

**FEBRUARY 1999 MARYLAND BAR EXAMINATION
REPRESENTATIVE GOOD ANSWERS**

PART A

QUESTION I

(10 Points - 12 Minutes)

Bob and Joe met at a local tavern to have a drink together. During their conversation, Bob told Joe that he intended to steal a late model BMW and sell it to make some quick money. Joe told Bob that he could provide Bob with a master key.

A week later, Joe and Bob met at the tavern again and Joe gave Bob a BMW master key. Later that evening, Bob drove a late model BMW belonging to Harry off the parking lot of the Hyatt Regency Hotel where Harry was staying.

The next morning when Harry discovered that his car was missing, he called the police and reported it stolen. Later that morning, the police pulled Bob over while he was driving the BMW and placed him under arrest. While searching the vehicle, they found two kilograms of cocaine and \$120,000 in cash in the trunk.

Harry, Bob and Joe have all been arrested. You are an intern in the office of the States Attorney. You have been asked to determine what charges are to be brought against each of them.

List the possible charges which may be brought against each defendant.

REPRESENTATIVE ANSWER NO. 1

Possible Charges against Harry:

1. Possession of a controlled substance.

The BMW belonged to Harry. It was driven off the parking lot of the Hyatt where Harry was staying. Thus, it appears that Harry had possession of the car. Because of these facts and the fact that Harry contacted the police when "his car was missing", Harry can be charged with possession of a controlled substance. Harry will argue the car was not in his control while it was parked on a public lot and could have been tampered with.

2. Possession with intent to distribute.

No minimum of a controlled substance is required to find a defendant guilty of possession with intent to distribute in Maryland. Here, however, police found two kilograms of cocaine and \$120,000 in cash in the trunk of Harry's car. This amount of drugs and "large" amount of cash suggests Harry's possessed items associated with distribution of a controlled substance. Because of the above facts, Harry can be prosecuted for this crime.

Possible charges against Bob & Joe.

1. Bob & Joe - Conspiracy.

Conspiracy in Maryland requires more persons than necessary to commit the crime. Police discovered Bob driving the BMW. Thus it was only necessary for one person to steal the car. However, Bob told Joe he intended to steal the car and Joe not only agreed, but provided the master key.

2. Bob - Theft of the BMW.

Bob was the principal in the first degree because he actually took the car.

Joe - Accessory before the fact.

An accessory is one who aides, abets, or encourages the crime. Because Joe provided the master key, Joe can be charged as an accessory before the fact.

Bob - Possession of a controlled substance.

Bob can be prosecuted for possession of a controlled substance because the car was in his possession and control when the police pulled him over.

REPRESENTATIVE ANSWER NO. 2

Harry

As the owner of the car, Harry can be charged with possession of an illegal substance. This would be a felony charge based upon the value of two kilograms of cocaine. The police investigation must show that Harry had control over the drugs. If the \$120,000 is found to be the proceeds of a drug transaction, Harry may also be charged with possession with the intent to distribute an illegal substance. If others are involved, Harry may also be charged with conspiracy.

Bob

The felony theft of the BMW will be a charge against Bob. Bob will also be charged with the possession and possession with the intent to distribute cocaine if the investigation shows that he knew about the drugs and had control over them. Bob is also charged with conspiracy to commit the felony theft.

Joe

Joe is charged with conspiracy to commit felony theft based upon the two meetings that he and Bob had and his supplying the master key. Bob intended to steal the car and came to an agreement, developed the plan and carried it out.

As a result of Joe's involvement in the conspiracy, he is subject to all of the charges placed against Bob, his co-conspirator.

QUESTION II **(20 Points - 25 Minutes)**

Tommy and his brother, Innis, wanted to buy their mother a birthday gift. She was known to favor exquisite diamonds. Innis wanted to do something special. Tommy, on the other hand, did not want to spend a lot of money. The brothers went to Real Deal Fine Jewelers which was a diamond warehouse located inside Security Square Mall in Woodlawn, Maryland.

Mona, a clerk in the store, assisted them in selecting a gift. While she showed Innis several diamond rings, she permitted Tommy to view a showcase of diamond necklaces located in the next aisle. There were several other patrons in the store including George, one of Tommy's best friends. George looked at the necklaces with Tommy but they did not find one that they liked.

Innis then called Tommy over to look at a ring that he had chosen. Tommy suggested that they look elsewhere before making a final decision. George, Tommy and Innis left the store. They were almost at the mall exit when two plainclothes moonlighting police officers stopped them, handcuffed them and took them back to the store. Mona had noticed that a necklace valued at \$75,000 was missing and had notified store security.

The two security guard/police officers took the men into the back room of the store, removed their handcuffs, strip searched them all and began interrogating them about the missing necklace. While searching the men's clothing, they found the necklace in George's pants pocket.

Outraged by the public humiliation and harsh treatment, Innis responded to the officers questions by saying in a sarcastic manner, "yeah, sure, this was a conspiracy. We all attempted to steal the necklace!"

The men have been charged jointly with the theft of the necklace in a statement of charges filed in the District Court of Maryland for Baltimore County. The prosecution intends to introduce Innis' statement and the necklace into evidence.

You are Innis' attorney.

- a) Discuss what pretrial motions, if any, you would file on his behalf and the basis for each.**
- b) Can Innis object to the search which led to the recovery of the necklace? Discuss fully.**

REPRESENTATIVE ANSWER NO. 1

- (a) I would file a pre-trial motion claiming that an unreasonable search and seizure occurred as prohibited by the 4th Amendment applicable to the states through the 14th Amendment.

First, I would argue that state action exists by virtue of the fact that the security guards were police officers.

Second, George, Tommy and Innis certainly had a reasonable expectation of privacy as to the search of their person.

Third, the police officers had no warrant for their search. An arrest occurred when George, Tommy and Innis were handcuffed because they could not have felt free to leave. Although an arrest need not have a warrant, it must be supported with probable cause. No probable cause existed because the mere fact that a valuable necklace was missing is not enough to suggest that George, Tommy and Innis were responsible for the theft of the necklace.

Because no probable cause existed, the arrest was unlawful and thus, the necklace seized cannot be admitted into evidence as the requirement of a search incident to a lawful arrest has failed. The exclusionary rule applies.

The second argument my motion would make is based upon the Fifth Amendment.

First, I would claim that state action existed for the reasons previously discussed.

Second, when the police officers handcuffed Tommy, George and Innis and took them to the back room of the store, they, in effect, placed them in custody, because they were not free to leave.

Third, the officers questioned them about the necklace without giving them the Miranda warnings advising them of their rights. They certainly knew that questioning the boys about the necklace was likely to elicit an incriminating response. Thus, Innis' statements about a conspiracy are not admissible and any argument that it was voluntary is doomed to failure in light of the arguments asserted above.

I would also argue that the "confession" by Innis violates the due process clause of the Constitution as it occurred under official compulsion, namely handcuffing, strip searching and interrogation.

- (b) Innis cannot object to the search that leads to the discovery of the necklace because he has no standing. The evidence was found on George, and he has no expectation of privacy in George's pockets.

REPRESENTATIVE ANSWER NO. 2

- (a) I would file a pretrial motion on behalf of Innis to have the statement made at the shopping mall excluded because it was obtained in violation of his 5th Amendment rights against self-incrimination. Police officers are presumed to be on duty 24 hours a day. When the police officers handcuffed Innis and took him into the back room for interrogation, it is clear that Innis was in custody. Therefore, he should have been given his Miranda warnings. The police officers may argue that they were not working in their capacity as police officers and they may argue that the statement was voluntarily made, but under the totality of the circumstances, it is clear that Innis was in police custody and should have been given the Miranda warnings.

Innis cannot object to the search conducted by the guard/police officers because merchants and store owners have a privilege to hold persons and to perform searches of persons whom they believe are stealing their goods. However, the time of detention and the scope of the search should be reasonable. In this case, the guards performed a strip search which is unreasonable.

The arrest of the boys was illegal. There was no probable cause to detain them. It is possible that other patrons browsing in the store could have taken the necklace. Absent probable cause or an articulable suspicion, the security guard/police officers unlawfully stopped, detained and handcuffed George, Tommy and Innis. Once arrested, there was no pat down, the police conducted an unlawful strip search that revealed the stolen goods. They were not in plain view and no exigency existed. Police officers could have obtained a warrant. Because the search, the arrest and detention were a result of an unlawful arrest, the necklace is considered fruit of the poisonous tree and should be suppressed.

- (b) I would also move to have the necklace excluded as the fruit of an illegal search. However, because the necklace was taken from George, Innis would not have standing to exclude evidence that was seized as a result of a search of George

QUESTION III
(5 Points - 8 Minutes)

Assistant State's Attorney John Smith has reviewed the case and determined that it may only be possible to successfully prosecute George for the theft because he has no evidence that the three men were working together.

John then approaches George who is not represented by an attorney, and suggests that, if George will agree to plead guilty and testify against Tommy and Innis, he will guarantee him probation.

George informs John that the theft was all his idea and that Tommy and Innis had nothing to do with it. After receiving this information, John decides to continue with the prosecution of Tommy and Innis.

You are Innis' attorney. Innis relates to you the substance of George's conversation with John.

What, if any, action would you take and when?

REPRESENTATIVE ANSWER NO. 1

I would file a complaint with the Attorney Grievance Commission because of John Smith's decision to pursue the case against Innis despite the exculpatory evidence which he received from George. I would also complain that he has contacted George and asked George to give up certain rights without an attorney being present. I would also file a motion to dismiss the case because John Smith received exculpatory information which he failed to provide to me as defense counsel.

REPRESENTATIVE ANSWER NO. 2

Maryland recognizes a duty on the part of the state to disclose exculpatory evidence. I would inform John Smith that Innis relayed to me the substance of George's conversation with him, I would request that he dismiss the case before trial. If he refuses, I would file a complaint with the appropriate disciplinary authority. Smith has reviewed the case and knows there isn't evidence to support a charge against Innis. George has admitted to Smith that Tommy and Innis were not involved in the theft.

Also, John should not have approached George without his attorney being present.

exact accord with the job specs.

3. Altec will not be liable for liquidated special or consequential damages or for any penalties, whether direct or indirect.

The County's plans and specs called for "600 Borneo Diesel Engines." Although Altec's engines clearly met the County's "equal or better performance clause" contained in its contract with Buildem, the County rejected them because, in its opinion, the engines were too large and would take up too much space in the confined area of the generating plant. After much hassling, Altec could not suggest an alternative that the County would accept.

After a six-month delay beyond the date by which the performance had been promised by Buildem in its contract with the County, Altec was forced to manufacture the type of diesel engine initially requested by the County. Buildem could not complete the contract in a timely manner because it could not complete the "shell" to house the diesel engines until the engines had actually been installed. Delivery of the completed system was 200 days beyond the date called for in the contract.

The contract between Buildem and the County provided for liquidated damages of \$100 for each day beyond the closing date. The County assessed \$20,000 against Buildem pursuant to the liquidated damage clause.

Buildem then sued Altec claiming that Altec's delay was solely responsible for the \$20,000 assessment. At trial Buildem proves the contract with the County would have been timely completed had the diesel engines been available on a timely basis.

If you were the Judge, for whom would you find and why?

REPRESENTATIVE ANSWER No. 1

The issue presented by this question is what are the terms of the contract between Altec (A) and Buildem (B). Because the contract is for the sale of engines, which are goods, it is governed by the UCC.

The first question is whether Altec's "proposal" constituted an offer or just an invitation to deal. Given the detail and the fact that all material terms are contained within the proposal (price, guaranty, etc), it most likely would be characterized as an offer.

The next issue is whether Buildem's letter on its stationery constituted an acceptance of Altec's offer. Under the UCC, an acceptance does not have to mirror the terms of the offer, unless the offer is expressly limited to its terms. Altec's offer was not so limited, so the fact that Buildem's letter contained additional terms, most notably "as per plans and specs" and "equipment subject

to approval by Garrett County”, does not change the fact that Buildem’s letter was a reasonable expression of acceptance. Whether the additional terms become a part of the contract, however, is another matter.

Additional terms become part of a contract if (1) both parties are merchants, (2) the offer is not limited to its terms, (3) the offeror does not object within a reasonable time, and (4) the new terms do not materially alter the contract. Here, A & B are both merchants and the offer was not limited to its terms. However, A may successfully argue that, especially given the terms and conditions contained in its Order Acknowledgment Form (which was a part of the initial offer and to which B did not object in its letter), the requirement that the equipment meet specs and be approved by the County is a material alteration and that by sending its Order Acknowledgment Form with the Standard Terms and Conditions of sale, A rejected these additional terms. Since B still had reasonably accepted its offer subject to the terms and conditions of sale, there was a contract on the terms A proposed, which included the limitation on remedies for breach and disclaimers regarding delivery dates and performance to specs. If A succeeds in arguing that such a contract was formed, it may be able to successfully contend that it did not breach the contract (it provided the 4 engines) at all (if coupled with terms and conditions #1 & 2) and in any event is not liable for the liquidated damages.

B, on the other hand, could argue that the original proposal was merely an invitation to deal and that its letter was the offer. A’s order acknowledgment form would be the acceptance, and the terms contained therein that were different (most notably #’s 2 & 3), did not become a part of the contract because they materially changed the contract terms (a limitation on remedies is always a material alteration. Time of delivery is not unless time is of the essence, as it is here). Therefore, the limitation on remedies is not effective and B can recover from A on account of its breach.

Because of the special nature of A’s proposal, its clear reference to the Order Acknowledgment Form/Terms and conditions of sale and B’s reasonable acceptance of such offer, I would rule for A.

REPRESENTATIVE ANSWER II

- I. As Judge, I would base my decision on whether or not the contract was formed based on the terms proposed by Altec originally or the terms of the acceptance.

Formation. This contract is for the sale of goods over \$500 so the UCC would apply. The proposal sent to the general contractors by Altec was not an offer. Instead, it was an invitation to offer. It may be construed as an offer since it was a bid from a subcontractor that Buildem relied upon when preparing its bid to Garrett County. As such, the form sent to Altec in the form of an order may be considered an acceptance. The acknowledgment sent by Altec contained some changes to the earlier agreement. These changes were materially different from the original contract. Assuming this was considered the acceptance it would be deemed a material change to

the contract and even a rejection of the original contract. There was no response from Buildem to the changed terms. Since this was a bid offer relied upon by Buildem I would construe the contract as being formed on the original terms, making Buildem the victor in the battle of the forms.

Performance. According to the terms of the agreement, Altec did not perform in the manner or time stated. Altec's ability to perform in accordance with the City's job specs is a material breach of the contract. The six month delay on the part of Altec caused a substantial delay in Buildem's meeting their obligations to Garrett County.

Damages: Liquidated damages are not usually favored. Most courts are reluctant to award liquidated damages that appear as a penalty. Liquidated damages are awarded if it was difficult to calculate damages at the time of the contract. In this case, the damages assessed by Garrett County against Buildem are reasonable considering Altec was responsible for the delay. I would award damages to Buildem in a reasonable amount. Indemnification from Altec is warranted.

PART B

QUESTION II

On October 8, 1996, A & B Trucking Co. obtained a loan of \$44,000 from Merchants Bank of Charles County, Maryland. The loan was to be repaid in monthly installments as evidenced by a promissory note executed on behalf of the company by its principal officers, A & B. The reverse side of the note contained a guaranty provision signed by G, individually. As collateral for the note, A & B Trucking delivered to Merchants Bank the title to a 1990 GMC Tractor and a 1985 Ford Tractor. Shortly after obtaining the loan, the 1985 Ford Tractor was destroyed in a fire.

On December 3, 1996, G entered into a written modification of the Guaranty Agreement in which the Bank released the title to the Ford Tractor and G agreed to make a lump sum payment on the note from insurance proceeds and to provide substitute collateral of the value of not less than \$7,000. On January 12, 1997 G delivered to Merchants Bank the title to a 1978 Mack Tractor. The title had been issued to H & W but had been endorsed only by W.

On January 19, 1997 the bank mailed the title to H requesting that he sign and return the title to the bank. No steps were taken to insure return of the title and it never was returned.

On September 9, 1997 the Mack Tractor was stolen from A & B's lot and was never recovered. Its fair value on that date was \$11,000. On June 1, 1998 A & B defaulted on a loan and Merchants Bank instituted suit against G to recover the balance due under the guaranty provisions of the note.

What defenses, if any, could you reasonably raise on behalf of G?

REPRESENTATIVE ANSWER No. 1

The bank does not have possession of the collateral (the truck is missing, as is the title). Possession is one way to perfect a security interest. Another way is to file a security agreement, but the Bank hasn't done this either. I would first argue the agreement is faulty. This, however, would only affect the bank's rights vis-à-vis other creditors of A & B.

Under §3-605(f), the bank has impaired the value of the interest in the collateral by violating its duty under §9-207(i) to take reasonable care in the custody and preservation of the collateral. The bank had the title in its possession, attempted a necessary step to preserve rights against prior parties (by sending the title back to H for a proper release signature) but then took no further steps to insure its return. This is not reasonable care.

I will argue that since the bank has impaired the value of the collateral, his (G's) obligation as an accommodation party is discharged to the extent that his obligation would be if the value of the collateral were not impaired.

G will probably have to pay the amount guaranteed, less the value of the impaired collateral, \$11,000, but can always go after A & B for reimbursement. The amount may vary depending on any insurance benefits which may be available.

REPRESENTATIVE ANSWER No. 2

I would raise the defense that the actions taken by Merchants Bank effectively discharged part of the obligation of G. G, as a guarantor, has promised to repay the debt on the loan of \$44,000 which was given to A & B Trucking Co. if A & B Trucking is not able to pay. Here, the amount of the recourse against G which is in question is the value of the Mack Tractor of \$11,000.

According to §3-605(e), a party who is obligated on an instrument where there is collateral (security interest) supporting the instrument may be discharged when the person who can enforce the instrument (here, that is Merchant's Bank) has impaired the amount of recourse because it has impaired the value of the security interest in the collateral.

Here, the Bank impaired its interest by not keeping possession of the title to the Mack Tractor. The title would be considered chattel paper (most likely, and at the least an instrument) and,

therefore, unless the bank followed the steps of putting its name as a secured party on the face of the title, and following the other guidelines for enforcing a security interest in titled vehicles, it would have to maintain possession of the title. Here the Bank relinquished possession by sending it to the other party for endorsement, thus they no longer have a perfected security interest and thus have impaired their security by \$11,000.

G should not be liable for the \$11,000 as part of the recourse on the guaranty since the secured party caused the impairment.

PART C

QUESTION I

(20 points - 25 minutes)

Acme Development Corporation subdivided land in Potomac, Maryland in 1971, and transferred lots to third party purchasers. Violet took title to Lot A. Acme retained title to Parcel C, which was comprised of several acres of unsubdivided land adjacent to Lot A for future development.

In January 1979, Violet sold Lot A to Lisa, and moved to Nevada. Lisa staked out a garden on the rear of Lot A that encroached 15 feet onto Parcel C. She located her garden by reference to old garden stakes and prior cultivation of the area. Lisa has planted a garden on Parcel C every year since 1979. In May 1979, Lisa placed a shed on part of Parcel C, and in 1980 she began to keep her boat and boat trailer on Parcel C.

Acme hired a service that has mowed all of Parcel C quarterly since 1979, and Acme has paid annual property taxes on Parcel C. Acme's mowing contractor notified Acme of the encroachment of the garden in 1980, and Acme told the contractor that Acme would allow the garden to remain until it decided to develop Parcel C. In 1981, the Contractor informed Lisa that Acme said she could keep her garden, boat, boat trailer and shed on Parcel C until Parcel C is developed.

In early September 1998, Acme sent a letter to Lisa that Beta Corporation has agreed to purchase and develop Parcel C, and demanded that Lisa remove her garden, boat, boat trailer, and shed from Parcel C before September 30, 1998. On September 30, 1998, Acme erects a fence around all of Parcel C after moving the shed, boat and boat trailer onto Lisa's property. Lisa responds by filing against Acme an action to quiet title in the Montgomery County Circuit Court in October 1998, claiming that Violet maintained a garden on the portion of Parcel C claimed by Lisa, and that she and her predecessor in title have used a 15 foot wide strip of Parcel C continuously since at least March 1978. Acme locates Violet in Nevada in January 1999, and obtains an affidavit from her stating that she used part of Parcel C for a garden from 1973 through October 1978, but that she stopped using it when her employer transferred her to Nevada. Furthermore, Violet stated that she planted a row of 20 pine trees along the common boundary line with Parcel C in March 1978 to make Lot A more attractive for sale. Four of the pine trees survived and are full grown, and there are stumps remaining in the ground for those that died.

Will Lisa prevail in the quiet title action? Fully explain the reasons for your decision.

REPRESENTATIVE ANSWER NO. 1

In order to possess land by adverse possession, the person must possess the land open and notoriously, actually, exclusively, and hostile to the true owner for the statutory period. Maryland has a 20 year statutory period for adverse possession.

Acme has a strong argument that Lisa should not acquire the 15 ft. strip by adverse possession. First, Acme gave its permission for Lisa to use the land until it decided whether or not to develop it. (Adverse possession must be hostile/without permission). Secondly, Acme kept the property up by mowing and paying annual property taxes. This indicates Acme's continuing interest in and control of the land.

As to the time, even if Violet did begin the garden in 1973 and continued until 1978, from October 1978 - January 1979 (when Lisa bought the land), no one was using the 15 ft. strip as a garden. In order to tack for adverse possession purposes, the use must be continuous, uninterrupted between tackers. Lisa is bringing her suit in October 1998; therefore, there would need to be continuous use from October 1978 - October 1998 to meet statutory requirement. Here, there is not.

Moreover, Violet's planting a row of pine trees on the common boundary line indicates her understanding of the divide between Parcels A and C and her action is inconsistent with a claim for adverse possession.

I do not believe Lisa will prevail in an action to quiet title, for the above-stated reasons.

REPRESENTATIVE ANSWER NO. 2

Whether Lisa prevails will depend on whether she can establish title by adverse possession. The elements are open and notorious use, actual and exclusive, continuous, hostile to the true owner and in the statutory period (in Maryland 20 years).

Lisa will want to argue that she acquired title to the garden land because she planted her garden on part of lot C every year since 1979 (continuous and actual) and placed her boat and trailer on the land in 1980. Lisa's claim meets difficulty when she tries to show the hostile and exclusive elements. Acme paid the taxes and had the lawn mowed every year and Acme was notified by contractor that Lisa was there in 1980. Thus, Lisa's use was not hostile, because the contractor also told Lisa she could stay on the land until Acme wanted to sell it (consent of the owner).

To try to defeat this argument, Lisa will want to argue that by tacking her time possessing parcel C with Violet's time encroaching on the parcel, she could meet the statutory period and thus have title before Acme asked her to leave. However, Lisa's argument will fail because during this period Violet

stopped using the land for a period between 1978 and 1979 before she sold her interest in lot A to Lisa. Thus, the continuous element of Lisa's adverse possession argument will fail. Likewise, her putting the boat and trailer on lot C in 1980 until the request to move it will fail for the same reasons.

As such, Lisa's claim in quiet title will fail because she cannot make it a strong case for adverse possession. Acme gave Lisa license to use the property for the garden and to store her boat and trailer. Since a license is not an interest in land, and is revocable at will, Acme was proper to request Lisa to remove her belonging from the parcel and stop the garden. Acme exercised control over parcel C at all times and Lisa's use of the land was with Acme's consent.

QUESTION II

(15 points - 20 minutes)

Solo Corporation ("Solo") is a duly organized Maryland stock corporation. At present, 100 shares of common stock are issued and outstanding. The stock is equally owned by five brothers, Max, Harry, Sam, Jack and Elvis and they have all served as directors of the corporation since its formation in December, 1996. Solo owns and operates three retail strip shopping centers. Elvis is the sole owner of another strip center located near one of Solo's properties. Each of the shopping centers has vacant space. Max is a real estate broker engaged in locating tenants for commercial clients, including Solo.

During a recent meeting of the Board of Directors of Solo, Max advises that he has a first rate tenant, Food Haven, for retail shopping space and discloses to the Board confidential information about Food Haven's operations. By a unanimous vote, the Board engages Max to offer the shopping center space owned by Solo for lease to this prospective tenant. After the meeting, Elvis tells Max that he will pay him an additional five percent (5%) in brokerage commission if he places the tenant in Elvis' shopping center rather than in one owned by Solo. Immediately thereafter, Max shows Food Haven the property owned by Elvis. Later that same day, Max calls Food Haven's representative and offers to share equally his commission with him if Food Haven leases Elvis' property.

After Jack, Sam and Harry see the Food Haven sign announcing its tenancy at Elvis' shopping center, they question Elvis. Elvis admitted that he had promised to pay Max a higher commission.

Harry, Jack and Sam consult your firm to advise them as to their rights and remedies against Elvis and Max, and how to protect the interests of Solo. The senior partner has asked you to prepare a memorandum addressing:

- (a) any claims and remedies which the stockholders and the Corporation may elect to pursue,**
- (b) the grounds for such actions and remedies,**

- (c) any defenses which could be raised to the actions and remedies, and
- (d) the probable result.

REPRESENTATIVE ANSWER NO. 1

TO: Senior Partner

A director of a corporation has a duty to act in the best interests of the corporation and with the prudence that a reasonable person would exercise under the circumstances.

- b) The stockholders could pursue a stockholder derivative action against the directors on behalf of the corporation, and/or they could sue Elvis and Max in their capacity as directors.
- b) The grounds for the suits would be that Elvis and Max collaborated to usurp an opportunity for the corporation and thereby breached their duty of loyalty. It could also be argued that they engaged in self-dealing by acquiring a benefit to themselves to the detriment of the corporation.

The Board had voted to offer Food Haven a space and Max and Elvis usurped that opportunity. The remedy for such action is that the directors must disgorge the profits/benefit acquired. Solo would not be able to get the lease contract in Food Haven as specific performance. It could only get money damages.

- c) As defenses, Max and Elvis could attempt to argue that Food Haven preferred the space at Elvis' over the other shopping centers. However, Elvis purposefully directed max to steer Food Haven away from other Solo locations. Max then "sweetened" the deal with Food Haven by offering ½ of his commission.
- d) If the lease has not been signed by Food Haven yet, a possible remedy would be for Solo's location to get the lease instead. However, absent that, Elvis & Max should be liable to the corporation for the amount of their profits and the income generated by the lease.

REPRESENTATIVE ANSWER NO. 2

TO: Senior Partner

RE: Solo Corporation

Every director of a Maryland corporation owes a duty of loyalty and care to the corporation. When Elvis approached Max and they conspired to take a prospective tenant away from Solo they violated their duty of loyalty by self-dealing. If it can be shown that Solo suffers damages, such as a loss of income from the tenant, Elvis and Max are personally liable to the corporation.

A shareholder generally would not bring this type of derivative suit since it appears that the complete board is not involved and that the board plans to take action on this matter.

The Board can file suit against Elvis and Max for the loss of this business opportunity because Max presented the board with confidential financial information during the meeting which has been misappropriated. This should be successful.

The Board may also require Max and Elvis to disgorge any profits which they have received as a result of this lease.

Max and Elvis can also be removed from the board or asked to resign. This could require a special vote of the board and consultation of the by-laws.

Max and Elvis may defend their actions under the business judgment rule by saying that this particular tenant was better suited for Elvis' shopping center.

Additionally, if the corporation has not suffered any damage that they can prove, there would be no remedy available.

The best solution would be to negotiate a settlement with Max and Elvis whereby the tenant would move to Solo's shopping center and Max and Elvis would resign from the Board.

Max and Elvis will also defend their actions because the board was aware of their conflicts of interest.

REPRESENTATIVE ANSWER NO. 3

A. Harry, Jack and Sam have a few options to pursue to remedy the action by Elvis and Max. However, before getting into specifics I would clarify my representation of them so that no conflicts arise. A lawyer cannot represent parties that have adverse interests thus, I would need to clarify whether I am representing the corporation, Harry, Jack and Sam as directors or as stockholders.

Assuming there is no conflict, Harry, Jack and Sam may want to bring a shareholder derivative suit against Elvis and/or Max. Harry, Jack and Sam should first propose this action to the board because the suit is on behalf of the corporation. In this case, discussion and voting by the board is probably not necessary due to the actions by Elvis and Max - it would not be very practical.

Harry, Jack and Sam may also want to pursue individual suits against Max and Elvis.

B. The stockholder derivative suit and the individual suits against Max and Elvis would be based upon

a breach of their fiduciary duty, duty of loyalty and duty of care. In this regard, Elvis and Max breached their duty of loyalty to the corporation by usurping a corporate opportunity and by directly competing with the corporation for their own gain. Each breached his fiduciary duty by not putting the corporation's interests first - before their own interest and not acting in the corporation's best interests. Moreover, each did not act as a prudent person and thus breached their duty of care. In addition, they violated a board vote.

As such, Max and Elvis may be held personally liable and may need to disgorge the profit/gain from the transaction.

- C. Max and Elvis will argue that they should not be personally liable and should be indemnified for any loss. Moreover, they will argue that the business judgment rule will protect them because they made the decision pursuant to their positions and should not be held personally liable. Max and Elvis will also argue that the transaction did not involve a corporate interest and was not harmful to the corporation. Max and Elvis' arguments will fail.

Max and Elvis will be held responsible personally - jointly and severally, and will need to disgorge the gain.

PART D
QUESTION I

(12 Points 15 Minutes)

On Friday, January 1, 1999, Amy discovered she had lost her purse containing her checkbook for her account at County Bank and her Easy Mart check cashing courtesy card. On Saturday, January 2, 1999, Becky entered the Easy Mart store in Cambridge, Maryland and used Amy's check and the card to purchase a stereo system. On Monday, January 4, 1999, Amy closed her old County Bank checking account and transferred her funds to a new bank account. The check written and presented by Becky was returned to Easy Mart unpaid with a notation that the account was closed. Chuck, head of security for Easy Mart, left a message for Amy to contact him. Amy returned Chuck's call and asked if he had her purse. Chuck replied he did not but that "he had her bad check." Chuck, who would not let Amy explain, repeatedly demanded that the check be paid or "he would get her." Chuck consulted with Dan, corporate attorney for Easy Mart. Thereafter, Chuck, without further investigation, applied for a criminal warrant against Amy for theft. Amy was arrested. She was subsequently found not guilty in a criminal trial in the District Court in Cambridge, Maryland.

Assume that you had successfully defended Amy in the criminal case and she wants to know what civil claims she might have. Advise her:

(a) What civil claim(s) can she potentially maintain, giving in your answer the elements of each?

(b) Who are potential defendant(s) and why?

(c) Evaluate potential defense(s) each of the defendant(s) may have.

REPRESENTATIVE ANSWER NO. 1

(a) Amy can maintain malicious prosecution and potentially defamation and false light against Chuck and Easy Mart. Amy's malicious prosecution claim would be based on Chuck's prosecution against Amy by willfully pressing for the criminal warrant without further investigation and since she was not found guilty of the charge.

Amy's defamation claim would be based on Chuck's defamation statement "the charge of theft" about Amy, which damaged her reputation. In Maryland for defamation in addition to the defamatory statement about the plaintiff that damages the reputation when it is published (here the charge and arrest were public) you also need falsity and fault. Here the charge was false and Chuck was negligent since he would not let her explain. He owed her a duty to reasonably listen to her explanation, he breached the duty and this breach caused her to be defamed. Amy could

also show damages based on her reputation being hurt for being arrested for a crime.

Amy could also claim false light. Chuck made false statements about her which were published which caused her damage to her reputation.

Amy also has a claim against Becky for conversion. Becky took Amy's personal property from Amy's possession and intended to take the property. Since the checkbook was taken and used to write a forged check, the claim would be conversion.

- (b) Chuck is the defendant for the defamation, false light and malicious prosecution charges. In addition, Easy Mart would be vicariously liable for Chuck's actions since Chuck was an employee of Easy Mart acting within the scope of employment.

Becky is the defendant for the conversion charge.

- (c) Easy Mart's defense may be that the store is not responsible for the intentional torts of its employees. However, the store is responsible for the intentional torts of an employee, if the employee's actions were based on his position and in furtherance of benefit to the store.

Since Chuck is head of security, he is in a position where security is his responsibility and benefits the store.

Becky's defense would be that she found Amy's purse and did not take it from Amy's possession. However, that defense is weak because after finding the purse, she intentionally wrote the bad check.

REPRESENTATIVE ANSWER NO. 2

- (a) Potential Civil Claims:

Amy may potentially have causes of action for abuse of process and malicious prosecution. The elements of abuse of process would be met because the potential defendants caused process - the criminal warrant - to issue without valid justification without a good faith inquiry and for improper purposes. Additionally, the elements of malicious prosecution - a bad faith prosecution of Amy - are present as well.

- (b) Potential Defendants:

Chuck is a potential defendant in his individual capacity because he is the person responsible for having the warrant issued.

Easy Mart is also a potential defendant as it would be vicariously liable for Chuck's actions as its

employee. An employer is liable for the acts of his employees performed within the scope of employment. Easy Mart might also be liable for its attorney's role in the prosecution of the matter.

- (c) Chuck's defense would be that he acted in good faith only after consulting Easy Mart's attorney. He would thus try to escape personal liability for the actions taken on behalf of his employer.

Easy Mart would defend that its actions were justified given the fact that it had Amy's dishonored check as evidence against her. Easy Mart would probably also defend that it cannot be liable for Chuck's failure to fully investigate the circumstances of the matter because by failing to do so Chuck was acting contrary to his employment responsibilities.

I believe Chuck's reliance on Easy Mart's attorney's advice might exonerate him personally if he was directed to proceed as he did. Also, Easy Mart may be privileged to have acted as it did because it had a reasonable belief that Amy had tried to pass off a bad check and had made no attempt to pay it.

PART D

QUESTION II

(10 Points 13 Minutes)

Oliver opened an investment account with Sykes, a broker for Dickens Investments, Inc. The account required Oliver's authorization for all investments. Oliver "e-mailed" Sykes on the day in question and ordered Sykes to purchase Edsel stock "only if his account could afford it." Based on incorrect accounting information maintained by Sykes and Dickens Investments, Inc., Sykes overbought Oliver's account. Upon discovery, Sykes told Oliver of the mistake by telephone and stated that the options were to sell the Edsel stock, which in the market at the time would mean a loss, or keep the stock and send in additional money for the purchase and hope that the market price would increase. Sykes also informed Oliver during the telephone conversation that if Oliver did not pick one of these options, the account would be liquidated. Sykes did not tell Oliver that he could get his money back. Refusing to sell the stock or pay additional money, Oliver told Sykes that the money from his account that went to the stock purchase should be immediately returned to his account. The controversy remains unresolved. Last week, a dividend check was sent to Oliver on the Edsel stock. Oliver believes that he can cash the dividend check and apply it as the commencement of the repayment of the money into his account.

You are Oliver's attorney. He tells you all of the above facts. He also tells you that Sykes and Dickens Investments, Inc. are going to sue him for his failure to provide the additional money to his account. He asks you what are his rights in this matter?

State the advice you will give Oliver. Provide a detailed analysis of the reasons for that advice. Do not discuss Security laws or issues.

REPRESENTATIVE ANSWER NO. 1

Without regard to security laws, this issue can be discussed as a contract case which involves the use of a principal and agent. First piece of advice - do not cash check.

Sykes was Oliver's agent. Sykes owed Oliver a duty of loyalty, care and obedience. Sykes is required to comport with the direction of his principal Oliver.

Sykes could only purchase stock for Oliver's account if he could afford it. A computer error by Sykes and Dickens investment. Sykes called Oliver to tell Oliver of his options: (1) sell the Edsel (loss) stock, or (2) keep and pay the difference between the price and the shortage in the account. However, Sykes misrepresented the third option which would be that Oliver could get his money back.

Oliver received a dividend check from Edsel which means he is the shareholder of record and still owns the stock.

Therefore, the advice I would give Oliver is to sue Sykes and Dickens for misrepresentation about the options. In addition, there would also be an action between Oliver, principal, and Sykes, the agent for breach of contract or exceeding the limits of authority. Sykes could buy stock if there was enough money - there wasn't. Even though there was a mistake made Sykes did not give Oliver all of the options nor did he do what his principal asked - "return the money to the account". Oliver could seek damages from Sykes because although Sykes had authority, he exceeded that authority and Oliver did not ratify or accept all material terms entered on his behalf. Therefore, Oliver could recover from Sykes for breaching the principal (agent duty).

He could also recover from Dickens investments if Dickens' negligent supervision led to the non disclosure of the last option.

Lastly and most important, I would advise Oliver not to cash the check because as soon as you do you have ratified the transaction.

REPRESENTATIVE ANSWER NO. 2

This scenario raises the issue of what duties an agent owes to a principal. As a broker, Sykes is an agent for his principal, Oliver. In a principal-agent relationship, an agent can only act on behalf of the principal if there is authorization by the principal to act. In this case, Oliver expressly authorized Sykes to purchase Edsel stock "only if his account could afford it." When there is an express authorization from a principal to an agent, the Court will interpret this authorization narrowly. Therefore, Oliver's e-mail message to Sykes will be interpreted to only allow Sykes to

buy the stock if it can be purchased with available money in the account. Here, Sykes did not heed this limitation, and thus will be liable for the over purchase of stock. Sykes will probably, however, only be liable to the extent of the amount in excess of what Oliver had in his account.

The next issue for Oliver to consider is that when an agent acts without authority, the agent's act can be ratified by the principal. Thus, if Oliver learned of the stock purchase by Sykes, accepted the benefit of this purchase, and did not alter the terms of the purchase, Oliver will be deemed to ratify the purchase.

Therefore, I would advise Oliver to return the individual check, because his acceptance of it would be a ratification of the whole purchase by Sykes. Also, I would tell Oliver that, to the extent he sustains any damages in this process, he can also sue Sykes for breach of a fiduciary duty.

PART D

QUESTION III

(13 Points 17 Minutes)

Delta Hardware Store purchases goods from both Alpha Distributors, Inc. and Omega Products, Inc. Alpha employs Tom as the driver of its delivery truck. Delta contracts with Dick, who operates Reckless Delivery Service, to deliver customer orders.

One morning Delta ordered widgets from both Alpha and Omega. Alpha sent Tom to make its delivery to Delta and Omega called Reckless, and Dick immediately left his office to pick up and deliver Delta's order. On the way to Delta, Tom turned down Hairpin Avenue to pick up his girlfriend's dress from the dry cleaner. The intersection of Hairpin Avenue and Cantsee Street in Prince George's County, Maryland, is a "4-way stop." Tom and Dick, each driving his respective company truck arrived at the intersection at the same time but neither stopped at the stop sign, and both trucks struck Harry's car, which was proceeding lawfully through the intersection after making a full stop.

Harry sues Alpha, Omega, Reckless, Tom and Dick for negligence seeking monetary damages for the cost of repair of his car. Dick sues Tom for damages for a pain in his neck caused by Tom's conduct. Tom walked away from the accident without injury. Alpha's insurance will be canceled, and Alpha will have to close its very profitable business, if its insurer has to pay Harry's claim. Tom does not own a personal vehicle and has no insurance of his own.

You are Alpha's company lawyer. Alpha wants you to represent both Alpha and Tom, stating that it will pay the fees for your representation of Tom, but directs you to make sure that Alpha's insurer does not have to pay Harry's claim. Alpha does not want Tom to know of the fee agreement.

(a) Can Harry recover from Alpha and/or Omega?

(b) Can Dick recover from Tom?

(c) Can you comply with Alpha's directions?

Explain.

REPRESENTATIVE ANSWER NO. 1

- (a) An employer is liable for the torts of its employees committed within the scope of employment. Alpha is liable for Tom's negligence in hitting Harry because Tom is Alpha's employee, he is their delivery driver and was so driving when the accident occurred. The mere detour to pick up his girlfriend's dress was limited, foreseeable, and thus Alpha is liable.

Omega's liability for Dick's negligence will turn on whether Omega has the right to control the manner of Dick's performance. On these limited facts, it appears that Reckless Delivery Service is an independent contractor and thus Omega would not be liable for Dick's negligence because they lacked the requisite contract.

- (b) Contributory negligence is a complete bar to recovery in Maryland. (The only exception is the last clear chance doctrine, which allows a plaintiff to avoid such a bar to recovery where the defendant had, after plaintiff's negligent act was complete, the opportunity to avoid the accident or prevent the injury.) Unless further facts are uncovered, it is unlikely Dick can recover from Tom where Dick was contributorily negligent in running the light. Finally, it should be noted that evidence of Dick's running the light does not constitute negligence per se in Maryland.

- (c) As Alpha's attorney, I must advise Alpha that I cannot comply with the company's directives for the following reasons:

An attorney cannot represent two potentially adverse clients unless the clients consent after full disclosure of the conflict and the attorney reasonably believes that such dual representation is possible without compromising either client's interests. Here, even if Tom were to consent after full disclosure, I would not undertake representation of Alpha and Tom because, given Alpha's desire to avoid paying Harry's claim and losing its business, and Tom's lack of insurance I see no reasonable way to avoid compromising one of my client's interests.

Furthermore, I would advise Alpha that even if such dual representation were possible, I could not keep the fee agreement from Tom.

While it is permissible under the Maryland Rules of Professional conduct for a third party to pay a client's fees, the attorney (and the third party) must be clear that the (nonpaying) client is the client the attorney must disclose and the client must consent to the fee arrangement, and the attorney must exercise independent judgment and act in the best interest of his client.

I would, therefore, advise Tom to seek independent counsel (i.e., his own attorney).

REPRESENTATIVE ANSWER NO. 2

Harry can recover from Alpha and Omega only if they are vicariously liable for Tom's and Dick's negligence, respectively.

Alpha:

Alpha can be liable for Tom's conduct if an agency relationship occurred and the conduct was within the scope of employment.

An employee is usually an agent because the principal employer has the right to control how the agent does the job, both parties assent to the relationship and the employee works for the employer's benefit.

In order for conduct to be within the scope of employment, it must be of the kind required by employment, performed on the job, or intended to benefit the employer. Here, the issue is whether Tom was on the job because he was stopping to run a private errand. Under Maryland agency law, a private errand in this case is probably a detour since it is a mere departure from authorized activity. Here Tom was in the process of doing his job in the company car and merely stopped for a brief personal reason.

Alpha will be liable.

Omega does not employ Dick, instead Dick acts as an independent contractor because Omega does not exert sufficient control over the manner in which Dick performs his job to establish an agency relationship. Therefore, Omega will not be liable.

- (b) Dick cannot recover from Tom.

According to the facts, both Tom and Dick were negligent for failing to stop at the stop sign (duty to stop, breached duty, caused injuries and damages). Therefore, Dick was contributorily negligent which bars his recovery, unless he can show that Tom had the last clear chance to avoid the accident. Here, no facts support such a finding since each arrived in the intersection at the same time.

- (c) I cannot comply with Alpha's directions.

In order to represent a client with another paying for the representation, the client would have to know about the arrangement, would have to consent, and the paying party would be unable to interfere in the representation.

Here, Alpha has asked you to make sure they don't have to pay Tom's claim which is not in Tom's best interest since he has no alternative means to pay. Therefore, there is a conflict in my representation of these two and I must not accept Tom as a client.

PART E
COMMON FACTS

Patty and David were married in Pittsburgh, Pennsylvania on February 14, 1995. One child, Kim, was born to their marriage on December 25, 1995. The family resided in Pennsylvania.

Shortly after Kim's birth, Patty met and fell in love with John, a sales representative from Baltimore. On Labor Day, 1996, Patty packed her bags, took the baby and moved to an apartment in Pittsburgh, which John paid for. In June, 1998, Patty and Kim left Pennsylvania and established residence in Howard County, Maryland, to live with John. Patty now is regularly employed in Baltimore City for an insurance company.

Devastated by Patty's infidelity and desertion, David devoted himself to his work as a self-employed inventor. He recently has patented several inventions which have been licensed to large companies. David now receives royalty payments which support his considerable business expenses. David has had no direct contact with Patty or Kim for at least two years. He provides no support for either of them, although he has sent presents for Kim at Christmas in 1997 and 1998. David remains a resident of Pennsylvania.

Patty and John want to marry. Patty, through a Maryland attorney, has filed a bill for divorce against David in the Circuit Court for Baltimore City, seeking an absolute divorce, custody of Kim, child support, alimony and an award of marital property.

David was properly served a summons and the divorce Complaint with financial statements on January 15, 1999 by certified mail, restricted delivery in Pennsylvania advising that a response should be filed within 60 days.

David promptly engages you, a Maryland attorney, to represent him in the action.

QUESTION I

(12 points - 15 minutes)

Analyze and explain all jurisdictional and procedural defenses you can raise to avoid having the merits of Patty's claims decided by the Circuit Court for Baltimore City, or any other Maryland court.

REPRESENTATIVE ANSWER NO. 1

The primary defense against hearing the case in Maryland is that if the cause of action arose outside Maryland, at least one party must reside in Maryland for one year. Here, Patty's adultery and separation from David arose in Pennsylvania. Also, Patty has only lived in Maryland since June, 1998. She has not met the one-year requirement.

Also, Patty should have filed for divorce in Howard County. The Rules state that you file for divorce in the county where the Defendant lives in, works in or has a vocation in. In the alternative, the Plaintiff may file in the county she resides in - in this case, Howard County. I would move the court to dismiss this case based on improper venue in my preliminary motion, as well as lack of subject matter jurisdiction since Patty has not been a resident for one year before filing. I must raise the improper venue in a preliminary motion. I can raise the subject matter jurisdiction preliminarily or in the Answer. I also must raise the lack of personal jurisdiction preliminarily, but this is my weakest argument since David was properly served.

Under Section 6-103.1, David does not meet the requirements since Maryland is neither the matrimonial domicile nor did the obligation of support arise under Maryland law nor have any agreements been executed in Maryland between David and Patty.

Therefore, since the cause of action arose outside Maryland, Patty has only lived in Maryland eight months, Patty filed in the wrong county and David does not meet the non-resident Defendant requirements under Section 6-103.1, the Maryland courts should not hear this case.

REPRESENTATIVE ANSWER NO. 2

Lack of Jurisdiction

David is not a resident of Maryland. Although Patty resides in Maryland and David was personally served with process in accordance with the Maryland Rules, Maryland is not the matrimonial domicile of the parties nor did the obligation to pay support arise in Maryland. Further, if the cause of action arose outside Maryland, Patty cannot file for divorce in Maryland until she has been a resident for one year (June, 1999).

Improper Venue

Assuming all other jurisdictional/procedural requirements were met, proper venue is where the defendant resides, carries on regular business, is employed, or habitually engages in a vocation, or where the plaintiff (Patty) resides.

Patty works in Baltimore City. She lives in Howard County. She should have filed the action in Howard County where she and Kim reside.

QUESTION II

(18 points, 30 minutes)

(Refer to the Common Facts above)

Assume all David's pre-trial motions have been denied, David has answered the Complaint, and both parties have had their discovery.

- (A) Pursuant to Maryland Rule 9-207, Patty's request for alimony pendente lite and child support pendente lite are referred to a master for a hearing. On Monday, February 22, 1999, the Master files a report recommending temporary alimony and temporary child support based on David's gross income, rather than his net income, which is considerably less. The report and recommendation are given on that day to David and his attorney.

David is unhappy with the report and recommendation and wishes further review by the court.

What pleadings, if any, can you file to fully protect David's rights at this stage? By when must these pleadings be filed? Explain fully.

- (B) Patty's counsel has prepared and served on you, as counsel for David, within the required time, a proposed Joint Statement of the parties concerning marital and non-marital property.

David reviews the proposed Joint Statement and asks you what risks he runs by not filing his own proposed Joint Statement. Advise David fully.

- (C) During a court-ordered mediation, David became extremely angry and said, "I'll see you and Kim rot in hell before I'll pay you a nickel." During trial before a judge of the Baltimore City Circuit Court, Patty's lawyer asks David to admit he made this statement.

You object.

Should the judge sustain or overrule your objection? Explain fully.

- (D) At the conclusion of the trial, the judge signed an Order awarding Patty an absolute divorce, custody and child support, but denying all other relief. Ten (10) days later, David tells you he wants to appeal on the ground that the trial court should have dismissed Patty's Complaint based upon his motions filed before the pendente lite hearing.

Is it too late for David to appeal these decisions? Explain your reasons.

REPRESENTATIVE ANSWER NO. 1

- (a) I must file exceptions to the master's recommendation and report within five days of receipt. (Rule 9-207(d)). In this case, the exceptions must be filed by March 1, 1999. I must state the exceptions with particularity. For example, the Master used David's gross income when under Section 12-201(2), the standard for self-employed is gross income minus ordinary and necessary expenses required to produce income. I also must order a transcript and request a hearing.
- (b) The only thing David is required to file is a financial statement. Under Rule 9-203(f), this statement must include itemization of assets, liabilities and income after taxes and expenses. It must be in the form of an affidavit and can be attached to relevant pleadings. The only way to be excused from filing this statement is if an agreement is alleged to exist about alimony, child support, etc.
- (c) The judge should sustain my objection. Under Rule 9-205(f), "no statement or writing made in the course of mediation is subject to discovery or admissible in evidence in any proceeding" This is strongly related to the public policy of not letting into evidence any settlement negotiations for fear of discouraging settlement. In this case, mediation is settlement negotiations. Therefore, nothing said in mediation should be disclosed for fear of discouraging mediation. The point of mediation is to settle the dispute, and if the parties were unable to freely speak without repercussions, mediation would be pointless.
- (d) No, David has 30 days after entry of final judgment or order to file a notice of appeal. Because David filed these motions properly (in a preliminary motion to dismiss), he has not waived his right to assert these defenses and appeal on those grounds.

REPRESENTATIVE ANSWER NO. 2

- (a) I should file a motion to dismiss challenging the court's jurisdiction over the case. The motion to dismiss would be based on: 1) lack of jurisdiction over David; 2) improper venue; and 3) insufficient service of process. Next, I would file exceptions to the Master's Report. Such an exception would have to be filed with the clerk within ten days after the filing of the Report or three days after service of the Report. The exceptions must be made in writing and detail the specific errors in the Report with particularity.

In this case, all of the errors would be the computation of alimony and child support based on David's gross rather than net income.

- (b) The major risk that David faces by not filing his own proposed Joint Statement is an overvaluation of assets and income and a deduction of liabilities and expenses. David would

place himself and the court in the position of relying on Patty's statement as the true reflection of the family's financial status. Without the proper basis on which to make a determination, the court would rely on Patty's statement for her costs and expenses. A support order would be based on an inaccurate accounting of David's liabilities, expenses and income and place him in needless financial risk.

- (c) The judge should sustain the objection. Pursuant to Maryland Code 9.205(f), no statement or writing made during the cause of mediation is subject to discovery or admissible in evidence in any proceeding unless the parties and their counsel agree in writing.

Because David made the statement during court-ordered mediation, the statement regarding Kim will be excluded during the trial.

- (d) It is not too late to appeal. A judgment must be final before an appeal may be taken. The notice of appeal need not be filed until within 30 days of entry of judgment or order from which appeal is being taken. The notice for appeal should be filed with the circuit court where the judgment was rendered. David has the right to appeal once as a right, but if he misses the deadline he cannot appeal ever. The appeal will go to the Court of Special Appeals. Certain things can be appealed before final judgments which are collateral to the matter, but this is not one of them.

PART F

QUESTION NO. I

(20 Points - 25 Minutes)

Baltimore County, Maryland, has experienced an increase in private recycling facilities. As a result, the use of its publicly owned recycling facility has declined. The County Council is concerned that if this trend continues, its revenues will decrease and it will have to close its facility and default on the large loan used to construct it. The County Council, therefore, enacted the following law to ensure that the County facility would be used:

All recyclable materials generated within the territorial limits of Baltimore County are to be transported and delivered to the Baltimore County Recycling Facility. It shall be unlawful for any person to remove, transport and/or dispose of recyclable materials generated within the territorial limits of the County to any other recycling facility. Any recyclable removed, transported and/or disposed of in violation of the law shall be seized and become the property of the County.

Recycling R Us, a private company currently operating a recycling facility in the County, and Use Again, a private Virginia-based recycling company interested in relocating to Baltimore County and processing recyclables generated in the County, are opposed to the law. Their representatives come to you to see if there are any legal challenges you can mount on their behalf.

What would you advise each, and why? Discuss fully.

REPRESENTATIVE ANSWER NO. 1

I would advise Use Again that it doesn't have standing to challenge the Ordinance. To have standing, a plaintiff must have an injury in fact. This injury cannot be speculative or prospective. Although Use Again may indeed want to enter the market for Baltimore County recyclables, it has not done so yet - so it has suffered no injury. Because it has no injury in fact, Use Again has no standing to challenge the law.

I would advise Recycling R Us that it does have standing to challenge the ordinance because it will be injured by its application. Recycling R Us has at least three good arguments:

1. The statute attempts to privatize an industry that has been open to the free market. This is in direct violation of the Commerce Clause unless it is necessary to achieve a compelling governmental interest. The Commerce Clause states that only Congress can regulate commerce between the states. In this case, the regulation would prevent recyclable material from being transferred to both in-state and out-of-state recycling facilities. Therefore, the

Commerce Clause applies. The court will apply strict scrutiny to determine if the statute is valid, and the County will bear the burden of proof. Although default on a loan may be a compelling governmental interest, the statute is not necessary to avoid the default. The Legislature could do any number of things to raise money, such as raising taxes. The statute is therefore an impermissible violation of the Commerce Clause.

2. Recycling R Us could argue that the statute is unconstitutionally vague. It does not define recyclable materials or other terms, such as “dispose” and “remove”.
3. The statute results in a taking for which just compensation is required. Recycling R Us will have to show that the statute took away all economically viable use of its business. This may be difficult to prove because other use for their equipment and land may be available and loss of the best or preferred use of the property may not be sufficient for a takings claim under the Fifth and Fourteenth Amendments.

REPRESENTATIVE ANSWER NO. 2

I would advise both Use Again and Recycling R Us to consider bringing suit against the County Council for violating their due process rights and unfair interference with a property right in the revenues they generate from their recycling businesses. First I would argue that the County has enacted legislation which unfairly discriminates between the Baltimore County recycling facility and all other recycling facilities. Although it is a legitimate concern of the County to want to increase its revenues to prevent defaulting on the loan, the law violates their rights to due process because the legislation is too broad and over-reaching. The County could more narrowly tailor its legislation and still protect its interests without unfairly discriminating against private recycling facilities. Thus, the law violates both businesses Fifth and Fourteenth Amendments due process rights by discriminating against them without a substantial and compelling reason.

I would advise Use Again that the law may be attacked as a violation of the Commerce Clause because it arguably regulates the flow of recyclables between the states. However, this may fail because Use Again may not have standing to oppose this law until it actually operates a recycling facility and does business in Baltimore County (and therefore could show that it will suffer an actual imminent harm). If it wishes to insure its standing, I would tell Use Again to relocate immediately or invest in a plant in Baltimore or contact Baltimore recycles and contract to handle their recyclables, and then claim a violation of the Commerce Clause.

The law violates Recycling R Us’ (and Use Again, if standing is shown) due process rights under the Fifth Amendment since the County can seize the recyclables without a hearing and without compensation. The recyclables aren’t illegal contraband, therefore, the owners must be compensated.

Finally, the law may be an unconstitutional impairment of Recycling R Us contracts if they have

already contracted to handle recyclables within the County.

QUESTION NO. II

(15 Points - 20 Minutes)

In an action filed against the Baltimore County Council, challenging the legality of the law, Plaintiffs call the following witnesses to testify about the following subjects:

(a) The wife of Councilman Kehoe, to testify that Kehoe told her all of the private recyclers were reprobates and should not be in business;

(b) The Associate County Attorney assigned to the Council to testify as to conversations the County Council had with him in executive session, which would reveal the “real” reason the law was enacted;

(c) A County employee assigned to the County’s recycling facility, to testify that the County’s facility continued to experience a reduction in funds generated by the facility after the new law was enacted.

The Defendant objects to the admission of any of the above testimony.

As counsel for the Defendant, what objections(s) would you raise to the admission of such testimony? State your reasons.

REPRESENTATIVE ANSWER NO. 1

- a. I would object to this as hearsay - an out of court statement made by another to prove the truth of the matter asserted. I would further object that Councilman Kehoe’s statement to his wife is confidential and privileged as a marital communication.
- b. I would object based on attorney-client privilege. The Council is entitled to the privilege just as any other client. The County Attorney cannot decide to waive the privilege as it belongs to the client. Therefore, the discussion cannot be admitted into evidence.
- c. I would object to this because it is not relevant. The legality of the ordinance is at issue, not the success of the law. Second, there has been no showing that the employee has any knowledge of the facility’s income. Without some basis for his testimony, it lacks credibility and reliability, and should be excluded.

REPRESENTATIVE ANSWER NO. 2

The following objections should be made:

- a. Councilman Kehoe's wife should not be allowed to testify because the Councilman's opinion of private recyclers has nothing to do with the validity of the law enacted and is therefore irrelevant. Additionally, the statement would be hearsay as the testimony of an out-of-court statement made by a declarant to prove the truth of the matter asserted. Finally, the statement was made by the Councilman to his wife in a confidential setting and is protected as a marital communication. The privilege may be waived, but so far has not been.
- b. The meeting of the County Council with its attorney falls under the attorney-client privilege. The attorney was assigned to represent and advise the Council and, therefore, an attorney-client relationship exists. The meeting occurred in executive session so there is no question that private parties were there to cause the privilege to be waived. Finally, the Council holds the privilege and must decide, as a body, to waive it.
- c. The fact that the facility is still losing money does not matter to the cause of action. It is irrelevant whether the law turns out to be a bad one, since it is a legislative decision to try to address a problem with the law. Moreover, there are no facts that show how this employee knows about the losing money - there's no foundation for his testimony. Under the Best Evidence Rule, assuming the lost profits are relevant, the actual records should be introduced.