

EVIDENCE EXAMINATION SPRING SEMESTER 2002
SECTION A. PROF. T.J. REED

Assumptions: All events take place in the state of Delaware. Delaware has adopted the Uniform Rules of Evidence. Your case is a federal case in U.S. District Court for the District of Delaware and the Federal Rules of Evidence apply to your case.

Instructions: You may refer to your pocket edition of the Federal Rules of Evidence, which you were permitted to freely annotate during the semester. You may not bring in any other outside materials.

Your Assignment: Your examination consists of a common fact pattern and three essay questions about the fact pattern.. Answer every part of every question to the best of your ability.

COMMON FACT PATTERN
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF DELAWARE

UNITED STATES OF AMERICA)
)
) No. 01-0228 (XXX)
)
)
FRED FOSS,)
) Defendant,)

SUMMARY OF INDICTMENT

On May 11, 2001., the defendant was indicted on two counts of violation of 18 U.S.C. § 152 (7) and (9) (fraud on the bankruptcy court)

18 U.S.C. § 152. Concealment of assets; false oaths and claims; bribery
Any person who--

* * * * *

(7) in a personal capacity, or as an agent or officer of any person or corporation in contemplation of a case under title 11 by or against the person or any other person or corporation, and within intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

* * * * *

(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a

custodian, trustee, marshal or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor. shall be fined under this title, imprisoned not more than 5 years or both.

and 18 U.S.C. § 371 (Conspiracy to commit fraud on the bankruptcy court.)

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

FACTS PRIOR TO MOTION IN LIMINE

The indictment alleged that on or about February 19, 2000, Fred Foss d/b/a Foss Galleries, Ltd (a sole proprietorship, filed a petition in bankruptcy in U.S. Bankruptcy Court under Chapter 7 of the Bankruptcy Act (liquidation) and on that date was adjudicated bankrupt. Bob Booker, Esq. was Foss' personal attorney but did not represent him in the bankruptcy proceeding. The firm of Dewey, Cheatham and Howe represented Foss in the bankruptcy matter. Carl Carlson was appointed trustee by a committee of creditors on 24 March 2000 and confirmed by the U.S. Bankruptcy Judge on 16 April 2000. On 9 July 2000, the trustee in bankruptcy commenced an action to recover assets of the bankrupt from Gallo Associates, Inc. a Delaware corporation. The trustee's complaint alleged that 86 paintings, etchings and drawings by Thomas Eakins, Maxwell Parrish, F.O.C. Darley and other major Delaware Valley artists had been unlawfully and fraudulently transferred by Foss to Gallo Associates, Inc. within one year prior to the filing of Foss's bankruptcy petition for grossly inadequate consideration. The complaint also alleged that the fair market value of the paintings was \$6,000,000.00.

During the course of discovery, Carlson, the trustee, found that Foss transferred his art works to Gallo on 22 January 2000. Bob Booker had incorporated Gallo just two days before the transfer.

Gallo's principal stock holders were Mike Miller and Judy Jones, Foss's employees, and Booker. The sales contract between Foss and Gallo called for a purchase price of \$1,000,000.00 evidenced by a ten year single payment promissory note signed by Booker as President of Gallo. Gallo then hired Foss as its gallery director at a salary of \$500,000 a year plus a bonus of 10% of gross sales each year. Foss then negotiated a sale of the art work to Arthur Albert in late May 2000, for \$4,000,000. Title to the art works was transferred to Albert in the United States on 1 July 2000. All the art works are now in Grand Caymen.

The U.S. Bankruptcy Judge held a hearing on the turn-over order on 29 July 2000. She issued an order directing Gallo to turn the art work or the proceeds of sale over to the U.S. Trustee. Gallo reported the sale to Albert in July, 2000 and reported that the proceeds of sale had been used up to pay salary and expenses. The judge then ordered Foss and Booker to bring in the books and records of Gallo. They refused to turn over Gallo's books and records on February 6, 2001. The indictments for criminal fraud then followed. The indictment alleges Foss conspired with Booker, Miller and Jones (unindicted co-conspirators) to defraud the bankruptcy court.

QUESTION ONE: AGENT PENN'S TESTIMONY. 45% OF GRADE

The defendants, ably represented by a recent Widener graduate, filed a motion in limine to exclude a transcript of testimony of Agent Pascal Penn given October 19, 2000, in U.S. Bankruptcy Court during the civil turn-over hearing; and to preclude the United States from referring to the transcript or Penn's testimony in its opening statement and in voir dire examination of jurors.

The Trustee in Bankruptcy called FBI Special Agent Penn in the civil turn-over hearing. Penn was an FBI agent with fourteen years' experience in investigating and detecting bankruptcy fraud. During those fourteen years, Penn has investigated more than 200 incidents of bankruptcy fraud and has testified in court as an expert on art fraud at least 15 times. During the turn-over hearing, in which Foss was present and represented by counsel, the following occurred.

QUESTIONS BY THE ATTORNEY FOR THE TRUSTEE:

- Q. Agent Penn, do you have an opinion whether or not Mr. Foss was engaged in a fraudulent transaction with respect to the sale of his inventory of art?
- A. Yes, I have an opinion. I believe, based on examining the bankruptcy schedules, the contract of sale between Foss and Gallo Galleries, and Gallo's employment contract with Foss, that Foss had formed a plan or conspiracy to knowingly and fraudulently transfer or conceal his principal assets, his inventory of art works.
- Q. How certain are you of this conclusion?
- A. Beyond a reasonable doubt.

Since the turn-over hearing, Agent Penn retired from the FBI on disability and is now confined to a wheel chair in a nursing home. All parties agree Agent Penn is unavailable as a witness.

DEFENDANT'S CONTENTIONS: Write down all the objections that Foss can legitimately raise to admission of Penn's testimony. Give a brief argument in support of each objection.

GOVERNMENT'S CONTENTIONS: Write down the Government's response to Foss' objections to admission of the Penn testimony and disclose the basis for the response.

PROBABLE OUTCOME: How the judge will rule on the motion to exclude the evidence? Discuss all the objections made and explain why the judge will rule that way.

QUESTION TWO: THE E-MAILS. 40% OF GRADE

Dewey, Cheatham & Howe insisted that Foss surrender all corporate books and records to them upon accepting representation. Two days before the turn-over hearing, Foss brought in floppy disks containing records of the Foss to Gallo to Arthur transaction. Foss told Ms. Gloria Howe, his lawyer, that the disks were copies of all the accounting data stored on the hard drive. Of his computer. While examining the disks, Howe found the following e-mails:

DATE: January 2, 2000, 1245

TO: BobB211@aol.com

FROM: Galleryman@indu.net

SUBJ: Confidential E-mail; Transferring art work to Gallo, Inc.

Have you finished incorporating Gallo? My creditors are pushing me for money and any day I could be sued. I need to get the inventory out of my hands to be able to sell it to Arthur as we planned. Then the four of us can divide the profits and leave the country.

DATE: January 2, 2000, 1433

TO: Galleryman@indu.net

FROM: BobB211@aol.com

SUBJ: Confidential E-mail: Transferring art work to Gallo, Inc.

I have filed the certificate of incorporation and recorded it in the County so we can go through with the transfer. I will send you a sales contract to show that you sold the inventory to Gallo at a fair price and then we can unload the art in Grand Cayman for a huge profit. I assure you that you can go ahead and file your bankruptcy petition after the transfer—the only thing that the bankruptcy court can take from you is the promissory note for the art work.

None of these memos were turned over to the trustee in bankruptcy by Howe. When criminal charges were filed against Foss, Howe contacted the U.S. Attorney and described the two memos she found on the hard drive. The United States subpoenas Gloria Howe under subpoena duces tecum to produce a print out of the two memos referred to above.

QUESTIONS BY THE GOVERNMENT

Q. What is your name and occupation?

A. Gloria Howe, attorney at law.

Q. Do you know the defendant?

A. Yes, Mr. Foss was a client and our firm represented him in his bankruptcy case.

Q. Were you the custodian of the books and records of Mr. Foss at any time?

A. Yes—when our firm undertook to do his bankruptcy we requested he turn over files and records for his business to us to prepare his bankruptcy petition and schedules.

Q. Did Mr. Foss do so?

A. Yes he did. He gave us computer floppy disks that contained copies of his records on the hard drive.

Q. Did you at my request print out two documents from the disks?

A. Yes, sir, I did. I have them here.

Q. Produce them— mark these exhibits 1, and 2 for the Government for Identification— are exhibits 1 and 2 for Identification true and correct print outs of the three documents I requested you to produce?

A. Yes, sir, they are.

OFFER EXHIBITS 1 and 2 for Identification into evidence.

FOR DEFENDANT: State all your objections to admission of the three memos.

FOR THE GOVERNMENT: Respond to the Defendant's objection

PROBABLE OUTCOME: How will the judge rule and why?

QUESTION THREE: CHARACTER EVIDENCE. 15% OF GRADE

Foss plans to call character witnesses to testify to the high reputation for honesty and good character he enjoys in Delaware. He plans to call Eldon Eslick, the President of Delaware Trust Company, Rev. Omar Oswald, the Episcopal Bishop of the Diocese of Wilmington, and former Delaware Governor Lunk Apsley, long-time family friends who have known Foss since he was a child. Foss also plans to testify that he was inveigled into the Gallo deal by his lawyer who took advantage of his naivete about the bankruptcy laws.

Pursuant to Rule 404(b), the United States sends written notice to defense counsel of intent to use the following uncharged misconduct to prove that Foss acted with specific intent to defraud the bankruptcy court:

1. In 1984, Foss, a 15 year old juvenile, was adjudicated delinquent in Family Court for possession of stolen credit cards and for running up a \$12,000 charge for various stereos, etc. on the stolen card. He later made complete restitution and the adjudication was expunged.
2. In 1991, Foss was convicted of possession of stolen property in the Circuit Court of Harford County Maryland, i.e. owning a Gilbert Stuart copy of the original portrait of Judge Samuel Chew that was stolen from a Philadelphia collector in 1972, The conviction was appealed, and was reversed due to numerous evidentiary errors committed during trial.
3. In 1998, Foss, who had been a regular part of the Antiques Road show for three years, was fired by PBS when it was discovered that he deliberately had a stooge bring in a James McNeil Whistler painting from Foss' studio to the Road Show in order to give the painting publicity and "up-appraise" the painting on television.

YOUR TASK AS FOSS' COUNSEL

1. Can any of these incident be admitted at trial if Foss does not testify and does not call character witnesses? Explain your answer.
2. If Foss testifies, how many of these incidents can be used against him in cross-examination? Explain your answer.
3. How many of these incidents can be used to cross-examine Foss' character witnesses? Explain your answer.

**ANSWER PROGRAM EVIDENCE SECTION A
SPRING 2002**

TOTAL POINTS: 166. Your Score: _____ /166 = _____ %

QUESTION ONE: 74 POINTS. 44.6% of grade Your Score: _____

Is the transcript of Agent Penn's testimony admissible? The transcript could be admissible under Rule 804(b)(1) as former testimony, or under the generalized hearsay exception Rule 807 (*It does not fit any other exception or exclusion and no points will be given for analysis of these other exceptions*)

A. DEFENSE CONTENTIONS. 20 POINTS YOUR SCORE: _____

1. Hearsay. 4 Points. Your Score: _____

The Government offers Penn's transcript to prove that Foss engaged in a fraudulent transfer. The trial transcript contains Penn's expert opinion about the nature of Foss's operations given in a civil case brought against Foss. It is an out-of-court statement offered to prove the truth of the matter asserted. It is hearsay and hearsay is inadmissible.

2. Violation of Confrontation Clause. 4 Points. Your Score: _____

The Sixth Amendment to the U.S. Constitution requires that the accused be confronted in court by the witnesses against the accused. Penn cannot confront the defendant in court because she is unavailable. The U.S. Supreme Court has allowed certain limited exceptions to the general rule in the past when hearsay is offered under a firmly-rooted exception to the hearsay rule. However, Penn's testimony is inadmissible under the former testimony exception and does not qualify for any other firmly-rooted hearsay exception. An offer of hearsay under the generalized exception (R. 807) is presumptively contrary to the Confrontation Clause, and the Government must show additional specific indicia of reliability to authorize admissibility. See *Idaho v. Wright*, 497 U.S. 805 (1990) The fact that Penn gave his opinion relying on hearsay documents undercuts the reliability of his testimony.

3. The Plan or Design of Foss's Scheme was Not the proper Subject of Expert Testimony. 4 Points. Your score: _____

Rule 702 states that expert testimony may be received when the subject is one beyond the ken of ordinary persons. Bankruptcy fraud does not require interpretation and explanation to men and women of ordinary intelligence. Therefore, Penn's testimony will not assist the jury in interpreting the evidence.

4. Probative Value v. Prejudice. 6 Points. Your Score: _____

Penn testified on the legal meaning and interpretation of the U.S. Criminal Code. He described the modus operandi of the defendant and his unindicted co-conspirators. He used words lifted from the statute defining the crime. He attempted to usurp the function of the judge by instructing the jury

on the law of the case.

Further, Penn's opinion is over-persuasive. Penn told the jury, in effect that they must find that Foss specifically intended to defraud the bankruptcy court by hiding assets: the scheme looks like a bona-fide sale of assets and although a transfer of assets within 30 days of filing bankruptcy may be set aside. The opinion's probative value is substantially outweighed by prejudice to the accused because Penn's transcript testimony tells the jury what to find on the ultimate legal issue in the case: specific intent.

B. GOVERNMENT'S CONTENTIONS. 26 POINTS. YOUR SCORE ____

1. Admissible as Former Testimony. 8 Points. Your Score: ____

Rule 804(b)(1) requires a two step foundation: (a) the witness is unavailable for any of the reasons stated in Rule 804(a); and (b) the former testimony was given in a prior proceeding in the same case, or if not in the same case, in a proceeding where the testimony was offered against a party who had the same motive and opportunity to develop the testimony as the party against whom the former testimony is offered in this case.

Penn is unavailable as a witness.. The trial transcript was taken in a civil procedure before the U.S. Bankruptcy Court. The defendant was present and had an opportunity to cross-examine the witness. The defendant's motive to develop the testimony of the witness by cross-examination in the civil turn-over hearing was identical to the motive the defendant would have to develop her testimony in this trial.

2. Admissible under Rule 807. 6 Points. Your Score: ____

If the Government offers the transcript under the generalized hearsay exception, then the Government must show that (1) there is no other source for the information contained in the transcript; (2) there are indicia of reliability supporting admission and (3) the interest of justice would be served by admission of the hearsay. Condition (1) has been met, condition (2) has been met, and condition (3) has been met because the defendant had an opportunity to cross-examine Penn in the civil turn-over hearing to discredit her testimony.

3. Violation of Confrontation Clause. 4 Points. Your Score: ____

Penn's testimony satisfies the Sixth Amendment to the U.S. Constitution because it is admissible under a firmly-rooted exception to the hearsay rule, the former testimony exception. If Penn's testimony is admitted under the generalized exception (R. 807), the Government has shown additional specific indicia of reliability to authorize admissibility. *Idaho v. Wright*, 497 U.S. 805 (1990) The fact that Penn gave his testimony on oath when the defendant was present to cross-examine her gives the necessary supplemental indicia of reliability.

4. The Plan or Design of Foss's Scheme was the proper Subject of Expert Testimony. 4 Points. Your score: ____

Rule 702 states that expert testimony may be received when the subject is one beyond the ken of ordinary persons. Bankruptcy fraud is an arcane art that requires interpretation and explanation

to men and women of ordinary intelligence. Therefore, Penn's testimony will assist the jury in interpreting the evidence.

5. Probative Value v. Prejudice. 4 Points. Your Score: _____

Penn did not testify on the legal meaning and interpretation of the U.S. Criminal Code. He described the modus operandi of the defendant and his unindicted co-conspirators. This is testimony on an intermediate issue of fact: the nature and extent of the conspiracy.

Penn's opinion will not be over-persuasive. The jury must find that Foss specifically intended to defraud the bankruptcy court by hiding assets: the scheme looks like a bona-fide sale of assets and although a transfer of assets within 30 days of filing bankruptcy may be set aside civilly, it is not obviously a criminal act. The opinion's probative value is equal to or greater than any prejudice to the accused because Penn is in fact explaining the way in which the evidence shows Foss acted with specific intent.

C. PROBABLE OUTCOME. 28 POINTS. YOUR SCORE: _____

1. Relevance. 2 Points. Your Score: _____

Penn's testimony is relevant to show that Foss transferred his art work to Gallo with specific intent to work a fraud on the bankruptcy court by explaining the meaning of the series of steps taken by Foss and his conspirators to put assets beyond the reach of the Bankruptcy Court..

2. Reliability: Hearsay: Former Testimony. 8 Points. Your Score: _____

The central issue is the reliability of the transcript testimony in a civil hearing. The Government offered the transcript under Rule 804(b)(1). All agree that Penn is unavailable as a witness. The fact that the transcript introduced came from a civil hearing in which the defendant was a party defendant does not bar its use in a later criminal prosecution against the same party on the same facts. This issue was disposed of in *United States v. Vartanian*, 245 F.3d 609 (6th Cir. 2001). In this case, Vartanian was charged with criminal civil rights violations (deprivation of civil rights by use of force or threat of force). A real estate agent testified in a civil trial about the defendant's terroristic threatening of an African-American family that wanted to buy a house in his neighborhood. The real estate agent died before defendant's criminal trial. The Government read portions of the agent's testimony from the civil trial over defense objections of hearsay and violation of the confrontation clause.

In this prosecution, the Government intends to use Penn's expert testimony from a civil turn over hearing in the criminal case because Penn is unavailable as witness. Since Foss was present at the turn over hearing and represented by counsel, Foss had an opportunity to develop Penn's testimony then that was identical to the type of development Foss would have done in court in the criminal prosecution.

3. Reliability: Hearsay: Generalized Exception. 4 Points. Your Score: _____

If the Government offered the same hearsay under Rule 807, the three pronged test for a generalized hearsay exception was met: (a) the only way that Penn's evidence could be obtained was

by use of the trial transcript, since he was unavailable; (b) the fact that he gave her evidence under oath when the defendant was present and able to cross-examine him added to the guaranty of trustworthiness of the testimony; and (c) it was in the interest of justice that his evidence be received in order to hear the defendant's own admission of guilt. Finally, the defendant's statements themselves were non-hearsay admissions disposing of the hearsay-within-hearsay issue.

4. Confrontation Clause: 4 Points. Your Score _____

Since the former testimony exception is a generally-accepted hearsay exception, the defendant's confrontation clause objection should be overruled. *Ohio v. Roberts*, 448 U.S. 56. (1980). If the transcript was offered under Rule 807, it would still satisfy the confrontation clause's requirement of additional indicia of reliability, since Penn gave her evidence under oath when the defendant was present and had an opportunity to cross examine her.

5. Proper Subject of Expert Testimony. 4 Points. Your Score: _____

Penn is qualified by reason of special experience, knowledge and education to explain a complicated bankruptcy fraud scheme to the jury. Ordinarily, the jury would be helped by an explanation of the complicated facts of this case. Penn's factual basis for his testimony is of a type used by experts in his field and is a reliable source of information.

6. Probative Value. 6 Points. Your Score: _____

If the had Government used Penn merely to explain how Foss and his confederates structured the transfer and why it was deceptive, then Penn's transcript might be admissible. However, Penn was precluded from giving an opinion on the issue of Foss' intent to deceive the bankruptcy courts. The answer in this case is controlled by *United States v. Scop*, 846 F.2d 135 (2d Cir. 1988) CB 750. In that case, the Government called an SEC investigator to give expert evidence on the nature and extent of the defendant's criminal operation. The Government really used Whitten, the expert, to put a legal conclusion before the jury. Whitten was neither qualified to give a legal opinion nor was Whitten permitted to instruct the jury on the law of the case: that is the prerogative of the judge alone. Consequently, Penn may not give an opinion on the issue of Foss' criminal intent, that is a jury issue and only the judge can instruct the jury on the law applicable to that finding.
(ALTERNATIVE ANSWER FOR EQUAL VALUE: contains the same reasoning, but concludes that Penn's testimony did not constitute an improper legal opinion or instruction on the law by someone other than the judge)

QUESTION TWO: 66 Points. 39.8% of score Your Score: _____

Howe, attorney for the defendant in another matter, has been called to authenticate and deliver two e-mails from defendant to a conspirator.

A. FOSS' DEFENSE CONTENTIONS. 20 POINTS YOUR SCORE: _____

1. Lack of Authentication. 4 Points. Your Score: _____

The foundation laid by Howe showed that she received a floppy disk containing the originals of

the e-mails from her client. The e-mail addresses for the two e-mails have not been explained by Howe, and until the e-mail addresses are shown by question and answer to be those of Foss and one of the other alleged conspirators, the e-mails are not authenticated. See Rule 901(a).

2. Hearsay. 4 Points. Your Score: _____

The e-mails were statements made out of court and are offered to prove the truth of the matter asserted. By definition, the e-mails are hearsay, and hearsay is inadmissible.

3. Confrontation Clause: 4 Points. Your Score: _____

The accused is unable to confront Galleryman, the message sender in the first e-mail, and BobB, the anonymous accuser in the second e-mail and therefore, the e-mail's reception would violate the confrontation clause.

4. Best Evidence. 4 Points. Your Score: _____

The best evidence of the e-mails would be the original transmissions as preserved on the server of AmericanOnline or IndusNet. The disks were copies made by downloading, and the print-out is a further distortion of the original. Further, the Government offers no explanation why the original server copies are unavailable. See Rule 1004

5. Attorney-client privilege. 4 Points. Your Score: _____

Matter, including documents and e-mail, delivered to an attorney for the purpose of seeking legal advice, with intent that the contents remain confidential, is prohibited from disclosure by the attorney-client privilege. The text of the two messages show that neither was addressed to Howe for the purpose of eliciting her help in committing a crime or fraud on the bankruptcy court. Therefore, the e-mails are privileged.

B. GOVERNMENT'S CONTENTIONS. 20 POINTS. YOUR SCORE ____

1. Authentication. 4 Points. Your Score: _____

Rule 901(b) is a non-exhaustive list of the ways in which a document may be authenticated. In this instance, the Government has shown the disks were delivered to the defendant's attorney by the defendant. That is sufficient to show that the disks are what they purport to be: records of the defendant's business.

2. Hearsay. 4 Points. Your Score: _____

The two e-mails offered in evidence are not hearsay for the following reasons: (a) the message from Galleryman is obviously from the accused, and BobB's reply message is obviously from Bob Booker, an unindicted co-conspirator. Therefore, the entire substance of both messages are admissions of the party or co-conspirator's statements in furtherance of the conspiracy. See Rule 801(d)(2)(A) and (E).

3. Confrontation Clause: 4 Points. Your Score: _____

The confrontation clause does not exclude the accused's own statements made outside court that

are contrary to the accused's legal interest in this prosecution. Further, the confrontation clause does not bar statements of co-conspirators made in furtherance of the conspiracy.

4. Best Evidence: 4 Points. Your Score: _____

The disks were copied from the original electronic transmission from the server. The paper print outs were made from the electronic copy. Rule 1001 defines "original" to include "... any printout or other output readable by sight, shown to reflect the data accurately." The same rule defines "duplicate" as "a counterpart produced ... by electrical re-recording or... by other equivalent technique which accurately reproduces the original. Rule 1003 admits duplicates on a par with originals unless authenticity is an issue.

5. Attorney-client privilege. 4 Points. Your Score: _____

There is no privilege for data communicated to an attorney in an attempt to make the attorney an accomplice to crime or fraud. Foss delivered messages to Howe that were in furtherance of an on-going conspiracy and were therefore not privileged under the crime-fraud exception to the attorney-client privilege.

C. PROBABLE OUTCOME. 26 POINTS. YOUR SCORE: _____

1. Relevance. 2 Points. Your Score: _____

The e-mails show the nature and extent of the conspiratorial plan, the identity of at least one of the conspirators, and the method by which Foss intended to dispose of his inventory in fraud on the bankruptcy court.

2. Reliability: Authentication. 4 Points. Your Score: _____

The foundation laid by Howe showed that she received a floppy disk containing the originals of the e-mails from her client. The court is permitted under Rule 104 to examine the documents themselves for internal clues relating to authenticity. Although Howe did not give evidence that the e-mail addresses for the two e-mails pertained to Foss and to Booker, the context of the messages shows that the messages were exchanged between them. The exhibits have been authenticated.

3. Hearsay. 4 Points. Your Score: _____

The Government is correct. The two e-mails offered in evidence are not hearsay for the following reasons: (a) the message from Galleryman is obviously from the accused, and BobB's reply message is obviously from Bob Booker, an unindicted co-conspirator. Therefore, the entire substance of both messages are admissions of the party or co-conspirator's statements in furtherance of the conspiracy. See Rule 801(d)(2)(A) and (E). See *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) CB 182. Foss' statement may also be admitted as a declaration against interest against Foss, who is unavailable as a witness due to the Fifth Amendment. Rule 804(b)(3).

4. Confrontation Clause: 4 Points. Your Score: _____

Since both e-mails are admissions by a party opponent or by a conspirator, the accused is not deprived of the right to confront his accuser because he is his own accuser. Foss' own statements

are contrary to his legal interest and are his own admissions. Booker's statements are those of an unindicted co-conspirator. By the law of agent and principle, Booker's statements in furtherance of the conspiracy are admissions of Foss. Therefore, Foss is not entitled to the protection of the confrontation clause. See *United States v. Inadi*, 475 U.S. 387 (1986). There is no violation of the confrontation clause here.

5. Best Evidence. Points. 4 Your Score: _____

The Government is correct. The disks were copied from the original electronic transmission from the server. The paper print outs were made from the electronic copy. Rule 1001 defines "original" to include "... any printout or other output readable by sight, shown to reflect the data accurately." The same rule defines "duplicate" as "a counterpart produced ... by electrical re-recording or... by other equivalent technique which accurately reproduces the original. Rule 1003 admits duplicates on a par with originals unless authenticity is an issue.

6. Attorney-client privilege. 8 Points. Your Score: _____

Matter, including documents and e-mail, delivered to an attorney for the purpose of seeking legal advice, with intent that the contents remain confidential, is prohibited from disclosure by the attorney-client privilege. Foss delivered the incriminating messages to Howe in the course of seeking legal advice. Although the messages are arguably "physical" evidence, in fact, they were communications that acknowledged past commission of a potentially criminal act. They were on a par with an oral face-to-face acknowledgment by Foss that he set up the dummy corporation to avoid losing his art works in bankruptcy. Therefore, Howe was under no legal duty to disclose the existence of these e-mails to the Government, nor can she break the attorney-client privilege by communicating them to the Government from the witness stand. The text of the two messages show that neither was addressed to Howe for the purpose of eliciting her help in committing a crime or fraud on the bankruptcy court. Therefore, the e-mails are privileged.

QUESTION THREE: 26 POINTS 15.7% of score Your Score: _____

A. CAN ANY OF THESE INCIDENTS BE ADMITTED IF FOSS DOES NOT TESTIFY AND DOES NOT CALL CHARACTER WITNESSES? 8 POINTS. YOUR SCORE: _____

The Government has the burden of proof by beyond reasonable doubt to establish that Foss had specific intent to defraud the Bankruptcy court. Rule 404(b) permits introduction of uncharged misconduct to show specific intent. The kind of uncharged misconduct that would be admissible would be the kind in which Foss exhibited a similar intent to deceive the Bankruptcy Court. The 1984 juvenile adjudication for possessing a stolen credit card has no relevance to intent to commit fraud on the bankruptcy court and would be inadmissible to prove intent. The 1991 conviction for possession of stolen property was reversed on appeal. It also does not relate to a similar scheme to swindle the bankruptcy court. Therefore it is not admissible to show intent. The 1998 deception before the public, if proved by the standard set down by *Huddleston v. United States*, also lacks relevance to the required intent to deceive the bankruptcy court.

B. IF FOSS TESTIFIES HOW MANY OF THESE INCIDENTS CAN BE USED AGAINST HIM IN CROSS-

EXAMINATION? 10 POINTS. YOUR SCORE: _____

1. **1984 juvenile adjudication for theft by deception. 2 Points. Your Score:** _____

Rule 609(c) precludes admission of any juvenile adjudication against the accused in a criminal trial. Therefore Foss cannot be cross-examined on this adjudication.

2. **1991 Conviction of Possession of Stolen Property. 4 Points. Your Score:** _____

Rule 609(b) precludes use of stale convictions more than ten years old unless the probative value of the conviction on truthfulness exceeds prejudice to the accused. Further, the conviction was reversed and is therefore not a conviction within the meaning of R. 609. See *United States v. Van Dorn*, 925 F.2d 1331 (11th Cir. 1991).

3. **1998 Antiques Road Show incident. 4 Points. Your Score:** _____

This action arguably was a deceptive and untruthful practice and would bear on Foss' credibility. Foss may be cross-examined about this incident. See Fed. R. Evid. Rule 608(b) However, the cross-examiner is bound by Foss' answer and cannot bring in extrinsic evidence to prove the deception.

C. HOW MANY OF THESE INCIDENTS CAN BE USED TO CROSS-EXAMINE FOSS' CHARACTER WITNESSES? 8 POINTS. YOUR SCORE: _____.

1. **1984 juvenile adjudication for theft by deception. 4 Points. Your Score:** _____

The standard for cross-examination of defense character witnesses was set by *Michelson v. United States*, 335 U.S. 469 (1948) If the Government has a good faith basis in asking about the prior bad act, and the act, if known by the witness, would influence reputation or opinion of good character, then the cross-examination is proper. The stolen credit card spree as a juvenile would be relevant to the character witnesses who knew the accused as a child.

2. **1991 Conviction of Possession of Stolen Property. 2 Points. Your Score:** _____

Likewise, the conviction for possession of the stolen Gilbert Stuart in 1991 would be relevant to the basis for reputation or opinion witness' evidence, although the conviction was later reversed on appeal.

3. **1998 Antiques Road Show incident. 2. Points. Your Score:** _____

Finally, the incident involving the bogus "rare painting" on Antiques Road Show is an example of deceptive practices that bear adversely on the reputation or opinion evidence of character witnesses. This, too, could be the subject of a cross-examination question of the character witnesses.