delivered the next day and the hole was unprotected. Ned's backyard, as the facts show, was surrounded by a high fence that protected the land from trespassers. However, because Wendy was in a rush she decided to climb the fence and escape from Hank by running through Ned's backyard. It could be found by the court that Wendy was not a foreseeable trespasser as the land of Ned cannot be easily trespassed as a result of the fence. Also, Wendy doesn't seem to be a regular trespasser of the land, or a discovered trespasser. It seems that Ned could prevent and foresee that Wendy will climb the fence and run through Ned's land. Because, Wendy was a mere trespasser, Ned doesn't own her a duty of care. Ned, will only be liable for traps that are in the land. The hole on Ned's land would be considered as a trap if Ned had dug it with the wanton, willful, reckless, or intentional purpose of damaging someone.

Here, the hole as stated before was dug with the purpose of planting a tree and not with the intentional, wanton, willful, or reckless purpose of damaging anyone.

Therefore, under the circumstances Ned did not owe a duty of care towards Wendy for the damages the hole dug on his land caused to her, and Wendy will not be able to recover from Ned.

Second Answer to Question Four

1. (a) A court should likely hold that T Town can be held liable for the injuries to Wendy (W) caused by Hank's assault.

To establish a claim for negligence, a plaintiff must establish (1) the existence of a duty on the part of the defendant, (2) a breach of that duty, (3) that the breach of the duty was the but-for and proximate cause of her injuries, and (4) harm / damages arising from the breach.

The relevant duty in a negligence action is usually the exercise of reasonable care. In addition, there is generally no affirmative duty to act or rescue another person absent some special relationship. However, if a plaintiff can establish the existence of a special relationship creating an affirmative duty to act, a court can find a breach of that duty by the defendant's failure to act.

Here, a court would most likely find a special relationship between W and the T Town police department via the order of protection duly filed with the department on W's behalf to protect her from Hank. Thus, a court could find that the police dept. had an affirmative duty to act to protect W. A court would also likely find that W reasonably relied on the operator's assurance that a police car would be right over, which may have prevented W from taking other steps to avoid harm from Hank (like leaving the house). Thus, the operator's giving the police the wrong

address could constitute a breach of the police department's affirmative duty to protect W from Hank.

In addition, a court would likely find that the operator's provision of the wrong address to the police car was the but-for and proximate cause of W's injuries. Although the intentional torts and criminal acts of third parties generally operate to break the chain of causation, as they constitute superseding intervening causes, because the police department's duty here took the specific form of protecting W from Hank, a court could likely find that its failure to do so due to the operator's giving them the wrong address was nonetheless the but-for and proximate cause of W's harm. But for the T Town operator's mistake and the police's resulting failure to protect W, Hank was able to bust into W's house and assaulted her.

Lastly, it is clear that W suffered harm / damages. Municipal liability could also come up in the court.

(b) Although court could most likely find that T Town can be held liable for the injuries to W caused by the police department's failure to reasonably protect her from Hank, a court would likely find that the police dept. would not also be liable for damages caused by W's stepping into the hole in Ned's backyard. This issue with such liability lies in causation. Generally, an intervening cause that is not reasonably foreseeable as a result of a defendant's breach of his duty to exercise reasonable care will cut off the chain of proximate causation as a superseding cause. Here, a court could likely find that Ned's digging of the hole and W stepping into it and injuring herself as a result of running away from Hank was not a reasonably foreseeable result of the police dept.'s breach of its duty to protect W. Therefore, a court would likely find that this constituted a superseding cause that cut off the chain of proximate causation and that the police department could not be held liable for W's injuries resulting from her stepping into the hole.

Moreover, T Town could argue contributory negligence on the part of W for not adequately watching her step. New York is a pure comparative fault jurisdiction, so a finding of contributory negligence would not bar W's recovery. Rather, the jury would assign W a percentage of fault, along with the police department's relative percentage, for which it would be liable.

2. A court would likely hold that Ned cannot be held liable for damages for injuries to W caused by her stepping into the hole Ned dug in his backyard. In New York, the common law distinctions of duties of landowners based on the plaintiff's classification as a licensee, invitee, or trespasser have been abandoned. Instead, all landowners have a duty of reasonable care in maintaining their premises in a reasonably safe condition as to all reasonably foreseeable persons who may enter their land. The classifications of such persons as licensees, invitees, and trespassers only go toward the foreseeability of the plaintiff's injuries.

Here, Ned owed a duty to maintain his premises in a reasonably safe condition for the benefit of all persons who might be reasonably foreseeable to enter his land. However, a court would likely consider the fact that Ned had a specific and reasonable purpose for digging the hole, as well as the fact that he had just dug the hole earlier that day in anticipation of delivery of the small tree. Moreover, a court would consider that Ned had enclosed his backyard in which the hole was dug with a four-foot high fence. Thus, a court would most likely conclude that it was not reasonably

foreseeable that W would make her way into Ned's backyard and step into the hole Ned had dug, thereby injuring herself. And because this was not reasonably foreseeable, especially considering the presence of the fence, there was no reason for Ned to warn his neighbors or other outsiders of the whole. Because W's stepping into the hole and injuring herself was not reasonably foreseeable, a court would likely hold that Ned did not breach his duty to maintain his premises in a reasonably safe condition and thus cannot be held liable for damages resulting from W's injuries caused by her stepping into the hole.

QUESTION-FIVE

Fred and Meg were married in 1980. Their only child, Sean, was born in 1984. Sean and his parents were estranged from the time Sean was a teenager.

In 2007, Fred duly executed a will containing the following provisions:

FIRST: I leave my beach property, Sandacre, to my sister, Susan.

SECOND: I intentionally make no provision for my son, Sean, who has gravely disappointed me.

THIRD: I leave $100,000 to Darcy, the daughter of my sister, Susan, for Darcy has always been like a daughter to me.

FOURTH: I leave $500,000 to my best friend and beloved wife, Meg.

FIFTH: I leave the remainder of my estate to my dear mother, Mom.

SIXTH: I name my brother, Brad, as my executor.

In 2011, Fred and Meg divorced, although they remained close friends and continued to regularly socialize together.

Fred died in 2013, survived by Meg, Sean, Susan, Darcy (Susan's only child) and Brad, and by his father, Dad. Mom died in 2012, and her duly probated will leaves her entire estate to Dad.

Fred's 2007 will was found among Fred's papers in his locked desk drawer cut into two pieces in an envelope with the words "My Will" written on it in Fred's handwriting. No other will has been found. At the time of his death, Fred's estate consisted of Sandacre and investments worth over $700,000.

Brad has offered Fred's 2007 will for probate. Sean filed an objection to probate of the will, claiming that the will was validly revoked. After a hearing at which due proof of the above facts was presented, the court admitted Fred's will to probate.

Susan validly renounced any interest in Fred's estate.

(1) Was Fred's 2007 will properly admitted to probate?

(2) Assuming Fred's 2007 will was properly admitted to probate, how should Fred's estate be distributed?

First Answer to Question Five

1. The issue is whether a will cut into two pieces found in an envelope with the words "My Will" in testator's locked desk drawer, was validly admitted to probate?

Under NY Estate Powers and Trust Law (EPTL) a valid will consists of a writing by a testator, who is over 18, signed by the testator at the end thereof, in the presence of or acknowledged by two witnesses, that is published to be his last will and testament, witnessed by two witnesses within 30 days of each other. Once a will is validly executed, it can be revoked in two ways; 1) by the creation of a new will that complies with all the will's formalities and expressly revoking the previous will, or 2) by a valid physical destruction of the will document by the testator or by a third party at the direction of the testator. When a will was last seen in the presence of the testator and subsequently found destroyed after the testator's death by a physical act, there is a presumption that the testator revoked his will.

Here, the facts tell us Fred's will was duly executed so he had a valid will, so it should be admitted to probate. However, because the facts tell us that the will was last seen in the presence of the testator, and upon his death it was found among papers in his locked drawer, cut into two pieces, a presumption arises that the will was revoked by physical act. Although it was cut into two pieces, the court must determine if the will was validly revoked by physical act. Based on the circumstances of divorcing his wife, who was left a large bequest under the will, and the death of his mother who was left the residuary of his estate, the court would likely conclude the will was revoked by a valid physical act. Thus, because the will was revoked by a valid physical act, the will was not properly admitted to probate.

2. The issue is how should a testator's will be distributed when he divorced his spouse before death, a residuary beneficiary died before the testator's death, the testator's son was disinherited by the will, and the beneficiary of a specific gift renounced a bequest left to her?

(a) The issue is who takes a specific gift that was validly revoked by a testator's sister?

Under the EPTL, a person who revokes a will is required to make a written, signed and acknowledged statement renouncing the will and file it with the court. They are also required to file a separate affidavit with the court stating that no consideration was received for revoking the will. If a valid renunciation occurs, the beneficiary is treated as predeceasing the testator and the gift would fall into residuary. However, NY's anti-lapse statue provides that when a testator makes a gift to his brother, sister or issue by will and that brother, sister or issue leaves issue that survives the testator the gift will not lapse and it will pass to the beneficiary's issue.

Here, the facts tell us Susan validly renounced the specific gift, Sandacre. Because Susan is the testator's sister and has issue, Darcy, the gift will not lapse and fall into residuary. Therefore, because NY's anti-lapse statute applies, Darcy will take Sandacre. In addition to taking Sandacre, Darcy will also receive a general gift of $100,000, the amount left to her under the will by Fred.

(b) The issue is whether Meg, the testator's ex-wife, will inherit $500,000 left to her under the will?

Under the EPTL, when a spouse is left a bequest under the testator's will and before the testator dies, the couple obtain a valid divorce, the surviving spouse is treated as predeceasing the testator and her bequest will fall into the residuary.

Here, Fred who executed his will in 2007, divorced his spouse in 2011 two years before he died. Therefore, she will be treated as predeceasing the testator. Although Meg and Fred remained close friends, that fact is irrelevant and the $500,000 left to Meg's will fall into the residuary.

(c) The issue is what happens when a residuary beneficiary predeceases the testator?

Under the EPTL, when a residuary beneficiary predeceases the testator, and no other residuary beneficiary is named, unless the anti-lapse statute applies, the gift will lapse. Here, because Fred's mother predeceased the testator and NY's anti-lapse statute doesn't apply because she is not a sibling or issue of Fred, the gift will fail resulting in partial intestacy. Therefore, the residuary of Fred's estate including the $500,000 left to his ex-wife will fall into intestacy.

(d) The issue is how a decedent's intestate property is distributed when the testator and his spouse divorced before the testator's death and the testator has disinherited his son?

Under the EPTL, when a decedent dies without a will or partial intestacy results because a full distribution of his estate could not be made according to his will, his estate is distributed according to the NY state intestacy statute. The NY Intestacy statute provides that if the decedent is survived by a spouse, the spouse takes the entire estate. If the decedent is survived by a spouse and children, the spouse takes $50,000 plus 1/2 of the estate and the other 1/2 of the estate is split per capita by the children. If the decedent is survived only by children, the children will take the entire estate shared according to a per capita basis. If the testator is not survived by a spouse or children, the testator's parents, if alive will inherit the property under the intestacy statute. Further, when a testator disinherits someone in his will, NY courts will give that clause full effect if the estate were to fall into intestacy.

Here, because Meg is treated as predeceasing Fred due to their divorce, she is not entitled to inherit via intestacy. Therefore, because he is not survived by a spouse and only one child, that child will take the entire estate. However, because Fred disinherited his only son, Sean, in his will, the courts will give that clause full effect in intestacy and Sean will not be entitled to take any of Fred's property. Therefore, because Fred is survived by his Father, his wife is treated as predeceased and his son was disinherited by the will, Fred's father will take all of Fred's property that fell into intestacy.

Second Answer to Question Five

1. The issue is whether physical destruction of a will in the possession of the testator is sufficient to prove revocation by destruction.

Under the Estates Powers and Trusts Law (EPTL), a valid will can be revoked by either a later duly executed will or codicil, or by physical destruction with intent to revoke the will. The act of physical destruction must be for the entire words of the will or the signature. Cutting the document in half is a sufficient physical destruction for the act requirement. The testator must also intend to revoke the will by the act of destruction. Absent any proof regarding intent, a will that is found destroyed while in the testator's possession and control is sufficient proof of intent to revoke.

Here, Fred's will was cut in two. The will was found in Fred's locked desk drawer. Therefore the will was in Fred's control and possession and a sufficient act of destruction occurred. The intent to revoke is assumed.

Sean will object that there is other evidence showing that there is no intent to revoke. It was contained in an envelope with the words My Will on it, and in a safe place. However, these arguments will fail because the fact that it was in Fred's control is sufficient evidence. The envelope could have been from before Fred decided to revoke the will.

Therefore, the will should not have been admitted to probate.

2. The issue is what is the correct distribution under the will.

Susan
The issue is what effect a valid renouncement by a sister of the testator has.

Under the EPTL, anyone can renounce their gift. Upon proper renouncement they are treated as predeceasing the testator.

Here Susan validly renounced and is treated as predeceasing Fred. However, because Susan is treated as predeceasing Fred the Anti-lapse statute applies. Under the Anti-lapse statute, a gift to issue or sibling does not lapse even if the issue or sibling predeceases the testator. Susan is the sister of Fred, and therefore the gift to Susan is preserved for her issue. Darcy is the only issue of Susan and therefore Darcy takes Sandacre. This is true even though Darcy has a separate gift under the will. The fact that Fred provided for her in the will, does not show that Fred was limiting her to only that amount. Therefore Darcy can receive Sandacre as well.

Sean
There is no requirement to leave anything to your children. Therefore Sean who is specifically not given a gift under the will takes nothing. This is true even under intestacy due to the failure of the residuary clause.

Darcy
Darcy has a general bequest of $100,000. Therefore, she takes that amount and as shown above also receives Sandacre.

Meg
Under the EPTL a gift to a spouse is nullified by a future divorce. Here, Meg and Fred divorced and therefore Meg does not get the $500,000 under the will. This is true even though they remained good friends. The gift falls under the residuary clause and because that clause fails as well, the gift falls into intestacy.

Mom
The issue is what effect does the residuary predeceasing the testator have on the distribution.

Under the EPTL if the residuary predeceases the testator, and the Anti-lapse statute does not apply, the residuary estate falls into intestacy. The Anti-lapse statute does not apply to gifts to parents.

Mom predeceased Fred. Therefore the residuary clause fails and the remaining $600,000 falls into intestacy. The estate is worth $700,000 and $100,000 went to Darcy. Therefore the residuary is $600,000.

Intestacy Distribution

Under the EPTL a spouse does not get under intestacy after divorce. Therefore Meg gets nothing. Issue that is intentionally and specifically not given a distribution does not get a share in intestacy. Therefore, Sean gets nothing. If there is no spouse and no issue that receive under intestacy, the next to receive are parents. Fred's Dad is still alive and therefore gets the remaining $600,000 under intestacy.

Therefore, the estate should be distributed as follows. Darcy gets $100,000 plus Sandacre.

MPT-ONE
MPT - In re Rowan
In this performance test item, examinees are associates at a law firm representing William Rowan, a British citizen, in an immigration matter. Rowan moved to the United States with his wife, a U.S. citizen, and became a conditional permanent resident of the United States. The couple recently divorced, and Rowan's ex-wife, Sarah Cole, actively opposes his continued residency in the United States. Acting pro se, Rowan filed a Petition to Remove Conditions on Residence; the immigration officer denied the petition, and Rowan seeks the law firm's assistance. Examinees' task is to draft a brief for the upcoming hearing before an immigration judge, arguing that Rowan married Cole in good faith and not solely to obtain residency, that the denial of Rowan's petition was not supported by substantial evidence, and that in fact, the totality of the evidence supports granting the petition. The File contains the instructional memorandum, guidelines for drafting persuasive briefs, a memorandum summarizing the client interview, an

affidavit by Sarah Cole, and a memorandum describing evidence to be submitted at the immigration hearing. The Library contains selected federal statutes and regulations on the requirements for conditional residency and two federal Court of Appeals cases addressing the basic process and standards for seeking a waiver of the joint filing requirement as well as the substantial evidence standard of review.

First Answer to MPT
In re Rowan

Persuasive Brief on Behalf of William Rowan, Petitioner

To: Immigration Judge

From: Examinee Date: February 25, 2014 Re: Matter of William Rowan Legal Argument

I. The petitioner has shown that his marriage was conducted in good faith due to his true affections for his wife and his support of her during their marriage.

Under the Immigration and Nationality Act, an alien is entitled to residency on a conditional basis if he marries a United States citizen. 8 U.S.C. § 1186a(a)(1). Although the married couple typically applies for removal of the condition together (see 8 U.S.C. § 1186a(c)(1)(A)), an alien who has divorced his spouse may apply to remove the conditional nature through a "hardship waiver." 8 U.S.C. §1186a(c)(4)(B). The petitioning alien has the burden of proving that the marriage was entered into in good faith by the alien. Id. The petitioning alien will meet his burden of proof by establishing his intent to make a life with his spouse when he married her. See Hua v. Napolitano, US Court of Appeals (15th Cir. 2011). The petitioning alien must prove this standard by a preponderance of the evidence. See Connor v. Chertoff, US Court of appeals (15th Cir. 2007).

The court should consider a number of factors in determining whether an alien spouse conducted his marriage in good faith. According to Connor, the proper inquiry is whether the alien spouse and his spouse "intended to establish a life together at the time they were married." Under Connor, factors to be taken into consideration by the court include the intent of the parties during their marriage, which can be established through "lease agreements, insurance policies, income tax forms, and bank accounts." Id. at p. 16. Testimony about the relationship both before and during marriage is also considered. Id. This type of evidence has greater weight than "personal conjecture or inference." Id at p. 16. Other factors considered are the actions of the spouses during the marriage and the way they presented themselves to others. See Hua v. Napolitano, US Court of Appeals (15th Cir. 2011). Under the Aliens and Nationality Act, the court should consider financial documentation, documentation about the length of time the parties cohabited after the marriage, and "other evidence deemed pertinent by the director." 8 C.F.R. § 216.5.

Here, Mr. Rowan and Ms. Cole agree that their relationship began in England, they lived together in England before marriage, they were married in England, and they lived as husband and wife in England prior to moving to the United States. The couple was married for five

months before moving to the United States. It was Ms. Cole's idea to move to the United States and Mr. Rowan agreed in an effort to support his wife's endeavors. Although the courtship was short, there is evidence that the two developed their relationship quickly and had true feelings for each other. Mr. Rowan reported that it was "love at first sight" when he met Ms. Cole. Anna Sperling, a friend and coworker of Mr. Rowan who spent time with the couple both together and separately, is prepared to testify that Ms. Cole felt gratitude toward Rowan for moving to the United States for her and that Ms. Cole believed Mr. Rowan "did it for love." Ms. Cole herself testified that she believed Mr. Rowan's affection for Ms. Cole was "real." George Miller, who was also a friend and coworker of Mr. Rowan, is prepared to testify that Mr. Rowan and Ms. Cole held themselves out as being a married couple and discussed things that were typical of married couples, such as buying real estate together. Mr. Rowan expressed that Ms. Cole did not seem as enthusiastic about holding themselves out as a married couple and socializing. However, Mr. Rowan's coworkers knew that Mr. Rowan was married and Mr. Rowan's friends were familiar with the marriage and socialized with both Mr. Rowan and Ms. Cole.

It is true that Mr. Rowan was motivated for coming to the United States for other reasons, such as his siblings who already lived in the United States and job opportunities, but the evidence establishes that Mr. Rowan was more interested moving to the United States due to his relationship and marriage with Ms. Cole. Although Mr. Rowan began to look for a job in the United States before proposing to Ms. Cole, Mr. Rowan had not secured employment in the United States prior to moving with Ms. Cole. This shows a good faith effort that Mr. Rowan moved to the United States to preserve his marriage and to be close to Ms. Cole, in addition to supporting Ms. Cole in her academic and professional pursuits. Mr. Rowan was supportive of Ms. Cole's endeavors in the United States. Mr. Rowan cosigned on a loan for Ms. Cole to buy a car. Although Ms. Cole's affidavit suggests that Mr. Rowan was not supportive of Ms. Cole's professional endeavors, the evidence establishes that Mr. Rowan was more interested in preserving their marriage whereas Ms. Cole was more interested in furthering her career. Ms. Cole traveled extensively during the 2.5 years marriage, with an estimate that she left the marital home for a total of seven months during this time. Although Ms. Cole may testify that Mr. Rowan was not supportive of these absences, Mr. Rowan reported that he was upset that Ms. Cole was gone for so much of the time. Over Mr. Rowan's objections, Ms. Cole accepted a job offer in another state. Ms. Cole expected Mr. Rowan to again relocate for Ms. Cole without having a job offer of his own. Mr. Rowan had already established himself in a career that he worked towards by obtaining a degree. It was Ms. Cole who filed for divorce when Mr. Rowan refused to move. It was Ms. Cole who abandoned the marital home for her own interests. It was also only after Mr.

Rowan refused to move that Ms. Cole threatened that she would testify against Mr. Rowan's petition for residency.

The couple has a considerable amount of documentary evidence that provides support that they lived together as a couple. They jointly signed a lease to an apartment and shared living expenses. They also moved to a larger space and signed a two-year lease, showing an intent by the couple to continue to live together in their marital relationship. The couple filed joint tax returns (for 2011 and 2012) and each named the other as next of kin. The couple was also married for nearly 2.5 years before becoming separated. They were living together in the United

States as husband and wife for nearly two years. If Mr. Rowan was only here to obtain United States residency, he would not have been such a supportive spouse towards Ms. Cole for all of that time.

Mr. Rowan married Ms. Cole in good faith due to Mr. Rowan's true affections for Ms. Cole. Mr. Rowan held himself out as a devoted spouse to Ms. Cole and remained committed to the marriage until Ms. Cole filed for divorce.

II. The immigration officer's decision was not supported by substantial evidence in the record.

A reviewing court must utilize the substantial evidence standard in reviewing a Board of Immigration Appeals' (BIA) determination in denying a hardship waiver. See Connor v. Chertoff, US Court of appeals (15th Cir. 2007). Specifically a court of appeals must affirm the BIA's order "when there is such relevant evidence as reasonable minds might accept as adequate to support it, even if it is possible to reach a contrary result on the basis of the evidence." Id at 15. This is the standard that should be used by the immigration judge in Mr. Rowan's case.

Unlike Connor, there is very little inconsistency in the documentary evidence or in the testimony of Cole and the information provided by Mr. Rowan. In Connor, the alien spouse lied on his immigration application about having children. Connor also testified about documentary evidence of the married couple, but was not able to provide evidence that certain documents (i.e., applications for life insurance and automobile tile) had been filed. The lease that Connor presented was unsigned by either spouse. Here, Mr. Rowan presented signed, valid documentary evidence supporting the marriage between Mr. Rowan and Ms. Cole and indicating that the marriage was entered into and maintained in good faith.

Mr. Rowan's case is more similarly aligned with the alien spouse in Hua, in which the Court of Appeals overturned the Secretary's decision and determined that the marriage was made in good faith. In Hua, the court considered that the alien spouse was not the spouse who filed for divorce, the nature of their courtship and marriage, and the actions of the other spouse that indicated that the non-alien spouse was not fully committed to the marriage (due to an extramarital affair). Here, Mr. Rowan did not initiate the divorce proceedings and he did not conduct himself in an unfaithful way during his marriage. Indeed, the substantial evidence in the record indicates that Mr. Rowan was committed to his marriage and desired to stay in the marriage.

III. The totality of the circumstances supports granting Rowan's petition to obtain lawful permanent residency and the immigration officer's decision should be reversed.

The reviewing agency must assess the entirety of the record in determining the validity of the marriage and whether the alien spouse married for reasons other than obtaining residency in the United States. Hua v. Napolitano, US Court of Appeals (15th Cir. 2011).

Here, the record supports that Mr. Rowan and Ms. Cole entered into a valid marriage that was not only based on Mr. Rowan's desire to obtain residency in the United States. There is evidence that Mr. Rowan was interested in living in the United States, but this interest does not negate the fact that he entered into his marriage with Ms. Cole in good faith. Rather, the evidence shows

that Mr. Rowan had true love and affection for Ms. Cole and that Mr. Rowan retained this love and affection until Ms. Cole filed for divorce. Mr. Rowan was invested in the marriage and in supporting Ms. Cole. Indeed, the evidence appears to suggest that Mr. Rowan was more invested in the marriage than Ms. Cole. Ms. Cole made the unilateral decision to leave the marital residence in support of her own career, thus going against Mr. Rowan's wishes. Further, Ms. Cole did not raise the issue of the validity of Mr. Rowan's intentions in entering into the marriage until after Ms. Cole filed for divorce. Ms. Cole herself said that she was "angry" and "shocked" when Mr. Rowan refused to relocate (for the second time) due to Ms. Cole's desires. As such, it appears that Ms. Cole could be motivated by anger and revenge in her testimony against Mr. Cole's application for removing the condition on his residency.

When considering the totality of the circumstances, it is clear that the immigration officer's decision lacks substantial evidence on the record as a whole. As such, petitioner Rowan has satisfied the good faith marriage requirement under 8 U.S.C. § 18861(c)(4)(B). Therefore, the Immigration Court should reverse the decision of the immigration officer and grant Mr. Rowan's petition to remove conditions on residence.

Second Answer to MPT
III. Legal Argument

A. The petitioner has met his burden of proving that the qualifying marriage was entered into in good faith and should be granted a "hardship waiver" because a totality of the evidence shows that the petitioner intended to establish a life with his spouse as evidenced by (a) a lease of real property, (b) a promissory note, (c) maintenance of a joint bank account, (d) the filing of joint income tax returns and (e) socialization together as husband and wife.

Under the Immigration and Nationality Act, an alien spouse may apply to the Secretary of Homeland Security to remove the conditional nature of his permanent residency where the qualifying marriage has been terminated (other than through the death of the spouse) on the basis of a "hardship waiver" by demonstrating that the qualifying marriage was entered into in good faith by the alien spouse. 8 U.S.C. 1186a(c)(4)(B).

The Fifteenth Circuit Court of Appeals held in Connor v Chertoff that "to determine good faith, the proper inquiry is whether [the couple] intended to establish a life together at the time they were married." Furthermore, as part of that inquiry, "the immigration judge may look to the actions of the parties after the marriage to the extent that those actions bear on the subjective intent of the parties at the time they were married". Connor v Chertoff. The petitioner has the burden of proving that he intended to establish a life with his spouse at the time he married her. Hua v. Napolitano.

(i) The petitioner entered into the marriage in good faith, as there is no evidence that the petitioner did not intend to establish a life with Cole when they married or that the petitioner married Cole solely to obtain an immigration benefit.

At the time of their marriage, Rowan and Cole were living in London, England without any articulated intent to move to the United States. In fact, they met in England and lived there together for nearly five months when first married. Furthermore, the petitioner has testified that he pursued Cole despite her repeated rebuffs, evidence which tends to show the petitioner's infatuation with Cole and his intent, no matter what, to gain her affection. Cole's affidavit corroborates that the decision to move to the United States was made by the couple after marriage. Even if, however, securing an immigration benefit was one of the factors that led the petitioner to marry Cole, if the petitioner meets his burden, the marriage can still be found to be legitimate for the purpose of a "hardship waiver". See Hua v. Napolitano. Therefore, the opinion in Cole's affidavit that the petitioner saw their marriage primarily as a means to get U.S. residency is not determinative if the totality of the evidence shows that petitioner entered the marriage in good faith. Whatever Cole's current perception of her past marriage to petitioner, current animosity should not drive an immigration officer's determination of whether, the petitioner entered into and carried out the qualifying marriage in good faith.

(ii) Once married, a totality of the evidence proves that the petitioner entered into the marriage in good faith and took steps to establish a life together.

The Fifteenth Circuit made clear in Hua v. Napolitano that "well-settled law requires us to assess the entirety of the record" when assessing a petitioner's hardship application. Some of the factors that the immigration official may consider are whether the couple socialized as husband and wife, living arrangements, loans or leases entered into together, the maintenance of joint property and the filing of joint tax returns.

Here, both the petitioner and Cole have testified that the couple returned to the United States in order for Cole to pursue her work at the university in Franklin City. The petitioner willingly followed Cole to the United States although he did not at the time have a job. Although the petitioner had previously contacted the university library in Franklin City, he had not at the time of the move received a job offer. His commitment to follow Cole to a new country even without a job is evidence that the petitioner intended to make his marriage to Cole last.

Furthermore, and contrary to Cole's affidavit, the petitioner and Cole entered into several legally operative documents together. The court in Hua v. Napolitano considered actions such as filing joint tax returns, maintaining a joint bank account and entering into automobile financing agreements as elements to prove that a marriage was entered into in good faith. Here, the petitioner and Cole both signed a two year lease together and maintained a joint bank account. They filed joint income tax returns for the years 2011 and 2012 and the petitioner co-signed an automobile promissory note entered into by Cole. Regardless of the petitioner's immigration status, he will remain liable as a co-signer on that automobile promissory note. Couples interested in building a life together merge financial assets and provide financial support for the other, exactly as the petitioner did by co-signing the automobile promissory note. Were the petitioner solely interested in obtaining an immigration benefit, he would not have been likely to desire to become indebted as co-signer for a woman he with whom he did not intend to build a relationship. Troublingly, Cole's affidavit neglects to mention the legal commitments that Cole and the petitioner undertook together and in fact maintains that the petitioner "carefully evaded any long-term commitments, including...property ownership and similar obligations". If the

petitioner was so careful, he would not have entered as a co-signer into a two year lease and he most certainly would not have co-signed for a $20,000 car loan. The facts do not support Cole's contention that the petitioner evaded long-term commitments with Cole; in fact, they show just the opposite. Petitioner was ready, willing and did enter into long term commitments with Cole.

Moreover, the witnesses will testify that the couple socialized as friends and self-identified as husband and wife. The witnesses will also testify that they discussed matters of marital property and unity such as purchasing real estate and borrowing money. Because the Federal Rules of Evidence do not apply at "hardship waiver" hearings, such testimonial evidence is admissible if it is probative and fundamentally fair. Both witnesses will testify about times they spend socializing with the couple together which is drawn from the firsthand observation of the witnesses. Although Anna Sperling's testimony relates her conviction that the petitioner was convinced that Rowan moved to the United States without a job "for love", such opinion testimony is admissible for the immigration official to consider in conjunction with other evidence.

Therefore, the petitioner has more that met his burden of proving both good faith at the time of entering into the marriage and during the marriage.

B. The immigration official's 18 U.S.C. 1186a(c)(4) waiver determination lacked substantial evidence on the record as a whole and therefore the immigration official improperly denied the petitioner's "hardship waiver".

The substantial evidence standard governs reviews of an immigration officer's section 1186a(c)(4) waiver determinations. Orders of an immigration officer should be affirmed when there is "such relevant evidence as reasonable minds might accept as adequate to support it, even if it is possible to reach a contrary result on the basis of the evidence." Connor v Chertoff. The immigration officer's decision should be based on the record as a whole. Hua v. Napolitano.

Here, the immigration official's decision should be overturned because it is not supported by substantial evidence on the record as a whole. In fact, the large majority of the evidence tends to suggest that the petitioner and Cole did intertwine their lives and interests once married. Evidence of marital fights and disagreements over the number of hours worked or work trips taken are natural in any marriage and do not disprove good faith. In fact, many couples experience adjustments during the initial years of marriage as they blend their professional and personal lives. The petitioner's complaints that Cole was working too many hours could instead been construed as evidence of petitioner's desire to spend more time with Cole and as evidence of his frustration with his inability to do so. In fact, there is no evidence that the couple would have divorced but for Cole's unilateral desire to advance her own career at the expense of petitioner's and their marriage. Under the standard articulated in 18 U.S.C. 1186(a)(c)(4) the strength of the marriage or any disagreements in the marriage are insufficient to show a lack of good faith in the face of other evidence that objectively shows that the petitioner and the spouse were actively maintaining a marriage of combined lives and monies.

The majority of the evidence presented suggested that when married, the petitioner and Cole took on legal obligations together, including a lease and a car loan, and lived lives together both

socially and privately. The only real evidence otherwise is contained in Cole's affidavit and, given that the petitioner has provided evidence of those legal commitments entered into by the petitioner and Cole together, Cole's credibility is put into question by virtue of the fact that she denied that such commitments were entered into. The immigration official did not make an adverse credibility determination relating to the immigration officer's interview with the petitioner. Therefore, there is no reason, on appeal to doubt the testimony offered by the petitioner. Instead, it appears that there are "specific, cogent reasons" why Cole's credibility could be put into question as her testimony is inconsistent with documentary evidence. It appears that the immigration officer may have place outsized importance on Cole's affidavit, instead of examining the entirety of the record. Examining the entire record is especially important where, as here, concerns may be raised as to the credibility of one party based on inconsistency.

Therefore, based on the entirety of the record, there is not relevant evidence as reasonable minds might accept as adequate to support the immigration officer's determination that the marriage was not entered into in good faith.