Applicant Number

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MULTISTATE ESSAY EXAMINATION

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MEE Question 1

While on routine patrol, a police officer observed a suspect driving erratically and pulled the suspect's car over to investigate. When he approached the suspect's car, the officer detected a strong odor of marijuana. The officer immediately arrested the suspect for driving under the influence of an intoxicant (DUI). While the officer was standing near the suspect's car placing handcuffs on the suspect, the officer observed burglary tools on the backseat.

The officer seized the burglary tools. He then took the suspect to the county jail, booked him for the DUI, and placed him in a holding cell. Later that day, the officer gave the tools he had found in the suspect's car to a detective who was investigating a number of recent burglaries in the neighborhood where the suspect had been arrested.

At the time of his DUI arrest, the suspect had a six-month-old aggravated assault charge pending against him and was being represented on the assault charge by a lawyer.

Early the next morning, upon learning of her client's arrest, the lawyer went to the jail. She arrived at 9:00 a.m., immediately identified herself to the jailer as the suspect's attorney, and demanded to speak with the suspect. The lawyer also told the jailer that she did not want the suspect questioned unless she was present. The jailer told the lawyer that she would need to wait one hour to see the suspect. After speaking with the lawyer, the jailer did not inform anyone of the lawyer's presence or her demands.

The detective, who had also arrived at the jail at 9:00 a.m., overheard the lawyer's conversation with the jailer. The detective then entered the windowless interview room in the jail where the suspect had been taken 30 minutes earlier. Without informing the suspect of the lawyer's presence or her demands, the detective read to the suspect full and accurate Miranda warnings. The detective then informed the suspect that he wanted to ask about the burglary tools found in his car and the recent burglaries in the neighborhood where he had been arrested. The suspect replied, "I think I want my lawyer here before I talk to you." The detective responded, "That's up to you."

After a few minutes of silence, the suspect said, "Well, unless there is anything else I need to know, let's not waste any time waiting for someone to call my attorney and having her drive here. I probably should keep my mouth shut, but I'm willing to talk to you for a while." The suspect then signed a Miranda waiver form and, after interrogation by the detective, made incriminating statements regarding five burglaries. The interview lasted from 9:15 a.m. to 10:00 a.m.

In addition to the DUI, the suspect has been charged with five counts of burglary.

The lawyer has filed a motion to suppress all statements made by the suspect to the detective in connection with the five burglaries.

The state supreme court follows federal constitutional principles in all cases interpreting a criminal defendant's rights.

1. Did the detective violate the suspect's Sixth Amendment right to counsel when he questioned the suspect in the absence of the lawyer? Explain.

2. Under Miranda, did the suspect effectively invoke his right to counsel? Explain.

3. Was the suspect's waiver of his Miranda rights valid? Explain.

1) Please type your answer to MEE 1 below

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

======== Start of Answer #1 (952 words) ========

Question 1:

1. Sixth Amendment Right to Counsel

The detective did not violate the suspect's 6th Amendment right to counsel. The issue here is whether formal charges had been brought against the suspect with the DUI booking.

Generally, the 6th Amendment right to counsel attaches once formal charges have been filed. The underlying policy of the 6th Amendment right to counsel is to ensure that the suspect receives fair representation throughout the judicial process of charges against him. Generally for the formal charges to attach is when the government has taken action that is is clear of its intention to prosecute on the charge. Generally, once the 6th Amendment right to counsel attaches, the suspect must have an attorney present at any post-charge line-ups, hearings, questioning, or other components of the process of the charge against the suspect that attached the right to counsel. That being said, the 6th Amendment right to counsel is charge-specific, meaning, that it applies only to the charges that have been formally brought either through arraignment or other

court charge, so, police cannot question the suspect or continue with any adversarial proceedings without his lawyer present for said charge.

Here, the suspect's 6th Amendment right to counsel attached before the DUI charge or the burglary charges. His 6th Amendment right to counsel attached initially to the aggravated assault charge. His 6th Amendment right to counsel had not attached yet to the DUI booking, nor the questioning concerning the burglaries. While the suspect may argue that the booking for DUI constituted a charge, thus, his 6th Amendment right to counsel attached, he would not win this argument because a booking does not equal a formal adversarial proceeding against the suspect. Further, the questioning regarding the burglaries did not invoke any formal adversarial proceedings against the suspect since it was merely questioning, and since the 6th Amendment is charge-specific, the police were not precluded under his 6th Amendment right to counsel to question him. Therefore, the detective did not violate the suspect's 6th Amendment right to counsel.

2. Miranda - Invoke Right to Counsel

The suspect did not effectively invoke his right to counsel under the 5th Amendment. The issue is whether the suspect clearly and unabiguously invoked his right to counsel after given Miranda warnings.

Under the 5th Amendment to the Constitution, a suspect is afforded the right to be free of self-incrimination from testimonial evidence. Under case law, the Supreme Court developed the scope of this 5th Amendment right as afforded under Miranda

warnings. Miranda warnings must be given, and are triggered when a person is in custodial interrogation. For a person to be in "custody," a reasonable person standard of "feel free to leave" is applied to the circumstances in each case. "Interrogation" can be in form of statements or questions that the police may say in order to elicit an incriminating response from the suspect. The Miranda rights include that a person has a (1) right to counsel and (2) the reight to remain silent, and anything can be used against them in a court of law. Generally, for a person to validly invoke the right to counsel or right to silence, the invocation must be clear and explicit. Once the right to an attorney has been clearly and unabiguously invoked, any and all interrogations must stop immediately, and the police must scrupulously honor the invocation by not questioning the suspect without his attorney present.

Here, the suspect saying, " I think I want my lawyer here before I talk to you" does not qualify as an effective invocation of his right to counsel under the Miranda. His invocation must be unambiguous, and "I think" does not unambiguously invoke his right to an attorney. It must be very clear. Nonetheless, the suspect also said "let's not waste time" to wait for the attorney to get there that further illustrates the lack of unambiguity in his statements. Therefore, the suspect did not effectively invoke his right to counsel under the 5th Amendment.

3. Miranda - Valid Waiver

The suspect validly waived his Miranda rights. The issue is whether the suspect knowingly and voluntariy waived his rights to counsel and silence under Miranda.

In general, the Due Process clause requires that a person's waiver of Miranda rights be made both knowingly and voluntarily. The purpose of the law is to ensure the reliability of the person's confessions or incriminating statements so as to avoid the pressure of the custodial environment. The court will consider factors like how long the suspect was held in a cell, or the length and types of questioning made by the police to the suspect in order to determine if there was undue pressure put on the suspect by the police. Also, the person's ability to comprehend th charges at hand as well as his capacity to understand the waiver of rights will be taken into acccount by the court.

Here, the suspect, did not clearly invoke his rights. There are no facts to suggest that he did not understand the charges against him, or what he was being questioned about. He also seemed to understand his rights under Miranda. He had only been waiting in the holding cell for 30 minutes. While the police did not tell him, even after one overhearing that his attorney was present, the police did not have a duty to inform the suspect that his attorney was present in the building. This is not considered undue pressure by the police, nor does it affect the validity of his waiver of his rights. When the suspect said, "let's not waste any more time" he volunteered this information. Therefore, the suspect validly waived his rights both knowingly and voluntarily.

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

MEE Question 2

A music conservatory has two concert halls. One concert hall had a pipe organ that was in poor repair, and the other had no organ. The conservatory decided to repair the existing organ and buy a new organ for the other concert hall. After some negotiation, the conservatory entered into two contracts with a business that both repairs and sells organs. Under one contract, the business agreed to repair the existing pipe organ for the conservatory for $100,000. The business would usually charge a higher price for a project of this magnitude, but the business agreed to this price because the conservatory agreed to prepay the entire amount. Under the other contract, the business agreed to sell a new organ to the conservatory for the other concert hall for $225,000. As with the repair contract, the business agreed to a low sales price because the conservatory agreed to prepay the entire amount. Both contracts were signed on January 3, and the conservatory paid the business a total of $325,000 that day.

Two weeks later, before the business had commenced repair of the existing organ, the business suffered serious and unanticipated financial reversals. The chief financial officer for the business contacted the conservatory and said,

> Bad news. We had an unexpected liability and as a result are in a real cash crunch. In fact, even though we haven't acquired the new organ from our supplier or started repair of your existing organ, we've already spent the cash you gave us, and we have no free cash on hand. We're really sorry, but we're in a fix. I think that we can find a way to perform both contracts, but not at the original prices. If you agree to pay $60,000 more for the repair and $40,000 more for the new organ, we can probably find financing to finish everything. If you don't agree to pay us the extra money, I doubt that we will ever be able to perform either contract, and you'll be out the money you already paid us.

After receiving this unwelcome news, the conservatory agreed to pay the extra amounts, provided that the extra amount on each contract would be paid only upon completion of the business's obligations under that contract. The business agreed to this arrangement, and the parties quickly signed documents reflecting these changes to each contract. The business then repaired the existing organ, delivered the new organ, and demanded payment of the additional $100,000.

The conservatory now has refused to pay the business the additional amounts for the repair and the new organ.

1. Must the conservatory pay the additional $60,000 for the organ repair? Explain.

2. Must the conservatory pay the additional $40,000 for the new organ? Explain.

2) Please type your answer to MEE 2 below

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

======== Start of Answer #2 (891 words) ========

1. No, the consevatory does not need to pay the extra $60,000 for the repair of the pipe organ. The issue here is whether an amendment to an existing contract can be modified without consideration. The parties in this problem signed two separate contracts. Although the parties are the same, the nature of the contracts involved differ signficantly. The first contract was a contract for services, i.e. the repair of a pipe organ. Contracts for services are covered by the common law. The Common law requires that any modification of an existing contract be supported by separate consideration on the part of both parties. In the eyes of the common law, the creation of a contract with supporting legal detriments on both sides creates a pre-existing legal obligation that the parties must fulfill. Here, the parties agreed that the conservatory would pay $100,000 up front for the company to repair the organ. Both parties accepted legal detriments, and agreed to perform

contingent upon the other's performance. We have an enforceable contract whereby the conservatory agrees to pay $100,000 in return for the business repairing its organ. The business has subsequently asked for an amendment to that contract, citing unexpect financial problems on its end. The company has asked for an increase in the amount it is to be paid for the service of fixing the organ in the amount of $60,000. The conservatory has not incurred any additional legal detriment or accept any different performance. The only difference is that the company has asked that it be allowed to pay later, as opposed to up front, but that is not sufficient consideration to support the amendments proposed by the business. Instead this appears to be an amendment of an existing contract which is not supported by the additional consideration required under the common law. Thus, the conservatory need not pay the additional amount sought by the business.

In addition, it's worth nothing here that the conservatory had already completely performed its side of the bargain when the business asked for an amendment. Pre existing obligations can be discharged or waived only if legal detriments remain on both sides of the contract. Here, the only

remaining obligation was on the business, which is another reason why they should not be able to amend.

The business may try to argue that the amendment was justified by unforeseen necessity which would otherwise discharge the contract. However, no such necessity is apparent from these facts. Necessity which discharges a contract must be such that the fundamental nature of the contract can no longer be performed and the purpose of the contract has been frustrated. Here, the necessity is merely that the business is losing money. Nothing from these facts suggests that the organ cannot be repaired or that a new organ cannot be installed. A threat of ongoing bankrupt will not be sufficient necessity to discharge the contract. Thus, the conservatory need not pay the $60,000 required by the business to complete the service.

It could also be argued that the subsequent amendment to the contract was an accord and satisfaction, meaning a separate contract, that is supported by separate consideration, and which suspends performance on a preexisting agreement. Upon completion of the accord,

both contracts are considered to have been satisfied. The problem is that, as noted above, we have no separate consideration on the part of the conservatory to support the accord. The only change in circumstances is the conservatory's request to hold off on payment until performance is complete. This is not the sort of legal detriment that a party must incurr to provide consideration for a contract and this is not an accord and satisfaction situation.

2. The second contract here is a contract for an organ. An organ is a good for purposes of the UCC, which defines goods as basically anything that is moveable. As with question 1, the issue here is whether a contract can be modified without additional consideration from both parties. An organ is a good, even if it isn't all that mobile. Since the organ is a good, the UCC applies. The business is one that repairs and sells organs, meaning it is a merchant for purposes of the UCC, i.e. one whose business is in the sale or

trade of the goods in question. The UCC does not follow the pre-existing legal duty standard established in common law. Instead, under the UCC, existing contracts can be modified with only a showing of good faith on both sides. Good faith under the UCC is honesty in fact and adherance to reasonable commercial standards. The standard requires both a subjective analysis of the party's conduct to determine if it is indeed honest and an objective analysis to determine if their conduct follows commercial standards. Here, nothing suggests that the business was not acting in good faith, although the veiled threat of suggesting that refusing to pay the additional money will mean they lose the money already spent isn't really very nice. I'm not sure it rises to the level of bad faith however. In the absence of any evidence showing bad faith, then the subsequent agreement of the parties to modify the contract, as evidenced in the writing subsequently signed, is enforceable and the conservatory will be required to pay the $40,000 for the new organ.

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

MEE Question 3

In 1994, a man and a woman were married in State A.

In 1998, their daughter was born in State A.

In 2010, the family moved to State B.

In 2012, the husband and wife divorced in State B. Under the terms of the divorce decree:

(a) the husband and wife share legal and physical custody of their daughter;
(b) the husband must pay the wife $1,000 per month in child support until their daughter reaches age 18;
(c) the marital residence was awarded to the wife, with the proviso that if it is sold before the daughter reaches age 18, the husband will receive 25% of the net sale proceeds remaining after satisfaction of the mortgage on the residence; and
(d) the remaining marital assets were divided between the husband and the wife equally.

Six months ago, the husband was offered a job in State A that pays significantly less than his job in State B but provides him with more responsibilities and much better promotion opportunities. The husband accepted the job in State A and moved from State B back to State A.

Since returning to State A, the husband has not paid child support because, due to his lower salary, he has had insufficient funds to meet all his obligations.

One month ago, the wife sold the marital home, netting $10,000 after paying off the mortgage. She then moved to a smaller residence. The husband believes that he should receive more than 25% of the net sale proceeds given his financial difficulties.

Last week, when the wife brought the daughter to the husband's State A home for a weekend visit, the husband served the wife with a summons in a State A action to modify the support and marital-residence-sale-proceeds provisions of the State B divorce decree. The husband brought the action in the State A court that adjudicates all domestic relations issues.

1. Does the State A court have jurisdiction to modify
   (a) the child support provision of the State B divorce decree? Explain.
   (b) the marital-residence-sale-proceeds provision of the State B divorce decree? Explain.

2. On the merits, could the husband obtain
   (a) retroactive modification of his child support obligation to the daughter? Explain.
   (b) prospective modification of his child support obligation to the daughter? Explain.
   (c) modification of the marital-residence-sale-proceeds provision of the State B divorce decree? Explain.

3)

======== Start of Answer #3 (607 words) ========

Question 3

1a. State A Does not have jurisdiction to modify the child support provision of the state B divorce decree. Under UIFSA and UCCJEA (for child custody), The child's home state has continuing jurisdiction to hear child support disputes. A child's home state is the state where the child has continuously lived the 6 months immediately proceeding the action. The home state has a relationship with the custodial parent and has the most evidence related to the child's needs. Here, the facts make it appear as if the husband had weekend visitation, and thus the child had spent the majority of the time in state and could be said to live in state A continuously. Another state may determine child support issues if the child no longer lives in the state or has no connection with the state, such as no parent with the state or no evidence relating to the child in the state. Here, the child lived in state B and state B has conintuining juris to hear the child custody matter and remains the most appropriate court to determine child support issues.

1b. State A does have jurisdiction to modify the marital residence sale proceeds provision of the state B divorce decree. To modify the divorce decree, a decree from the granting state may be registered in another state and enforced under the uniform interstate family support act UIFSA; also divorce decrees are given full faith and credit under the constition if they were valid in the original state and the issuing state had

jurisdiction. Further, to have jurisdiction as to property, the state would need personal jurisdiction over the parties. the husband could have state B register the divorce decree with A and it could be modified by state A. Both the husband and wife were subject to state A's jurisdiction because the wife was subject to personal service in the state and state A was the husband's domocile. Further, the divorce decree is entitled to full faith and credit because state B had proper jurisdiction over the divorcing parties as both were domiciled there at the time of the divorce.

2a&B. The husband could not have retroactive modification of his child support obligatoin to his daugther. A child support order is modificaible upon a substnatial and material change of circumstances of the child's needs or the paying spouses ability to pay. Additionally, the change in the paying spouse's circumstances must be unanticipated. Furhter, Child support obligations are due when current and can't be retroactively modified. However, non-payment of child support does not affect visitation rights. Here, the husband is obligated by law to meet all past and unpaid child supoprt obligtions. Past and unpaid child support obligations can be enforced by garnishing wages, attaching property, and are punishable by contempt of court.

The court can consider prosepctively modifiying the husband's support obligatoin based on his changed job circumstances, but will likely refuse to modify his obligation because the change in circumstances was intentional and voluntary. The husband knew when taking the lower paying job that he would be obligated to pay the ordered sum and the court will order him to pay the sum or he could be subject to comtempt or wage garnishment.

2c. The husband will not be able to obtain modification of the martial residence sale proceeds of the state B divorce decree. Property distribution agreements, and orders are final and are not subject to modification, especially when they are fair, reasonable, and voluntarily consented to. Despite the husband's unfavorable financial status, he voluntarily entered into the property settlement agreement, and thus is bound by state B's decree.

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

MEE Question 4

The United States Forest Service (USFS) manages public lands in national forests, including the Scenic National Forest. Without conducting an environmental evaluation or preparing an environmental impact statement, the USFS approved a development project in the Scenic National Forest that required the clearing of 5,000 acres of old-growth forest. The trees in the forest are hundreds of years old, and the forest is home to a higher concentration of wildlife than can be found anywhere else in the western United States.

The USFS solicited bids from logging companies to harvest the trees on the 5,000 acres of forest targeted for clearing, and it ultimately awarded the logging contract to the company that had submitted the highest bid for the trees. However, the USFS has not yet issued the company a logging permit. Once it does so, the company intends to begin cutting down trees immediately.

A nonprofit organization whose mission is the preservation of natural resources has filed suit in federal district court against the USFS. The nonprofit alleges that the USFS violated the National Environmental Policy Act (NEPA) by failing to prepare an environmental impact statement for the proposed logging project. Among other remedies, the nonprofit seeks a permanent injunction barring the USFS from issuing a logging permit to the logging company until an adequate environmental impact statement is completed. The nonprofit believes that the logging project would destroy important wildlife habitat and thereby cause serious harm to wildlife in the Scenic National Forest, including some endangered species.

Assume that federal subject-matter jurisdiction is available, that the nonprofit has standing to bring this action, and that venue is proper.

1. If the logging company seeks to join the litigation as a party, must the federal district court allow it to do so as a matter of right? Explain.

2. What types of relief could the nonprofit seek to stop the USFS from issuing a logging permit during the pendency of the action, what must the nonprofit demonstrate to obtain that relief, and is the federal district court likely to grant that relief? Explain.

4) Please type your answer to MEE 4 below

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

======== Start of Answer #4 (1110 words) ========

1. Yes, if the logging company seeks to join the litigation as a party, the federal district court must allow it to intervene as a matter of right. The issue is whether this act would qualify as a permissive intervention or an intervention as a matter of right.

A federal court can permit a party to intervene in an action if the party has an interest in the litigation and wants to be a party to the litigation. Courts often permit interested parties to join to promote judicial economy and prevent a person or entity from being subjected to multiple lawsuits regarding the same issue. However, in these cases the court can decide to allow the intervention or deny it.

Intervention as of right is different. A party has the right to intervene when his interest in the litigation is so strong that his rights are going to impacted by the outcome of the litigation, no other party to the lawsuit is protecting his interest., and the result of the lawsuit will decide his fate with regard to this interest. The court cannot deny such a

party the right to join.

Here, if the permanent injunction is awarded, the logging company will not be able to fulfill its contract with USFS. Thus, extreme financial rights are at stake for the logging company in this litigation. Additionally, no other party is looking out for the rights and needs of the logging company. Specifically, the USFS does not have the same financial stake in the venture as does the logging company. It simply seeks to manage public lands, and approved a development project in this area.

The non-profit will likely argue that the USFS is looking out for the rights of the logging company; however, this argument is not persuasive. The USFS has the obligatio to consider the interest of the national lands, not the financial stake of this logging company. Both the USFS and the logging company may both want this development project to go through at this point, but their like-minded view is for different reasons.

Additionally, if the non-profit succeeds in obtaining a permanent injunction, the logging company will have no way to protect its financial venture at this point. It will be too late. The logging company will be forced to seek logging contracts elsewhere, and lose the time and money it spent preparing its bid and preparing for the clearing of the forest while waiting for the permit issuance.

As such, the logging company should be permitted to intervene as a matter of right because of its extreme financial stake in the litigation and the fact that no other party is

looking out for its interests.

2. The non-profit can seek a Temporary Restraining Order ("TRO") and a Preliminary Restraining Order ("PRO"), the court is likely to grant both orders due to the finality of the logging activity and the quickness at which tress can be cut down.

A TRO is a restraining order that lasts fourteen days after its issuance, until the parties have time to have a hearing before the court on the issuance of a preliminary restraining order. The temporary restraining, if issued, would keep the UFSF from acting within those 14 days. To receive this relief, the non-profit must demonstrate there is no time to notify the other party and have a hearing; the interest at stake is great and irreversible; and wil cause great, irreparable harm if permitted.

The non-profit organization will likely be able to demonstrate these facts to the court. Specifically, the USFS could issue the license at any moment, and the logging company could begin cutting down trees. As such, there is no time to notify the USFS and schedule a hearing. Additionally, logging companies can cut down trees quickly, and this logging company has stated that it will begin "immediately" after receiving the license. Once the trees have been cut, there is no going back. The trees are hundreds of years old, and replacing new ones will take hundreds of years. Finally, not only are the trees at stake, endangered species live in these trees. If their habitats are destroyed, the harm could be great and irreparable.

Because the TRO only lasts 14 days, the harm to the USFS will not be too great. It has not yet issued the license, so it is obviously not in too big of a hurry. The USFS will be able to plead its case after the 14 days at a PRO hearing.

In addition to the TRO, the non-profit could also seek a PRO. A PRO is restraining order keeps a party from acting during the pendency of a suit, and will either cease to exist at the end of the litigation or become a permanent injunction. A PRO is issued after a hearing with the parties, and the court weighs the following facts: (1) the burden on the injoined party if the injunction is issued versus the harm on the requestint party if the PRO is denied; (2) the interests of the public; (3) the irreparable nature of the possible harm; and (4) the likelihood the requesting party has in succeeding on the merits.

The federal district court would be likely to grant non-profits PRO for several reasons. First, the burden on the UFSF is outweighed by the harm to the non-profit if the injunction is not issued. Specifically, if the license is issued during the pendency of the trial and all the trees are cut down, it will be too late. Non-profit will no longer be able to protect its mission in preserving the natural resourses of this region. Second, the likely has an interest in seeing this national forest preserved in its natural state. Very few places still exit where trees hundreds of years old house endangered species, and much of the public would likely want it to be preserved. However, without knowing the nature of the development on cannot say for sure what the public would desire.

Third, the harm the non-profit could suffer if the PRO is not granted would be irreparable. One cannot just go out and plant new hundred year old trees once they have been cut down. Additionally, you cannot just go create new habitats for endangered species.

Finally, the non-profit is likely to succeed on its merits. If in fact the USFS was supposed to conduct an environmental evaluation and prepare an environmental impact statement, the court will not look favorably on this failure. Additionally, preservation of the national forests is an important interest to protect, and the court is likely to side with the non-profit organization.

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

MEE Question 5

A prison inmate has filed a civil rights lawsuit against a guard at the prison, alleging that the guard violated the inmate's constitutional rights during an altercation. The inmate and the guard are the only witnesses to this altercation. They have provided contradictory reports about what occurred.

The trial will be before a jury. The inmate plans to testify at trial. The guard's counsel has moved for leave to impeach the inmate with the following:

> (a) Twelve years ago, the inmate was convicted of felony distribution of marijuana. He served a three-year prison sentence, which began immediately after he was convicted. He served his full sentence and was released from prison nine years ago.
> (b) Eight years ago, the inmate pleaded guilty to perjury, a misdemeanor punishable by up to one year in jail. He paid a $5,000 fine.
> (c) Seven years ago, the inmate was convicted of felony sexual assault of a child and is currently serving a 10-year prison sentence for the crime. The victim was the inmate's daughter, who was 13 years old at the time of the assault.

The inmate's counsel objects to the admission of any evidence related to these three convictions and to any cross-examination based on this evidence.

The guard also plans to testify at trial. The inmate's counsel has moved for leave to impeach the guard with the following:

> Last year, the guard applied for a promotion to prison supervisor. The guard submitted a résumé to the state that indicated that he had been awarded a B.A. in Criminal Justice from a local college. An official copy of the guard's academic transcript from that college indicates that the guard dropped out after his first semester and did not receive a degree.

The guard's counsel objects to the admission of this evidence and to any cross-examination based on this evidence.

The transcript and the résumé have been properly authenticated. The trial will be held in a jurisdiction that has adopted all of the Federal Rules of Evidence.

1. What evidence, if any, proffered by the guard to impeach the inmate should be admitted? Explain.

2. What evidence, if any, proffered by the inmate to impeach the guard should be admitted? Explain.

5) Please type your answer to MEE 5 below

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

======== Start of Answer #5 (671 words) ========

1. Evidence proffered by the guard

The inmate's conviction for felony distribution of marijuana is admissible if the judge determines that its probative value outweighs the prejudice to the inmate. In a criminal case, the prosecution may impeach the defendant-witness wtih a felony conviction, not involving dishonesty, only if the trial judge determines its probative value outweighs the danger of unfair prejudice. In addition, the conviction must not be too remote in time. Generally, a conviction is too remote if more than ten years has elapsed since either the conviction was entered or the convict was released from prison.

Here, the inmate was convicted of felony distribution of marijuana, which is not a crime involving dishonesty. Although the conviction was entered twelve years ago, the inmate was released from prison only nine years ago. Measured from the date of release, the conviction is not too remote. Hence, the conviction is admissible if the judge determines that its probative value outweighs the prejudice to the defendant. This determination could go either way; however, the standard favors admission, given that the evidence need only be slightly more

probative than prejudicial to be admissible. And because the inmate is bringing a claim as an inmate, it probably will not prejudice him in the eyes of the jury.

The inmate's conviction for perjury should be admitted. Under the Federal Rules of Evidence, a witness may be impeached by a prior conviction. A witness may be impeached by a crime involving dishonesty, regardless of whether it was a felony or misdemeanor conviction. The trial judge generally has no discretion whether to admit this typ of impeachment evidence.

Here, the inmate pleaded guity to a misdemeanor charge of perjury. Perjury is the taking of a false oath (lying) about a material matter while under a legal duty to tell the truth (i.e. in a court proceeding). Perjury is a crime that is inherently dishonest--in fact that is the essence of the crime. It is irrelevant that crime was only a misdemeanor under the Federal Rule. As such, the inmate's conviction for perjury should be admitted.

The inmate's conviction of felony sexual assault should probably be excluded. Again, a felony conviction offered against a criminal defendant for impeachment purposes is admissible if the judge determines that its probative value outweighs the prejudice to the inmate and it is not too remote in time. Here, the conviction is not too remote--it was entered seven years ago. However, the prejudice to the defendant probably outweighs its probative value. A sexual assault is inherently personal and likely to evoke an emotional response from the jury. This is especially true given that the victim was the defendant's daughter. The probative value of this crime in light of the lawsuit (a civil rights action) is

likely little. Thus, the conviction should probably be excluded by the judge.

2. Evidence proffered by the inmate

The inmate's attorney should be allowed to question the guard as to his transcript but it should not be admitted into evidence. Under the Federal Rules of Evidence, a witness can be impeached by a prior bad act. However, such evidence can only be elicited on cross-examination and the impeaching attorney may not reference any of the consequences of the bad act. No extrinsic evidence is permissible for this type of impeachment.

Here, the guard's act of lying on his resume as to his BA in Criminal Justice can be construed as a prior bad act. Thus, it is a permissible line of questioning for the inmate's attorney on cross-examination. However, he can only ask the guard about on cross-examination (i.e. "Isn't it true that you listed a BA from the local college on your resume but never in fact completed college?"). He may not offer the resume or the transcript into evidence. And, he may not call other witnesses, such as the registrar of the college or the guard's supervisor, to prove that the guard did in fact lie. He is limited to what he can elicit on cross-examination.

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

MEE Question 6

Mega Inc. is a publicly traded corporation incorporated in a state whose corporate statute is modeled on the Model Business Corporation Act (MBCA). Mega's articles of incorporation do not address the election of directors or amendment of the bylaws by shareholders.

Well within the deadline for the submission of shareholder proposals for the upcoming annual shareholders' meeting, an investor, who was a large and long-standing shareholder of Mega, submitted a proposed amendment to Mega's bylaws. The proposal, which the investor asked to be included in the corporation's proxy materials and voted on at the upcoming shareholders' meeting, read as follows:

> Section 20: The Corporation shall include in its proxy materials (including the proxy ballot) for a shareholders' meeting at which directors are to be elected the name of a person nominated for election to the Board of Directors by a shareholder or group of shareholders that beneficially have owned 3% or more of the Corporation's outstanding common stock for at least one year.
>
> This Section shall supersede any inconsistent provision in these Bylaws and may not be amended or repealed by the Board of Directors without shareholder approval.

Mega's management decided to exclude the investor's proposal from the corporation's proxy materials and explained its reasons in a letter to the investor:

> The investor's proposed bylaw provision would be inconsistent with relevant state law because the Board of Directors has the authority to manage the business and affairs of the Corporation. Generally, shareholders lack the authority to interfere with corporate management by seeking to create a method for the nomination and election of directors inconsistent with the method chosen by the Board of Directors.
>
> Furthermore, at its most recent meeting, the Board of Directors unanimously approved an amendment to the Corporation's bylaws that provides for proxy access for director nominations by a shareholder or a group of shareholders holding at least 10% of the Corporation's voting shares for at least three years. This procedure takes precedence over any nomination methods that might be sought or approved by shareholders.

The investor is considering bringing a suit challenging management's refusal to include the investor's proposed bylaw provision and challenging the board's amendment of the bylaws at its recent meeting.

1. Is the investor's proposed bylaw provision inconsistent with state law? Explain.

2. If the investor's proposed bylaw provision were approved by the shareholders, would the bylaw amendment previously approved by the board take precedence over the investor's proposed bylaw provision? Explain.

3. Must the investor make a demand on Mega's board of directors before bringing suit? Explain.

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

======== Start of Answer #6 (563 words) ========

(1) The investor's proposed by-laws are not inconsistent with state law. Because the state has adopted the MBCA, the MBCA provides the governing law. At issue is whether a shareholder's proposed by-laws can provide for the nomination and election of directors when the corporation's articles of incorporation are silent. Generally, a corporation's articles of incorporations provide for matters governing the nomination and election of directors. However, if the articles of incorporation contain nothing about this area, a corporation may enact by-laws governing the area. Moreover, if there are no bylaws providing otherwise, shareholders are free to amend bylaws providing for the nomination and election of directors. This is reflective of the basic structure of corporate law: shareholders elect directors

Here, Mega Inc's articles of incorporation do not provide for the nomination and election of directors. Moreover, none of Mega Inc's bylaws state that shareholders cannot amend bylaws relating to the nomination and election of directors. Although the bylaw passed by the Board of Directors conflicts with the investor's proposed by-laws, this does not mean that the investor's proposal violates state law. Rather, the Board's bylaws are subject to amendment by shareholders. Thus, the investor's proposed by-laws are not inconsistent with state law.

(2) The investor's proposed bylaw provision would take precedence over the Board's

prior bylaw amendment. At issue is whether the Board of Directors can provide for the nomination and election of the corporation's directors. Generally, directors are charged with setting corporate policy and hiring officers. In contrast, shareholders are charged with electing directors and voting on fundamental corporate policies. Althought a corporation's articles of incorporation may provide for a different result, the silence of the articles on this matter means that the MBCA's default rules govern.

In this instance, the investor's proposed bylaw provision takes precedence over the Board's because Mega Inc's articles do not specify the manner in which directors are to be nominated and elected. As such, the default rule governs, and the shareholders are charged with this matter. Thus, the investor's proposed bylaws take precedence.

(3) The investor does not have to make a demand on Mega's board before bringing suit. At issue is whether a demand is required when a shareholder is suing a corporation because the corporation has interfered with the shareholder's rights in some manner. A shareholder is directly harmed when his or her power to vote or enact bylaws is directly harmed by the corporation. In a direct suit, the sharholder need not notify the corporation's directors before bringing suit. In contrast, a shareholder must notify the corporation's directors before bringing a derivative action. A derivative action is present when a shareholder sues a corporation's directors for breaching their duties of loyalty and care to the corporation. In such an action, the shareholder's rights are not harmed; they are merely unsatisfied with the manner in which the corporation is being

run.

Here, the investor's suit against the corporation is a direct action. His rights to amend bylaws have been harmed directly with the corporation. Nothing in the fact pattern indicates that the investor is unsatified with the manner in which the corporation has been run by the directors; he merely wants to have his right to amend the bylaws enforced. Thus, the investor has a direct suit against the corporation, and does not have to make a demand on the board before bringing suit.

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

MULTISTATE ESSAY EXAMINATION DIRECTIONS

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

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

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

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

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

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

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

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