

July 2018

New York State  
Bar Examination

MEE & MPT Questions

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## MEE QUESTION 1

In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court held that Congress has the power under the Commerce Clause of Article I, Section 8, of the Constitution “to prohibit the local cultivation and use of marijuana,” even when applicable state law permits such cultivation and even when the cultivation and use are entirely within state borders. At the time of that decision, at least nine states authorized the use of marijuana for medicinal reasons. Since the decision, medicinal use of marijuana has been approved in numerous other states, and some states have also begun to allow the recreational use of marijuana.

Concerned with the widespread disregard of federal law in states that have “legalized” marijuana use, Congress recently passed the Federal Drug Abuse Prevention Act. Sections 11 and 15 of that Act provide as follows:

*Section 11.* Any state law enforcement officer or agency that takes any individual person into custody for violation of any state law must make a reasonable investigation within five business days to ascertain whether the individual in custody was under the influence of marijuana at the time of the alleged offense. Such officers or agencies must file monthly reports with the federal Drug Enforcement Agency on the outcome of these required investigations, including the name of any individual determined to have been under the influence of marijuana at the time of his or her alleged offense.

*Section 15.* No state government, state agency, or unit of local government within a state shall be eligible to receive any funding through the federal Justice Assistance Grant program unless use of marijuana is a criminal act in that state.

The Justice Assistance Grant program has been in existence for many years. It is the primary program through which the federal government provides financial assistance for state law enforcement agencies. Last year, the federal government made approximately \$300 million in grants to state and local law enforcement agencies through this program. Congress has appropriated another \$300 million for such grants in the upcoming fiscal year.

State A has a population of about 4 million people. Its crime rate is below average. Last year, total spending by law enforcement agencies in State A was \$600 million, of which \$10 million came from federal grants under the Justice Assistance Grant program.

State A recently adopted legislation decriminalizing the use of marijuana for all purposes by persons over the age of 21.

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As applied to State A,

1. Is Section 11 of the Federal Drug Abuse Prevention Act a constitutional exercise of federal power? Explain.
2. Is Section 15 of the Federal Drug Abuse Prevention Act a constitutional exercise of federal power? Explain.

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## **MEE QUESTION 2**

A homeowner, who knew that his neighbor wanted to buy a lawn mower, called the neighbor and offered to sell his lawn mower to her for \$350. The neighbor replied, “No way! That price is too high.” The homeowner responded, “The price is a good one. See if you can find another lawn mower as good as mine for as little as \$350. I’m confident that you’ll come to your senses. In fact, I’m so confident that not only am I still willing to sell you the lawn mower for \$350, but I promise to keep this offer open for a week so that you have time to do some comparison shopping. If you don’t get back to me within a week, I’ll sell the lawn mower to someone who knows what a good value it is.”

Four days later, the neighbor concluded that \$350 was, indeed, a very good price for the homeowner’s lawn mower. Accordingly, she decided that she would go see the homeowner the next morning and accept the offer to buy the lawn mower from him for \$350. That evening, the neighbor got a telephone call from an acquaintance who lived on the same block as the homeowner and the neighbor. The acquaintance said, “Congratulate me! I just got a great deal on a used lawn mower. [The homeowner] agreed to sell me his lawn mower for \$375. At that price, it’s a steal. I’m picking it up tomorrow afternoon.” The neighbor replied, “This must be a mistake; he offered to sell that lawn mower to me.” The acquaintance said, “There’s no mistake; we wrote up the deal and everything. I’ll come by your place right now and show you the signed contract.” A few minutes later, the acquaintance went to the neighbor’s house and showed her a signed document pursuant to which the homeowner had agreed to sell his used lawn mower to the acquaintance for \$375.

The neighbor went to the homeowner’s house the first thing the next morning, rang his doorbell, and as soon as the homeowner came to the door, said, “I accept your offer.” The homeowner replied, “Too late. I’ve agreed to sell the mower to someone else for \$375. Next time, act quickly when you are presented with such a great bargain.”

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The neighbor is furious about the homeowner's refusal to sell her the lawn mower for \$350. In her view, the homeowner was bound to keep his offer open for a week and, in any event, her statement "I accept your offer" created a contract that bound the homeowner to the deal.

1. Was the homeowner bound by his promise to keep his offer open for a week? Explain.
2. Assuming that the homeowner was not bound by his promise to keep the offer open, did the neighbor's statement "I accept your offer" create a contract with the homeowner for the sale of the lawn mower? Explain.

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### **MEE QUESTION 3**

In 2015, a man purchased a convenience store that sells gasoline and snack-type grocery items. The man's store is located within two miles of three other convenience stores that are larger and contain small dining areas. When he bought the store, the man planned to expand it as soon as he could in order to offer the same services and products as the other three stores in the area.

In 2017, the local zoning board passed an ordinance that rezoned the district in which all four stores are located from "light commercial" to "residential." Convenience stores are not "residential" uses. The zoning ordinance contained typical language protecting existing nonconforming uses.

In early 2018, the man decided to expand his store by 1,100 square feet to add a small dining area. To finance this expansion, he obtained a \$200,000 loan commitment from a local bank, with the funds to be disbursed at such times and in such amounts as the bank determined to be appropriate if, in the bank's good-faith judgment, there was "satisfactory progress" being made on the project. Documents reflecting this commitment were signed by the man and the bank, and a mortgage to secure the repayment of the loan was promptly and properly filed in the local land records office.

Two weeks after obtaining the loan commitment, the man signed a contract with a general contractor for construction of the store expansion. In compliance with its loan commitment, the bank disbursed \$50,000 to the man, who, in turn, paid that sum to the general contractor. Construction began immediately thereafter.

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Four weeks into the project, a plumbing subcontractor installed all the plumbing fixtures. After the general contractor failed to pay the \$20,000 agreed price to the subcontractor, the subcontractor immediately filed a mechanic's lien against the man's property in the local land records office to secure its claim for \$20,000.

Eight weeks into the project, the bank disbursed an additional \$40,000 to the man, who, in turn, paid \$40,000 to the general contractor. The general contractor used these funds to pay various creditors, but not the plumbing subcontractor.

Two weeks ago, a bank loan officer learned for the first time about the mechanic's lien. The next day, when the man approached the bank about making another disbursement, the loan officer refused. The man asserts that, under the loan agreement, the bank is obligated to disburse further funds.

1. Is the expansion project a nonconforming use? Explain.
2. Assuming that the expansion project does not violate the zoning classification, is the bank obligated to disburse further funds? Explain.
3. Does the mechanic's lien have priority, in whole or in part, over the bank's mortgage? Explain.

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#### **MEE QUESTION 4**

By his will, a testator created a trust of a small house and an apartment building containing six three-bedroom apartments. The will directed the trustee to sell the house within six months of the testator's death. The will also provided, in relevant part, that "all trust income will be paid to my cousin, Albert, during his lifetime" and that "upon Albert's death, all trust principal will be distributed to my granddaughter, Betty." Neither the will nor the trust made any provision for the testator's son, who was living at the time the will was executed. Shortly after making this will in 2006, the testator died.

After the trust was created, the trustee sold the house for \$100,000 and properly invested the sale proceeds. All six apartments in the apartment building were rented at market rates ranging from \$1,200 to \$1,400 per month.

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In 2010, one apartment, which had been rented for \$1,300 per month, was vacated. The trustee thereafter rented this apartment to himself for \$1,300 per month. The other five apartments continued to be rented throughout the term of the trust at market rates of between \$1,200 and \$1,400 per month.

In 2012, a portion of the apartment building's roof was destroyed by fire. Because the trustee had not purchased a fire insurance policy, he spent \$50,000 to repair the roof. The trustee charged this expense to trust income even though the trust had liquid assets of more than \$120,000 that could have been used to pay for the repair. Because the roof repair was charged to trust income, Albert received \$50,000 less income from the trust in 2012 than he had received in prior years.

In 2013, Betty died. Betty was survived by her husband and a daughter. Under Betty's duly probated will, she left her entire estate to her husband. If Betty had died intestate, her estate would have been distributed equally between her husband and her daughter.

There is no applicable statute relevant to the disposition of Betty's interest in the trust.

In 2018, Albert died. Albert was survived by Betty's husband and Betty's daughter. Albert was also survived by the testator's son.

1. What fiduciary duties, if any, did the trustee violate in administering the trust? Explain.
2. Upon Albert's death, how should the trust principal be distributed? Explain.

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### **MEE QUESTION 5**

A woman has sued a man for injuries she received in an automobile collision at a suburban traffic circle in State A on January 1. Both drivers were driving alone, there were no other witnesses, and a forensic accident investigation failed to determine which of the two drivers was at fault.

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Among other things, the woman's complaint alleges the following:

1. The woman was driving her pickup truck in the traffic circle at or below the speed limit when the man suddenly pulled his car into the traffic circle immediately in front of her.
2. The man's action left the woman no opportunity to slow down, stop, or avoid colliding with his car.
3. The woman observed that the man was texting on his phone when he entered the traffic circle and did not see him look up to check for traffic before entering the circle.
4. The accident caused the onset of significant neck pain for the woman requiring extensive medical treatment and resulting in lost wages.

The man has denied that he was texting at the time of the accident and alleges that the accident was the woman's fault. According to the man, the woman was driving her truck substantially over the speed limit, her brakes were defective, and despite the fact that the man's car was far ahead of the woman's truck when he entered the traffic circle, the woman failed to slow down to avoid a collision.

A jury trial has been scheduled.

The man's attorney plans to offer the following evidence:

- (a) Testimony by a mechanic to the effect that "I inspected [the woman's] truck a week before the accident. The brakes on the truck were worn and in need of repair. I ordered new parts."
- (b) A written invoice signed by the mechanic stating: "New parts for [the woman's] truck brakes ordered on December 23 and received on January 2," found in the mechanic's file cabinet among similar invoices for other customers.
- (c) Testimony by the woman's doctor, who treated the woman for neck pain after the accident, that the woman told the doctor, "I have suffered from painful arthritis in my neck for the past five years."

The woman's attorney plans to call the man's roommate to testify that "[the man] is addicted to texting and never puts his phone down. He even texts while driving."

State A has adopted evidence rules identical to the Federal Rules of Evidence.

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1. Is the mechanic's testimony admissible? Explain.
2. Is the invoice for the new parts for the woman's truck brakes admissible? Explain.
3. Is the doctor's testimony admissible? Explain.
4. Is the roommate's testimony admissible? Explain.

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### **MEE QUESTION 6**

A woman and a man decided to start a solar-panel installation business in State X. They agreed to incorporate the business and to be equal shareholders. They also agreed that the woman would be solely responsible for managing the business.

On November 10, the woman mailed to the Secretary of State of State X a document titled "Articles of Incorporation." The document included the name of the corporation (Solar Inc.), the name and address of the corporation's registered agent, and the woman's name and address (as incorporator). The woman, however, inadvertently failed to include in the document the number of authorized shares, as required by the business corporation act of State X, which in all respects comports with the Model Business Corporation Act (1984, as revised). The woman signed the document and included a check to cover the filing fee.

On November 20, the woman, assuming that the articles of incorporation had been filed and purporting to act on behalf of the corporation, entered into a one-year employment contract with a solar-panel installer. The woman signed the employment contract as "President, Solar Inc." and the installer signed immediately below.

On November 30, the woman received a letter from the Secretary of State's office returning the articles of incorporation and her check. The letter stated that the articles, although received on November 15, had not been filed because they failed to include the number of authorized shares, as required by state law.

On receiving this letter, the woman immediately revised the articles by adding the number of authorized shares. On December 5, the woman mailed back the revised articles to the Secretary of State's office, along with another check to cover the filing fee. The revised articles of incorporation were received and filed by the Secretary of State's office on December 10.

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Six months later, Solar Inc. went out of business and the installer's employment was terminated.

1. When did Solar Inc. come into existence? Explain.
2. Is the woman personally liable to the installer on the employment contract that she signed? Explain.
3. Is the man personally liable to the installer on the employment contract? Explain.

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### **MPT 1 – State of Franklin v. Hale**

In this performance test, the examinee is an assistant district attorney in the office that prosecuted defendant Henry Hale for the attempted murder of Bobby Trumbull. Hale was convicted following a jury trial. He has now filed a motion for a new trial claiming that the prosecution failed to disclose exculpatory statements by a witness and the victim in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and that the trial court erred in allowing the prosecution to introduce the witness's out-of-court statements, which were made to a detective shortly after the shooting and placed Hale at the scene. The trial court allowed the introduction of this hearsay evidence on the theory that Hale had wrongfully caused the witness, who was his girlfriend at the time of the shooting, to be unavailable by marrying her before trial. The court found that Hale had married the witness, at least in part, to prevent her testimony at his trial by asserting Franklin's spousal privilege. Examinees' task is to draft the argument section of the brief opposing Hale's motion for a new trial and persuading the court that no *Brady* violation occurred with respect to either the witness's purported recantation or the victim's statement to the medic in the ambulance, and that the trial court properly admitted the witness's hearsay statements. The File contains the instructional memorandum, the office's guidelines for writing persuasive briefs, the defendant's brief in support of motion for a new trial, excerpts from the trial testimony, and excerpts from the hearing testimony on Hale's motion for a new trial. The Library contains excerpts from Franklin rules of evidence, criminal statutes, and rules of criminal procedure; and three Franklin cases.

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## **MPT 2 – Rugby Owners & Players Association**

The examinee’s law firm has been retained by two entities, the Rugby League of America (the League, made up of the owners of each of the eight teams) and the Professional Rugby Players Association (the union representing the players). The parties want the law firm’s assistance in the creation of an unincorporated membership association, the Rugby Owners & Players Association (ROPA). ROPA will be a joint venture of the League and the Players to exploit various commercial opportunities, such as broadcast rights and merchandising, presented by professional rugby. Although the League and the Players each have their own counsel, they need a neutral counsel to assist them in the creation of ROPA, as neither side entirely trusts the other. The examinee is asked to draft only those provisions of ROPA’s Articles of Association that deal with the association’s governance (e.g., quorum requirements, voting rules, filling vacancies on the board, naming a chair, apportioning revenue, and amending the articles). In doing so, the examinee is instructed to provide a brief explanation of each of his or her recommendations and describe how the recommended language comports with both Franklin law and the clients’ wishes for how the association should operate. The File contains the instructional memorandum, an interview with the representatives of the League and the Players, and an initial draft of selected provisions of the ROPA Articles of Association, with blanks to be filled in for both substantive language and explanation for those provisions the examinee is to draft. The Library contains excerpts from a treatise on Franklin corporate law, which is also applicable to unincorporated membership associations, and a case from the Franklin Court of Appeal addressing quorum and voting requirements.

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Sample Essay Answers

## **JULY 2018 NEW YORK STATE BAR EXAMINATION**

### **SAMPLE ESSAY ANSWERS**

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

## **ANSWER TO MEE 1**

1. The issue is whether Section 11 of the Federal Drug Abuse Prevention Act is a constitutional exercise of federal power as applied to State A.

Under the Tenth Amendment of the United States Constitution, all powers not granted to the federal government are reserved to the states. The Tenth Amendment precludes the federal government from commandeering states to enact laws or participate in federal regulatory programs. For this reason, Congress runs afoul of the Tenth Amendment when they enact legislation that targets states in their sovereign capacity as law-makers or law-enforcers. However, when Congressional legislation merely is of general applicability or targets states in non-sovereign capacities, such as employers, then there are no judicially enforceable limits on Congress' power under the Tenth Amendment.

Here, Section of 11 of the Federal Drug Abuse Prevention Act ("the Act"), targets State A in its sovereign capacities, addressing its state law enforcement officers or agencies that take individuals into custody for violation of State A law. Hence, this section of the Act raises Tenth Amendment concerns as applied to State A. Section 11 compels State A to participate in the administration of a federal regulatory program, whereby which State A officers or agencies must file monthly reports with the federal Drug Enforcement Agency, a regulatory arm of the federal government, lest they be in violation of federal law. This legislation of a kind as that previously struck down by the Supreme Court, where Congress commandeered states to effectuate a federal background check program for handgun owners. Because Section 11 constitutes the federal government commandeering State A in its sovereign capacities to administer a federal regulatory program, it is not a Constitutional exercise of federal power under the Tenth Amendment of the United States Constitution.

In sum, Section 11 of the Act is unconstitutional under the Tenth Amendment as applied to State A.

2. The issue is whether Section 15 of the Federal Drug Abuse Prevention Act is a constitutional exercise of federal power as applied to State A.

Under its Constitutional Article I Taxing and Spending Power, Congress may appropriate monies and spend them if such spending is in the interest of the general welfare. While Congress cannot commandeer states to act to enact laws or enforce federal regulatory programs, it can induce states to act through attaching conditions to the receipt of federal funds disbursed pursuant to its Taxing and Spending Clause. Such attachment of conditions is Constitutional under the Tenth Amendment if the conditions are: (i) unambiguously disclosed; (ii) not unduly coercive such that it would represent a "gun to the states" head, in the words of the Supreme Court in *NFIB v. Sebelius*; (iii) the condition must be rationally related to the purpose of the funds; and (iv) the condition cannot abridge a Constitutional right, such as compelling speech in violation of the First Amendment to the Constitution.

Here, Section 15 of the Act attaches a condition to State A and other states' receipt of federal Justice Assistance Grant ("Grant") funding, namely that no state government, agency, or unit of local government in a state may receive any Grant funding without criminalizing marijuana. Unlike Section 11, this section does not operate to command states to criminalize marijuana, but rather conditions Grant funding on it, and so the four-factor test articulated above applies.

Applying the test, the condition to receive Grant funding is unambiguously disclosed to State A, plainly stating that if states do not criminalize marijuana, no governmental agency within it receives Grant funds. Hence, the first element of Section 15's constitutionality is met as applied to State A.

Second, the condition to receive Grant funding in Section 15 is not unduly coercive as to State A, as only \$10 million of State A's overall \$600 million law enforcement budget was derived from Grant funds. This does not give rise to a "gun to the head" that would deprive State A of any choice other than to repeal its marijuana decriminalization legislation and re-impose criminal sanctions for its use. Indeed, overall, the Grant represents less than 2% of State A's overall funding. Hence, the second element of the Section 15's constitutionality is met as applied to State A.

For a condition attached to federal funding to be rationally related to the expenditure, there need not be any narrow-tailoring, necessity, or even substantial relation between the condition and the expenditure. All that is required is a mere reasonable logical relation that may even be advanced ad hoc for the purpose of litigation. This is an exceedingly low bar that courts are unlikely to use to strike conditions down as unconstitutional.

Here, the marijuana criminalization condition is rationally related to the Grant expenditures, as the condition concerns the criminalization of marijuana by states and the Grant funding itself is to be used to fund state law enforcement agencies who would in turn investigate and make arrests for marijuana use in state borders. Even if the legislation seems motivated by states who have allowed recreational marijuana use in their borders, a court would likely find that the requisite rational relation between the conditions is present.

Hence, the third element of the constitutionality of Section 15's is met as applied to State A.

Courts will strike down conditions attached to federal funding that involve compelled speech or the adoption of federal views, as they did when Congress conditioned HIV/AIDS funding to those eligible for such grant funding on the recipients' denunciation of prostitution.

Here, conditioning the receipt of federal funds through the Grant on State A's criminalization of marijuana does not give rise to compelled speech on State A's part, nor does it require the State to make a statement inconsistent with its own views. Rather, the condition would compel legislative action by State A, which is not to be confused with compelled speech, as would be

an express joint resolution from State A that marijuana consumption is immoral. Hence, the fourth element of Section 15's constitutionality is met as applied to State A.

In sum, Section 15 of the Federal Drug Abuse Prevention Act is a constitutional exercise of federal power as applied to State A.

## **ANSWER TO MEE 1**

### **1. Section 11 of the Federal Drug Abuse Prevention Act is Unconstitutional because it Unduly Infringes Upon State Sovereignty**

The issue presented is whether Section 11 of the Federal Drug Abuse Prevention Act unconstitutionally "commandeers" the sovereign functions of the State by infringing upon the exclusive sovereign powers of the state.

Pursuant to the Constitution, Congress is limited in its actions to issues that are expressly delegated to it by the States. Pursuant to the 10th Amendment, all other powers are reserved for the States, which have unlimited power as sovereigns to act, so long as those actions do not violate the Constitution or a proper law of Congress. Where Congress acts outside the scope of its powers and forces the State to take action otherwise reserved for the State and not in the purview of an express power of Congress, the action by Congress is unconstitutional.

Here, Section 11 requires that State law enforcement officers and agencies must make reasonable investigation within 5 business days to ascertain whether the individual in custody was under the influence of marijuana. The officers or agencies must then file monthly reports with the federal DEA on the outcome of these investigations, including naming of any individual under the influence of marijuana at the time of the alleged offense. Such action by Congress, which requires and demands actions by state law enforcement officers, is an unlawful infringement on the sovereign authorities of State A. Congressional spending, taxing, or interstate commercial powers do not permit it to intrude upon the State's uniquely sovereign power of how it should pass and enforce its laws. Congress may undertake other avenues to ensure the outcome here that it desires is achieved; however, the course of action chosen is not permissible.

Therefore, Section 11 of the Federal Drug Abuse Prevention Act is an unconstitutional exercise of federal power.

### **2. Section 15 of the Federal Drug Abuse Prevention Act is Constitutional as Proper Exercise of Congressional Spending Power**

The issue here is whether Section 15 exceeds Congressional spending power pursuant to the Constitution.

The Constitution permits Congress to spend federal monies to benefit the general welfare. While Congress may not appropriate state power under the 11th Amendment and force a State to act within its sovereign capacity -- as explained in response to answer 1 -- Congress may use the spending power to incentivize states to pass laws if: (1) the purpose of the appropriation is related to the general welfare; (2) the appropriation is related to a lawful federal program; (3) the means of qualifying for the disbursement of federal funds is unambiguous; (4) the disbursement does not require the state to engage in otherwise unconstitutional activity; and (5) the disbursement is not coercive of the state government.

Here, the purpose of the law is to protect the general welfare from the harmful effects of marijuana. The enforcement of laws to protect the public from harmful drugs is carried out by local government law enforcement agencies. To qualify for the disbursement, the state law must make use of marijuana a criminal act. The prohibition of marijuana does not infringe on otherwise unconstitutional activity -- restated, it does not require the state to engage in otherwise unconstitutional activity. Finally, State A receives \$10 million out of a total budget of \$600 million from the federal government. Such a ratio does not make this law otherwise unduly coercive.

Therefore, State A may choose to keep marijuana decriminalized, or criminalize the use of the drug and accept the federal funds. It may not do both because Section 15 is a constitutional exercise of federal power.

## **ANSWER TO MEE 2**

1. The homeowner was not bound by his promise to keep his offer open for a week. At issue is whether the homeowner was free to revoke his offer at any time, or if his declaration to his neighbor that he would hold open his offer to the neighbor for a week rendered the promise irrevocable until then. An offer is an objective manifestation of an intent to bargain. Upon being made, offers are freely revocable by the offeror with the exception of three situations: 1) where there was an option contract in place, 2) where the offer is a merchant's firm offer, or 3) where there was detrimental reliance on the promise, which was reasonably foreseen and induced by the offeror (promissory estoppel). As here, none of these three options apply and the homeowner was therefore free to revoke his offer to the neighbor before the expiration of the week.

As the homeowner was seeking to sell his lawn mower to the neighbor, which is a movable good, the UCC, Sec. 2 applies may apply. Under the UCC, a merchant who offers in writing to keep an offer open for a period of time is not free to revoke that offer until the requisite period



of time has passed under the merchant firm offer rule. While merchants are free to specify what period of time an offer will be held open for, it is not to exceed 3 months. As here, it is unclear whether the UCC would even apply. While the offer was for the sale of goods -- a lawnmower -- the homeowner is likely not a merchant for purposes of UCC qualification. A merchant is one who regularly deals in goods of the kind being offered for sale. Here, homeowner appeared to be conducting a one-off sale and thus would not qualify as a merchant for UCC purposes. However, even if the homeowner was considered a merchant, his offer still would not qualify under the firm offer rule. In order to be binding, offers made pursuant to the firm offer rule must be in writing and signed by the merchant being charged. Here, although the homeowner orally promised to keep open his offer for the neighbor, the facts suggest that the offer was oral. In turn, because the offer was not reduced to writing and was not signed by the homeowner, it would not be an irrevocable offer under the merchant firm offer rule.

Similarly, the homeowner's rule was not irrevocable as an option contract. Option contracts typically apply to contracts that are not covered by the UCC and instead covered by common law. In the instance that the UCC does not apply, the inquiry at hand would be whether homeowner was obligated to keep open his offer to neighbor as an option contract. An option contract is an offer that cannot be freely revoked by the offeror until the requisite time specified in the option contract has passed. During this time, an offeree's rejection will not close the option contract, which must still remain unrevoked until the passing of the period of time to which the option is tied. Unlike the merchant's firm offer rule, an option contract need not be in writing and it needed not be signed by the offeror being charged. However, while oral offers can create option contracts, an option contract will be held open as irrevocable only if there is valid consideration. Consideration is an incurred legal detriment (or promise to confer a legal benefit) that induces the other party to promise. As here, no consideration was given for the homeowner's offer. The homeowner exclaimed that it was willing to sell the lawn mower for \$350 and would hold open this offer for a week, but the neighbor neither conferred any legal benefit on the homeowner (such as a monetary payment) nor incurred any legal detriment (such as refraining from doing something s/he was legally entitled to do) as consideration for the offer. In sum, the neighbor's oral statement that it would keep the offer open for a week did not constitute an irrevocable option contract because there was no valid consideration given by the neighbor.

Lastly, where a promisor reasonably foresees a promisee relying on their promise and the promisee does, in fact, detrimentally rely on their promise, a promisor may be estopped in quasi-contracts from denying a formed contract -- even where there was no valid consideration. Promissory estoppel does not apply here. Although the homeowner did make a promise, the neighbor never gave any indication to the homeowner that it was going to rely on this promise. In turn, the neighbor did not detrimentally rely on the homeowner's promise to keep the offer open for one week.

Because his offer was not in writing, the homeowner did not create a merchant's firm offer, and because there was no consideration given, the homeowner did not create an option contract when he told his neighbor that he'd keep open his offer for one week. In turn, the homeowner

was not bound by his promise to keep his offer open for one week and was free to revoke it at any point.

2. Assuming that the homeowner was not bound by his promise to keep the offer open, the neighbor's statement "I accept your offer" did not create a contract with the homeowner for the sale of the lawn mower. A contract is created between two parties when there is an objective assent to be bound by one another's promises, given with consideration. That assent must be mutual. While an offeree can accept an offer made by an offeror, thereby manifesting their intent to be bound by contract, a contract is not made where the initial offer has been revoked. Where an offer is freely revocable, revocation can happen in one of two ways: 1) the offeror can make a clear and unambiguous statement to the offeree that the offer has been revoked, or 2) the offeror can show through clear and unambiguous conduct that the offer has been revoked. Such conduct need not be made directly by the offeror to the offeree -- so long as the offeree has reason to know of the conduct, the revocation will be complete. Here, the neighbor knew prior to their acceptance that the offer for the sale of the lawnmower had been revoked. A day before the neighbor "accepted" the homeowner's offer to sell; the neighbor received a call from an acquaintance exclaiming that the homeowner had sold his lawn mower to the acquaintance. At that point, the offeree had unambiguous and unequivocal evidence of the homeowner's revocation of his offer: the lawnmower had been sold to the acquaintance and therefore could no longer be sold to the neighbor. In fact, even when the neighbor protested and said there must be a mistake, the acquaintance unambiguously replied that no mistake was made -- he came to the neighbor's house and showed the contract for the sale of the lawnmower, signed by the homeowner him/herself. At that point, the neighbor was made knowledgeable of the homeowner's revocation of the offer to sell the land mower. In turn, there was no outstanding offer when the neighbor called to accept the homeowner's offer. Therefore, no contract was created by the neighbor's statement, "I accept your offer."

## **ANSWER TO MEE 2**

### **1) Homeowner's Promise to keep the offer open**

The homeowner was not bound to keep his promise to keep his offer open for a week. At issue is whether the homeowner's offer was an irrevocable offer. As a preliminary issue, the offer was for the sale of a lawn mower, so the question applies the UCC and non-conflicting common law rules. An offer is a promise, commitment, or an undertaking of a clear and definite nature that creates in the offeree a reasonable belief of the power of assent or acceptance. Revocation occurs when an offeror cancels or retracts the offer before the offeree's acceptance. Offers are generally revocable unless it falls under an exception that makes the offer irrevocable. First, at common law, if the offeree pays consideration for the offeror's promise to keep the offer open for a specified period of time, then the offer is an option contract and cannot be revoked until the end of the specified time. Second, under UCC, a

merchant's firm offer rule applies when (i) a merchant seller (ii) makes an offer in a signed writing (iii) and the writing gives assurances that the offer will be held open for a specified time (or maximum of three months if unspecified). UCC defines a merchant as a person who is engaged in the regular sale of a certain type of goods or who possesses special knowledge or expertise due to his profession or skill. Finally, an offer may be irrevocable due to estoppel insofar as the promise made could reasonably induce a person to believe that the offer would be kept open and the offeree reasonably and detrimentally relied upon the promise and suffered some harm.

Here, although the Homeowner's first offer to sell the "lawn mower" was explicitly rejected by the neighbor, the homeowner's promise to keep the offer open for a week constituted a second offer because it was a promise and a commitment that created the power of assent in the neighbor. However, the offer was revocable because neither of abovementioned mentions exceptions apply. First, the offer was not an option contract because the Neighbor did not pay any consideration to keep the promise open. Instead, the Homeowner made a unilateral promise to keep the promise open so that the Neighbor could check out and compare other lawnmowers. Similarly, the offer does not fall under the UCC Merchant's Firm offer because (i) the Homeowner is not a "merchant" as he is not a seller who is engaged in the business of selling lawnmowers and neither does he possess any sort of special skill that gives him any expertise in selling lawnmowers; and (ii) the offer was not in a signed writing - it was made over the phone with no written assurances. Finally, although the Homeowner's promise to keep the offer open for a week could have reasonably induced the Neighbor rely on the offer, especially given that this was a second offer after the Neighbor rejected the offer once and the Homeowner insisted, the Neighbor did not suffer any harm whatsoever, so there is no detrimental reliance. Had the Neighbor rejected a different offer from someone else based on the Homeowner's promise, there could have been possible detrimental reliance and a court may have found the offer as irrevocable. Therefore, on the basis of the facts provided, the Homeowner was not bound by his promise to keep the offer open as the offer was revocable at law.

## **2) Neighbor's Acceptance of the Offer**

The Neighbor's acceptance of the offer (by saying "I accept your offer") does not create a binding contract for the sale of the Homeowner's lawnmower. The issue here pertains to whether the revocation of an offer can be indirect or implied. Acceptance is the manifest assent of the offeree to accept the offeror's offer and be bound by a legal contract. However, acceptance is time-specific insofar as an offeror has the power to revoke an offer *before* the offeree's acceptance unless it falls under a stated exception (see above). Revocation can either be express/direct or implicit/indirect based on the offeror's conduct. Express revocation generally occurs if the offeror informs the offeree of the revocation. Implied revocation can occur if the offeree receives information from (i) a reliable source (ii) relating to the offeror's conduct (iii) such that based on the conduct; a reasonable person would believe that the offeror clearly intended to revoke the offer. Generally, if the offeror sells an item to another person, it constitutes a reasonable intent of revoking the offer to the original/first offeree. As long as the

offeree receives this information before acceptance, regardless of the offeree's intent to accept the offer in the near future, the offer is considered revoked.

In this case, the Homeowner's offer was revocable (see above and assumption in the question) This means that the Homeowner could revoke the offer either explicitly or impliedly before the Neighbor's acceptance. Here, there was an implicit revocation because the Acquaintance was a reliable source who had informed the Neighbor of her purchase of the Homeowner's lawnmower. As mentioned above, a reasonable person would conceive of the Homeowner's sale of the lawnmower to the Acquaintance as a clear intent to revoke the offer to the Neighbor. Additionally, the information here is especially reliable and unequivocal in the Homeowner's intent because the Acquaintance showed the Neighbor the signed contract of the sale of the lawnmower. Given that this revocation happened before the Neighbor' acceptance the next day, the revocation was valid. Therefore, the Neighbor's acceptance was too late and did not create a binding contract.

### **ANSWER TO MEE 3**

1. Expansion project is not a nonconforming use because non-conforming use is only limited to the extent of original use and does not permit substantial expansion after the enactment of zoning code

The issue is whether the expansion project after the enactment of zoning ordinance ceases to be a nonconforming use protected under the zoning ordinance and thus violates the zoning ordinance. Government has broad power to enact zoning statute to promote an area's morale, health, safety and general welfare. Valid use that existed prior to the zoning code that does not comply with the zoning code is sometimes protected under the category of "nonconforming use" and does not constitute a violation of zoning code. However, the non-conforming use is limited to the extent of its prior usage and cannot be substantially expanded. A substantial expansion of the use would cause the use to lose the protection status of "nonconforming use" and violates zoning code.

Here, the local zoning board passed an ordinance that rezoned the district from light commercial to residential. The zoning ordinance contains typical language protecting existing nonconforming uses. Convenience stores are not residential use. Because the man's convenience store existed prior to the passage of zoning code, it was protected and man can continue operate the store under the zoning statute. However, the man can not substantially expand it to add a dining area. Here, the man planned to expand his store by 1110 square feet. The expansion was substantial enough to lose the protection of "nonconforming use" and thus violate the zoning statute.

2. Bank is not obligated to further funds because this decision is made in good-faith judgment.

The issue is whether bank is obligated to disburse further funds under the contract. A party owes the other party to the contract a duty of good faith and fair dealing. Here, the loan contract specifically states that funds would be disbursed at such times and in such amounts as the bank determined to be appropriate, if, in the bank's good-faith judgment, there was satisfactory progress being made on the project. Thus, bank has discretion as to determine whether or not to disburse the funds under the contract.

Because general contractor failed to pay the plumbing subcontractor, the plumbing subcontractor has filed a mechanic lien against the man's property in the local lands office. Bank's interest in the loan is also secured by the man's property. "Satisfactory progress being made on the project" is undefined and ambiguous. Bank may feel unsafe about its interest in man's property due to the mechanic lien and thus deem the progress made on the project is unsatisfactory. Bank may also no longer trust or have confidence in man's ability to finish the project due to the existence of mechanic lien. Thus, bank's decision to reject making another disbursement is made in good-faith and supported by valid reasons. Bank has no obligation to disburse further funds

3. Mechanic's lien has priority as to the \$40,000 loan provided by the bank, but is subordinate to the \$50,000 loan by the bank.

The issue is whether the mechanic's lien has priority over bank's mortgage. Man's obligation to repay the loan is secured by a mortgage. Thus, bank has a security interest in man's property. There are 3 requirements for a valid security interest to exist: 1) the debtor has rights 2) secured party has given value and 3) secured party has authenticated a security agreement indicating the collateral. All 3 requirements are satisfied here. The man has rights in his property, the bank extended value by making a \$200,000 loan commitment to the man and they signed a mortgage agreement. This interest is also perfected because the loan was promptly and properly filed in the local records office.

Mechanic also has a lien interest in the man's property. Between a lien creditor and a perfected security interest, security interest will prevail as long as the interest is perfected before the person becomes the lien creditor.

For the \$50,000 loan made to the man two weeks after obtaining the loan commitment, bank will have priority because the interest arises before the mechanic filed a lien against man's property. Mechanic had notice of bank's mortgage as mortgage is properly filed in the local records office.

However, mechanic will have priority over the \$40,000 loan made by the bank eight weeks into the project. If the future advance is obligated/mandatory, then disbursement of future advance will relate back to the date the security interest is perfected and has priority to other liens that arise after the security interest is perfected. However, if the future advance is only

optional, then future advance will not have priority over liens that arise before the future advance is made.

Here, bank's loan contract states that bank has discretion to disburse funds as long as the decision is made in good-faith. Thus, it's not mandatory for bank to disburse fund to the man. The \$40,000 disbursement will not relate back to the date when interest is perfected. Instead, because it arises after the mechanic lien arises; it will lose to mechanic lien.

Some jurisdictions adopt rule that mechanic lien will have priority over all other security interest in the collateral. Mechanic lien is usually a lien that arises because mechanic has performed some work but is unpaid for it. As a result, mechanic filed a lien to secure the payment obligation. In these jurisdictions, mechanic lien will have priority over other security interests. If the state in the current case adopts this rule, then mechanic's lien will have priority over the bank's mortgage, for \$20,000 amount.

### **ANSWER TO MEE 3**

#### 1. Nonconforming Use

The expansion constitutes nonconforming use. At issue is whether the grandfather clause to the zoning ordinance implies the right to expand nonconforming use. Zoning ordinances are generally constitutional and do not require compensation as long as they do not constitute takings. To avoid a taking, most zoning ordinances include provisions to grandfather-in existing uses that do not conform with the terms of the new ordinance. But such provisions do not generally permit the expansion of the nonconforming use.

Here, the zoning ordinance plainly entitles the man to keep his store in its present condition, even though it violates the new zoning ordinance. But the grandfather provision will not permit his expansion of the store because it only applies to continued use. An expansion by more than a thousand square feet would constitute much more than continued use. Because the expansion would constitute more than mere continued use, does not fall within the exception to the zoning ordinance. Hence, because the expansion will not fall within the exception to the zoning ordinance, the expansion project constitutes a non-conforming use.

#### 2. Obligation to Disburse Funds

The bank is not obliged to disburse further funds. At issue is whether the existence of a lien permits the bank to excuse its granting of further advances. An optional future advance is one that a creditor may but is not required to make. Typically, the grant of the advance is tied to conditions, which are within the discretion of the creditor. Here, the loan agreement provides that the bank must disburse funds only when, and in such amounts as, it is

determines is appropriate based on its good faith judgment of whether there has been satisfactory progress. In light of the subcontractor's lien, the bank has declined to grant the advance. The bank is within its power to do so because it could conclude that the existence of the subcontractor lien and the accompanying disagreement among the parties has frustrated the advancement of the project. Hence, the bank is not obliged to disburse further funds.

### 3. Priority

The mechanic has part priority. At issue is when did the loans occur. The general rule is that creditor's take priority in the order in which they make loans. But where a creditor does not immediately record her loan, this analysis may be changed based on the particular recording act at issue. There is an exception to the general rule for optional future advances. An optional advance is one that a creditor need not make. Typically, each optional advance is treated as a separate loan. The rationale for this rule is to prevent a creditor from obtaining priority over all future creditors without taking on any risk. A creditor will prevail under both a notice and race notice statute if it both loans and records first.

Here, the bank made a \$200,000 loan commitment to the man but reserved the right to determine if and when it should issue payments based on its good faith belief that there was progress in the project. The subcontractor then attached a lien. Under a traditional loan arrangement, the bank would have had complete priority--no matter the recording system--because it loaned and recorded first. Under this arraignment, each disbursement constituted an optional advance. As such, each disbursement took priority in the order in which it was made. The bank initially made a disbursement of \$50,000. The subcontractor then secured a \$20,000 lien and properly recorded it. Finally, the bank disbursed an additional \$40,000. When it made this disbursement, the bank had record notice of the attachment of the lien. Hence, if each disbursement is treated as a separate loan, the bank only has priority over the first \$50,000 disbursement. The lien creditor has priority over the remainder of the mortgage.

### **ANSWER TO MEE 4**

(1) THE TRUSTEE VIOLATED THE DUTIES OF (A) LOYALTY; (B) CARE; AND (C) IMPARTIALITY

(a) Self-Dealing (Loyalty)

A trustee is subject to the duty of loyalty, which is scrupulously observed in trust law to a higher extent than usual. This duty mandates that the trustee act only in the interests of the beneficiaries and never for his own benefit; other than in taking reasonable compensation for services rendered or costs imposed. Under the "no further inquiry" rule, a trustee who engages in self-dealing shall be found in *per se* breach of trust even if the self-dealing was fair--unless

he can demonstrate that either (i) the settlor agreed to the conflict in the trust's creation, or (ii) all beneficiaries consent to the self-dealing after full and fair disclosure. Without consent of some sort, the breach is automatic.

Here, the trustee rented an apartment to himself from the trust's principal. This is definitional self-dealing, as he is renting the trust property to himself for personal uses. Under the no-further inquiry rule, he is in breach because he can neither show (i) that the settlor agreed to the decision; nor (ii) that the beneficiaries consented to it. First, the settlor gave no indications that the trustee may use the property for his own purposes. Second, the beneficiaries, from the facts, were not contacted regarding this, and they did not give their consent. Accordingly, this is a *per se* breach of the duty of loyalty due to self-dealing. It is completely irrelevant that he paid the average market rate of the apartment.

#### (b) Failure to Insure (Care)

A trustee is subject to the duty of care in dealings with the trust property. This duty mandates that the trustee exercise the care of a reasonable trustee in managing the property. This has been held to mean that a trustee is required to protect the trust property with the purchase of insurance, which can be paid from trust *res*--or else the property's foreseeable destruction will be a breach of the duty of care. A failure to purchase insurance may be held reasonable if the property was only a small portion of the *res* or was otherwise immaterial; this would be because the "same or similar circumstances" would alleviate the need of a reasonable person to act.

Here, the trustee did not purchase insurance and the failure constitutes a breach of the Duty of Care. First, reasonable people in the possession of property purchase insurance for it. The trustee failed to do this and the building was foreseeably destroyed as a result. Thus, there is a *prima facie* breach of the duty of care. Second, the trustee will not be able to rebut this by showing the property was inconsequential to the trust--on the contrary, this property was almost the entirety of the trusts' real property and constituted a major source of income and principal. Therefore, its loss should have been protected against--and a reasonable trustee in the same circumstance would have certainly insured the property.

#### (c) Improper Distribution of Res (Impartiality)

A trustee to a trust with both present and remainder beneficiaries has a duty to make distributions and concessions in an impartial manner. This does not require the trustee to make perfectly equal distributions, but it does require the trustee to balance the relative trust interests and needs of the beneficiaries. Moreover, under the majority UTIPA (Uniform Trustee Income and Principle Allocation Act), the trustee has discretion in its ability to allocate interest and principal--UNLESS the settlor's instructions make explicitly clear otherwise. When the settlor demands a certain allocation of property, it will control over the UTIPAA. To note, trust income is considered the produce of: rents, leases, dividends (other than in kind), and other



sources of income where there is not a full disposition of the property. Principal, on the other hand, consists of the general assets of the trust which resulted from the full disposition of such assets and the new assets acquired therewith: such as sales of property, dividends in kind, and receipts of non-income. When there is such a deviation between income and principal, the trustee has a duty to separate how the funds are distributed on the basis of kind: for example, the trustee must generally fix problems with a principal-recipient beneficiary's property using the disposition of other principal; it is considered prejudicial to the income-beneficiary to use their equitable title to benefit another beneficiary with separate equitable title to other, distinct trust res. There is an exception for necessity and the need to preserve the trust; therefore a trustee may invade principal to fix an issue with income property if it is necessary to maintain the trust res and protect the income-beneficiary's interest.

Here, there was clearly a deviation from the standard. Initially, the settlor specifically determined where he wished the principal and the income to go. Settlor wished for the income to go to Albert and then for the principal to be disbursed to Betty; note he did not state that "all *remaining*" principal is to be disbursed--he said "**all principal.**" Accordingly, Albert has no right to the principal, just as Betty has no right to the income. Here, the apartment was principal even if its primary use was the creation of income. Thus, using the income to which Albert had equitable title to serve the future interests of the property to which Betty had equitable title, there was a misappropriation of funds under the impartiality duty. Although the trustee could argue this was necessary to preserve the income to Albert, the trust had liquid assets of \$120,000 on hand which otherwise could have been used to save the property. Accordingly, the use of the Albert's funds to repair the interest of Betty is a breach of the trust as expressly defined by the settlor.

## (2) TRUST PRINCIPAL DISTRIBUTION UPON ALBERT'S DEATH GOES TO BETTY'S HUSBAND BY HER WILL

In general, a trustee must distribute the remaining principal per the terms of the trust at its conclusion or the happening of a specified event. Unless the trust specifically limits alienability, however, the remainder-beneficiary may generally make transfers of their equitable interest after it has vested. A gift in a testamentary trust is considered to be effective at the time the equitable title is split and conveyed to a beneficiary. A remainder beneficiary's interest is a presently held future interest and is subject to the general rules thereto. When a gift creates a vested remainder, the vested remainder is fully devisable and transferable inter vivos unless restricted by the trust terms. On the other hand, when the remainder is merely contingent--or is subject to a condition precedent, it shall not be devisable and any predeceasing of the giftee shall result in lapse. In the absence of an anti-lapse provision, such a failed gift would return to the testator/settlor's estate. A remainder is vested so long as it identifies (i) ascertainable person and (ii) immediate possession upon the end of the preceding estates; this is established with words such as "to X after Y's life estate." On the other hand, a remainder is subject to a condition precedent--and unvested--if it creates words of condition, such as "to X, if X survives Y." If the interest is a vested remainder and is devisable, then it

passes through the decedent- giftee's estate (or if with a will, pursuant to the testator-giftee's intents).

Here, the devise to Betty was a vested remainder and therefore was able to validly pass to her husband by the terms of her will. First, Betty was completely ascertainable from the very beginning--the words identified her as a living person with a specific relationship. Second, her possession was not limited by words of survival. Rather, the possession was to be immediate upon Albert's death. If, on the converse, the words had made Betty's survival the condition, then the gift would have lapsed and gone to the testator's estate--and to his son by intestacy. HOWEVER, this is not the case because a vested remainder is fully devisable inter vivos and will not be destroyed at the owner's death. Accordingly, the beneficial interest passed pursuant to Betty's will in which she left her entire estate to her husband. Therefore her husband has been the valid remainder beneficiary since her death and **all trust principal should be disbursed to husband at Albert's death.** Nothing goes to either the daughter or the original testator-settlor's son.

#### **ANSWER TO MEE 4**

1. The trustee has violated fiduciary duty of care, loyalty and impartiality in administering the trust.

(1) The trustee has violated fiduciary duty of loyalty.

The trustee owes the trust's beneficiaries (for the testamentary trust) a duty of loyalty. He must discharge his duty in good faith, and reasonably believe that his conduct is in the best interests of the beneficiaries. This requires that the trustee could not engage in conflicting transactions (self-dealing), usurping trust's opportunities, and gain secret profits. When the trustee enters into transactions involving trust properties that solely for the benefit of himself, the common law "no further inquiry" rule would deem such transaction is a conflicting transaction as a breach of trustee's fiduciary duty. No further inquiry would be made as to the trustee's good faith, or whether the transaction is fair to the trust as a whole. The beneficiaries have options to subsequently ratify or reject the transaction. If the beneficiary rejects such transaction, they could claim the (1) losses to the trust property due to the trustee's breach of duty; or (2) profits trustee made due to the breach of the duty.

Here, the trustee rented one of the apartments, the trustee property, to himself. Since such transaction was entered into for the trustee's benefits, it is irrelevant whether the trustee was in good faith or the transaction was fair (in fact, the rental price trustee paid, i.e. \$1,300, was the market price of the apartment). The transaction was deemed containing a conflict of interest between the trustee's role as a fiduciary and his personal interest.

Therefore, this transaction is a breach of duty of loyalty.

(2). Trustee also breached his duty of care owed to the beneficiaries.

The trustee owed the beneficiaries a duty of care. He must use the care as a prudent person in the like position would deem appropriate under the circumstances. Under the prudent person investment rule, the trustee should take care of the trust property, and management the property as a reasonable prudent person would deal with his own personal property. This requirement asks the trustee to do diversification, and make the trust property in good shape and productive. Here, a portion of the apartment building's roof was destroyed by fire, and the trust suffered loss because the trustee failed to purchase a fire insurance policy. It is arguably true that a reasonable prudent person, when managing his real property, would properly buy fire insurance policy to safeguard against unforeseeable losses. The trustee's failure to purchase necessary insurance for the apartment buildings and made the apartment suffered loss would constitute a breach of his duty of care owed to the trust.

(3) Trustee also breached his duty of impartiality among life beneficiaries and remainder beneficiaries.

Trustee should maintain impartial when the trust contains different categories of beneficiaries, especially when the interests of the life beneficiaries and the remainder beneficiaries, and income and principal beneficiaries diverse. The requirement of impartiality requires that the trustee properly apportion the income and expenses generated from the trust property between different beneficiaries. If the expenses are primarily related to the principal value of the property, then the expense should normally allocate to the principal beneficiaries.

Here, the trustee charged the whole roof repair expenses to income beneficiaries, even though the trust had liquid assets to pay the amount. The roof repair is primarily related to the property value of the apartment, though it may also affect the rental value. When expenses are reasonably related to both the income and principal value of the property, the trustee should apportion the amount instead of burden only one class of beneficiary. Since the trustee here apportions the whole amount to the income beneficiary thus improperly favor one class of beneficiary over another class, the trustee has breached his duty of impartiality.

2. Upon Albert's death, the trust principal will be distributed to Betty's husband, as named under Betty's duly probated will.

(1) Testator's son.

As a rule, children do not have a right to inherit from their parents, if their parents intentionally omit them from the will. An exception is for the pretermitted child, who is born after the will is executed, and there is no evidence that the parent intentionally omit the later born child.

Here, the testator created a testamentary trust in his will leaving all of his estate in a trust, without naming his son as a beneficiary. This fact alone did not give the son standing to challenge the validity of the testator's will (absent other grounds, e.g. fraud, duress, undue influence, capacity etc.), since there is no such a right in a child to inherit from their parent. As the fact provides that the testator's son was living at the time the will was executed, the son is not a pretermitted child, and so no exception should be made for him. Nothing in the fact pattern indicates other grounds for invalidating the testator's will, therefore, the court should probate the will as it is, and the son is not entitled to inherit under the will, except that certain gifts under the trust lapse and the son may be entitled to inherit under the intestacy law.

## (2) Betty's husband and daughter

Under the common law rule, when the remainder interest is indefeasibly vested, the remainderman is entitled to take regardless whether she survives the life tenant or not. Here, the testator created the trust naming Albert as the life time beneficiary, and upon Albert's death, the trust principal will be distributed to Betty. Betty's remainderman interest did not contain any condition precedent or condition subsequent, and it is indefeasibly vested. The court will not presume a survivorship condition on the remainder gift. Therefore, when Betty predeceased Albert in 2013, her interest was nonetheless vested, and upon Albert's death, the principal should be distributed according to Betty's will in disposition of her estate. According to Betty's duly probated will, she left all her estate to her husband.

Under the UTC, however, a survivorship condition may be implied. Thus, if the remainderman does not survive the life tenant, the gift may lapse, and may revert to the grantor's estate and distributed either under residuary clause or by intestacy, unless an anti-lapse provision governs. Here, it is very likely that an anti-lapse statute would apply. An anti-lapse statute would save an otherwise lapsed gift if the grantee is certain blood relatives of the settlor. Here, Betty is the testator's granddaughter, so she is within the category in the anti-lapse statute. Under the anti-lapse statute, the gift to Betty will not lapse due to her predecease, and will pass under her valid will.

In either case, Betty's daughter will not share in the trust principal, because she was not named in Betty's will. And as discussed above, a child could not challenge a valid will solely on the basis that the parent disinherit her.

## **ANSWER TO MEE 5**

### **1. The Mechanic's Testimony**

The first issue is whether the mechanic's testimony is admissible.

Evidence is generally admissible for any issue for which it is relevant. Relevance means a tendency to make a fact more or less likely to be true. Relevant evidence is admissible unless its probative value is substantially outweighed by prejudicial effect, or if it is cumulative, or tends to confuse the jury. A lay witness can testify to relevant evidence based on personal knowledge or opinion, as long as it is within what an untrained person could reasonably know based on past experiences, and the opinion or observation does not require any scientific expertise or technical knowledge. A witness can be qualified as an expert in his or her field as long as the witness has adequate training, experience, or expertise in the subject. Expert evidence is admissible under the *Daubert* factors, which include testable methods and standards and publication in journals generally recognized in the field.

Here, the mechanic's testimony is relevant (and quite probative) for the issue of whether the woman's brakes were defective. The mechanic testified based on personal knowledge that he inspected the truck a week before the accident. The opinion that the brakes were worn was probably an expert opinion because it required a level of expertise in auto-parts. However, a mechanic would be expected to rely on widely accepted principles for determining whether brakes were worn, which are readily testable, printed in relevant literature, and accepted in the field. The mechanic would have to be qualified as an expert to give that opinion, but assuming he is a professionally certified mechanic, the court should allow it because of his training, expertise, and experience in the maintenance of cars.

Thus, the mechanic's testimony is admissible.

### **2. The Invoice**

The second issue is whether the invoice for new brakes is admissible.

#### *i. Hearsay*

Hearsay is a statement made by a declarant out of court, that is sought to be admitted for its truth. Hearsay is generally inadmissible, but that rule is subject to a number of exceptions. One exception is the business records exception. Under the business records exception, records that would otherwise be hearsay are admissible for their truth so long as they are regularly kept in the course of the declarant's business and are not made for the purposes of or in anticipation of litigation.

Here, the invoices are business records kept by the mechanic. The invoice is relevant for the issue of whether the woman had defective brakes at the time of the accident. Although the invoice was made when the brakes arrived on January 2, a day after the accident, it is likely that the lawsuit was filed some time afterwards. More importantly, the invoice is identical to

similar receipts for other customers. The record therefore fits under the business record exception because it was a regularly kept record that was not made in anticipation or for the purposes of litigation. Therefore, it is admissible for its truth, even though it is hearsay.

#### ii. Authentication

A writing containing evidence must also be authenticated before it is admitted. Authentication can take place in a number of ways, including through comparing handwriting and signatures.

Here, the invoice was written and signed by the mechanic. A factfinder (or even a lay witness) can compare the handwriting or signatures to authenticate the invoices.

#### iii. Conclusion

Thus, the invoice is admissible.

### **3. The Doctor's Testimony**

The third issue is whether the doctor's testimony is admissible.

#### i. Hearsay

The general rule for hearsay is given above. Another exception to the rule against hearsay is statements made for the purposes of medical treatment. Those statements are admissible for their truth, but the statements must be specifically those that are made for the treatment (and not, for example, those ascribing fault).

Here, the statement is not accusatory, but strictly medical, and was given for treatment after the accident. It informs the doctor that the woman, the doctor's patient, suffered from arthritis for five years. Although the facts do not state the context in which she made this statement, it fits the general pattern of statements made for the purposes of treatment or diagnosis (for example, to describe familiarity with, or past problems with, a drug or course of treatment). The statement is relevant for the question of damages, because the woman is claiming damages for pain and suffering and medical costs, which she ascribes to the accident. Because the statement was made for the purpose of medical treatment or diagnosis, it is admissible for its truth, even though it is hearsay.

#### ii. Privilege

Statements made to a medical professional for the purposes of treatment are generally privileged. The holder of the privilege is the patient and can prevent the doctor from testifying. However, the patient may not claim the privilege if the patient puts his or her own physical state at issue.

Here, the woman is the doctor's patient, so she enjoys doctor-patient confidentiality. However, by asserting a personal injury action, she necessarily puts her physical condition at issue. She thereby has lost the privilege.

### iii. Conclusion

Thus, the doctor's testimony is admissible.

## **4. The Roommate's Testimony**

The fourth issue is whether the roommate's testimony is admissible.

Generally, evidence of past behavior or of character is not admissible to prove that a person acted in accordance therewith. However, evidence of habit is admissible for the proposition that the person acted in accordance with the habit, even if the witness describing the habit was not present on the day of the incident in question. Habit constitutes actions that are so routinely and repeatedly done that they are likely to be done each time. Habit evidence is usually characterized with words like "always," "constantly," or "never."

Here, the roommate is testifying to the man's habit of texting. The roommate said that the man "never puts his phone down," and even said the man is "addicted to texting." In context, this is not a medical diagnosis, but rather testimony to the man's habit of using his phone and texting. That is probative as to the question of whether the man was texting on the day of the incident.

The roommate's sentence "He even texts while driving," however, may not be habit evidence. The sentence "he even texts while driving" is equivocal and does not necessarily say the man *always* texts while driving. More likely, by the use of the word "even," the roommate says the man *sometimes* texts while driving. That is not habit evidence and is therefore not admissible. Furthermore, it is highly prejudicial because the fact that the man was texting and driving is the woman's main defense. This sentence's probative value may be substantially outweighed by its prejudicial effect.

Thus, the first sentence in the roommate's testimony is admissible, but the second one is not.

## **ANSWER TO MEE 5**

### **Mechanic's testimony:**

The mechanic's testimony is likely to be admissible as expert testimony. The issue is whether the mechanic is an expert.

An expert is allowed to testify as to something a lay witness would not be able to. An expert can testify if it is scientific and the expert has experience on the particular subject. Here, a mechanic would likely be an expert witness. The mechanic is offering evidence stating that he inspected the woman's truck a week before the accident and that the brakes were worn and in need of repair and that he ordered new parts. The mechanic would be a qualified expert because mechanics are likely to know when breaks need to repair. In addition, the mechanic was the one who personally inspected the car and therefore had actual knowledge of the situation. Under the Daubert test and expert testimony is valid if it is accepted in the community. This would be proper expert testimony. If this was not considered expert testimony it would be valid lay person testimony. A lay person can testify if the person has personal knowledge and the person's statement is not one that needs to be proven by scientific facts. Here, the mechanic is testifying to his personal knowledge that when he was inspecting the woman's truck he noticed the brakes were worn and in need of repair. This would be valid lay person testimony if he is not ruled to be an expert.

The mechanic's testimony is not hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted. The mechanic statement was not out of court but would be in court. In addition, this evidence is relevant. Evidence is relevant when it will probably prove or disprove a material fact. Here, this evidence is relevant to show that the woman's trucks needed repair. The man stated that the brakes were defective and this is relevant to prove his case.

### **The Invoice:**

The invoice is likely admissible under the business records exception. The question is whether this invoice was in the ordinary course of business.

The business records exception is an exception to the hearsay rule. Hearsay is an out of court statement being offered for the truth for the matter asserted. the invoice states that "New Parts for (the woman's) truck brakes ordered on December 23 and received on January 2." This is an out of court statement being offered to prove that he ordered new brakes. This is hearsay. However, the business records exception applies. The business records exception states that business records maintained in the ordinary course of business are admissible.

Here, the invoice was signed by the mechanic and found in the mechanic's file cabinet among similar invoices for other customers. This shows that it is typical that the mechanic creates invoices for customers. It is also signed by the mechanic showing that the mechanic was the



one who created the document. The court will likely rule that this is in the ordinary course of business and therefore is an exception to the hearsay rule.

The invoice is relevant. The invoice is relevant to show that the brakes were received on January 2. The accident occurred on January 1. This evidence is relevant to show that the brakes had not yet been installed.

### **Doctor's Testimony:**

The doctor's testimony is likely admissible. The question is whether it is hearsay and whether the patient doctor privilege applies.

The evidence might be admitted as an admission by a party opponent. An admission by a party opponent is not hearsay. Admission by the party opponent is a statement said by an opposing party. Here the woman is the opposing party and she said the statement. The doctor is saying that the woman told her that she suffered from painful arthritis in her neck for the past five years. This will likely constitute an admission by a party opponent because the woman said it and is a party to the case. Therefore this would be non hearsay.

Furthermore, this evidence might be admissible for impeachment purposes. In the complaint the woman stated that the accident caused the onset of significant neck pain for the woman requiring extensive medical treatment and resulting in lost wages. The man's attorney would present this evidence to show that the woman in fact had suffered from painful in arthritis in her neck for the past five years and it was not the injury that caused the neck issues. In order for this to be used for impeachment purposes the woman would first have to testify that the neck issues were caused by the accident and then the man's attorney can introduce this evidence to impeach her. This would be impeached a prior inconsistent statement. Prior inconsistent statements cannot be used as substantive evidence unless given under oath. A complaint is given under oath and therefore it might also get in as being substantive evidence. If this is a prior inconsistent statement under oath then it is not hearsay.

This is evidence is not likely to fall under the hearsay exception for a medical diagnosis. Hearsay is an out of court statement being offered for the truth of the matter asserted. This statement is hearsay because it is an out of court statement offered to prove the painful arthritis in the woman's neck. However, there is an exception to the hearsay rules when a doctor is testifying to statements made in the course of treatment of the injury. Here the statement "I have suffered from painful arthritis in my neck for the past five years" does not relate to the plaintiff telling her doctor about the injuries she caused from this case. Therefore, this would not fall under the exception. In addition, the man's attorney is bringing this and not the woman therefore, it is likely to be used for impeachment purposes as stated below.

However, the woman will probably claim patient-client privilege because this was a statement said in confidence to the doctor when she was being treated for neck pains after the accident. The woman will likely claim the privilege because she was being treated for a medical

condition. This privilege does not apply when an injury is an issue in the case. Here, in the woman's complaint she states that "the accident caused the onset of significant neck pain for the woman requiring extensive medical treatment resulting in lost wage." This shows that the injury is at issue and therefore the privilege probably will not apply.

The doctor's testimony is relevant to show that the accident did not cause the woman significant neck pain but that she had painful arthritis in her neck for the past five years. This is relevant to show that the woman's statements are inconsistent.

### **Man's Roommate Testimony:**

The man's roommate testimony is likely to be admissible to prove habit. The issue is whether this constitutes as habit.

Habit evidence is admitted when a person can show that a person conformed to that habit. Habit evidence is admitted because it is reliable. Here, the woman's attorney is attempted to show that the man conformed to his habit because he is addicted to texting and never puts his phone down. She states he even texts while driving. An addiction is likely good enough to show habit and the court will likely admit this evidence. This habit evidence is relevant to the case because the woman said that she saw the man texting on the phone when he entered the traffic circle. If the man is addicted to his cell phone this is likely offered to prove that he was on his cell phone at the time of the accident.

However, if the court rules that this is character evidence the court will not admit it. In a civil case character evidence is not admissible to show that a person acted in conformity with their character unless character is directly at issue. Character is at issue in defamation, negligent entrustment and child custody cases. This is a personal injury case and character is not admissible. Therefore, if this is determined to be character evidence it will not be admissible.

### **ANSWER TO MEE 6**

1. A corporation comes into existence only when the proper filing by the secretary of state is entered. Hence the corporation only came into existence on December 10th.

The woman attempted to form the corporation on November 10th. She properly complied with the Model Business Corporation Act except as concerned the requirement that she list the number of authorized shares. Hence, the corporation was not formed on November 10th.

On November 20th she entered into contracts in the name of the alleged corporation. As will be explained below, she may be able to escape personal liability on these contracts on the theories of corporation by estoppel and de facto corporation. However, even if those doctrines

applied, they only pertain to the question of liability. In other words, a finding that the elements of a de facto corporation have been met, or that corporation by estoppel applies, does not mean that a de jure (legal) corporation was formed. Accordingly, even though I will, in my answer to question 2, conclude that the woman is not personally liable on the contract due to these doctrines, that does not mean that the corporation was in fact properly incorporated as of those dates.

On December 5<sup>th</sup>, the woman mailed back the revised articles to the Secretary of State's office, along with another check to cover the filing fee. It is important to note that although the articles were received on November 15<sup>th</sup>, that does not mean the corporation came into existence on November 15<sup>th</sup>. Filing is required - that is the legally significant act that brings a corporation into existence.

The corporation's revised articles (which we will assume otherwise complied with the filing requirements) were filed on December 10<sup>th</sup>. Because the filing by the secretary of state is the legally significant date bringing a corporation into existence, that is the date that the corporation will be deemed to have come into existence.

2. The woman will not be personally liable on the contract because of the operation of either the de facto corporation doctrine or the de jure corporation doctrine.

Generally, the members of a corporation are not personally liable on the corporation's debts. Instead, it is the corporation that is liable on the corporation's debts. A problem arises when parties to a corporation act on behalf of a corporation whose incorporation was defective. In such a case the incorporators can escape personal liability on contracts they entered into using two theories.

The doctrines of de facto corporation and corporation by estoppel act to allow a corporation to enforce a contract that the purported corporation entered into notwithstanding the fact that there was a problem with the corporation's incorporation that prevented it from being a de jure (legal) corporation. Notably, these doctrines are not embraced by all the states, but are alive in certain states and we will assume they are at least possibly viable arguments in this jurisdiction. The doctrine of de facto corporation requires a colorable attempt to comply with the corporate law, a statute on point that would otherwise provide for incorporation, a good faith attempt to comply, and lack of knowledge that the corporation's incorporation was defective. The doctrine of corporation by estoppel is generally limited to contract cases and provides that counterparty to a contract with a corporation that was defectively incorporated will be estopped from denying the existence of the corporation if the counterparty subsequently wants to get out of being in the contract. Again, there is a requirement that the purported incorporators be unaware that the incorporation was defective.

In this case the woman complied with the requirements of de facto corporation. There was a statute on point (State X's business incorporation act comports with the Model Business Corporation Act). There was a colorable attempt to comply; the woman did an otherwise good

job and proper effort to properly incorporate, notwithstanding the defect in her filing that rendered the filing ineffective. In other words, she genuinely tried to incorporate, and is not coming in at the end with some out-of-left-field argument that no corporation was formed so that she can escape personal liability on her debts. Moreover, if the facts are to be believed, the woman did not *know* that she failed to properly incorporate. That is an essential element of a finding of de facto corporation. Accordingly, because the requirements of de facto corporation have been satisfied, the woman will not be personally liable on this contract.

Alternatively the doctrine of corporation by estoppel will operate to similarly allow her to escape liability. The installer relied on the fact that it thought it was entering into a contract with a corporation called Solar Inc., as evidenced by the fact that the woman signed the contract as the president of Solar Inc. Moreover this is a contract claim rather than a tort claim to which the doctrine of corporation by estoppel would not otherwise apply. The doctrine of corporation by estoppel operates in circumstances like the ones at issue to ensure that a counterparty that contracted with a corporation on the basis that it was a corporation cannot subsequently use the fact that the corporation's incorporation was defective to sue the corporation's members personally.

For the foregoing reasons the woman should not be held personally liable.

3. The man will likely not be found personally liable on the contract either, but for slightly different reasons; he should focus on the corporation by estoppel argument, rather than the de facto corporation argument.

Generally, the members of a corporation are not personally liable on the corporation's debts. Instead, it is the corporation that is liable on the corporation's debts. A problem arises when parties to a corporation act on behalf of a corporation whose incorporation was defective. In such a case the incorporators can escape personal liability on contracts they entered into using two theories.

The doctrines of de facto corporation and corporation by estoppel act to allow a corporation to enforce a contract that the purported corporation entered into notwithstanding the fact that there was a problem with the corporation's incorporation that prevented it from being a de jure (legal) corporation. Notably, these doctrines are not embraced by all the states, but are alive in certain states and we will assume they are at least possibly viable arguments in this jurisdiction. The doctrine of de facto corporation requires a colorable attempt to comply with the corporate law, a statute on point that would otherwise provide for incorporation, a good faith attempt to comply, and lack of knowledge that the corporation's incorporation was defective. The doctrine of corporation by estoppel is generally limited to contract cases and provides that counterparty to a contract with a corporation that was defectively incorporated will be estopped from denying the existence of the corporation if the counterparty subsequently wants to get out of being in the contract. Again, there is a requirement that the purported incorporators be unaware that the incorporation was defective.

In this case it would be unlikely for the man to succeed on a theory of de facto corporation. It is possible that this doctrine requires that the person seeking to escape personal liability must be someone actively involved with the colorable attempt to incorporate that the de facto corporation doctrine requires. We are told that the man's involvement was minimal. Moreover it was the woman, rather than the man, actively involved in the incorporation efforts. The man's better argument is to use a theory of corporation by estoppel. The installer relied on the fact that it thought it was entering into a contract with a corporation called Solar Inc., as evidenced by the fact that the woman signed the contract as the president of Solar Inc. Moreover this is a contract claim rather than a tort claim to which the doctrine of corporation by estoppel would not otherwise apply. The doctrine of corporation by estoppel operates in circumstances like the ones at issue to ensure that a counterparty that contracted with a corporation on the basis that it was a corporation cannot subsequently use the fact that the corporation's incorporation was defective to sue the corporation's members personally.

So even if the man fails to make a de facto corporation argument, he will at least be able to make a corporation by estoppel argument and escape personal liability under the contract.

### **ANSWER TO MEE 6**

1. Solar Inc. came into existence on December 10. In order for a corporation to come into existence, the incorporators must fill out the business's articles of incorporation while complying with the state's business act and then mail them to the Secretary of State. If the business's articles of incorporation comply with the state's requirements, the Secretary of State will then file the articles of incorporation. Once they are filed, the business then comes into existence.

Because the original articles of incorporation contained errors, they were not properly submitted to the Secretary of State. It was therefore not until the woman corrected the error and mailed back a corrected copy that they were properly submitted. Solar, Inc. then came into existence when the Secretary of State received them and filed them on December 10th.

2. The woman is not personally liable to the installer on the employment contract that she signed. The issue is whether the woman is liable based on the fact that Solar Inc. was not a de jure corporation on the date of the contract.

As a general rule, an investor is not personally liable for the debts and contract of a corporation. However, first, a valid corporation must come into existence. In order for a corporation to be validly formed and therefore to be a de jure corporation, one must comply with all of the requirements in the state's corporations statute and the articles of incorporation must be received and filed by the Secretary of State. Here, on the date that the woman entered into the employment contract, the corporation was not validly formed.

Courts, however, will nonetheless treat a corporation as validly formed and will give its investors the benefits of incorporation based on a finding that a de facto corporation was formed. A de facto corporation will occur when: (i) there was a valid incorporation statute under which the corporation could have incorporated; (ii) the incorporators made a good faith attempt to comply with the statute and had colorable compliance; and (iii) those engaged in the business carried themselves out as though they operated a corporation and exercised the rights of corporate citizenship.

Here, there was a valid statute under which Solar Inc. could have incorporated, the Model Business Corporation Act. In addition, there was clearly good faith and colorable compliance with the statute. The woman had filled out the documents, paid the filing fee, and believed they were filed. In addition, she made an innocent mistake in failing to include the authorized number of shares. Finally, she carried herself out as though she operated a corporation and exercised the rights of corporate citizenship. She signed the employment contract as President, Solar Inc.

The woman will also not be personally liable on the employment contract based on the doctrine of corporation by estoppel. One who deals with the company as though it is a valid corporation will be estopped from later claiming that it is not and seeking to hold investors personally liable. Because the installer signed the employment contract seemingly under the belief that Solar Inc. was a valid corporation and after the woman had signed "President, Solar, Inc.," the installer will be estopped from claiming otherwise.

It is also important to note that promoter liability does not apply here. In order for promoter liability to apply, the promoter must know that the corporation was not validly formed. Here, the woman believed that Solar, Inc. was formed. Thus, she will not be liable on the contract.

3. The man is not personally liable to the installer on the employment contract. The issue is whether the man is liable in light of the fact that the corporation was not properly formed when the contract was entered into.

As noted above, generally investors are not personally liable for the debts of a corporation. It does not matter whether they actively or passively manage the affairs of the company. Moreover, even though a corporation was not formed, a court, for the reasons above, would likely treat Solar Inc. as a valid corporation for the purposes of the employment contract under the theory of either corporation by estoppel or corporation de facto. Moreover, the man cannot be held liable under a theory of promoter liability because he was not the one out soliciting business for the corporation.

## ANSWER TO MPT 1

### State of Franklin v. Henry Hale

#### Case No. 17 CF 1204

#### **Respondent's Brief - State of Franklin**

#### Statement of Facts [omitted]

#### Legal Argument

##### Standard of Review

The United States Supreme Court has held that the government must provide a defendant with material evidence that is favorable to his guilt or sentencing. *Brady v. Maryland*, 373 U.S. 83 (1963). To establish a Brady violation, a defendant must demonstrate three critical elements: (1) the evidence must be favorable to the defendant; (2) the government must have suppressed the evidence, either willfully or unintentionally; and (3) the evidence must be material. [*Haddon v. State (Frank. Sup. Ct. 2012)* citing *Strickler v. Greene*, 527 U.S. 263 (1999)]. The failure to prove one of these components will be determinative in finding that no *Brady* violation occurred.

In defendant's brief in support of motion for a new trial, he alleges that he is entitled to a new trial because the government failed to comply with the requirements of *Brady* by not (1) furnishing defendant with Reed's purported recantation of her prior identification of Hale to law enforcement and (2) providing defendant with Trumbull's statement to the EMT. Moreover, the defendant alleges that he was prejudiced by the admission of Hale's testimony because it constituted inadmissible hearsay and a privilege applied. The defendant's claims are without merit and do not entitle him to a new trial.

#### **I. The Government Did Not Commit A Brady Violation When It Failed To Provide Ms. Reed's Recantation of Testimony Because The Evidence Was Neither Favorable Nor Material to the Defendant's Guilt. Given that no *Brady* violation occurred as to this matter, Defendant is not entitled to a new trial.**

Defendant alleges that the prosecution violated their *Brady* requirements by not providing him with Reed's recantation of her prior identification of Hale as the shooter. Defendant argues that Reed's inconsistent statements were favorable to his defense, were in the possession of the government because they were possessed by Detective Jones, and were material to his matter.

### *A. Evidence Favorable to Defendant*

Evidence which will serve to impeach a prosecution witness is "favorable" evidence. (*Haddon, citing Gigliov. United States*, 405 U.S. 150 (1972)). Evidence is favorable to the defendant if a "neutral fact-finder who learned" of that information would be less likely to believe that the defendant committed the crime with which he was charged.

In *Haddon*, the defendant was working as a prostitute and was accused of taking money from one of her customers while threatening to harm him. *Haddon*. At trial, the customer, testified that the defendant took \$1,000 out of his wallet and threatened to cut him in little pieces" if he tried to stop her. *Id.* The robbery occurred while they were in a motel room and there were no other witnesses to the incident. *Id.* The motel owner testified that he had seen Morgan and Haddon when they checked into the hotel and Morgan's wallet was "fully of money." Haddon argued that the prosecution suppressed inconsistent statements Morgan made to police on various occasions. *Id.* In finding for the defendant in *Haddon*, the Franklin Supreme Court found that multiple inconsistent statements by a witness are favorable evidence to a defendant. *Id.* Indeed, the Court determined that in one account Morgan claimed that nothing happened and then in another account stated that he voluntarily gave Haddon the money. Since these were inconsistent statements, the court found that it would serve to impeach Morgan and therefore was favorable to Haddon. *Id.* The touchstone for the Court was that the defense would have benefitted if they were able to cross-examine Morgan about the conflicting statements that he made to police officers.

Here, Reed originally told law enforcement on the June 20, 2017, immediately after the incident that she had been sitting on her balcony above the Courtyard of the Starwood Apartments when she recognized her ex-boyfriend, defendant, arguing with another individual. Reed stated that she did not know what exactly that they were arguing about but that she knew that the two men were in a verbal altercation until she heard a gunshot. When she looked up, she saw Mr. Hale running out of the courtyard and Mr. Trumbull on the ground. Reed then contradicted this statement when she came into the police precinct on August 26, 2017. In her second statement to police, she indicated that the defendant was not the shooter at the Starwood Apartments on June 20, 2017 and she was unaware of who it the actual perpetrator was. Moreover, she could not explain why she lied to Detective Lee on the date in question and did not provide much additional information.

Similar to the matter in *Haddon*, Reed's inconsistent stories appear to be evidence favorable to the defendant. Given that the two stories could have made Reed open to impeachment, had the defense known about this information prior to trial, the party could have benefitted from cross-examining the witness about the conflicting statements that were made to the police officers. However, a neutral-fact finder that learned about the circumstances of the inconsistent statements is unlikely to believe that it was less likely that defendant committed the crime.

Indeed, Reed's first statement was provided to law enforcement almost immediately after the shooting occurred. She provided the police with a full statement about the shooting and knew



the defendant because he was her ex-boyfriend. Moreover, the second statement that she provided to law enforcement has evidence of coercion from the defendant. A day after getting married to the defendant, Reed went back to the police station and informed law enforcement that the defendant was not the shooter. When asked why she lied about the statement, Reed shrugged. When further pressed about details of the shooting, Reed stated "[h]e just told me to tell you that he didn't do it." Reed did not identify who the "he" in that statement was and it indicated that she was recanting her statement at the instruction of another individual. The fact that Reed was afraid of her husband and whether or not she would be harmed if she provided testimony in the case, would not be considered favorable to the defense and would not make a neutral fact-finder who learned of that information less likely to believe that the defendant committed the crime. In fact, the conflicting testimony and stories, would serve to hurt the strength of the defendant's case. Indeed, Reed testified that the defendant told her it would be "hard for us to stay together" if she testified against him. Unlike in *Haddon*, where Morgan was giving conflicting stories about what happened which included that nothing occurred and that he voluntarily provided the money to *Haddon*, there was no element of coercion and the conflicting statements would have been favorable to *Haddon*. Contrasted to the instant matter, Reed's recanted her statement only after she had become married to the defendant, the defendant had the opportunity to convince her to go back to the law enforcement and recant the statement, and the surrounding circumstances that the statement was coerced or made under undue pressure. For those reasons, the statement is not going to be found favorable to the defendant.

### *B. Government Must Have Suppressed the Evidence*

To determine whether the government has "suppressed" evidence, the court must determine if the evidence at issue was in the "possession" of the government. *State v. Capp* (Frank. App. 2014). Evidence can be in the "possession" of the government even if the evidence is unknown to the prosecutor. *Id.* However, there are limitations to how far this constructive possession extends. Indeed, if the evidence is in the possession of the investigating police department or another government entity **involved in the investigation or prosecution** of the matter, the evidence will be deemed to be in the possession of the government. *Capp*, citing *Kyles v. Whitley*, 514 U.S. 419 (1995). Notwithstanding that nexus, a defendant cannot stretch the scope of prosecutorial possession by alleging that the government is deemed to be in possession of "all records of all government agencies regardless of whether those agencies had any part in the prosecution of the case." *Capp*. Notably, if a government agency was not involved in the investigation or prosecution of the defendant, then Franklin courts have found that the records are not subject to disclosure under the *Brady* requirements. *Id.*

Here, the government concedes that it is in possession of the evidence for purposes of *Brady*. Indeed, the statement in which Reed recanted her story to law enforcement was made to a government entity whose specific purpose is to investigate criminal activity and crimes. Even though the assigned Assistant District Attorney in this case, Ms. Lucy Beale was unaware of Reed's statement to Detective Jones until after the trial, the government can unintentionally suppress the evidence and still be found in violation of *Brady*.

Moreover, the open-file policy at the District Attorney's Office will further buttress this viewpoint. In *Haddon*, the court found that *Brady* violations occur "whether the suppression was intentional or inadvertent." *Haddon*. Indeed, when the prosecution has adopted an open-file policy, Franklin Court have found that it is "especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld." *Haddon* citing *Strickler*. The *Haddon* court found that because the prosecution had an open-file policy the defense would have no reason to believe that there were conflicting statement to police that were not in the prosecutor's file. These facts align precisely to the current case. Even though the assigned prosecutor did not have actual knowledge of the statement, the open-file policy will not excuse the government's failure to provide that information to the defendant because it was reasonable that the defendant believed that all favorable evidence was contained in the file of the open-file of the prosecutor.

Therefore, the government concedes that it was in possession of the Reed's confession.

### *C. Evidence Must Be Material*

The final prong of the *Brady* analysis is that the evidence was material. *Haddon*. Evidence is material if "had the jury been provided with the evidence, there is a reasonable probability that the result would have been different." *Id.* When the state suppresses evidence favorable to the defendant, the only fair determination of materiality is a "collective one." *Id.* The government's has a "cumulative obligation" to divulge all favorable evidence." *Id.* Any other result would tempt the state to withhold evidence, in the hope that, individually each piece of evidence would not make a difference." *Id.*

Here, even with the sweeping government standard, it is unlikely that the information of Reed's recantation would have been different. As aforementioned, the second statement was not favorable to the defendant because it demonstrated suspicious circumstances at which it was procured and offered. The outcome of the case would most likely not have been different if the defendant was furnished with this information. indeed, there was another eye-witness, Trumbull who was actually shot and survived the encounter. This would have been strong evidence against the defendant and most likely would not have been likely for the jury to reach a different result. In fact, this case is unlike the matter in *Haddon* where the court found that the failure to provide Morgan's inconsistent statements were material. Morgan was the sole eyewitness to the alleged robbery. Contrasted with *Haddon*, Reed's testimony was not the only eye-witness testimony that was offered by the government but also had Trumbull would had a history with the defendant and was able to testify to the fact that he shot him. Therefore, the evidence is not material.

Based on the totality of the elements, the defendant has failed to demonstrate that a *Brady* violation occurred because the evidence of Reed's statement was neither favorable nor material.

#### *D. Motion for New Trial*

Franklin Rule of Criminal Procedure 33 provides that a court "may vacate any judgment and grant a new trial if an error during or prior to trial violated a state or federal constitutional provision, statute, or rule, and if the defendant was prejudiced by that error." [*FRC Crim. Pro.* 33]. Given that there was no *Brady* violation for Reed's recanted testimony, the defendant is not able to get a new trial. A new trial may be granted only if an error during the prior trial violated a federal constitutional provision. Since no *Brady* violation occurred, a new trial cannot be granted as to this issue.

In the alternative, for the sake of the argument, if the Defendant were able to demonstrate that Reed's statement was favorable and material, the Defendant would still not be entitled to a new motion for a new trial because he failed to satisfy this standard. Indeed, in order to be granted a new trial, an error has to have not only violated a constitutional rule, but the defendant had to have been prejudiced by that error. This second prong carries a heavy burden. It is unlikely that the defendant would have been prejudiced by this error because the case did not turn on Reed's testimony. Moreover, the impeachment of Reed may have caused more harm to Defendant's case by showing that he had unduly pressured her into recanting her statement. The evidence which was provided by Trumbull would be sufficient to show that he was not prejudiced by the lack of this information.

## **II. The Government Did Not Commit a *Brady* Violation as to Trumbull's Testimony Because The Government Was Not In Possession of the Statement for *Brady* Purposes.**

### *A. Government Possession*

As aforementioned, in order to make out a *Brady* violation, the defendant must show that the Government violated all three prongs of the *Brady* test. Here, the defendant is unable to demonstrate that the Government was in possession of Trumbull's testimony and therefore no *Brady* violation occurred.

To determine whether the government has "suppressed" evidence, the court must determine if the evidence at issue was in the "possession" of the government. *State v. Capp* (Frank. App. 2014). Evidence can be in the "possession" of the government even if the evidence is unknown to the prosecutor. *Id.* However, there are limitations to how far this constructive possession extends. Indeed, if the evidence is in the possession of the investigating police department or another government entity **involved in the investigation or prosecution** of the matter, the evidence will be deemed to be in the possession of the government. *Capp*, citing *Kyles v. Whitley*, 514 U.S. 419 (1995). Notwithstanding that nexus, a defendant cannot stretch the scope of prosecutorial possession by alleging that the government is deemed to be in possession of "all records of all government agencies regardless of whether those agencies had any part in the prosecution of the case." *Capp*. Notably, if a government agency was not involved in the investigation or prosecution of the defendant, then Franklin courts have found that the records are not subject to disclosure under the *Brady* requirements. *Id.*

In *State v. Capp*, the defendant had been charged with murdering his wife. According to the prosecution, Capp injected his wife with a lethal dose of narcotics and the couple had a history of domestic violence incidents. The defense argued that this matter was a suicide. *Id.* Capp alleged that the government had violated its *Brady* obligations by "suppressing" his deceased wife's medical records to show that she was at risk of harming herself. *Id.* The records were in the actual possession of the county hospital. The Franklin Court of Appeal found that the government complied with its *Brady* request because it did not "possess" the records for purposes of *Brady*. Pursuant to the decision, the court found that the role of the hospital is to "treat patient, not to investigate crime." *Capp*. Since the medical records were compiled not in the furtherance of a prosecution but to assist with the medical treatment of a patient, the documents are not under the government's possession requirement.

Here, the victim Bobby Trumbull had been transported to the hospital via an EMT after being shot in the courtyard of Starwood Apartments. During the course of transport, Trumbull stated to the EMT doctor that he didn't "know exactly what happened or who shot me, but that rat Henry Hale thinks I owe him money. This is all his fault." This statement was furnished while Trumbull was being provided with a heavy dose of intravenous narcotics. Defendant now proclaims that the government violated its *Brady* violation by not providing the defense with this statement to EMT even though it was in the government's possession. Similarly to *CAPP*, records that are maintained by county agencies that are not established for the purpose of prosecuting or investigating the defendant are outside the reach of "possession" under the *Brady* requirement. Indeed, the Court found in *CAPP* that the government did not have to provide the defendant with his wife's medical records because they were compiled by the county hospital, a government agency that was not in the business of prosecuting defendants, and they were in the actual possession of the hospital. In this matter, the EMT doctor works for an ambulance service that is part of the City government. This EMT service is set up to help individuals in medical emergencies, not for investigating or prosecuting criminal cases. Therefore, the government should be deemed not to have been in possession, actual or constructive, of Trumbull's statement to the EMT.

Beyond that, the Franklin Court in *Capp* further found that "a prosecutor is not required to furnish a defendant with *Brady* material if that material is fully available to the defense through "due diligence." *Capp*. The Court stated that both the defense and prosecution had equal access to the wife's medical records and Defense counsel could have easily subpoenaed the records as easily as the government. *Id.* Similarly in this matter, the statement to the EMT was made in the spur of the moment to the EMT and could have easily been obtained by the defendant through contacting the EMT and speaking to him about the events in question. The defense could have discovered such a statement by performing due diligence in investigatory work and thus should not be able to reap the benefit of failure to adhere to that standard after trial.

For those reasons, the Government was not in possession of Trumbull's testimony for the purposes of *Brady*. Since there was no *Brady* violation, the defendant was not prejudiced by any error that could have occurred.

## *B. Motion for New Trial*

Franklin Rule of Criminal Procedure 33 provides that a court "may vacate any judgment and grant a new trial if an error during or prior to trial violated a state or federal constitutional provision, statute, or rule, and if the defendant was prejudiced by that error." [*FRC Crim. Pro.* 33]. Given that there was no *Brady* violation for Reed's recanted testimony, the defendant is not able to get a new trial. A new trial may be granted only if an error during the prior trial violated a federal constitutional provision. Since no *Brady* violation occurred, a new trial cannot be granted as to this issue.

## **III. Federal Rule of Evidence 804**

Franklin Rule of Evidence 804 governs unavailable declarants. FRE 804 states that a "declarant is considered to be unavailable as a witness if the declarant: (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies." [*FRE 804(1)*]. Franklin Criminal Statute Section 9-707 sets the parameters for a spouse's privilege not to testify against a spouse. The directive holds that "[o]ne spouse cannot be compelled to give testimony against his or her spouse who is a defendant in a criminal trial." [*Frank. S. 9-707*]. The privilege can be asserted by the accused only. *Id.* Finally, the spouses "**must** be married at the time that the privilege is asserted." *Id.* An exception to the hearsay rule for unavailable witnesses applies when a statement offered against a party **wrongfully caused** - or acquiesced in wrongfully causing - the declarant's unavailability as a witness, and did not intending that result. [*FRE 804(b)(6)*].

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Rule 804 of the Franklin Rules of Evidence provides that certain hearsay evidence may be admissible if the witness is unavailable. A witness who claims spousal privilege is considered to be unavailable. *State v. Preston*, (Frank. App. 2011, citing *FRE 804(a)(1)*). Franklin Rule of Evidence 804(b)(6) allows for the admission of a hearsay statement which is offered "against a party that wrongfully caused. . . the declarant's unavailability as a witness, and did so intending that result." *Preston*. Importantly, the Rule requires that the conduct causing the unavailability be wrongful; it does not require that the conduct be criminal. *Preston*.

In *Preston*, Preston was convicted of having stolen artwork from the local library. There was no forensic or other physical evidence linking him to the crime. The only witness that could connect him to the crime of theft was his wife Felicity Carr. At the time of the theft, the two were not married, and when Carr was questioned by police, she stated that she saw Preston steal the artwork. The two then became engaged, with a wedding date arranged at the time of the theft and the time she made her statement to the police. The two were married before trial and Preston successfully asserted spousal privilege. In finding that the spousal privilege applied, the *Preston* court stated that the question is whether Preston engaged in conduct designed to prevent the witness from testifying. If the court finds that the defendant married the witness with the intent to enable him to claim spousal privilege, then the statement can be used against the defendant. The *Preston* court found that that was not the case in that matter. Since the defendant and his wife were already engaged to be married before the theft occurred and

had a date set for the wedding, this planning had occurred prior to any statement or theft and thus the defendant could not have committed any wrongdoing.

Indeed, a court's finding of wrongful causation must be rooted in "facts establishing that a significant motivation for the defendant entering into the marriage was to prevent his or her spouse from testifying." *Preston*. Here, the facts are substantially contrasted with *Preston*. Unlike the defendant in *Preston*, the defendant and the witness were not married at the time of the shooting. To be sure, the two had a previous relationship, but that was four years ago and it only lasted roughly seven months. Moreover, the defendant proposed to the witness one month after the shooting and the two got married on August 25, 2017. The next day, the witness went to the station and gave the second piece of testimony that the defendant was not the shooter. These actions were a deliberate attempt by the defendant to prevent the witness from testifying by using the privilege. While the witness believes that the defendant loves her and that was the underlying reason for the marriage, she also testified that the defendant told her they could not be together if she testified against him and that he wanted to marry her quickly, before the trial started. These actions demonstrate that defendant wanted to use the spousal privilege for the purposes of testifying and thus not within the ordinary course of events as were outlined in *Preston*.

Since the trial court properly admitted the evidence through the exception FRE 804(b)(6) the introduction of the hearsay testimony was permitted.

#### *Motion for New Trial*

Should this Court find in the alternative, that the witness's statement by the Detective did not fall under the exception, the defendant would still not be eligible for a motion for a new trial because he was not prejudiced by the testimony. The standard, but for the error, there is a strong probability that the result of the trial would have been different, is not applicable here. Unlike in *Preston*, where the wife was the only witness who connected Preston to the theft, Reed testimony was merely corroborative of Trumbull who actually was shot by the defendant and could directly testify against him at the trial. Beyond that, the defense has an opportunity to cross-examine Trumbull about the incident. Indeed, Trumbull will be beneficial to the defense as he has a prior felony conviction which can be used to impeachment as to honesty. Moreover, the Detective's statement of what Reed relayed to him can also be cross-examined by the defense through the Detective. Regardless, Reed was not the only eye-witness to the events, was not the only person that had previous dealings with the defendant, and could present strong testimony in the Government's favor. Trumbull's testimony is the most powerful piece of the Government's case, as defendant is charged with attempted murder against Trumbull, and this evidence alone is sufficient to sustain a conviction. Reed's testimony helps to buttress the State's case but even the hearsay statements were included, it would not have unduly prejudiced the defendant so much that the trial would have ended in a different manner.

Even if this testimony would have been admitted, it would be harmless and thus the defendant's motion for a new trial should be denied. The province of the jury should not be disturbed.

### **Conclusion**

For the foregoing reasons, the Government has complied with its *Brady* requirements, Reed's hearsay statement was admissible, and Defendant's motion for a new trial should be denied.

[Signed by Assistant District Attorney]

Office of the District Attorney for the State of Franklin - County of Juneau

### **ANSWER TO MPT 1**

#### **III. Legal Argument**

##### **A. The prosecution was not required to turn over Sarah Reed's August 26, 2017 statement under *Brady v. Maryland* because that statement was not favorable to the defense, and it was immaterial.**

*Under the Supreme Court case Brady v. Maryland*, the prosecution is prohibited from suppressing any exculpatory evidence. The 3 elements of a *Brady* violation are that 1) the evidence must be favorable to the defendant; 2) the government must have suppressed the evidence, and 3) the evidence must be material (*Haddon V. State, Franklin Supreme Court* (2012) (quoting *Strickler v. Greene*, 527 US 263 (1999)).

In *Haddon*, the Franklin Supreme Court, citing the US Supreme Court decision *Giglio*, explained that evidence is favorable to the defendant if it can be used to impeach a prosecution witness. In *Haddon*, the suppressed evidence was clearly favorable to the defendant, because it consisted of directly contradictory statements made by the victim and key witness. In one interview, the witness said nothing happened between him and the defendant prostitute; in another account, he claimed he voluntarily gave the defendant the money. At trial, the same witness testified that the prostitute threatened to "cut him in little pieces" if he didn't hand over his wallet. The earlier 2 interviews were clearly insistent with his trial testimony, and thus would have been strong impeachment evidence.

In contrast, Sarah Reed's so-called recantation was not clearly inconsistent with her earlier statements to police, and thus would not be favorable to defendant Hale. As Detective Jones explained in his testimony, Reed was very evasive in her August interview, and appeared nervous, noting that an unidentified male told her to tell Detective Jones that Hale wasn't the

shooter. This statement is not a clear contradiction of Reed's earlier remarks as in *Haddon*, because in the Reed-Jones interview it was unclear Reed actually believed what she was saying. She refused to make eye contact with Jones, didn't say who the "he" was forcing her to talk to police, and refused to say if she was afraid of her husband. Such a statement, which appears to be made under duress, is unlike the impeachment material in *Haddon* where the witness contradicted himself without any signs of coercion or duress. In fact, Reed's interview with Jones may be unfavorable to the defendant, because it raises the possibility of witness tampering.

As to the second element, it can be assumed *arguendo* that the prosecution did have possession of the statement. The 2014 Franklin Court of Appeal case *State v. Capp* explains that evidence is in the possession of the prosecution even if the evidence is unknown to the prosecutor, so long as the police department or other investigating agency has possession of the evidence. Thus, it seems that the fact Detective Jones had the statement in his case file would satisfy the possession element even though DA Beale said the statement wasn't in the file she received from police. Nevertheless, there is no *Brady* violation because as explained above, the statement was not favorable to Hale, and as explained below, the statement was not material.

However, as to the second element, there is a strong argument that Reed's statement was not *solely* in the government's possession because the defendant easily could have interviewed her and learned what she told Jones. *Dicta* in *Capp* explains that a prosecutor has no obligation to turn over evidence that the defendant could obtain through due diligence because such evidence is not *solely* in the government's possession. Here, Reed is the defendant's wife, so it would be very easy for defense counsel to speak with her and learn what she said to Jones before trial. In any event, because the favorability and materiality elements are not met, this *Capp* *dicta* analysis is merely an alternative argument for rejecting defendant's *Brady* claim.

Turning to the third element, this evidence would not be material under *Haddon*. *Haddon* explained that the test for materiality is whether there is a reasonable probability that the trial result would be different had the jury been provided with the evidence. The court noted that the materiality of suppressed evidence is determined on a collective basis. Thus, materiality is not determined on a case-by-case manner, but by looking at the effect all the improperly withheld evidence would have cumulatively. Thus, in *Haddon*, the suppressed contradictory witness statements were material because exculpatory forensic evidence (fingerprint testing that showed the defendant's fingerprints were not found on the defendant's wallet) was also suppressed. Notably, there has been no such suppression of forensic evidence here; Detective Lee's testimony indicates there was no forensic evidence on Hale in this case. Moreover, as explained below, no other evidence was improperly suppressed, as EMT Womack's statement was not *Brady* material. Taken by itself, Reed's statement was of little value either for impeachment or substantive purposes. As explained above, her statement was given in a nervous manner, and she refused to divulge the identity of the person forcing her to make the statement. Her statement is therefore of dubious value because it is not clear she was motivated by her firsthand experiences in making the statement; it seems she was being forced by



somebody else to talk to Detective Jones. In any event, as no other *Brady* material was suppressed, Reed's one statement is not material under the *Haddon* cumulative test.

Notably, because the statement was immaterial and thus there was no *Brady* violation, the Reed statement is not grounds for a new trial. Franklin Rule of Criminal Procedure says the court may vacate any judgment and grant a new trial if violation of a state or federal constitutional provision or statute occurred and the defendant was harmed by that error. Of course as there was no constitutional violation, there was no prejudice to hale. If there was a *Brady* violation, then there would be grounds for a new trial as a finding of materiality under *Brady* suffices to establish prejudice under Rule 33. But that is not the case here, for the foregoing reasons.

**B. The Prosecution did not need to turn over EMT Womack's statement under *Brady* because the statement was not in the possession of the prosecution, and in any event the defense could have obtained his testimony though due diligence.**

As explained above, in *Capp*, the court explained that for the government to have "suppressed" evidence, that evidence must have been in the possession of the government, meaning that the police or another government entity involved in the investigation or prosecution must have that evidence. (*Capp*, citing *Kyles v. Whitley*, 514 US 419 (1995)). Notably, the *Capp* court explained that for the government to have "possession" of evidence, the government entity with possession must have a part in the prosecution of the case. Thus, in *Capp*, the defendant's wife's medical records, in the possession of the hospital, were not in the government's possession for *Brady* purposes. The court noted that hospitals treat patients, but do not investigate crime, and thus the government did not possess records held by the county hospital and therefore could not be found to have suppressed them under *Brady*.

Accordingly, Hale's argument that the prosecution suppressed statements made by Trumbull to EMT Womack in the aftermath of the shooting is clearly incorrect in light of *Capp*. Although Womack works for the ambulance service, which is part of the city government, EMTs are in no way involved in the investigation or prosecution of cases. Womack's testimony confirmed this point when asked on cross examination whether he had any role in the investigation; he said he did not and that moreover he wasn't even called as a witness. Indeed, EMTs, like the hospital in *Capp*, treat patients, but do not play any investigatory or prosecutory role. Therefore, the prosecution was not in "possession" of Trumbull's statement to Womack, because EMTs, like hospitals, are not involved in investigation or prosecution.

Alternatively, the statement to Womack was also not in the government's possession using the analysis from the dicta at the end of the *Capp* decision. The *Capp* court noted that a prosecutor has no obligation to furnish *Brady* material if that material is fully available to the defense through the exercise of due diligence. In *Capp*, both the prosecutor and defense had equal access to the wife's medical records, and thus defense counsel easily could have subpoenaed the records. Accordingly, the records were not *solely* in the government's control and thus there was no *Brady* violation.

Similarly, it would have been very easy for Hale to obtain evidence of Trumbull's statement to Womack merely by interviewing or calling Womack as a witness. On cross-examination, Womack confirmed he would have spoken to Hale's attorney and revealed everything that Trumbull told him. Defense counsel's failure to speak with this witness shows a lack of due diligence; if defense counsel was diligent, he would have interviewed Womack and learned what Trumbull said about owing Hale money and not knowing exactly who shot him. Accordingly, there was no *Brady* violation because under *Capp*, the defendant easily could have obtained Womack's statement.

Accordingly, as there was no *Brady* violation, there was no constitutional error, and thus defendant is not entitled to a new trial under Franklin Rule of Criminal Procedure 33.

**C. Reed's out-of-court statements were admissible under Franklin Rule of Evidence 804(b)(6) because Hale married Reed for the purpose of keeping her from testifying, and thus he "wrongfully cause" her unavailability.**

In *State v. Preston*, a 2011 Franklin Court of Appeal case, the court held that it was improper to admit the defendant's wife's statements under 804(b)(6) because he did not wrongfully cause her unavailability by marrying her. There, defendant asserted the spousal privilege to prevent his wife from testifying. In that case, the government's attempt to introduce the wife's hearsay statements under 804(b)(6) was unsuccessful, because the court held that while the spousal privilege does make the witness spouse "unavailable," that unavailability is not wrongfully caused if the defendant planned to marry the defendant regardless of the trial. Indeed, in *Preston*, the defendant and wife were engaged to be married before the theft at issue had even occurred; the court noted they had even set a wedding date. Critically, the court held that a finding of wrongful causation of unavailability must be "rooted in facts establishing that a significant motivation" for the marriage was preventing the spouse from testifying. That was clearly not the case in *Preston* because the couple intended to be married long before the crime occurred.

In contrast, Hale wrongfully caused Reed's unavailability because he married her predominantly to keep her from testifying. Reed's testimony indicates that she married Hale on August 25, 2017- just over a month after Trumbull was shot. Indeed, Hale proposed to Reed on June 25, 2017, only 5 days after the crime. The haste with which Hale proposed to Reed after the crime stands in sharp contrast to the situation in *Preston*, where the defendant and his wife had already set a wedding date before the crime was committed. Moreover, whereas the couple in *Preston* was stable and had set wedding plans, Hale and Reed had a rocky relationship: Reed's testimony indicates they had recently been broken up. Critically, Reed testified that Hale said he wanted to get married quickly, before the trial started. There was no evidence of such nefarious wedding-trial coordination in *Preston*. Indeed, Reed testified that Hale said it would be difficult for him to stay with Reed if she testified against him, further demonstrating that he married her in order to prevent her from testifying. Thus, Hale wrongfully caused Reed's unavailability under *Preston*.

Notably, the defense's policy argument is unavailing. It is not inconsistent to uphold a marriage through the spousal privilege but then to allow a spouse's statements to come in under 804. It is important to remember that marriages entered into for reasons other than for preventing trial testimony will be fully protected. It is only when a defendant, like Hale, enters into marriage to wrongfully protect his wife from testifying will the court have to uphold the spousal privilege while simultaneously allowing the spouse's statements in as hearsay. Thus, in these cases policy actually supports the court's decisions, because we do not want the courts to encourage marriages entered into for improper purposes by refusing to admit evidence that properly falls under 804 (as it does here).

The *Preston* court went on to hold that improperly admitting the wife's statements under 804(b)(6) was prejudicial under Rule 33, because the wife was the only witness and allowing blatant hearsay into evidence without the opportunity for cross-examination was clearly prejudicial. Of course, there is no such prejudice here, as unlike in *Preston*, Hale wrongfully caused his wife's unavailability, and thus it was proper to admit her statements under rule 804.

## **ANSWER TO MPT 2**

**To: Abraham Ringer**

**From: Examinee**

**Date: July 24, 2018**

**Re: Rugby Owners & Players Association**

### **ARTICLE IV--BOARD OF DIRECTORS**

#### **SECTION 1. GOVERNMENT.**

**Language:** The government of the Association shall be vested in, and its affairs shall be managed by, a Board of Directors, consisting of sixteen (16) directors, who shall represent each class of members as follows: eight (8) directors will be selected by the class of team owners, one (1) selected by each team member, and the other eight (8) directors will be selected by the team members, one (1) from each team, agreed upon by a majority vote of the members of that particular team.

#### **Explanation:**

As per the interview with the clients, the teams and owners have indicated that they want equal representation on the Board of Directors for the Rugby Owners & Players Association

(ROPA), and that they would like two representatives per team--one for the owner side and one for the team side. As such, two classes of directors must be created, a class of owner directors and a class of team member directors. In addition, under Franklin law, there must be a minimum of three directors on the board. Walker's Treatise, 10.4. This requirement is clearly met, as the clients' directives would call for 16 directors.

In addition, it is noted that even numbers of directors on the Board of Directors is generally recommended against. Walker's Treatise, 10.4. The reasoning behind odd numbers of directors on a board is to avoid deadlocking in voting power and to avoid situations in which the organization is forced to stagnate because the parties cannot agree amongst themselves. However, this same predicament can also encourage cooperation between the various classes and ensure that action will not be taken to the detriment of one class and for the benefit of another. *Id.* In this instance, while the parties have agreed a joint venture makes the most economic sense, there is evident distrust between the owners and the team members and, consequently, they would like to avoid a situation in which one party could act to the detriment of the other through the Board of Directors. By instituting an even number of directors for the board, the parties will not be placed in a situation where one could take action to harm the other, and they will be required to negotiate and work together, as they hope to do.

#### SECTION 5. VACANCY IN BOARD DIRECTORS.

**Language:** In the event of a vacancy on the Board of Directors, the organization members will follow the terms under Section 3, Election of Directors, in order to make a determination in filling the vacancy. As such, if a Director representing an owner vacates his position on the board; such owner will be responsible for naming his replacement. If a Director representing the members of a team vacates his position on the board, that team's players shall be responsible for electing a Director to his position.

#### **Explanation:**

An overarching goal communicated by the clients was equality of representation on the Board of Directors and ensuring that the owners and teams each have their own representative on the board. As such, it is in keeping with their goals that the owner or team whose representative director vacates his position is permitted to fill the vacated spot. In addition, under Franklin law, the Articles of Association are permitted to indicate the method of election for vacancies in the Board of Directors. Walker's Treatise, 10.8. One such permissible method is by allowing each of the class members to fill vacancies in that class. In this instance, the class is further specified as to the particular team or owner whose representative must be replaced.

## SECTION 6. MEETINGS OF THE BOARD.

### **Language:**

b. Quorum. At least three directors from each class of representatives must be present to constitute a quorum. In total, at least nine (9) directors must be present for the board to take any action.

c. Voting. To pass a normal resolution brought to the board, a majority of directors present and voting from each class must vote in favor of any proposed normal resolution. In order to pass a special resolution, a 2/3 majority of directors present and voting from each class must vote in favor of any proposed special resolution.

### **Explanation:**

a. As mentioned above, while the owners and members have indicated a desire to work together in the management of ROPA, they have also been quite frank in their opposing opinions and related distrust of one another. As such, it is best to ensure that no action may be taken by the Board of Directors absent representation from each class. They have also expressed concerns that a single team or single owner might be able to exercise negative control by voting against a proposal. As such, it seems best to require three representatives from each class to represent a quorum, as opposed to just a single member, or even only two members. In addition, Franklin law requires that there be a quorum of a majority of board members at a meeting in order to permit the board to take action. Since there will be sixteen members on this board, there must be at least nine directors at the meeting for there to be a quorum under Franklin law.

b. The clients indicated that they will permit that a majority of voting power of each class be able to take certain actions on behalf of ROPA, but were particularly concerned regarding the change of allocation of income by a majority vote. As such, they wished that the requirements for a vote to change the income distribution between the team owners and team members be higher than a majority. The drafted language reflects their desire to increase the minimum votes required to change the distribution of revenues. In addition, it is modeled off of *Schraeder v. Recording Acts Guild*, in which a director successfully challenged the alteration of the revenue allocation because there was a lack of majority vote for the proposal. The drafted language, including language requiring a supermajority vote, in addition to being consistent with the client's expressed wishes, provides even greater protection than that which the provision in *Schraeder* did. Finally, the provision is consistent with Franklin law, which permits a resolution in the Articles of Association to require that certain matters of great importance be passed by a supermajority, or even entirety, of the board. Walker's Treatise, 10.9.

## ARTICLE V--OFFICERS

**Language:** The Board of Directors shall appoint the following officers: a Chair, a Secretary, and a Treasurer. The Chair shall be a member of the sitting Board of Directors, appointed by one class of directors on a rotating basis.

### **Explanation:**

Under Franklin law, the board is required to name, at the least, a chair, secretary, and a treasurer. Walker's Treatise, 10.10. As such, the drafted language represents compliance with these requirements.

The parties were unable to come to an agreement regarding the appointment of a chair to the board, with the owners wishing they appoint the CEO and the team members wishing they have a chair on a rotating basis, and neither wishing for an independent party. As such, a compromise was difficult to reach. Although the drafted language represents the choice selected by the team members, it also represents the most neutral choice for chair. In the absence of a disinterested, independent, and nonvoting chair, the options are a chair that rotates among the classes, or selection of the CEO. However, when the CEO is selected to be the Chair of the board, certain fiduciary duties may arise. As an employee of the board, the CEO is required to remain neutral between positions raised by the different classes. Walker's Treatise, 10.10. In fact, the parties themselves have indicated the great importance of the CEO remaining neutral in his role. However, as indicated by the parties, the possibility of differences of opinion arising is great. However, as the Chair, the CEO may be placed in a position where rulings would run counter to one of the parties' interests, particularly in an organization consisting of only two classes. Walker's Treatise, 10.10. As such, in order to ensure that the CEO is not placed in such a position, where he may be forced to breach a duty to the board members and the members of the organization, it is recommended in the drafted language that the parties permit the board to select a chair from the current board members on a rotating basis between the classes.

## ARTICLE VII--APPORTIONMENT & DISTRIBUTION OF REVENUES

**Language:** Organization revenues shall consist of all profits from merchandising and marketing materials related to the member teams and players, including, but not limited to, the team logos and trademarks, and players' likenesses. Revenue shall be divided equally between the classes, with the owner's entitled to 50% of the revenue and the team members entitled to the remaining 50% of the revenue. Any allocation decisions made after this initial allocation are left to the members of the classes to determine.

A vote to change apportionment and distribution of revenues will be considered a special resolution which requires a 2/3 majority from each class of directors in order to be effectuated.

### **Explanation:**

The parties have indicated that they wish to divide revenues equally between the classes-- owners and team members and that both parties have agreed to this equal distribution. As such, the drafted language represents their desire to split the income (as specified in the draft, but left open to include additional related items), equally. In addition, and as discussed above regarding voting requirements, a change to the distribution allocations is considered a special proposal which will require a 2/3 supermajority vote from each class to effectuate. Again, this will address party concerns regarding the ability of a simple majority to be able to change the allocation upon which they have agreed and is consistent with Franklin law regarding the ability to require a supermajority vote for special circumstances.

#### ARTICLE VIII--AMENDMENT OF ARTICLES

**Language:** Amendment of the Articles of Association shall constitute a special resolution, which, as specified in Article IV, Section 6, requires a supermajority of votes from both classes of directors.

**Explanation:** The parties had indicated a fear of simple majority decisions for major actions taken by the board and have clearly put a lot of thought into the initial management and organization of ROPA. As such, the drafted language indicates a protection of the current status quo regarding the power allocation between the two classes of members. By requiring a 2/3 vote, and not a simple majority, the parties are accorded greater assurances that the current provisions will be protected unless a supermajority of each class believes they should be altered. In addition, by not making it a decision that requires unanimity, which is also permitted under Franklin law, this ensures that no party alone can veto a decision for an amendment that may be wished for by most other members.

## ANSWER TO MPT 2

To: Abraham Ringer

From: Examinee

Date: July 24, 2018

Re: Rugby Owners & Players Association

### ARTICLE IV — BOARD OF DIRECTORS

**SECTION 1. GOVERNMENT. Language:** The government of the Association shall be vested in, and its affairs shall be managed by, a Board of Directors, consisting of an even number of Directors up to twice the number of teams that make up the Rugby League of America, who shall represent each class of members as follows: half of the Directors shall represent teams of the Rugby League of America, apportioned equally among the teams, and half of the Directors shall represent team's players, apportioned equally among the groups of players.

**Explanation:** As set forth in the client interview, the teams and players groups want equal representation on the board, to maintain equal standing and to require cooperation between them in the future. Although there are currently eight teams within the league, the organization noted that in the future, it is possible that the league will expand to include more teams (and more players accordingly). Because this Association is founded with the longevity of the Association in mind, and hoping for its continuing vitality and success, the number of directors is not specified. Rather, it allows for a number of directors proportional to the number of teams in the League. Under Franklin law, there must be a minimum of three directors for an association's board of directors. *Walker on Corporations and Other Business Entities* Section 10.4. Although Boards usually have an odd number of directors, using an even number of directors when more than one class of members is represented may encourage cooperation among the various classes, as the board would not otherwise be able to take action. This suggestion directly mirrors the hopes of the founders of the Association.

### SECTION 5. VACANCY IN BOARD OF DIRECTORS.

**Language:** Any vacancy of a Director representing any team in the Rugby League of America shall be replaced by the owner of that team; any vacancy of a Director representing the roster of players of each such team shall be replaced by the player who becomes that team's players' representative to the Professional Rugby Players Association.

**Explanation:** As set forth in the client interview, it is envisioned that each team's owner will name a director, and a director may be replaced upon that owner's prerogative, until the ownership of the team changed or the individual named was no longer named to that position. Similarly, the players' directors will be those players that sit on ROPA's board as the team's



players' representative, and will be replaced accordingly when the specific team's players' representative to the union change. Because the classes wish the Directors to be representative of the interests of the members, the filling of vacancies should maintain class members' control of their representation. Under Franklin law, a number of vacancy provisions are cognizable, and specifically allow the Articles of Association to provide an alternative method. *Walker on Corporations and Other Business Entities* Section 10.8.

## SECTION 6. MEETINGS OF THE BOARD.

a. Frequency of meetings: The Board shall meet at least twice each calendar year.

b. Quorum:

**Language:** A quorum shall exist when more than half of the total number of directors are present for the conduct of business, and at least two representatives of each class of members must be present for there to be quorum.

**Explanation:** As set forth in the client meeting, the parties wish to require collaboration and to prevent unilateral action. Although this is in part achieved through the voting requirements, it is also achieved by requiring a quorum where directors from both classes can be present. Under Franklin law, a quorum of a majority of board members is required. *Walker* Section 10.9. However, the Articles may also require additional quorum requirements. As in *Schraeder*, requiring a special quorum requirement ensures that enough persons are present to discuss a meeting. Although that case held that once a quorum is present for a board meeting, it continues to exist for the duration of the meeting, such that a walking out will not take away a quorum, at the very least it allows board members to be present with one another and discuss matters.

c. Voting

**Language:** For a resolution within the ordinary course of the Board's business to be approved, a majority of directors present and voting from each class must vote in favor of the proposed resolution. Resolutions outside of the ordinary course of business, including amendment to the Articles, require a supermajority. *See* Article VII.

**Explanation:** The clients have expressed a need for cooperation. However, they have also noted that they must not put too much in the way of getting work done, such as passing pro forma matters. Requiring a majority of both classes present ensures that a matter will pass with the approval of both groups, which have beforehand competed with one another across the table. The emphasis on within the ordinary course of ensures that matters that are not contentious may be passed easily. In *Schraeder*, the Franklin court held that voting looks to the number of directors who were present when quorum was counted.

## ARTICLE V — OFFICERS

The Board of Directors shall appoint the following officers: a Chair, a Secretary, and a Treasurer.

The Chair shall be the Chief Executive Officer acting as a nonvoting member.

**Explanation:** *walker* Section 10.10 notes that a chair may be disinterested, independent and nonvoting, or that an alternative may be used, such as requiring the chair to move between the classes. The parties have noted that they do not wish there to be an independent board member to add to the board, so the possibility of a disinterested, independent nonvoting chair is not within the interests of the group. Nevertheless, the parties disagree as to whether the chair should be the CEO as a nonvoting director, or whether the chair should rotate between sides. The board of directors appoint the CEO. An oscillating chair may help to insulate the board from division, but a CEO that sits as a nonvoting member has the benefit of presiding over parties that in some situations will be at odds. The CEO, as the person in charge of management, will more likely be neutral in allocating responsibility and resolving disputes.

## ARTICLE VII — APPORTIONMENT & DISTRIBUTION OF REVENUES

**Language:** The Association shall apportion and distribute, after deduction of expenses and reserves, any revenues earned by the Association in equal proportion (50%-50%) to the Rugby League of America and the Professional Rugby Players Association.

**Explanation:** As set forth in the client interview, the two entities recognize that the owners' properties, such as the team logos and trademarks, and the players' properties, such as their likenesses, are about equal in value, and wish to share the revenue in a unified marketing scheme. The entities have additionally expressed that the 50-50 arrangement should be paid to the league and the players' association, which will then independently determine how to apportion the amount paid among its constituents. Additionally, because this provision is established in the Articles of Association, any change to this apportionment provision will require an amendment to the articles. *See* Article VIII. By requiring a supermajority voting method to change this provision, internal conflict between directors of the teams and directors of the players may be avoided. *See Schraeder v. Recording Arts Guild* (resolving a dispute arising from the board's attempt to alter the allocation of revenues to a 60%-40% agreement where a supermajority was not required).

## ARTICLE VIII — AMENDMENT OF ARTICLES

**Language:** These Articles may be amended by a supermajority of directors present and voting from each class in favor of any amendment considered. For purposes of this article, a supermajority shall be a proportion of at least 3/4 of all directors present.

**Explanation:** As set forth in the client interview, the two entities have a shared history of negotiating with one another, having not always been collaborators. Only recently, the two experienced a long, hard battle over the negotiation of fees. Additionally, the rugby association is in its nascence, and there is room for substantial growth of the competitive sport. With this expansion comes the likelihood that revenues generated from the players or teams will change, that their interests diverge, and that they will want to reallocate their interests. Logos and trademarks and likenesses may change in value, and at some point the teams may wish to see a larger recoupment from their health initial investment. However, the parties have also expressed their commitment to equal voting power and representation, particularly to share revenue. The parties agree that they can never require unanimity, which would allow only one team or team's players to stonewall any movement. The parties wish to create a system that requires them to collaborate, but one that is not unduly burdensome, such as the many items that will come to the board's attention that are pro forma. Fischer has said that serious matters should not be possible through unilateral action by either side. By placing important governance features into the Articles of Association, particularly Board representation and apportionment and distribution of revenues, any change to them will require an amendment to the Articles. By requiring a supermajority from both classes of directors to approve a change in the Articles, the parties guarantee from the outset that unilateral action will be prevented and cooperation required. Doing so, as noted above, seeks to avoid the problems experienced in *Schraeder*, in which the music association there attempted to change its apportionment and distribution agreement without a supermajority, ostensibly because the allocation was not set forth in the Articles themselves.