MEE Question 1

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

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

> *Section 11.* Any state law enforcement officer or agency that takes any individual person into custody for violation of any state law must make a reasonable investigation within five business days to ascertain whether the individual in custody was under the influence of marijuana at the time of the alleged offense. Such officers or agencies must file monthly reports with the federal Drug Enforcement Agency on the outcome of these required investigations, including the name of any individual determined to have been under the influence of marijuana at the time of his or her alleged offense.
>
> *Section 15.* No state government, state agency, or unit of local government within a state shall be eligible to receive any funding through the federal Justice Assistance Grant program unless use of marijuana is a criminal act in that state.

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

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

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

As applied to State A,

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

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

1) Please type your answer to MEE 1 below When finished with this question, click to advance to the next question.

1. Section 11

The issue is if Section 11 of the Federal Drug Abuse Prevention Act is unconstiutional as applied to State A. The precise issue is if Section 11 violates the anti-commandeering doctrine.

The anti-commandeering doctrine states that the federal government may neither force states to enact legislation or force states to enforce federal policies or programs. The anti-commandeering doctrine preserves federalism and the sovereignty of the states. The federal government may not commandeer state and local law enforcement for the purpose of carrying out federal policies. State and local law enforcement act pursuant to the sovereign authority of their states and not the federal government.

Here, Section 11 is a blatant violation of the anti-commandeering doctrine. The mandates that state law enforcement officers "must" investigate whether any person they take into custody was under the influence of marijuana. The law also mandates that state law enforcement must submit monthly reports to the federal government. These mandates are unconstitutional. They are eerily similar to the unconstitutional provisions of the Brady act which required state law enforcement officers to enforce federal gun safety regulations and background checks. The federal government may not force state law enforcement officers to compile a list of individuals suspected of being under the influence of marijuana and supplying it to the federal government.

Accordingly, Section 11 is unconstituitional because it violates the anti-commandeering doctrine by forcing State A officials to enforce a federal program.

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2. Section 15

The issue is if Section 15 of the Federal Drug Abuse PRevention Act is unconstitutional as applied to State A. The precise issue is if Section 15 is an unconstitutional exercise of Congress' spending power.

Congress has the specifically enumerated power to spend for the general welfare. Included within that power is the power to place conditions upon grants of federal money to the states. Conditions on spending will be upheld so long as: (1) the terms of the condition are related to the funds being spent; (2) the terms of the condition are unamibiguous and obvious to the states; (3) the spending being withheld if the states refuse to comply must not be so great so as to be deemed coercive; and (4) the condition must not require the states to engage in unlawful or unconstitutional behavior.

Here, Section 15 requires states to criminalize marijuana if they are to receive funding through the federal Justice Assistance Grant which is the primary source of federal assistance for state law enforcement. Here, the federal government will argue the condition is related to the purpose of the spending because marijuana cultivation, use, and distribution advances an illicit criminal market which encourages and produces secondary criminal behavior. The federal funding is designed to combat criminality, and criminalizing marijuana does just that. Furthermore, the condition is clear and unambiguous. The States know exactly what they must do to receive the federal funding. Furthermore, under the decision of Raich, nothing about the condition is unconstitutional or unlawful. There is no fundamental right to use marijuana. Finally, the government willl argue the amount of funding being withheld is not so great so as to be coercive. State A spends approximately $600 million on law enforcement in a year, and funding from the grant only comprises a mere $10 million of that funding.

State A will counter argue that the condition is unrelated to the purpose of the funding because decriminalizing marijuana will allow State A to focus its scarce resources on more serious crimes such as crimes of violence. State A will argue that it is inconsistent to deny funding to aid law enforcement entirely if law enforcement does not enforce one specific policy of the federal government. Furthermore, State A will content that $10 million is not a small figure especially in light of the fact that the grant has been in existence for several years now. Now that State A has become dependent on the funding through the federal grant, State A has started to cater its budget with the expectation of the grant money. This new condition will in effect require State A to either come up with $10 million out of pocket to cover the lost assistance or to cut $10 million worth of services in order to keep the state budget balanced. While State A's argument is somewhat compelling, the federal government likely has the better argument because, (1) the terms are clear, (2) the amount of funding withheld is a small percentage of the state's total funding for law enforcement, (3) nothing about the condition is unlawful, (4) and criminalizing marijuna will promote law enforcement agendas.

Accordingly, Section 15 of the act is likely constitutional as applied to State A.

END OF EXAM

MEE Question 2

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

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

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

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

1. Was the homeowner bound by his promise to keep his offer open for a week? Explain.

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

2) Please type your answer to MEE 2 below When finished with this question, click to advance to the next question.

Under general contract principles, an offer is made when the person receiving the offer ("offeree") would reasonably believe that the person extending the offer ("offeror") intended to be bound and that the offeree had the ability to create an enforceable contract upon acceptance. Ordinarily, an offeror may revoke his offer at any time before acceptance and revoation is effective upon reciept. An offer may revoked by express revocation, by operation of law, or by an act inconsistent with the offer (i.e., selling the subject matter of the offer to a third party) if the offeree learns of the act from a reliable source or her own observations.

At common law, an offer may be revocable if the offeror has extended an option contract. An option contract is one in which the offeree gives the offeror consideration in exchange for the offeror's promise to hold the offer open for a specified period of time. A similar doctrine under Article 2 of the UCC is the merchant's firm offer. A merchant's firm offer exists if the offeror is a merchant (one who specializes in buying and selling the goods at issue) who promised to hold an offer open for a reasonable period of time not to exceed 3 months in a signed writing. The UCC applies to transactions for the sale of goods and goods are things that are moveable at the time of contracting.

In the instant case, the parties were negotiating over the sale of a lawn mower which is a moveable thing at the time of identification of the contract. Because the lawn mower is a good, the UCC will apply to this transaction. The offeror is a homeowner, the offeree is his neighbor, and the facts do not suggest that either is a merchant in any form, particularly with respect to lawn mowers, so special provisions that apply to merchants will not be applicable here.

The Homeowner Was Not Bound By His Promise to Keep the Offer Open For a Week

The primary issue here is whether the homeowner's promise to keep the offer to sell his lawnmower for $350 open for a week is enforceable. Though the homeowner promised to keep the offer open, and may be morally obligated to do so, he has no legal duty to hold it open. His statement was an unambiguous offer to sell his lawnmower because he clearly intended to be bound if his neighbor accepted, but the neighbor rejected his initial offer and gave no consideration for homeowner to keep the offer open. Where there is no consideration, there is no option contract and the offer remains revocable at common law. Additionally, homeowner is not a merchant and the promise to hold the offer open was not in writing, so UCC's merchant's firm offer rule is inapplicable and its requirements are not met. Given that both doctrines that can create a legal obligation to hold an offer open for a specified period of time fail on the facts given, the homeowner was not bound by his promise to keep the offer open for a week.

The Neighbor's Statement of Acceptance Did Not Create a Contract with the Homeowner

The primary issue here is whether the homeowner revoked his offer before the neighbor accepted it. An acceptance is generally effective on dispatch, so neighbor's statement constituted an acceptance when it was spoken. An offer cannot be accpeted once it is revoked, so timing is key in this case. The homeowner entered into a contract with acquaintance to sell homeowner's lawn mower for $375, an act that is wholly inconsistent with his offer to sell the same lawnmower to neighbor for $350. Neighbor learned of the inconsistent act from acquaintance and the facts do not indicate whether acquaintance is a reliable source or not. However, acquaintance went a step further when neighbor questioned his statement and showed neighbor the signed document in which

homeowner agreed to sell his lawn mower. A contract signed by homeowner is an extremely reliable source and puts neighbor on notice of the inconsistent act; the homeowner's offer was effectively revoked once neighbor became aware that homeowner sold the lawn mower to acquaintance.

Thus, the homeowner's offer was revoked before the neighbor called him and there was nothing for the neighbor to accept. Neighbor's statement was too late to operate as an acceptance or create a legally enforceable contract. Neighbor has no rights to the lawn mower, nor any recourse against homeowner.

END OF EXAM

MEE Question 3

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

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

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

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

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

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

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

1. Is the expansion project a nonconforming use? Explain.

2. Assuming that the expansion project does not violate the zoning classification, is the bank obligated to disburse further funds? Explain.

3. Does the mechanic's lien have priority, in whole or in part, over the bank's mortgage? Explain.

3) Please type your answer to MEE 3 below When finished with this question, click to advance to the next question.

1. Whether the expansion project is a nonconforming use.

Local governments have zoning authority to establish separate zones for individual purposes such as "commercial" or "residential." The government's zoning must be reasonably related to legitimate government interests. Additionally, citizens must be able to apply for variances to the zoning if they can show that without a variance they will lose the economic value of a preexisting nonconforming use of the land in question.

Here, in 2017 the local zoning board passed an ordinanace that rezoned the district in which Man's convenience store was located from "light commercial" to "residential." The zoning ordinance contained language that protected existing nonconforming uses. As such, Man does not need to apply for a variance for his preexisting nonconforming use, as he is "grandfathered" in.

Whether the expansion project is then a nonconforming use will depend upon the factual circumstances. Here, the expansion is not changing the use of the land. It will still be used as a convenience store, it will just be a larger store with a small dining area, just like the other convenience stores in the area. This dining area will not change the nature of the business or the use of the land. As such, it is not likely that the expansion will be found to be an illegal nonconforming use, and does not violate teh zoning calssification, but instead will be a furtherance of the already protected nonconforming use of the land that existed at the time of the rezoning.

2. Is Bank obligated to disburse further funds?

When a loan is obtained from a lender, and secured by a mortgage, and the loan reserves the right to disburse future funds based upon the lender's discretion, then the lender may exercise this discretion to deny future payments that might not be protected under the mortgage security. Here, in early 2018, Man obtained a $200,000 loan commitment from a local bank. The loan agreement detailed that the bank woudl disburse funds at such times and in such amounts as the bank determined to be appropriate if, in the bank's good-faith judgment, there was "satisfactory progress" being made on the project. This was a valid safeguard on their investment. The bank wanted to make sure that their interest was protected, and that they were not lending money that was not protected.

The bank initially disbursed $50,000 to Man, and later another $40,000. But, after learning about the mechanic's lien that had been filed against the property in which bank had a mortgage interest, it was well within the bank's discretion to deny and further payments. The bank is not obligated to disburse any further funds.

3. **Whether the mechanic's lien have priority over the bank's mortgage.**

Generally, when prioritizing creditors' interests in a mortgaged property, first in time is first in right. Exceptions exist for purchase money mortgages or if a recording act provides otherwise. Here, bank made a loan to Man and, in return, obtained a security interest in Man's property which was promptly and properly filed in the local land records office. Pursuant to that loan, bank disbursed $50,000. Four weeks later, however, Subcontractor filed a mechanic's lien against Man's property in teh local land records office to secure a claim for $20,000. Because the lien was filed properly, the bank was put on constructive notice of the lien. Because the bank retained discretion in disbursing any future funds, any such future disbursements would represent junior mortgange intersts - junior to the mechanic's lien. Bank did, then, distribute $40,000 to Man, eight weeks into the project. This second disbursement is junior to the lien, and the

mechanic's lien has priority over the second disbursement of $40,000. The general contractor did not use this second disbursement to pay the plumbing contractor that had filed the mechanic's lien. Therfore, the mechanic's lien has priority, in part, over the bank's mortgage; priority over the second disbursment of $40,000, but not over the initial disbursement of $50,000.

END OF EXAM

MEE Question 4

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

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

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

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

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

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

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

1. What fiduciary duties, if any, did the trustee violate in administering the trust? Explain.

2. Upon Albert's death, how should the trust principal be distributed? Explain.

4) Please type your answer to MEE 4 below When finished with this question, click to advance to the next question.

1. **Fiduciary Duties.** The trustee violated the duties of (i) loyalty (by self dealing), (i) protection of trust property, and (iii) treating remainder and income beneficiaries equally. The issues are whether the trustee can lease trust property to himself at a fair market price, whether she is liable for failure to insure trust property, and whether she is liable to the income beneficiary for apportioning the cost of a repair to income.

Duty of loyalty: Trustees of a trust owe a duty of loyalty to the beneficiaries, which generally means that the trustee cannot engage in self dealing. As a part of this duty, the trustee cannot benefit herself at the expense of the trust, sell trust property to herself, loan trust money to herself (even with adequate interest and security), or lease trust property to herself (even at fair market value). If a trustee self-deals, it is automatically a breach of the duty of loyalty (the no-further-inquiry rule), regardless of whether the transaction is fair to the trust.

Here, the trust contained an apartment building with six three-bedroom apartments. In 2010 one that had been rented for $1,300 per month was vacated. The trustee rented this apartment to himself for $1,300 per month, and the other apartments continued to be rented throughout the term of the trust at market rates of between $1,200 and $1,400. Because the trustee rented trust property (the apartment to himself), he committed a breach of the duty of loyalty by self-dealing. This is true even though the lease appears to be at market rate, as the apartment buildings "were rented at market rates ranging from $1,200 to $1,400 per month." Hence, the trustee breached the duty of loyalty in administering the trust.

Protection of trust property: Trustees of a trust owe a duty to the beneficiaries to take reasonable actions to protect trust property. Generally this means the

beneficiary must maintain adequate insurance on trust property, including insurance against casualties such as fire.

Here, the trustee failed to purchase a fire insurance policy, and fire destroyed a portion of the apartment building's roof. Because he failed to maintain fire insurance - a basic duty of the trustee to protect trust property - he breached the duty to take reasonable actions to protect trust property. Thus, he breached his duty to protect trust property.

Duty to treat income and remainder beneficiaries equally: In the absence of an express direction from the settlor to favor the income or remainder beneficiary, the trustee owes a duty to the income and remainder beneficiaries to treat each equally; that is, to not favor income beneficiaries over remainder beneficiaries and vice versa. Part of this duty includes the duty to properly apportion expenses and income between income and principal. In general, ordinary expenses (such as ordinary repairs of ordinary wear and tear, income taxes, etc.) are attributed to the income beneficiary's interest, while capital expenditures (such as improvements, rebuilding, etc.) are attributed to the remainder beneficiary.

Here, the testator's will did not expressly state that the trustee should favor the icnome beneficiary (Albert) over the remainder beneficiary (Betty), so the trustee owed a duty to treat Albert and Betty equally. When the trustee spent $50,000 to repair the roof, he charged the entire expense to trust income even though the trust had liquid assets of more than $120,000 that could have been used to pay for the repair. Albert, the income beneficiary, received $50,000 less income from the trust than he had received in prior years. The nature of the repair of the roof after the fire destroyed it seems like more of a capital expenditure, such that the principal account should have borne at least some of the costs of repair. This was not an expense that arose, for example, because the roof was worn out, or simply needed a few shingles replaced because of age. Instead, it was a substantial expenditure necessitated because of significant fire

damage. Hence, the principal account should have borne at least some, if not all, of the expense. Thus, the trustee violated his duty to treat Albert and Betty equally.

2. **Distribution of Trust Principal.** Upon Albert's death, the trust principal should be distributed to Betty's husband. The issue is whether remainders in a trust are devisable by will or lapse if the remainder beneficiary dies before the remainder beneficiary receives her interest.

In general, if a beneficiary in a will or testamentary trust dies before the testator, the gift is deemed to have lapsed, and it passes through the residuary. An anti-lapse statute changes this result by saving the lapsed gift for the deceased beneficiary's descendents. On the other hand, once a trust comes into being, future remainder interests in trust are generally alienable, meaning they can be devised, assigned or sold in the absence of a spendthrift clause.

Here, the testator's will provided that "all trust income will be paid to my cousin, Albert, during his lifetime" and that "upon Albert's death, all trust principal will be distributed to my granddaughter, Betty." The testator died in 2006, and the trust came into being. At that point, Betty had the capability to devise her remainder interest in the trust via will or to assign it. In 2013, Betty died, survived by her husband and a daughter; her will devised her entire estate to her husband. Part of this estate was Betty's remainder interest in the trust, which passed to the husband.

The fact that the gift would have lapsed and passed through the residuary clause to the residuary beneficiary or intestacy to the testator's son if Betty had predeceased the testator is irrelevant, as is the fact that the testator's will made no provision for the testator's son. If the testator had made the will before the son was born, he would have been a pretermitted heir, entitled to an intestate

share, but in this instance, he was already born. As a result, the trust principal should be distributed to Betty's husband.

END OF EXAM

MEE Question 5

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

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

1. The woman was driving her pickup truck in the traffic circle at or below the speed limit when the man suddenly pulled his car into the traffic circle immediately in front of her.

2. The man's action left the woman no opportunity to slow down, stop, or avoid colliding with his car.

3. The woman observed that the man was texting on his phone when he entered the traffic circle and did not see him look up to check for traffic before entering the circle.

4. The accident caused the onset of significant neck pain for the woman requiring extensive medical treatment and resulting in lost wages.

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

A jury trial has been scheduled.

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

(a) Testimony by a mechanic to the effect that "I inspected [the woman's] truck a week before the accident. The brakes on the truck were worn and in need of repair. I ordered new parts."

(b) A written invoice signed by the mechanic stating: "New parts for [the woman's] truck brakes ordered on December 23 and received on January 2," found in the mechanic's file cabinet among similar invoices for other customers.

(c) Testimony by the woman's doctor, who treated the woman for neck pain after the accident, that the woman told the doctor, "I have suffered from painful arthritis in my neck for the past five years."

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

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

1. Is the mechanic's testimony admissible? Explain.

2. Is the invoice for the new parts for the woman's truck brakes admissible? Explain.

3. Is the doctor's testimony admissible? Explain.

4. Is the roommate's testimony admissible? Explain.

5) Please type your answer to MEE 5 below When finished with this question, click to advance to the next question.

Mechanic's Testimony

The testimony is likely admissible. Whether the mechanic's testimony is admissible depends on whether the testimony is related to his personal knowledge.

A witness may testify about anything that the witness has personal knowledge about. This can include things that the witness has seen, observed, or experienced. Further, the witness may offer an opinion as to that which is rationally related to his or her observation. Common examples include opining that a car was speeding after observing it pass other cars or opining that a man was drunk when a witness observed the individual walking unsteadily and slurring words. If the opinion testimony is not rationally related to observation, then the attorney will likely have to certify the witness as an expert or the witness will not be allowed to testify. That would usually include certifying that the person is a trained and educated expert and that the expert's opinions and conclusions are reached based on methods similar to other members of his or her field.

From the outset, it is unlikely that a judge would prevent the mechanic from discussing what he did and observed. Thus, his testimony that he "inspected the woman's truck a week before the accident" and "that he ordered new parts" are admissible.

Further, it is likely that the testimony that the mechanic seeks to offer will be admissible lay witness opinion testimony. As the mechanic will testify, he personally inspected the vehicle. The mechanic did not rely upon others' statements or on reports, rather, the mechanic inspected the vehicle first hand.

Further, while admittedly relying on considerable more experience than the average layman, the mechanic observed that the brakes were worn. This is likely rationally related to what the mechanic observed and experienced. Further, even if inadmissible lay witness testimony, the attorney could likely figure out a way to get the testimony in under expert testimony. Although, it may prove tough sledding to certify a work-a-day auto mechanic as an expert witness.

The testimony is therefore admissible as lay witness opinion testimony because it is rationally related to his observations.

Invoice for New Parts

The invoice is likely admissible. Whether the invoice for new parts can be admitted depends on whether it can be classified as a business records exception to the hearsay rule.

Hearsay prevents the admission of any out-of-court statement made by a declarant for the truth of the matter asserted. There are several exceptions to that rule (to say the least). One is the business records excpetion which allows hearsay testimony to be admitted when: (i) the record is a part of the ordinary course of the business, (ii) the record in question was made by someone with a duty or job responsibility to make the record, (iii) the person making the record had personal knowledge of it, (iv) the record was regularly made as part of the ordinary course of business. If all of these elements are present, then it substantially lowers the likelihood that the hearsay record will have the prejudicial affect the hearsay rule aims to prevent. The business records exception does not require that the declarant to be unavailable.

Here, the written invoice will likely be found a hearsay statement. It was made out-of-court. Further, it will likely be offered to prove that the woman's car needed new breaks. Thus, it will be offered for the truth of what the document contains. It is a classic hearsay record.

However, the record is also likely a business record and can be admitted anyway. As demonstrated by the facts, the invoice was contained in a cabinet along with several other customer invoices. Further, an auto-mechanic, as part of his or her trade, routinely buys and sells parts that may not be in stock. The invoice was thus likely a record that is part of a regular day-to-day business function. In addition, the mechanic likely frequently made these invoices. As shown by the facts, these invoices were found in *his* filing cabinet which suggests that he regularly sent invoices. Finally, as the mechanic personally signed the invoice, he had personal knowledge of the record.

Therefore, the invoice is admissible as a business record exception.

Doctor's Testimony

The testimony is admissible. Whether the testimony of the woman's doctor is admissible depends upon whether the statement was one made for the purpose of a medical diagnosis.

Another exception to the hearsay rule are statements made for the purpose of medical diagnosis. These statements are typically made to medical personal, although that is not required. They must pertain, however, to the patient's past or current medical condition and must be made for the purpose of diagnosing the medical issue. This exception also does not require that the declarant be unavailable.

Here, the statement that the woman told the doctor is also a hearsay statement. It was made out of court and will likely be offered for its truth; presumably to show that the woman had prior medical issues not caused by the accident. However, this statement was made to a doctor. Further, the statement detailed her medical symptoms for the preceeding five years. The offered statement is limited to only these statements related to treatment. There is no testimony

accusing the man of causing her accident thath would likely result in inadmissible hearsay.

Therefore, the statement the doctor is prepared to testify about is hearsay that meets the medical diagnosis exception.

Roommate's Testimony

The testimony is inadmissible. Whether the roommate's testimony is admissible depends upon whether it is inadmissible character evidence or admissible habit evidence.

Character evidence, that is, evidence offered to show that a party's conduct conformed with a characteristic on a particular occasion, is admissible in most circumstances. Only in criminal cases when a defendant makes his character an issue or a civil case involving a character trait (fraud, defamation, etc.) will character evidence be admissible. However, another type of evidence that is similar but distinguishable, is admissible. Habit evidence is admissible to show that a party always conforms to a particular set of circumstances. The ideal habit evidence would be an unchanging response to an external circumstance. For example, always buckeling a seatbelt, always brushing teeth, etc.

Here, the evidence suggests character evidence more than habit evidence. True, the roommate will testify and say "[the man] never puts his phone down. He even texts while driving." On their face, theses statements sound like habit evidence. However, the statement "he never puts his phone down" is almost certainly hyperbole. After all, people must put their phones down to sleep or bathe. So he cannot possibly *never* put his phone down. Further, the statement "he even texts while driving" does not suggest repition. The roommate's statement could relate to only one incident.

The better classification for the offered testimony is that of character evidence. The testimony is therefore inadmissible.

END OF EXAM

MEE Question 6

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

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

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

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

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

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

1. When did Solar Inc. come into existence? Explain.

2. Is the woman personally liable to the installer on the employment contract that she signed? Explain.

3. Is the man personally liable to the installer on the employment contract? Explain.

6) Please type your answer to MEE 6 below

(1) Solar Inc. Came Into Existence When the Secretary of State Filed the Revised Articles on December 10th.

Solar Inc. came into existence when the Secretary of State filed the revised Articles on December 10th. The issue is when a valid corporation was formed.

In order to form a corporation, the incorporator must file the Articles of Incorporation with the Secretary of State. These Articles must include the corporation's name, including the term "incorporated, limited, etc." to denote its corporate existence; the name of the incorporator; the name of the registered agent as well as the address of the registered office; and the maximum number of authorized shares for the corporation. Once these are appropriately filed, the Secretary of State will file these Articles, upon which, the corporation comes into existence.

Here, the incorporator forgot a required portion of the Articles of Incorporation. She did not list the authorized shares for the corporation. Thus, the Secretary of State could not file the Articles. After revision, the incorporator mailed the revised Articls back to the Secretary of State, the corporation was still not formed until the Secretary of State finally filed the articles on December 10th.

Thus, Solar Inc. came into existence on December 10th.

(2) Currently, The Woman Is Personally Liable On the Employment Contract She Signed.

A. Liability as Corporation's President and Use of Doctrines for De Facto Corporation and Estoppel

The first issue is whether the woman is personally liable as the corporation's President.

The President of the corporation is an agent of the principal corporation and may typically enter into contracts on behalf of the corporation in the ordinary course of business. When a validly formed corporation's President enters into contracts, they are typically binding on the corporation as the principal and not personally for the President. However, when a person fails to actually form a corporation, they instead operate as a general partnership and are personally liable on all contracts.

Here, the woman failed to file correct Articles, and therefore, no corporation was formed. At best, the woman and the husband created a partnership, and would both be personally liable under this contract.

However, there are two doctrines that could come into play to absolve the woman of liability. The first doctrine is that of the de facto corporation. Where the incorporator makes a colorable, good faith attempt to file the Articles (and therefore doesn't know they are defective), and the company acts as it is a corporation, a de facto corporation may be presumed. The second doctrine is estoppel. Where a party deals with the other party as though they are a corporation, that party will later be estopped from denying the existence of the corporation. So, he cannot personally pursue the person he dealt with.

Here, the woman entered contracts and conducted business as though the corporation was formed, and the corporation accepted the benefits of corporate life through these dealings. Therefore, a de facto corporation likely exists. Also, the solar-panel installer dealt with the woman as though she was acting for a

corporation. She even signed the contract as President of Solar, Inc. So, he would likely be estopped from later denying the corporations existence.

Therefore, though the woman is techinically personally liable on this contract due to defective corporate formation, she can be saved by the two doctrines discussed above.

B. Promoter Liability

The woman is likely personally liable as a promoter. The next issue is whether the woman many be liable as a promoter.

A promoter is a person who negotiates deals and enters into contracts for a currenlty unformed corporation. A promoter is liable on all contracts it enters into unless there is a novation. With a novation, the corporation, promoter, and other party must all agree that the corporation takes the promoter's place on the contract (and is therefore liable instead of the promoter). The corporation is only liable once it adopts the contract. Adoption may be express, or it may be implied through conduct, such as accepting the benefit of the corporation.

Here, the woman did not effectively form a corporation. Therefore, she really was acting as a promoter and entering the not-yet-formed corporation into contracts. The corporation seems to have adopted the contract, in that it will accept the benefit (or probably already has accepted the benefit) of the solar-panel installer's skills and employment. However, nothing in the facts indicate that a novation has occurred that would absolve the woman of liability. She may have signed the document as "President, Solar Inc." but this designation really means nothing until there is a novation.

Therefore, she is personally liable as a promoter.

SEE ANALYSIS ABOVE FOR DE FACTO CORPORATION AND ESTOPPEL DEFENSES

(3) The man is likely personally liable as well, but will be able to raise the same defenses.

The issue is whether the man is liable because the corporation was not formed when the woman entered into the employment contract. When a corporation fails to form, a general partnership is actually created. Under a partnership, the partners are personally liable on all contracts.

Here, the woman failed to correctly file. So, instead of forming a corporation, a general partnership was created and opened up her and her partner (the man) to personal liability.

However, the man will be able to assert the same defenses (de facto corporation and estoppel) as described above.

There is also an issue of whether the woman was acting as an agent of the presumedly formed partnership.

Even though partners are typically liable for the contracts entered into by their other partners, the contract must be within the scope of the partnership business. A principal is only liable for the contracts it authorizes. Authorization may be express or it may be implied. One implied authorization is apparent authority. Under this doctrine, if the partner/principal cloaks the other with the appearance of authority and a third party relied on that appearance of authority, the principal is liable for the actions taken. Another implication is if someone who usually holds such a title would be permitted to make such contracts and deals, they are

presumed to have the authority to do so (impliedly authorized). Unless a partner rejects the activity before it's entered into, or if the action is outside the scope of hte partnership, he too will be liable on the contract.

Here, the man never objected to the employment of the solar-panel installer. Moreover, employing a solar-panel installer is well within teh business function of solar-panel installation business such as Solar Inc. Therefore, the woman acted within the scope of the partnership, and, assuming a partnership formed rather than a corporation, the man would be liable under partnership theories as well.

So, he is likely personally liable, but may utilize the same defenses as the woman above.

END OF EXAM