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# July 2014 MEE Questions and Analyses



[www.ncbex.org](http://www.ncbex.org)

National Conference of Bar Examiners  
302 South Bedford Street | Madison, WI 53703-3622  
Phone: 608-280-8550 | Fax: 608-280-8552 | TDD: 608-661-1275  
e-mail: [contact@ncbex.org](mailto:contact@ncbex.org)



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## **Preface**

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The Multistate Essay Examination (MEE) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the questions and analyses from the July 2014 MEE. (In the actual test, the questions are simply numbered rather than being identified by area of law.) The instructions for the test appear on page iii.

The model analyses for the MEE are illustrative of the discussions that might appear in excellent answers to the questions. They are provided to the user jurisdictions to assist graders in grading the examination. They address all the legal and factual issues the drafters intended to raise in the questions.

The subjects covered by each question are listed on the first page of its accompanying analysis, identified by roman numerals that refer to the MEE subject matter outline for that subject. For example, the Federal Civil Procedure question on the July 2014 MEE tested the following areas from the Federal Civil Procedure outline: III., Injunctions and provisional remedies; and IV.C., Pretrial procedures—Joinder of parties and claims (including class actions).

For more information about the MEE, including subject matter outlines, visit the NCBE website at [www.ncbex.org](http://www.ncbex.org).

## **Description of the MEE**

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The MEE consists of six 30-minute questions and is a component of the Uniform Bar Examination (UBE). It is administered by user jurisdictions as part of the bar examination on the Tuesday before the last Wednesday in February and July of each year. Areas of law that may be covered on the MEE include the following: Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Conflict of Laws, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Federal Civil Procedure, Real Property, Torts, Trusts and Estates (Decedents' Estates; Trusts and Future Interests), and Uniform Commercial Code (Negotiable Instruments and Bank Deposits and Collections; Secured Transactions). (Effective with the February 2015 MEE administration, Uniform Commercial Code Articles 3 and 4 [Negotiable Instruments and Bank Deposits and Collections] is no longer being tested.) Some questions may include issues in more than one area of law. The particular areas covered vary from exam to exam.

The purpose of the MEE is to test the examinee's ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation. The primary distinction between the MEE and the Multistate Bar Examination (MBE) is that the MEE requires the examinee to demonstrate an ability to communicate effectively in writing.

## **Instructions**

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The back cover of each test booklet contains the following instructions:

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.



# *July 2014 MEE*

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## ▶ *QUESTIONS*

*Criminal Law and Procedure*

*Contracts*

*Family Law*

*Federal Civil Procedure*

*Evidence*

*Corporations*



## **CRIMINAL LAW AND PROCEDURE QUESTION**

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.

## Criminal Law and Procedure Question

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.

## **CONTRACTS QUESTION**

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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.

## **FAMILY LAW QUESTION**

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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.

## **FEDERAL CIVIL PROCEDURE QUESTION**

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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.

## **EVIDENCE QUESTION**

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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.

## **CORPORATIONS QUESTION**

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.



# *July 2014 MEE*

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## ▶ *ANALYSES*

*Criminal Law and Procedure*

*Contracts*

*Family Law*

*Federal Civil Procedure*

*Evidence*

*Corporations*



# **CRIMINAL LAW AND PROCEDURE ANALYSIS**

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**(Criminal Law and Procedure V.A., B., D.)**

## **ANALYSIS**

### **Legal Problems**

- (1) Did the detective violate the suspect's Sixth Amendment right to counsel when he questioned the suspect about the burglaries without the lawyer present, given that the lawyer represented the suspect in an unrelated criminal matter?
- (2) Under Miranda, did the suspect effectively invoke his right to counsel when he said, "I think I want my lawyer here before I talk to you"?
- (3) Was the suspect's waiver of his right to remain silent under Miranda valid?

## **DISCUSSION**

### **Summary**

The Sixth Amendment right to counsel, as applied to states through the Fourteenth Amendment, is offense-specific. Although the suspect had an attorney representing him on his pending assault charge, he had no Sixth Amendment right to the assistance of counsel with respect to the five uncharged burglaries because formal adversarial proceedings had not yet commenced on those charges. The suspect's Sixth Amendment right to counsel was not violated by the detective's failure to inform him that the lawyer was present or of the lawyer's demands.

However, a person undergoing custodial interrogation also has an independent constitutional right to counsel during custodial interrogation under Miranda. When a suspect invokes his right to counsel under Miranda, custodial interrogation must immediately cease for a period of at least 14 days. However, the invocation of the right to counsel must be unambiguous and clearly convey that the suspect has requested counsel. Here, because the suspect's statement, "I think I want my lawyer here before I talk to you," was ambiguous, he did not invoke his Miranda right to counsel.

A waiver of rights must be knowing, intelligent, and voluntary. Here, the suspect waived his right to remain silent under Miranda when he signed the waiver form. The fact that the detective did not correct the suspect's assumption that the lawyer would need to drive to the jail—by telling him that the lawyer was in the waiting room and was demanding to see him—did not affect the validity of the suspect's waiver.

### ***Point One (35%)***

The suspect's Sixth Amendment right to counsel was not violated because the right does not attach on new charges until formal adversarial judicial proceedings have commenced on those charges.

The Sixth Amendment, as applied to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The right to counsel does not attach with respect to particular charges until formal adversarial judicial proceedings have commenced (i.e., "at or after the initiation of

adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment [or in some states, arrest warrant],” *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (internal quotations omitted)). Once a suspect’s Sixth Amendment right to counsel has attached, any attempts to “deliberately elicit” statements from him in the absence of his attorney violate the Sixth Amendment. *See Massiah v. United States*, 377 U.S. 201 (1964); *Brewer v. Williams*, 430 U.S. 387 (1977).

The Sixth Amendment right to counsel is charge- or offense -specific. Representation by counsel in one prosecution does not, in itself, guarantee counsel for uncharged offenses. *See McNeil*, 501 U.S. at 175; *Texas v. Cobb*, 532 U.S. 162 (2001). Here, the suspect’s Sixth Amendment right to counsel had attached only for the pending aggravated assault charge. The suspect’s right to counsel for the aggravated assault case did not guarantee counsel for the five unrelated and uncharged burglaries that were the subject of the detective’s interrogation. Thus, because formal adversarial judicial proceedings against the suspect for the uncharged burglaries had not begun, he had no Sixth Amendment right to counsel.

Finally, the detective’s failure to inform the suspect of the lawyer’s presence and demands to speak with him does not implicate the suspect’s Sixth Amendment right to counsel, which had not yet attached. *See id.*; *Moran v. Burbine*, 475 U.S. 412, 428–31 (1986).

***Point Two (30%)***

The suspect did not effectively invoke his right to counsel under Miranda because his statement was not unambiguous.

A suspect subject to custodial interrogation has a right to consult with counsel and to have an attorney present during questioning. *Miranda v. Arizona*, 384 U.S. 436 (1966). When a suspect invokes his right to counsel during an interrogation, law enforcement must immediately cease all questioning. *See Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981). Custodial interrogation cannot be reinitiated unless and until the suspect has been re-advised of his Miranda rights, has provided a knowing and voluntary waiver, and (1) counsel is present and (2) the suspect himself initiated further communication with the police, *see id.* at 484, or (3) (if the suspect was released from custody after the initial interrogation) at least 14 days have passed. *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010).

To invoke the right to counsel, a suspect’s request must be “unambiguous.” This means that the suspect must articulate the desire for counsel sufficiently clearly that a reasonable officer would understand the statement to be a request for counsel. *Davis v. United States*, 512 U.S. 452, 459 (1994). If the request is ambiguous, the police are not required to stop the interrogation.

In this case, the suspect’s statement, “I think I want my lawyer here before I talk to you,” was not an unambiguous request for counsel. The most reasonable interpretation of this statement is that the suspect *might* be invoking his right to counsel. *Id.* at 461 (“maybe I should talk to a lawyer” is not an unequivocal request for counsel). *See also Burket v. Angelone*, 208 F.3d 172, 197–98 (4th Cir. 2000) (“I think I need a lawyer” is not an unambiguous request for an attorney); *Soffar v. Cockrell*, 300 F.3d 588, 594–95 (5th Cir. 2002) (discussion of various statements that did not constitute unequivocal requests for counsel).

Under these circumstances, the detective was not required to cease the custodial interrogation of the suspect. Nor was the detective required to clarify or ask follow-up questions to determine whether the suspect in fact wanted an attorney. *Davis*, 512 U.S. at 459–60.

**Point Three (35%)**

The suspect's waiver of his Miranda rights was knowing, intelligent, and voluntary despite the fact that he was never told of the lawyer's presence in the jail or of the lawyer's demands.

A valid waiver of Miranda rights must be “voluntary”—i.e., the product of a free or deliberate choice rather than intimidation, coercion, or deception. *Berghuis v. Thompkins*, 560 U.S. 370, 382–83 (2010). In addition, the waiver must be knowing and intelligent. That is, it “must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Moran v. Burbine*, 475 U.S. 421 (1986).

In this case, the suspect signed a Miranda waiver form after receiving proper warnings. There is no evidence “that the police resorted to physical or psychological pressure to elicit the statements.” *Id.* The entire interview lasted only 45 minutes. The only issue is whether the suspect knowingly and intelligently waived his Miranda rights despite the fact that the detective did not tell the suspect about the lawyer’s presence and her demands.

The Supreme Court has said that “[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.” *Id.* at 422. If the suspect “knew that he could stand mute and request a lawyer, and . . . was aware of the State’s intention to use his statements to secure a conviction,” then the waiver is valid regardless of the information withheld. *Id.* at 422–23.

Here, the suspect was correctly informed of his rights. *Miranda v. Arizona*, 384 U.S. at 467–73. His comments demonstrate that he understood that he could have a lawyer present if he desired (i.e., wondering whether he should call his attorney) and that he understood that there might be consequences to speaking with the detective (“I probably should keep my mouth shut, but I’m willing to talk to you for a while.”). His comment, “[L]et’s not waste any time waiting for someone to call my attorney and having her drive here,” along with his signature on the Miranda waiver form, show that his waiver was valid under the constitutional standard.

The fact that the detective did not tell the suspect about the lawyer’s presence and demands has no bearing on the validity of the suspect’s waiver because “such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.” *Moran*, at 424. The Supreme Court has specifically declined to adopt a rule requiring that law enforcement tell a suspect of an attorney’s efforts to contact him, *id.* at 425 (“Nor are we prepared to adopt a rule requiring that the police inform a suspect of an attorney’s efforts to reach him.”).

[NOTE: An examinee might also recognize that this general rule is further supported by the Supreme Court’s decision in *Florida v. Powell*, 559 U.S. 50 (2010), approving state Miranda warnings that do not explicitly warn suspects that they have a right to have counsel present during custodial interrogation.]

# **CONTRACTS ANALYSIS**

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(Contracts I.B.2.; II.B.; IV.A.3. & A.5.)

## **ANALYSIS**

### **Legal Problems**

- (1) In the case of a service contract (governed by the common law of contracts), is a modification enforceable when a party agrees to pay more for the same performance than was originally promised?
- (2) In the case of a contract for the sale of goods (governed by Article 2 of the UCC), is a modification enforceable when a party agrees to pay more for the same goods than was originally promised?
- (3) May a party avoid an agreement on the basis of economic duress?

## **DISCUSSION**

### **Summary**

There are two arguments that the conservatory can make to support the claim that it is not bound to pay the higher prices: lack of consideration and economic duress.

The organ repair contract is governed by the common law of contracts. Under the common law, the business would have difficulty recovering the additional \$60,000 for the organ repair because, under the “preexisting duty rule,” the agreement of the conservatory to pay the extra price was not supported by consideration. However, the business might argue that the modification is enforceable under an exception to the preexisting duty rule for fair and equitable modifications made in light of unanticipated circumstances.

The organ sale contract is governed by Article 2 of the Uniform Commercial Code. The business would likely recover the additional amount under that contract because Article 2 provides that consideration is not required for a modification to be binding.

In both cases, the conservatory could seek to avoid its agreement on the grounds of economic duress, but that argument is not likely to succeed.

### ***Point One (45%)***

The business probably cannot recover the additional \$60,000 for the organ repair because the conservatory’s promise to pay more money was not supported by consideration.

The general rule is that, to be enforceable, a promise must be supported by consideration. Under RESTATEMENT (SECOND) OF CONTRACTS § 71, a promise is supported by consideration if it is bargained for in exchange for a return promise or performance. However, under the “preexisting duty rule” (exemplified in RESTATEMENT (SECOND) OF CONTRACTS § 73 and *Alaska Packers’ Ass’n v. Domenico*, 117 F. 99 (9th Cir. 1902)), promise of performance of a legal duty already owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration.

If the business had promised the conservatory anything new or different in exchange for the agreement to pay the additional \$60,000 (such as, for example, repairing the pipe organ more

quickly or using better parts), that would constitute consideration, especially in light of the principle that courts do not inquire into the adequacy of consideration. Here, however, the business already had a legal duty under the original contract and did not agree to do anything else in exchange for the conservatory's promise to pay \$60,000 more.

However, an exception to the preexisting duty rule is sometimes applied in situations of unanticipated changed circumstances. Under RESTATEMENT (SECOND) OF CONTRACTS § 89, followed in many jurisdictions, a promise modifying a duty under a contract not fully performed on either side is binding even if not supported by consideration, if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made.

If a court applies the rule in Restatement § 89, the critical issues will be whether the modification was in fact “fair and equitable” and whether it can be justified in light of unanticipated circumstances. In many cases in which modifications have been upheld, a party encountered difficulties or burdens in performing far beyond what was knowingly bargained for in the original contract, with the result bordering on impracticability, such as having to excavate solid rock instead of soft dirt, or having to remove garbage far in excess of the amounts contemplated. The conservatory would argue that the business's performance difficulties were not of this sort at all—nothing about repairing the pipe organ itself was any different from or more difficult than originally contemplated, except that the business itself encountered financial distress unrelated to its burdens in performing its obligations under these contracts.

Even if the business satisfies that element of the rule in Restatement § 89, the business must also demonstrate that the circumstances that gave rise to the need to modify the contract were “unanticipated” at the time the original contract was made. Here, the facts suggest that when the business entered into the original contract, it expected that the price paid by the conservatory would enable it to perform. However, any evidence that the business knew or had reason to know at the time of execution that it would need more money from the conservatory to be able to perform would mean that the request to modify was not “unanticipated.”

[NOTE: Some cases, such as *Schwartzreich v. Bauman-Basch, Inc.*, 231 N.Y. 196, 131 N.E. 887 (1921), find that if the parties mutually agreed to rescind the original contract and then, after rescission, entered into an entirely new contract for a higher price, the new contract is supported by consideration. There is no evidence that such a rescission followed by a new contract took place here.]

### ***Point Two (45%)***

The business can recover the additional \$40,000 for the new organ because no consideration is required under Article 2 of the UCC for good-faith contract modifications.

The contract to buy a new organ is a contract for the sale of goods and therefore is governed by Article 2 of the Uniform Commercial Code. UCC § 2-102. Under Article 2, unlike the common law, an agreement modifying a contract needs no consideration to be binding. UCC § 2-209(1). Section 2-209(1) thus obviates the preexisting duty rule entirely in contracts for the sale of goods.

Even though consideration is not required, modifications governed by § 2-209 must satisfy the obligation of good faith imposed by the UCC. UCC § 1-304. *See also* Official Comment 2 to UCC § 2-209. Good faith means “honesty in fact and the observance of reasonable commercial standards of fair dealing.” UCC § 1-201(b)(20). In this context, the obligation of good faith means that “[t]he effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a ‘modification’ without legitimate commercial reason is ineffective as a violation of the duty of good faith.” Official Comment 2 to

## Contracts Analysis

UCC § 2-209. Here, because the business's financial reversals were serious and apparently unanticipated at the time that the business entered into the contract with the conservatory, and commitment of the extra money was needed to enable the business to perform, a court would likely find that the business acted in good faith. Thus, a court would likely uphold the enforceability of the conservatory's promise to pay the additional \$40,000.

### ***Point Three (10%)***

The conservatory is unlikely to be able to defend against enforcement of its promises to pay additional money under the theory of economic duress, because the business probably did not make an improper threat.

Under the common law of contracts, parties may raise the defense of duress. This common law defense also applies to contracts governed by UCC Article 2. *See* UCC § 1-103(b).

A contract is voidable on the ground of economic duress by threat when it is established that a party's manifestation of assent is induced by an improper threat that leaves the party no reasonable alternative. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175. *See also, e.g., Austin Instrument Inc. v. Loral Corp.*, 272 N.E.2d 533 (N.Y. 1971) (a threat to withhold essential goods can constitute duress). In order to void its agreement to pay the additional sum because of economic duress, the conservatory must demonstrate that (1) the business made a threat to the conservatory, (2) the threat was "improper" or "wrongful," (3) the threat induced the conservatory's manifestation of assent to the modification, and (4) the threat was sufficiently grave to justify the conservatory's assent.

Here, it appears that three of the four elements are likely satisfied. The business plainly made a threat. Moreover, the threat induced the conservatory's assent to the modification, and the threat was sufficiently grave to justify that assent. If the conservatory had not agreed to pay the business the extra amounts, the conservatory would have lost its entire \$325,000 investment. In light of this potential loss, a court could easily conclude that the conservatory had no reasonable alternative.

However, the business has a strong argument that its threat (indicating that it would breach the contracts unless the prices were increased) was not wrongful or improper, but was instead nothing more than a communication of the reality of its own perilous situation to the conservatory.

A mere threat to breach a contract is not, in and of itself, improper so as to support an action of economic duress or business compulsion. Something more is required, such as a breach of the duty of good faith and fair dealing, as was present in *Austin Instrument Inc.*, *supra*. Because the business could not perform the original contract without the requested modification, the economic duress claim for the conservatory would likely fail for much the same reason that the business would be able to enforce the modification. At the time the modification was requested, the business was not trying to extort a price increase because of the conservatory's vulnerability, but instead was simply stating the reality that the business could not perform without more money.

# **FAMILY LAW ANALYSIS**

**(Family Law III.B., D. & G.)**

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## **ANALYSIS**

### **Legal Problems:**

- (1)(a) Does the State A court have jurisdiction to modify the State B child support order?
- (1)(b) Does the State A court have jurisdiction to modify the marital-residence-sale-proceeds provision of the State B property-division decree?
- (2)(a) May a child support order be modified retroactively?
- (2)(b) May a child support order be modified prospectively based on a change of employment with a lower salary?
- (2)(c) May a property-division order be modified after entry of a divorce decree?

## **DISCUSSION**

### **Summary**

The State A court may exercise personal jurisdiction over the wife because she was personally served in State A. However, subject-matter jurisdiction over the interstate modification of child support is governed by the Uniform Interstate Family Support Act (UIFSA). Under UIFSA, State A does not have jurisdiction to modify the order for the daughter's support because the wife is still a resident of State B. UIFSA, on the other hand, does not govern property distributions, and thus a State A court is not precluded from hearing the husband's petition to modify the marital-residence-sale-proceeds provision of the divorce decree.

A child support order may not be modified retroactively. A child support order may be modified prospectively based on a substantial change in circumstances. Courts agree that a significant decrease in income is a substantial change in circumstances. All states treat voluntary income reductions differently than involuntary reductions but employ different approaches for evaluating the impact of a voluntary reduction. Whether the husband could obtain prospective modification of the child support order depends on which approach is applied.

A property-division order is not subject to post-divorce modification based on a change in circumstances. Thus, the husband may, in some states, obtain prospective modification of the order for the daughter's support, but he may not obtain modification of the marital-residence-sale-proceeds provision.

### ***Point One(a) (25%)***

Personal jurisdiction over a nonresident respondent does not confer subject-matter jurisdiction over child support modification. Under UIFSA, a State A court may not modify a child support order issued by a State B court when, as here, the child or either parent continues to reside in State B, the jurisdiction that issued the child support order.

The State A court may exercise personal jurisdiction over the wife. The wife was personally served in State A, and a state may exercise jurisdiction based on in-state personal service. *See*

## Family Law Analysis

*Burnham v. Superior Court*, 495 U.S. 604 (1990). But personal jurisdiction over the wife is not enough to give a State A court jurisdiction to modify the State B support order.

The interstate enforcement and modification of child support is governed by the Uniform Interstate Family Support Act (UIFSA), which has been adopted by all states. Under UIFSA, the state that originally issued a child support order (here, State B) has continuing, exclusive jurisdiction to modify the order if that state remains the residence of the obligee, the child, or the obligor and all parties do not consent to the jurisdiction of another forum. *See* UIFSA § 205. *See also* UIFSA § 603 (“A tribunal of this State shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction.”). The wife and daughter continue to reside in State B, and the wife has not consented to the jurisdiction of another forum. Thus, a State A court does not have jurisdiction to modify the State B child support order.

[NOTE: Examinees who do not discuss personal jurisdiction but fully discuss UIFSA may receive full credit.]

### ***Point One(b) (15%)***

UIFSA does not apply to disputes over property division. Thus, the State A court may exercise jurisdiction over the husband’s petition to modify the marital-residence-sale-proceeds provision of the State B divorce decree because it has personal jurisdiction over the wife.

The State A court in which the husband brought his action has jurisdiction to adjudicate domestic relations issues. The husband’s petition to modify the property settlement is a domestic relations issue. The courts of State A may exercise personal jurisdiction over the wife because she was personally served in State A. *See Burnham v. Superior Court*, 495 U.S. 604 (1990); *see* Point One(a).

UIFSA does not apply to divorce property-division disputes. Thus, although a State A court may not adjudicate the husband’s petition to modify his child support obligations, it may adjudicate his property-division claims. (Even though the court has jurisdiction, it may not modify the property-division award on the merits. *See* Point Two(c).)

### ***Point Two(a) (20%)***

A child support order may not be modified retroactively.

State courts have long held that obligations to pay child support ordinarily may not be modified retroactively. “If the hardship is particularly severe, the courts sometimes devised a way to protect the obligor, but in most instances the courts hold that retroactive modification of this kind is beyond their power and indeed the governing statute may so provide.” HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONSHIPS IN THE UNITED STATES* 725 (2d ed. 1987).

Federal law now goes further and *requires* the states, as a condition of federal child-support funding, to adopt rules that absolutely forbid retroactive modification of the support obligation. *See* 42 U.S.C. § 666(a)(9)(C). The states have adopted rules consistent with the federal requirements.

### ***Point Two(b) (25%)***

It is unclear whether the husband could obtain prospective downward modification of his child support based on his voluntary acceptance of a job with a lower salary.

Prospective modification of a child support order is typically available only when the petitioner can show a substantial change in circumstances. *See* ROBERT E. OLIPHANT & NANCY VER

STEEGH, FAMILY LAW 213–15 (3d ed. 2010). A significant decrease in income is typically viewed as a substantial change.

However, when a parent seeks to modify a child support obligation because he has *voluntarily* reduced his income, a court will not modify the obligation based solely on the income loss. Some courts refuse to modify whenever the income shift was voluntary. *See, e.g., Aguiar v. Aguiar*, 127 P.3d 234 (Idaho Ct. App. 2005). Others look primarily to the petitioner’s intentions and permit downward modification if he has acted in good faith. *See, e.g., In re Marriage of Horn*, 650 N.E.2d 1103 (Ill. App. Ct. 1995). Many courts use a multifactor approach. *See OLIPHANT & VER STEEGH, supra*, 217–18.

Here, there is no question that the husband’s loss of income was voluntary. In a jurisdiction in which voluntary income reduction bars support modification, the husband’s petition would be denied.

In a jurisdiction employing a good-faith or multifactor approach, it is possible, but not certain, that the husband could obtain downward modification. The evidence supports the husband’s good faith: his change in employment appears to be based on his new job’s greater responsibilities and better promotion possibilities. In a jurisdiction using a multifactor approach, the court would likely also consider the impact of such a shift on the daughter, the likely duration of the husband’s income loss, and the likelihood of a promotion that would ultimately inure to the daughter’s benefit. Thus, on these facts, it is possible, but by no means certain, that the husband could prospectively obtain downward modification of his child support obligation to his daughter.

***Point Two(c)(15%)***

**A divorce property-division award is not subject to modification.**

A support order is aimed at meeting the post-divorce needs of the supported individual. Because the future is unpredictable, courts are empowered to modify a support award to take account of changed circumstances that may occur during the period in which support is paid.

By contrast, a property-distribution award divides assets of the marriage based on the equities at the time of divorce. Because the past can be ascertained, a property-division award is not subject to post-divorce modification. *See HARRY A. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS, AND QUESTIONS* 691 (6th ed. 2007).

Here, the husband is seeking modification of a property-division award with respect to an asset owned by the parties at the time of divorce. Thus, the husband may not obtain a modification of the marital-residence-sale-proceeds provision of the divorce decree based on his reduced income.

# **FEDERAL CIVIL PROCEDURE ANALYSIS**

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**(Federal Civil Procedure III.; IV.C.)**

## **ANALYSIS**

### **Legal Problems**

- (1) Is the logging company entitled to join this action as a matter of right?
- (2)(a) May the nonprofit organization obtain a temporary restraining order to stop the USFS from issuing a logging permit?
- (2)(b) May the nonprofit organization obtain a preliminary injunction to stop the USFS from issuing a logging permit during the pendency of the action?

## **DISCUSSION**

### **Summary**

The logging company is entitled to intervene in this action as a matter of right because it has an interest in the property or transaction that is the subject of the action and is so situated that its interest may be impaired or impeded as a practical matter if the action goes forward without it. The logging company's interest is not adequately represented by the USFS's presence in the lawsuit.

The nonprofit organization may seek a temporary restraining order (TRO), followed by a preliminary injunction, to prevent the USFS from issuing a logging permit pending the outcome of the action. The nonprofit is likely to obtain a TRO if it can demonstrate a risk of immediate and irreparable injury. The nonprofit is also likely to obtain a preliminary injunction if it can demonstrate a significant threat of irreparable harm and a likelihood of success on the merits of its National Environmental Policy Act (NEPA) claim.

### ***Point One (50%)***

Rule 24(a) of the Federal Rules of Civil Procedure requires federal courts to allow a person to intervene in an action as a matter of right if the person a) is interested in the property or transaction that is the subject of the action, b) is so situated that its interest may be impaired or impeded if the litigation goes forward without it, and c) is not adequately represented by existing parties. Here, the logging company likely meets all three requirements and should be allowed to intervene as a matter of right.

Rule 24 of the Federal Rules of Civil Procedure governs intervention, the process by which a non-party to an action may join the litigation. Under Rule 24(a) (intervention of right), a person must be permitted to intervene if three conditions are met: (1) the movant "claims an interest relating to the property or transaction that is the subject of the action," (2) the movant "is so situated that disposition of the action may as a practical matter impair or impede the movant's ability to protect its interest," and (3) "existing parties" do not "adequately represent [the movant's] interest." FED. R. CIV. P. 24(a). The three requirements for intervention of right are often "very interrelated." 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1908, at 297 (2007 & 2011 Supp.).

Here, the court should find that the logging company meets this test. First, the logging company has a strong interest in the property or transaction that is the subject of this action. The USFS has accepted the logging company's bid, and the logging company is merely awaiting issuance of a logging permit to begin logging. The nonprofit organization is seeking to prevent this logging. The logging company therefore has a strong, direct, and substantial interest in the subject matter of the lawsuit and in having its winning bid honored and a logging permit issued. *See, e.g., Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (stating that "[t]imber companies have direct and substantial interests in a lawsuit aimed at halting logging"); *see also Natural Resources Defense Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1343–44 (10th Cir. 1978) (holding that applicants whose license renewals were pending had Rule 24(a)(2) interests where the lawsuit sought to halt the license-issuing process pending preparation of environmental impact statements). *See generally* 7C WRIGHT ET AL., *supra*, § 1908.1, at 309 ("If there is a direct substantial legally protectable interest in the proceedings, it is clear that this requirement of the rule is satisfied.").

Second, the logging company's interest in receiving a logging permit may well be impaired, as a practical matter, by the outcome of the lawsuit. If the USFS loses the lawsuit, it will have to prepare an environmental impact statement before issuing the logging company's permit. This will, at a minimum, delay the logging company's ability to exercise its rights and may, in the long run, mean that no logging permit is ever issued. Intervention of right is not limited to those that would be legally bound as a matter of preclusion doctrine. *Id.* § 1908.2, at 368. Rather, "[t]he rule is satisfied whenever disposition of the present action would put the movant at a practical disadvantage in protecting its interest." *Id.* § 1908.2, at 369. Here, that condition is easily satisfied. *See Kleissler*, 157 F.3d at 972 ("Timber companies have direct and substantial interests in a lawsuit aimed at halting logging . . .").

Given that the logging company has an interest that may be impaired by disposition of the action, it should be allowed to intervene unless the court is persuaded that the USFS adequately represents the logging company's interest. *See* Rule 24(a)(2); 7C WRIGHT ET AL., *supra*, § 1909. Here, it could be argued that the USFS adequately represents the logging company's interest because the USFS presumably wants the court to uphold its development plan and allow it to proceed with issuance of the logging permit, which is the same relief that the logging company would seek. However, whether representation is truly adequate depends upon "[a] discriminating appraisal of the circumstances." 7C WRIGHT ET AL., *supra*, § 1909, at 440. Although both the government and the logging company wish to avoid the preparation of an environmental impact statement, their interests are distinct. The USFS's interest is proper management of the national forest system, while the logging company's interest is making a profit from logging the 5,000-acre tract. The USFS's handling of the litigation is likely to be affected by a variety of policy concerns and political considerations that have nothing to do with the logging company's purely economic interest in securing the right to cut trees in the Scenic National Forest. *See, e.g., Kleissler*, 157 F.3d at 973–74 ("[T]he government represents numerous complex and conflicting interests in matters of this nature. The straightforward business interests asserted by intervenors here may become lost in the thicket of sometimes inconsistent governmental policies.").

[NOTES: (1) Examinees who mistakenly analyze the logging company's case for joinder under the related but incorrect Rule 19 "Required Joinder of Parties" may receive credit. Rule 19 allows existing parties to demand joinder of non-parties (or seek dismissal of the case if they can't get it). There is a close relationship between Rule 24 and Rule 19 and both contain a similar standard for determining when "interested" third parties are "entitled" or "required" to be in the lawsuit. Indeed, the two prongs of the Rule 24 intervention test that are discussed above

## Federal Civil Procedure Analysis

are nearly identical to the two prongs of the Rule 19(a) required joinder test. Examinees who discuss and apply the test should receive credit even if they cite Rule 19 rather than Rule 24.

(2) Examinees may discuss permissive joinder. Although permissive joinder is a possibility here, the question asks only whether the logging company can join the action as a matter of right, and a permissive joinder analysis is not responsive to the question. To the extent an examinee discusses permissive joinder, the analysis will focus on whether the logging company “has a claim or defense that shares with the main action a common question of law or fact.” FED. R. CIV. P. 24(b)(1)(B). The district court also “must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” FED. R. CIV. P. 24(b)(3). On our facts, the logging company’s claim for the issuance of a logging permit would certainly share common questions of law and fact with the USFS’s defense against the nonprofit’s claim. There are no facts suggesting that the logging company’s presence would unduly delay or otherwise prejudice adjudication of the original action. Thus, the district court would have discretion to permit the logging company to intervene even if it denied intervention of right.]

### ***Point Two(a) (25%)***

The nonprofit organization could seek and would likely obtain a temporary restraining order to stop the USFS from issuing a logging permit, pending a hearing on an application for a preliminary injunction.

The first type of interim relief the nonprofit could seek to stop the USFS from issuing a logging permit to the logging company is a temporary restraining order (TRO) prohibiting the USFS from issuing the logging permit. A TRO can be issued without notice to the adverse party, but only in limited circumstances and only for a limited time. FED. R. CIV. P. 65(b). To secure a TRO without notice, the nonprofit would need to submit an affidavit containing specific facts that demonstrate a risk of “immediate and irreparable injury” if a permit is issued. FED. R. CIV. P. 65(b)(1). In deciding whether to grant a TRO, courts will also consider the same factors that are relevant in deciding whether to grant a preliminary injunction (e.g. the moving party’s likelihood of success on the merits, the balance of hardships, and the public interest). *See* Point Two(b), *infra*. The TRO would last only long enough for the court to consider and resolve a request by the nonprofit for a preliminary injunction, but no longer than 14 days (unless the court extends it for good cause or the adverse party consents to an extension). In addition, bond is required.

Here, the court is likely to grant the nonprofit’s request. The nonprofit could plausibly claim that cutting down 5,000 acres of old-growth forest in an area that is home to the highest concentration of wildlife in the western United States would have “an immediate and irreparable” adverse impact on the environment and cause irreparable harm to the nonprofit’s interest in preserving and protecting natural resources, including wildlife habitat.

### ***Point Two(b) (25%)***

The nonprofit could also seek, and would likely obtain, a preliminary injunction to stop the USFS, which is likely to be granted if the nonprofit’s claim that the USFS violated NEPA has a strong basis in fact and law.

Because the TRO would be temporary, the nonprofit would need to move for a preliminary injunction to prevent the USFS from issuing a logging permit throughout the pendency of the litigation. Preliminary injunctions are injunctions that seek to “protect [the] plaintiff from

irreparable injury and to preserve the court’s power to render a meaningful decision after a trial on the merits.” 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2947, at 112 (2013). Rule 65 of the Federal Rules of Civil Procedure sets out the procedural requirements for preliminary injunctions. Preliminary injunctions may be granted only upon notice to the adverse party, FED. R. CIV. P. 65(a)(1), and only if the movant “gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” FED. R. CIV. P. 65(c).

While Rule 65 sets out the procedural requirements for preliminary injunctive relief, it does not specify the substantive grounds upon which it may be granted. The court’s discretion in ruling upon a motion for a preliminary injunction “is exercised in conformity with historic federal equity practice.” 11A WRIGHT ET AL., *supra*, § 2947, at 114. The court typically considers four factors:

- (1) the significance of the threat of irreparable harm to the plaintiff if the injunction is not granted,
- (2) the balance between this harm and the injury that granting the injunction would inflict on the defendant,
- (3) the probability that the plaintiff will succeed on the merits, and
- (4) the public interest.

*Id.* § 2948, at 122–24; *accord Habitat Educ. Center v. Bosworth*, 363 F. Supp. 2d 1070, 1088 (E.D. Wis. 2005). The most important of these factors is the risk of irreparable harm to the plaintiff. 11A WRIGHT ET AL., *supra*, § 2948.1, at 129. If the plaintiff has an adequate remedy at law (e.g., if money damages can compensate the plaintiff for its loss), then a preliminary injunction will be denied. *Id.* § 2948.1.

Here, a court would likely conclude that the potential for environmental damage to the forest creates a significant threat of irreparable harm. “[E]nvironmental injury is often irreparable. . . . Courts have recognized that logging such as would occur [here] can have long-term environmental consequences and thus satisfy the irreparable injury criterion.” *Habitat Educ. Center*, 363 F. Supp. 2d at 1089 (citing *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (noting that the imminent and continuing logging activities presented “evidence of environmental harm . . . sufficient to tip the balance in favor of injunctive relief”)); *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1382 (9th Cir. 1998) (stating that “[t]he old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce”) (internal citation omitted)); *see also* 11C WRIGHT ET AL., *supra*, § 2948.1, at 151 (noting that “a preliminary injunction has been issued to prevent harm to the environment”).

The second factor, the balance between the harm to the plaintiff and the harm the defendant will suffer if the injunction is issued, also appears to support issuance of a preliminary injunction here. The USFS will have to wait before it can develop the Scenic National Forest, and the logging company may lose money if the delay is prolonged. These economic harms could be compensated monetarily if an injunction is issued inappropriately. Where “an injunction bond can compensate [the] defendant for any harm the injunction is likely to inflict, the balance should be struck in favor of [the] plaintiff.” *Id.* § 2948.2, at 192. *See also Habitat Educ. Center*, 363 F. Supp. 2d at 1089 (stating that “the relative absence of harmful effects on the Forest Service weighs in favor of granting the injunction”).

The third factor is the likelihood that the plaintiff will prevail on the merits. Although there is limited information concerning the merits of the action, the nonprofit alleges that the federal statute (NEPA) requires an environmental impact statement and further states that the USFS created *no* environmental impact analysis or statement at all. Assuming that those

## Federal Civil Procedure Analysis

allegations are correct, it seems plausible to conclude that the nonprofit will be able to show a likelihood of success on the merits.

Finally, courts deciding whether or not to issue preliminary injunctive relief are to consider the public interest. “Focusing on this factor is another way of inquiring whether there are policy considerations that bear on whether the order should issue.” 11C WRIGHT ET AL., *supra*, § 2948.4, at 214. If the court concludes that the nonprofit is likely to succeed on its NEPA claim because the USFS wrongfully failed to conduct an environmental impact assessment, it is likely to find that the public interest would be served by restraining the USFS from proceeding with logging in a national forest. *See Heartwood, Inc. v. U.S. Forest Service*, 73 F. Supp. 2d 962, 979 (S.D. Ill. 1999), *aff’d on other grounds*, 230 F.3d 947 (7th Cir. 2000) (“violations by federal agencies of NEPA’s provisions as established by Congress harm the public as well as the environment”).

Thus, a court is very likely to grant a preliminary injunction if it concludes that the nonprofit has a significant likelihood of success on the merits.

## **EVIDENCE ANALYSIS**

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(Evidence I.D.; II.A. & C.)

### **ANALYSIS**

#### **Legal Problems**

(1) Under what circumstances can evidence of prior convictions be used to impeach a witness's credibility in a civil case?

(1)(a) May the inmate's credibility be impeached by evidence of a 12-year-old felony drug conviction, if he was released from prison 9 years ago?

(1)(b) May the inmate's credibility be impeached by evidence of an 8-year-old misdemeanor perjury conviction that was punishable by 1 year in jail, if he pleaded guilty and was sentenced only to pay a \$5,000 fine?

(1)(c) May the inmate's credibility be impeached by evidence of a 7-year-old sexual assault conviction if the inmate is still serving a 10-year prison sentence and the victim was his 13-year-old daughter?

(2)(a) May the guard's credibility be impeached by cross-examination regarding specific instances of misconduct (i.e., lying on his résumé) relevant to credibility?

(2)(b) May the guard's credibility be impeached by admission of extrinsic evidence (his résumé and academic transcript) offered to prove specific instances of misconduct relevant to credibility?

### **DISCUSSION**

#### **Summary**

Under the Federal Rules of Evidence, witnesses can be impeached with evidence of prior convictions and/or specific instances of misconduct. Whether evidence of prior convictions should be admitted to impeach generally depends on the nature of the crime, the amount of time that has passed, and (only in criminal cases) whether the "witness" is the defendant. FED. R. EVID. 609(a).

In this civil case, evidence of the inmate's conviction for distribution of marijuana should be admitted to impeach the inmate because he was convicted of a felony and was released from prison fewer than 10 years ago. FED. R. EVID. 609(a)(1). Credibility is critically important in this case because the jury will hear conflicting testimony from the two disputing parties and there were no other eyewitnesses to the altercation. Under Rule 609(a)(1), the inmate's conviction should be admitted because it has some bearing on his credibility and its probative value is not substantially outweighed by concerns of unfair prejudice, confusion, or delay. *Id.*

Evidence of the inmate's misdemeanor conviction for perjury must be admitted because the crime "required proving—or the witness's admitting—a dishonest act or false statement" by the inmate. FED. R. EVID. 609(a)(2).

## Evidence Analysis

Evidence of the inmate’s felony conviction for sexual assault should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice to the inmate based on the heinous nature of the crime. FED. R. EVID. 609(a)(1). In the alternative, the judge could limit the evidence relating to this conviction by excluding details of the inmate’s crime.

In all civil (and criminal) cases, witnesses can also be impeached with evidence of specific instances of prior misconduct that did not result in a conviction. FED. R. EVID. 608(b). Pursuant to Rule 608(b), misconduct probative of untruthfulness can be inquired into on cross-examination but cannot be proved through extrinsic evidence. *Id.* Thus, the inmate’s counsel should be permitted to cross-examine the guard regarding the false statement in the guard’s résumé. However, extrinsic evidence of the guard’s misconduct (i.e., the guard’s authenticated résumé and transcript from the local college) should not be admitted, even if the guard denies wrongdoing or refuses to answer cross-examination questions about these matters. *Id.*

### ***Point One (10%)***

The Federal Rules of Evidence permit impeachment of witnesses with evidence of prior convictions.

Whether convictions should be admitted to impeach generally depends on the nature of the crime, the amount of time that has passed, and (only in criminal cases) whether the “witness” is the defendant. FED. R. EVID. 609(a). Under Rule 609(a), evidence of prior convictions may be admitted for the purpose of “attacking a witness’s character for truthfulness.” *Id.*

There are two basic types of convictions that can be admitted for the purpose of impeachment:

- (1) convictions for crimes “punishable by death or by imprisonment for more than one year” (which generally correlates to “felonies”), FED. R. EVID. 609(a)(1); and
- (2) convictions “for any crimes regardless of the punishment . . . if the court can readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement.” FED. R. EVID. 609(a)(2).

Pursuant to Rule 609(a)(1), in civil cases, the admission of evidence of a felony conviction is “subject to Rule 403 [which says that a court may exclude relevant evidence if its probative value is substantially outweighed by other factors].” FED. R. EVID. 609(a)(1). However, Rule 403 does not protect the witness against admission of prior convictions involving dishonesty—which *must* be admitted by the court. FED. R. EVID. 609(a)(2).

Finally, Federal Rule of Evidence 609(b) contains the presumption that a conviction that is more than 10 years old, or where more than 10 years has passed since the witness’s release from confinement (whichever is later), should *not* be admitted unless “its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect” and the proponent has provided the adverse party with reasonable written notice. FED. R. EVID. 609(b).

### ***Point One(a) (25%)***

The court should admit evidence of the inmate’s 12-year-old felony marijuana distribution conviction.

The inmate’s conviction for marijuana distribution was for a felony punishable by imprisonment for more than one year. *See* FED. R. EVID. 609(a)(1). Moreover, although the conviction was 12 years ago, the 10-year time limit of Rule 609(b) is not exceeded because that time limit runs

from the date of either “the witness’s conviction or release from confinement for it, whichever is later.” FED. R. EVID. 609(b). Because the inmate served three years in prison, he was released from confinement nine years ago.

However, pursuant to Rule 609(a)(1), the admission of felony convictions to impeach a witness in a civil case is “subject to Rule 403.” FED. R. EVID. 609(a)(1). Neither Rule 609(a) nor the advisory committee notes specify which factors courts should consider when balancing the probative value of a conviction against the dangers identified in Rule 403 (which include (1) unfair prejudice, (2) confusion of the issues, (3) misleading the jury, (4) waste of time or undue delay, and (5) needless presentation of cumulative evidence). FED. R. EVID. 403.

In this case, credibility is very important because the evidence consists primarily of the testimony of the disputing parties and there were no other eyewitnesses to the altercation. This enhances the probative value of any evidence bearing on the inmate’s credibility. A court is likely to conclude that the inmate’s prior felony drug conviction is relevant to his credibility. *See, e.g., United States v. Brito*, 427 F.3d 53, 64 (1st Cir. 2005) (“Prior drug-trafficking crimes are generally viewed as having some bearing on veracity.”). Although the probative value of any conviction diminishes with age, *see, e.g., United States v. Brewer*, 451 F. Supp. 50, 53 (E.D. Tenn. 1978), the inmate’s ongoing problems with the law suggest that he has continued (and even escalated) his criminal behavior over the past nine years. The court should admit this evidence because its probative value is not substantially outweighed by any Rule 403 concerns. Specifically, any prejudice to the inmate would be slight because the conviction is unrelated to the altercation at issue and the conviction was not for a heinous crime that might inflame the jury.

[NOTE: Whether an examinee identifies the jury instruction as containing a “conclusive” or “mandatory” presumption is less important than the examinee’s analysis of the constitutional infirmities.]

***Point One(b) (15%)***

The court must admit evidence of the inmate’s eight-year-old misdemeanor conviction because perjury is a crime of dishonesty.

Rule 609(a)(2) provides that evidence of a criminal conviction “must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement.” FED. R. EVID. 609(a)(2). The inmate’s conviction for perjury would have necessarily required proving that the inmate engaged in an act of dishonesty. This conviction occurred within the past 10 years, so it “*must* be admitted” because, in contrast to Rule 609(a)(1) (discussed in Point One(a)), admission under Rule 609(a)(2) is mandatory and not subject to Rule 403.

***Point One(c) (20%)***

The court should exclude evidence of the inmate’s seven-year-old felony sexual assault conviction because the probative value of this evidence is substantially outweighed by the danger of unfair prejudice. In the alternative, the details of the prior conviction could be excluded.

The inmate’s conviction for felony sexual assault was seven years ago, and he has not yet been released from incarceration, so Rule 609(a) but not 609(b) is applicable here. FED. R. EVID. 609(a). This conviction is therefore admissible to impeach the inmate, unless its probative value is substantially outweighed by the danger of unfair prejudice or any other Rule 403 concern. *Id.*

## Evidence Analysis

Sex crimes are generally *not* considered relevant to credibility, *see Hopkins v. State*, 639 So. 2d 1247, 1254 (Miss. 1993), so the probative value of this conviction is relatively low. Moreover, the heinous nature of the inmate’s crime (sexual assault on his daughter) makes the danger of unfair prejudice to the inmate very high. Thus, the court should exclude evidence of the conviction because it was for a heinous offense that is likely to inflame the jury and it has little bearing on credibility. *See, e.g., United States v. Beahm*, 664 F.2d 414, 419 (4th Cir. 1981).

As an alternative to excluding this evidence, the judge could minimize the unfair prejudice to the inmate by permitting limited cross-examination but refusing to allow specific questions about the nature of the inmate’s conviction. For example, a court could limit cross-examination to the fact that the inmate was convicted of a “felony” or perhaps that he was convicted of a “sexual assault” without identifying the victim. However, because evidence of the inmate’s prior convictions can be admitted solely for the purpose of enabling the jury to assess his credibility and because his two earlier convictions should have already been admitted, the court should exclude all evidence of the felony sexual assault conviction.

### ***Point Two(a) (15%)***

The court should permit the inmate’s counsel to cross-examine the guard regarding the false statement in his résumé because the guard’s misconduct bears on his truthfulness.

The inmate wishes to cross-examine the guard about his prior dishonest behavior—lying on his résumé—that did not involve a criminal conviction. Rule 608(b) allows witnesses to be cross-examined about specific instances of prior non-conviction misconduct probative of untruthfulness “in order to attack . . . the witness’s character for truthfulness.” FED. R. EVID. 608(b).

The court’s decision to allow cross-examination about the guard’s prior dishonest behavior depends on the probative value of such evidence balanced against the danger of unfair prejudice to the guard or any other Rule 403 concern. FED. R. EVID. 403. Here, the guard’s false statement on his résumé that he obtained a degree in Criminal Justice is highly probative of his untruthfulness because it grossly misrepresents his actual academic record, was made recently, and was made with the intent to deceive. Because the probative value of this evidence is very strong and is not substantially outweighed by any Rule 403 concerns, cross-examination of the guard on this topic should be permitted. The court may also consider it fair to permit this cross-examination of the guard on these matters, assuming that one or more of the inmate’s prior convictions have been admitted to impeach his credibility.

### ***Point Two(b) (15%)***

The court should exclude extrinsic evidence of the guard’s non-conviction misconduct, even if the guard denies wrongdoing or refuses to answer questions about the matter.

Although Rule 608(b) allows cross-examination about specific instances of prior misconduct probative of untruthfulness, “extrinsic evidence” offered to prove such misconduct is not admissible. FED. R. EVID. 608(b). The rationale for this rule is that allowing the introduction of extrinsic evidence of prior misconduct by witnesses, when these acts are relevant *only* to the witnesses’ truthfulness and not to the main issues in the case, would create too great a risk of confusing the jury and unduly delaying the trial. The court does not have discretion to admit this extrinsic evidence. *See, e.g., United States v. Elliot*, 89 F.3d 1360, 1368 (8th Cir. 1996).

Here, the inmate's counsel may cross-examine the guard about the false statement on his résumé. However, the inmate's counsel must accept the guard's response. Even if the guard denies wrongdoing or refuses to answer questions about the matter, the inmate's counsel cannot introduce the guard's résumé or the transcript from the local college to prove the guard's misconduct.

# **CORPORATIONS ANALYSIS**

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**(Corporations V.A.2.; IX.)**

## **ANALYSIS**

### **Legal Problems**

- (1) Do shareholders have the authority to amend a corporation's bylaws with respect to director nominations?
- (2) Do board-approved bylaws on a particular subject, here nomination of directors, preempt subsequent conflicting bylaw amendments by shareholders?
- (3) Is a suit challenging both management's refusal to include the proposed bylaw amendment in Mega's proxy statement and the board's amendment of the bylaws dealing with nomination of directors a direct or derivative suit?

## **DISCUSSION**

### **Summary**

The voting and litigation rights of the shareholders of Mega are subject to the provisions of the Model Business Corporations Act (MBCA).

The investor's proposed bylaw provision is not inconsistent with state law. Under the MBCA, shareholders may amend the bylaws when the amendment deals with a proper matter for the corporation's bylaws, such as procedures for nominating directors.

The Mega board's bylaw amendment does not preempt the investor's proposed bylaw provision or the Mega shareholders' power to approve it. While shareholders can limit the board's power to amend or repeal the bylaws, the board cannot limit the shareholders' power.

Whether the investor must make a demand on Mega's board depends on how the investor frames its claim. If the investor claims a violation of shareholder voting rights, the claim is direct and pre-suit demand on the board is not required. If, on the other hand, the investor claims that the directors violated their fiduciary duties by amending the bylaws to entrench themselves, the claim is derivative and a pre-suit demand is required.

### ***Point One (30%)***

Shareholders may amend the corporation's bylaws where the proposed bylaw provision relates to procedural matters typically included in the bylaws, such as the nomination of directors.

Internal affairs of the corporation, such as the conduct of shareholder meetings and election of directors, are subject to the corporate law of the state of incorporation. *See McDermott Inc. v. Lewis*, 531 A.2d 206 (Del. 1987) (applying law of jurisdiction where corporation was incorporated in case involving voting rights). This state's corporate statute is modeled on the MBCA.

Under the MBCA, "shareholders may amend . . . the corporation's bylaws." MBCA § 10.20(a). Thus, the only question is whether the bylaws can specify the procedures for shareholder nomination of directors.

The MBCA states that the bylaws “may contain any provision that is not inconsistent with law or the articles of incorporation.” MBCA § 2.06(b). In addition, the MBCA was revised in 2009 to address shareholder nomination of directors in public corporations (known as “proxy access”) and specifies that the bylaws “may contain . . . a requirement that . . . the corporation include in its [proxy materials] one or more individuals nominated by a shareholder.” MBCA § 2.06(c)(1); *see* Committee on Corporate Laws, ABA Section of Business Law, *Report on the Roles of Boards of Directors and Shareholders of Publicly Owned Corporations and Changes to the Model Business Corporations Act—Adoption of Shareholder Proxy Access Amendments to Chapters 2 and 10*, 65 BUS. LAWYER 1105 (2010).

The inclusion of director-nomination procedures in the bylaws is consistent with practice and is recognized by the Delaware courts, whose views on corporate law carry significant weight. Typically, the procedures for nomination of directors are found in the bylaws. *See* 1 COX & HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 3.12 (3d ed. 2011); *see also* 4 FLETCHER, CORP. FORMS ANN. PART III, ch. 21 (2013) (including sample bylaws that permit nomination of directors by shareholders). The Delaware Supreme Court has confirmed that the bylaws may “define the process and procedures” for director elections. *See CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008) (concluding that bylaw amendment requiring reimbursement of election expenses to certain successful shareholder nominators is “proper subject” under Delaware law).

[NOTE: The question of the proper scope of the bylaws can be answered using the more general MBCA § 2.06(b) or the 2009 MBCA revision adding § 2.06(c)(1) (adopted in CT, ME, VA). In addition, some examinees might raise the point that shareholder proposals may not compel the board to take action, such as by including shareholder nominations in the company’s proxy materials, on the theory that the “business and affairs” of the corporation are to be managed by the board. *See* MBCA § 8.01(b). Although shareholders are generally limited to adopting precatory resolutions that recommend or encourage board action, this limitation does not apply when shareholders have specific authority to take binding action on their own—such as to amend the bylaws.]

### ***Point Two (30%)***

Shareholders can amend (or repeal) board-approved bylaws. Further, shareholders can limit the board’s power to later amend and repeal a shareholder-approved bylaw.

Under the MBCA, shareholders have the power to amend the bylaws. *See* Point One. The board shares this power with the shareholders, unless (1) the corporation’s articles “reserve that power exclusively to the shareholders” or (2) “the shareholders in amending, repealing, or adopting a bylaw expressly provide that the board of directors may not amend, repeal, or reinstate that bylaw.” *See* MBCA § 10.20(b).

Shareholder-approved bylaw provisions can amend or repeal existing bylaw provisions, whether originally approved by the board or by shareholders. *See* ALAN R. PALMITER, CORPORATIONS: EXAMPLES AND EXPLANATIONS § 7.1.3 (7th ed. 2012). Thus, the Mega board’s bylaw amendment—which set more demanding thresholds for shareholder nomination of directors than the investor’s proposed bylaw provision—would be superseded (repealed) if Mega’s shareholders were to approve the investor’s proposal.

Further, a shareholder-approved bylaw generally can limit the power of the board to later amend or repeal it. *See* MBCA § 10.20(b)(2). Thus, if Mega’s shareholders approved the bylaw

provision proposed by the investor, Mega's board could not repeal the provision because it includes a "no board repeal" clause.

The revision to the MBCA in 2009 dealing with shareholder proxy access does not change this conclusion. That revision specifies that a shareholder-approved bylaw dealing with director nominations may not limit the board's power to amend, add, or repeal "any procedure or condition to such a bylaw in order to provide for a reasonable, practicable and orderly process." MBCA § 2.06(d). Thus, according to the revision, if shareholders approve a bylaw amendment that limits further board changes, the board would nonetheless retain the power to "tinker" with the bylaw to safeguard the voting process, but could not repeal the shareholder-approved bylaw. The Official Comment to MBCA § 2.06(d) makes clear that the revision is "not intended to allow the board of directors to frustrate the purpose of the shareholder-adopted proxy access . . . provision." Thus, if Mega's shareholders were to approve the bylaw provision proposed by the investor, Mega's board could only amend the provision regarding its procedures or conditions in a manner consistent with its purpose of permitting proxy access for Mega's shareholders.

[NOTE: The board's attempted interference with a shareholder voting initiative may also have been a violation of the directors' fiduciary duties. *See Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988) (finding that directors breached their fiduciary duties by amending bylaws and expanding size of board to thwart insurgent's plan to amend bylaws and seat a majority of new directors). The call, however, asks examinees to consider whether shareholders or the board have "precedence" over amending the corporate bylaws. Thus, an examinee's answer should be framed in terms of "power" and not "duty."]

### ***Point Three (40%)***

The investor need not make a demand on the board if the investor states a direct claim, such as an allegation that the board interfered with the investor's right to amend the bylaws. But the investor must make a demand on the board if the investor states a derivative claim (on behalf of the corporation), such as an allegation that the directors sought to entrench themselves by interfering with the proposed proxy access.

The MBCA generally requires that shareholders make a demand on the board of directors before initiation of a derivative suit. MBCA § 7.42 (shareholder may not bring derivative proceeding until written demand has been made on corporation and 90 days have expired). A derivative suit is essentially two suits in one, where the plaintiff-shareholder seeks to bring on behalf of the corporation a claim that vindicates corporate rights, usually based on violation of fiduciary duties. PALMITER, *supra*, § 18.1.1 (6th ed. 2009). The demand permits the board to investigate the situation identified by the shareholder and take suitable action. No demand on the board is required, however, if the shareholder brings a direct suit to vindicate the shareholder's own rights, not those of the corporation.

Is the suit brought by the investor derivative or direct? The MBCA defines a "derivative proceeding" as one brought "in the right of a domestic corporation." MBCA § 7.40(1). Thus, the answer to how the investor's suit should be characterized turns on what rights the investor seeks to vindicate. If the investor frames its claim as one of fiduciary breach by directors—for example, for failing to become adequately informed about voting procedures or for seeking to entrench themselves in office by manipulating the voting structure to avoid a shareholder insurgency—then the suit is "derivative" and the investor must make a demand on the board. *See* MBCA Ch. 7, Subch. D Introductory Comment ("the derivative suit has historically been the principal method of challenging allegedly illegal action by management").

If, however, the investor frames its claim as one to vindicate shareholder rights, the suit is direct and no demand is required. For many courts, the direct-derivative question turns on who is injured and who is to receive the relief sought by the plaintiff-shareholders. See *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004) (characterizing a merger-delay claim as direct because delay of merger only harmed shareholders, not corporation). Thus, if the investor claims that management's refusal to include its proposed bylaw amendment in the corporation's proxy materials violates its shareholder rights to initiate corporate governance reforms, the suit will be direct. Courts have not questioned the ability of shareholders to bring direct suits challenging board action to exclude their proposed bylaw amendments from the corporation's proxy materials. See *JANA Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335 (Del. Ch. 2008) (upholding shareholder's direct challenge to board's interpretation of advance-notice bylaw); *Chesapeake Corp. v. Shore*, 771 A.2d 293 (Del. Ch. 2000) (upholding shareholder's direct challenge to actions by board that effectively prevented it from proposing bylaw amendments in contest for control).

Is the way that the investor frames its claim conclusive? Courts have permitted shareholder-plaintiffs to challenge a transaction in a direct suit, even though the same transaction could also be challenged as a fiduciary breach. See *Eisenberg v. Flying Tiger Line, Inc.*, 451 F.2d 267 (2d Cir. 1971) (permitting direct suit challenging a corporate reorganization as a dilution of shareholder voting power, even though reorganization may have involved conflicts of interest and thus constituted a fiduciary breach). Thus, the investor's choice to pursue a claim challenging the legality of management's decision to exclude the investor's proposal from the corporation's proxy materials—rather than a possible breach of fiduciary duty—is likely to be respected. See 3 COX & HAZEN, *supra*, § 15.3 (describing situations in which a claim can be framed as derivative or direct).

[NOTE: Some issues under Delaware corporate law regarding pre-suit demand are not relevant here. For example, whether the Mega directors are independent and disinterested is not relevant to the MBCA requirement of a pre-suit demand. As the Official Comment to MBCA § 7.42 points out, the MBCA's requirement of "universal demand" gives the board "the opportunity to reexamine the act complained of in the light of a potential lawsuit and take corrective action," even when the directors might be non-independent or have conflicts of interest.

Nor is it relevant to the MBCA pre-suit demand requirement that the statutory 90-day waiting period may be onerous. The first paragraph of MBCA § 7.42 requires a pre-suit demand without exception; the second paragraph of the section imposes a 90-day waiting period before a derivative suit may be brought, which can be shortened if the board rejects the demand or "irreparable injury to the corporation would result by waiting for the expiration of the 90-day period." The call, as written, asks only whether a pre-suit demand should be made and does not ask examinees to address whether the post-demand waiting period should be shortened under the "irreparable injury" standard.]







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National Conference of Bar Examiners

302 South Bedford Street | Madison, WI 53703-3622

Phone: 608-280-8550 | Fax: 608-280-8552 | TDD: 608-661-1275

e-mail: [contact@ncbex.org](mailto:contact@ncbex.org)