Applicant Number

03803

THE MEE®

MULTISTATE ESSAY EXAMINATION

Read the directions on the back cover.
Do not break the seal until you are told to do so.

NATIONAL CONFERENCE OF BAR EXAMINERS
302 S. BEDFORD ST., MADISON, WI 53703
608-280-8550
WWW.NCBEX.ORG

MEE Question 1

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

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

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

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

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

1) Please type your answer to MEE 1 below

Â

Â

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

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

1)

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

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

2)

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

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

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

MEE Question 2

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

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

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

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

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

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

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

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

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

2) Please type your answer to MEE 2 below

Â

Â

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

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

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

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

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

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

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

MEE Question 3

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

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

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

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

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

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

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

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

3) Please type your answer to MEE 3 below

Â

Â

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

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

MEE Question Three:

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

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

Under UCC Article 9, a party can obtain a security interest in collateral. The process begins by "attaching" to collateral. Attachment governments the relationship between the debtor (the borrower/the one giving the collateral) and the secured party (the creditor/the one taking the collateral). In order to attach, the entities must: (1) agree that the secured party will take a security interest in the collateral (or gain possession or control); (2) the debtor must have right in the collateral; and (3) the secured party must give value. A security interest must properly describe the collateral that is being used as collateral, but the UCC provides that its definitions may generally be used (one such description is equipment). Once attached, the secured party then "perfects" the security interest so as to inform the world of its interest in the debtor's collateral. Perfection cannot occur until attachment occurs. One method of perfecting, which applies to equipment (the collateral at issue here) is to file a financing statement. The debtor must authorize the creditor to file a financing statement and the financing statement must generally provide notice to what the secured party has attached to.

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

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

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

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

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

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

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

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

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

MEE Question 4

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

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

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

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

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

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

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

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

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

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

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

4) Please type your answer to MEE 4 below

Â

Â

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

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

MEE Question Four:

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

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

Under the FRCP, the first question is always whether the information sought to be discovered is relevant or potentially relevant to an issue or claim that could be raised at trial. Once satisfied with that, the next question is whether the discovery request is unduly burdensome, disproprorinate, or a means by which a party is harassing another party. These two steps are satisifed, then the information is generally discoverable and next question is whether another rule would prevent discovery. In certain situations, expert opinions are shielded from general discovery unless the requesting party can show extenuating circumstances. One such rule to expert opinions from experts who will not testify at trial *if* the opinions are given in anticipation of litigation.

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

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

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

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

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

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

MEE Question 5

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

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

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

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

The jury found the defendant guilty of both offenses.

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

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

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

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

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

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

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

5) Please type your answer to MEE 5 below

Â

Â

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

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

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

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

Generally, theft and burglary are considered separate offenses and neither is considered to be a lesser included offense of the other (unlike robbery and theft). The specific test for whether a conviction for two separate offenses triggers double jeopardy is the Blockburger Test. Under this test, a criminal defendant cannot be convicted for two different offenses arrising from the same conduct and facts unless the two offenses charged each have one separate, independent element not contained in the other charge. Here, the jurisdiction's statutory definitions of the offenses each contain an independent element that is not included in the other offense. Burglary is defined as (1) entering into the dwelling of another, (2) without consent, and (3) with an intent to commit a felony therin. Theft is defined as (1) taking and carrying away (2) the property of another with (3) the intent to permanetly deprive the owner of possession. The statutory charges indicate that each offense contains an independent element that is not contained in the other offense. Consequently, the Double Jeopardy clause does not bar the defendant from being convicted for both theft and burglary even though the offenses would be based on the same conduct and facts.

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

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

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

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

Here, however, the judge heard evidence that beared on a statutory element on the crime and needed to be proven beyond a reasonable doubt at trial. The jurisdiction's statute provides that a Class D offense of theft is only a a misdeamnor if the value is proven to be between $2,500 and $5,000 and a felony if the value of the item exceeds $5,000. The only evidence presented at trial was that the owner testified she had bought the ring for $3,000. While the prosecution could have presented evidence from the exper testimony at trial to prove that the value of the ring was $5,000 and the jury could have considered whether that was proven beyond a reasonable doubt or the judge could have considered evidence warranting an upward departure to impose a greater sentence, the judge cannot usurp the jury's role as fact finder of a statutory element of the offense and heighten the offense convicted from a misdemanor to an offense. Because it appears that the judge imposed an additional year of incarceration by finding that the defendant should have been convicted of felony theft, the judge erred.

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

MEE Question 6

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

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

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

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

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

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

Assume that the Uniform Partnership Act (1997) applies.

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

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

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

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

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

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

Here, there is no partnership agreement. Ben only had 20% control of the partnership, but the business of the partnership was to buy and sell antique vehicles. Ben would likely have express and/or implied authority to enter into a contract with a collector for the sell of an antique car. It is doubtful, though, that Ben had the authority to lie in the contract. However, apparent authority probably existed here. The collector was contracting iwth Empire through Ben to buy an antique car. He reasonably believed that Ben had the authority to act in the way in which Ben was acting. It is questionable whether the collector reasonably believed that the car was one that a famous movie car had driven or whether the collector had the duty to investigate the truth before buying the car. But he still reasonably believed that Ben had the authority to engage in the transaction based upon the nature of the business.

Accordingly, Ben had the authority to bind the partnership.

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

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

Here, Ben had authority to bind the partnership. Adam, as a partner in Empire, can be sued and held personally liable for all debts and obligations of the partnership and his other partner, Ben. The only requirement is that the creditor sue Adam and provide service on Adam individually. The collector sued Adam, Ben, and the partnership. The facts do not indicate whether ADam was personally provided with service. If the collector sues Adam for the entire amount upon judgment, the collector will be able to recover the entire amount from Adam. Adam, though, can seek contribution from his co-partner and the partnership.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

END OF EXAM