FEBRUARY 2000 MARYLAND BAR EXAMINATION
REPRESENTATIVE GOOD ANSWERS

PART A - QUESTION I

(15 Points 15 Minutes)

In January, 1978, Curtis and Peggy Jones purchased a property located at 4711 Duncannon Road, Pikesville, Maryland and they moved in on January 15th that same year. Their next door neighbors were Charlotte and William Perry who lived at 4713 Duncannon Road and had lived there for 20 years when the Joneses moved in.

In February of 1978, Mr. Jones constructed a 3' tall wooden fence 5' inside his property line and between the two properties with a gate between the two properties facing the Perrys' house. In March of 1978, Mr. Jones then had a paved driveway constructed outside his fence so that one could pass through the gate and get into a car parked in the driveway. The driveway was 8' wide and 60' long and encroached upon 3' of the Perrys' property.

The Joneses used the driveway continuously, maintained it and kept it free of snow in the winter. The Perry's also used the driveway, but only with the Joneses' permission.

In 1989, the Perrys died in an automobile accident leaving as their sole heir their nephew, Jerry, who was then 10 years old. The property was then leased to Charles and Georgia Crosby who moved in in July of that year. In August of 1999, the Joneses received a certified letter from the Crosbys demanding that they cease and desist using the driveway between the two properties as the driveway was on the property they were leasing.

You are an attorney licensed to practice law in the State of Maryland. The Joneses have come to you for advice concerning their right to use the driveway.

Under what theory may the Joneses assert their ownership of the driveway? Are they likely to succeed? Discuss fully.

REPRESENTATIVE ANSWER 1

The Joneses are likely to succeed under the theory of adverse possession. Under this doctrine, one must adversely possess real property for the statutory period of twenty (20) years under Maryland Law.

In order to prevail, the Joneses must prove that their use of the driveway which encroached 3' upon the Perry's property was (1) open and notorious; here they paved the driveway which included the encroachment, putting others on notice which was open and notorious; (2) exclusive; here they

excluded others, the facts inform that they gave the Perry's permission to use the driveway; (3) they used the driveway continuously according to the facts; (4) they had actual possession of the 3' encroachment because it was paved by them and they used it regularly; (5) under claim of right because they paved it and excluded others.

When the Perrys died in 1989 and left their property to Jerry, Jerry was under a disability. However, this disability did not interfere with the claim of the Joneses. The statutory period continued to run. It was not until August of 99, when the Joneses received a certified letter from the tenants to cease and desist using the driveway. By this time, the Joneses had acquired the 3" encroachment by adverse possession because they had used it for the statutory period of 20 years.

The Perry's estate may argue that Jerry's disability tolled the statute, but that argument will fail because the statutory period started to run prior to the onset of the disability.

REPRESENTATIVE ANSWER 2

The Joneses are likely to succeed in asserting their ownership rights under the theory of adverse possession. Adverse possession requires that the use be continuous, open, notorious, actual (as opposed to constructive) and hostile for a period of twenty (20) years.

The driveway was constructed in march of 1978 and the letter was not received until August of 1999 yielding over 21 years of continuous use.

This use was open and notorious as against the true owners possessory rights over the three (3) foot encroachment. It was apparent to anyone observing and it was actual, that is, a real physical encroachment, not just symbolic.

The Joneses use was hostile in that it was repugnant to the possessory rights of the true owners. Perhaps the Perrys were unaware of their property boundary and so were oblivious to the fact that their property rights were being infringed upon, but that does not matter. The fact is that the Joneses used property that was not theirs as though it was their own (maintained it, plowed it and used it) for a continual period of 21 years.

However, Jerry, when he reaches 18, or by a guardian prior to that time may assert his rights against the Joneses claim. He would prevail only if the statutory period were suspended as a result of his minority. However, that is not the case. The statutory period, since it started prior to the owner's disability, continues to run.

PART A - QUESTION II

(20 Points 30 Minutes)

Mary Jo and Jimmy were married on December 1, 1985. After their marriage, they bought a home in Harford County, Maryland which was titled as tenants by the entireties and where they resided during their marriage. Four children were born of the marriage, namely; Jill, age 12; Jimmy, Jr., age 11; Martin, age 7; and Matthew, age 6.

Jimmy was self-employed and earned about $250,000 annually. Mary Jo was an emergency room nurse at the Harford County General Hospital with a salary of $50,000 annually.

The couple began having marital problems, and in May of 1997, after a one year separation, they entered into a legally binding separation agreement which required Jimmy to pay Mary Jo $4,000 per month child support and to be responsible for 50% of all medical bills for the children not covered by medical insurance. The separation agreement was incorporated, but not merged, into the Judgment of Divorce and the parties were divorced in July of 1997.

Jimmy visited his children on a regular basis. He involved them in sports and other activities that Mary Jo's schedule did not permit. In July of 1999, Matthew became very ill. After a series of tests, it was determined that he suffers from leukemia and needs a bone marrow transplant to survive. If a compatible donor cannot be found, there is a new experimental procedure which may be used to prolong Matthew's life. The doctors informed Jimmy and Mary Jo that, although the procedure is expensive, it could substantially lengthen Matthew's life. The procedure is not covered by their medical insurance.

During the testing to determine if he was a compatible bone marrow donor, Jimmy learned that Matthew was not his biological child. Suspicious, Jimmy had the other children tested and, to his surprise, he learned that Martin also was not his biological child.

Hurt and angry because of his wife's infidelity, Jimmy does not wish to continue to pay child support for the children that are not his, and he does not wish to be responsible for Matthew's medical care.

After Jimmy confronted Mary Jo, she admitted that she had an affair during the marriage with the father of the two younger children and the children were conceived at times when Jimmy and Mary Jo were temporarily separated.

Barry, the biological father of the two younger children, is employed at McDowell's Hamburgers and earns $5.50 per hour. Until being contacted by Jimmy, he was unaware that he was the father of the children. He now wants to become involved with them and have regular visitation.

You are an attorney licensed to practice law in Maryland. Jimmy has sought your advice

concerning the situation.

If he was to file a Motion for Modification of the Judgment of Divorce, what is the likelihood that the child support payments for Matthew and Martin would be terminated and that he would not be held responsible for Matthew's medical care? Discuss fully.

REPRESENTATIVE ANSWER 1

In advising Jimmy on his motion for modification, I would discuss the following:

The standard is the best interests of the child. The courts will determine from all the facts and circumstances what is in the best interests of the child.

The separation agreement was incorporated but not merged into the judgment of divorce, therefore, it survives as a separate contract and may be enforced under contract law and its terms are not superseded by the judgment of divorce. However, issues regarding children, such as child support and medical expenses may always be modified.

As a general rule, children born during the marriage are considered children of the parties to the marriage. Since Jimmy and Mary Jo were married at the time that the children were born, they are both considered Jimmy's children.

However, Mary Jo admitted to Jimmy that she had an affair during the marriage and that he is not the biological father of the two children conceived during their brief separations. This admission may be admitted into evidence to rebut the presumption that Jimmy is the father of the two children.

The fact that Jimmy has contacted the biological father and he wants to be involved will be considered. Barry, as the biological father, may agree to be the donor for Matthew.

The court will look to the best interests of the child, Because at this point, the child does not know Barry is his biological father and the facts inform that Jimmy visited with the children on a regular basis.

The court will also look to the fact that Barry only makes $5.50 per hour and cannot afford to maintain the level of support the children were receiving from Jimmy because of his $250,000.00 salary.

In conclusion, the court, since the separation agreement was not merged into the judgment, the court may enforce the agreement either by its contempt powers or independent contract law.

REPRESENTATIVE ANSWER 2

There are several grounds on which Jimmy may file for modification of the judgment.

There has been a material change of circumstances here. Two of the children being supported are not Jimmy's and one of them has acute expensive medical needs.

There is a strong presumption in favor of legitimacy of children born during the marriage, and Jimmy bears the burden of rebutting this presumption to have the court order modified.

First, the children have been tested and two are not Jimmy's. Blood testing, which is probably the test Jimmy used, is generally viewed as very accurate. Moreover, the children were conceived during periods of separation, and there are no facts indicating that Jimmy and Mary Jo had sexual relations during the separations.

The biological father never knew about his paternity and now wants to be involved.

It appears as though there is plenty of evidence to rebut the presumption against paternity of Martin and Matthew. However, the court must also look to the best interests of the children in this situation prior to modifying the order.

Jimmy has a superior salary to Mary Jo and he has been quite involved in his children's lives up until now. The biological father is making minimum wage and is not in a position to offer monetary support for the children. Moreover, Matthew's medical condition will be a source of concern for the court, especially since some of Jimmy's income would appear to be necessary to pay for the experimental procedure.

Termination of support in this case as regards Matthew does not appear to be in Matthew's best interest, but the court will also have to weigh the value of the experimental treatment versus the trauma it might cause. The court may not find that it is in the best interests of the children to terminate support.

PART B - QUESTION I
(25 Minutes 15 Points)

Bob Buyer decided to purchase a picturesque cottage near Small Town, Maryland. He approached Sam Shifty, a real estate agent in Small Town, about preparing a purchase contract. Shifty said the cottage was owned by Clarissa Marple and that $50,000 was a fair price. Buyer signed a contract in that amount and left it with Shifty, who said he would handle everything. Later, Shifty informed Buyer that Marple had signed the contract and that closing would occur at Shifty's office on February 11th, 2000.

Buyer arrived at Shifty's office at the appointed time and was introduced to a woman identified as Clarissa Marple by Shifty. In fact, the woman was Irma Imposter. Buyer wrote out a check for $50,000 payable to Clarissa Marple and delivered it to Imposter. The check was drawn on Buyer's account at Small Town Bank. Imposter signed Marple's name to a deed for the property and gave it to Buyer.

Promptly after the closing, Imposter indorsed the check with Marple's forged signature and presented the check for cash at the Small Town Bank. Marple was also a customer of the Bank. The teller recognized Imposter as Marple's housekeeper. The teller thought the transaction was a little unusual but since Marple was a well-known eccentric and often had Imposter cash checks drawn on Marple's account for sums of money, some for amounts as large as large as $5,000, he asked Imposter to indorse the check as a precaution, which she did. He then cashed the check. Imposter and Shifty have not been seen since.

When Buyer arrived at the cottage later that day with a moving van, he found it occupied by Clarissa Marple. She was not the same person he had met previously and knew nothing about a contract. Buyer promptly sent a stop payment order for his check to Small Town Bank but the check had already been cashed.

Small Town Bank deducted $50,000 from Buyer's checking account. Buyer has demanded that the Bank recredit his account. He has informed Marple that, if the Bank does not recredit his account, he will sue her.

As between Buyer, the Bank and Marple, who is responsible for the $50,000? Why?

Representative Answer 1

The Bank was in the best position to stop this fraudulent activity, therefore, should be liable for the money. The bank, under 4-401, could pay out on the account, but should have taken some precautionary measures. Although Marple has done quirky transactions in the past, they were never for an amount more than $5,000, substantially lower than Buyer's $50,000 check. Although it did have an

indorsement, it should have been compared to Marple's signature card for such a large sum of money. In addition, because the teller recognized the imposter as not being Marple, he should have refused to cash the check. Generally, with a general, not specific indorsement such as this, payment goes to the bearer. However, under 3-40B, the signature was unauthorized, so is not effective.

Under limited circumstances, Marple could be liable. Under 3-405, she would be liable if she intrusted endorser with a signature stamp. Additionally, if she failed to use ordinary care with a signature stamp, she would be liable under 3-406(a). This is not the case, however, because imposter forged Marple's signature herself.

A check is always a negotiable instrument and buyer would be responsible for paying to a subsequent holder in due course (HDC). I don't believe the bank is an HDC, however, because they should have had notice of the fraudulent activity. Because the bank was in the best place to stop this fraudulent activity, it should be responsible for the $50,000.

Representative Answer 2

Normally, in situations like this, the drawer of the check (Buyer) is ultimately responsible because the check was made out to an imposter, and the drawer, not the bank, is in the best position to determine imposters. Thus, under 3-404, an indorsement by an imposter is normally effective as the indorsement of the payee and a bank will be liable.

Also, where a drawer's negligence contributes to a forged signature, the drawer will be ultimately liable, 4-406. However, there is no evidence really of Buyer's negligence or failure to exercise due care, although perhaps he could have asked for identification. This is a weak basis on which to assess liability.

With respect to the stop payment order, the bank is not responsible on this basis because, although Buyer provided the information required by 4-403 apparently the bank had already paid.

As stated above, normally drawers are liable in this situation. However, in this case, Buyer can likely shift responsibility to the bank under 3-404(a) & (b) because of the teller's actions.

Buyer has a good argument here that the bank teller did not exercise ordinary care in this situation. Although the "reasonable commercial standards" in Small Town maybe more lax because the tellers are more familiar with their customers, this teller at least had an inkling that this transaction "smelled bad." There is no evidence that the teller acted in bad faith as defined in 1-201, but he was not acting in a commercially reasonable manner. That is, he knew imposter was Marple's housekeeper, he never checked the indorsement of a $50,000 check against a signature card when the check was presented by someone else, he asked no questions even though this check was for $45,000 more, a substantial amount, from other checks imposter had cashed drawn on Marple's account, and

he never called Marple in this situation.

When a person paying an instrument fails to exercise ordinary care and that failure substantially contributes to the loss, the person may recover from the payee the amount of the loss in this situation 3-404(d). No matter what happened in the past with Marple and imposter, the teller should have clued in to a potential problem by imposter trying to case a $50,000 check. the bank should return the money to Marple. Marple will not be liable in this situation most likely.

Imposter was not acting as a responsible employee in this situation under 3-504 - there is some evidence of responsibility here by the actions and amount of the check put imposter out of the scope of responsibility, to a reasonable person. Moreover, 3-405 applies more to checks drawn on employer's account.

More importantly, a person is not liable or an instrument unless she signs it 3-401. Marple never signed the check and is not liable as an endorser here. Imposter may be held liable because it is her signature, but Marple may not.

PART B - QUESTION II

(20 Minutes 15 Points)

Reading Power, Inc. is a Maryland charitable corporation whose members provide literacy tutoring on a volunteer basis. Its members provide one-on-one tutoring to functionally illiterate adults in Talbot County, Maryland. It provides services to approximately 100 clients annually.

The volunteers decided that they could better serve their clients if they had a full-time paid reading specialist for consultation and training. The volunteers realized that Reading Power had no funds to pay an employee. Representatives of Reading Power approached Local Charities, Inc., a Maryland charitable corporation, about providing $30,000 in funding for the specialist.

On January 11, 2000, the president of Local Charities sent Reading Power a letter which read in pertinent part:

> "Our Board has reacted with enthusiasm to your proposal. We plan to place donation boxes at local stores to raise money for literacy purposes. We anticipate that we will have no difficulty at all in raising $30,000 by July 1, 2000."

After receiving the letter, the president of Reading Power entered into an oral contract of employment with Sarah Teacher to act as a reading specialist for one year commencing July 1, 2000. Teacher provided notice to her current employer that she would be leaving her job.

On February 15, 2000, Local Charities informed Reading Power that Local Charities had

decided to fund another literacy program which served more clients. The donation boxes placed in stores by Local Charities did not designate a specific group but merely indicated that the funds were to be used for adult literacy purposes.

What are Reading Power's rights, remedies and liabilities under these facts to (1) Local Charities and (2) Sarah Teacher? Explain your answer.

Representative Answer 1

Reading v. Local Charities: Reading Power has no claim in contract against the Local Charities organization. The problem here is that there was no offer and acceptance. The original request sent to the Local was not an offer, but a request. The response sent by the president of Local was not an offer either. He simply stated that they were enthusiastic about the idea. It clearly states in the letter that donation boxes would be distributed "for literary purposes." It was very general, and did not commit any money to Reading. Local left itself open so if a better program came along, it was free to use the money for that.

Reading, although it detrimentally relied on Local's letter, it had no right to, and its reliance was not reasonable in nature. There was definitely no "meeting of the minds." No contract means Reading has no rights to Local.

Reading v. Sarah Teacher: This oral contract would normally not be enforceable under the statue of frauds, because it is not capable of being completed within 1 year. Generally, the statue of frauds has been held to be inapplicable to charities to encourage charitable activities. Here there was clear and reasonable detrimental reliance. Offer and acceptance appears to be present and Sarah quit her job as a result. Reading should be liable for damages caused by its breach to Sarah, probable for the $30,000 under her oral employment contract.

Representative Answer 2

Reading Power v. Local Charities: Reading Power's (RP) rights against Local Charities (LC) are fairly limited under these facts. As this does not involve the sale of goods, common law contract rules apply.

There is a fundamental problem in the formation of this contract. RP's approaching of LC is more of an "invitation to deal" than an offer. LC's letter is neither an offer nor an acceptance - it is an illusory promise because it does not promise to do anything. Offers and acceptances require present intent, which is lacking in the letter - "we plan to place." Moreover, the language "we anticipate that we will have no difficulty . . . " is illusory - placing donation boxes is no guarantee of the $30,000 requested by RD.

Because LC promised to do nothing, it has a good defense to contract formation. RP, however, relied on the letter in hiring Sarah Teacher. This reliance has ended up being to its detriment since it may be incurring liability on this basis (discussed below). LC may have reasonable know that RP would rely on its letter, which might give rise to promissory estoppel claims. That is, PR may claim that LC should have known or knew that it (RP) would reasonably rely on its letter and engage a reading specialist. However, RP had not extended any money in reliance of the offer, it merely made a contract. This is not normally the kind of reliance that will give rise to promissory estoppel, which usually requires more detrimental reliance that RPs.

LC also notified RP of its decision to fund another source within a little over a month. Thus, RP should be sending out grant applications and letters to try to get funding from an alternate source.

If a court did find LC liable here, RP's damages would probably amount to the cost of covering Teacher's contract. Presumably $30,000 or whatever the agreement for salary was.

RP v. Teacher: Here, there appears to be an essential element missing from the contract. Salary, although one could assume from the facts it is $30,000.

This is an oral contract but can be performed in a year because it is only for a year, so RP can't raise the statute of frauds as a defense.

Teacher can claim a breach of contract - anticipatory repudiation, against RP but she must cover and find employment elsewhere - she can likely recover damages of $30,000 year - salary of new job. This will place her in same position as if contract performed. She may also try to claim against LC as a third party beneficiary but she is not an intended beneficiary of any contract, if at all, between LC and RP but an incidental beneficiary even though she relied to her detriment, she could not recover.

PART C - QUESTION I

(13 Points 17 Minutes)

Gus got into an argument with his wife Candy over her alleged marital infidelity. During the disagreement Gus threw a razor at Candy which cut her wrist requiring medical attention. The police were called to the hospital and based on what Candy told Deputy Turner, Deputy Turner went to Gus' residence and lawfully arrested him for first degree assault and took him to the police station. At the station, Deputy Turner advised Gus of all of his Miranda rights. Gus said he understood his rights and agreed to talk with Deputy Turner. Gus then asked Deputy Turner, "Do you think I should have a lawyer with me?" Deputy Turner responded that he did not think the situation was a "big deal". Gus then gave a statement incriminating himself.

Gus has retained you to represent him.

Analyze whether Gus' statement is admissible in the State's case in chief.

REPRESENTATIVE ANSWER NO. 1

This question turns upon the effect of Gus' question "Should I have a lawyer with me?" and Deputy Turner's response: "It's no big deal." (Gus' Fifth Amendment rights are implicated here).

When Gus agreed to talk with Deputy Turner, he may have effectively waived his Miranda rights. A waiver must be knowing and intelligent, as well as voluntary.

Gus' question suggests that the waiver was not knowing and intelligent. If Gus made the incriminating statement under Deputy Turner's influence, i.e., that it was not a 'big deal,' Gus may not have given a valid waiver.

Deputy Turner's obligation - The question is what was Deputy Turner's obligation in response to Gus' question. Rather than falsely indicate that it was not a big deal, Deputy Turner should have respected Gus' desire to have a lawyer.

The Rules of Crim. Pro. dictate that when a person is in custody and expresses a desire to have a lawyer present, the police is obligated to comply with that. Did Deputy Turner's response amount to non-compliance? Account may find that Gus was merely interested in Deputy Turner's opinion and that Deputy Turner simply gave it, but, given the seriousness of the circumstances, this is very unlikely. I would say the statement should be suppressed because Gus expressed a desire to have a lawyer present (albeit in a round-about way), and Deputy Turner was obligated to act in such a way as to not induce further statement.

REPRESENTATIVE ANSWER NO. 2

The statement would not be admissible in the State's case in chief (it might be for impeachment, but that wasn't asked) for the following reasons:

First, Gus was clearly in a custodial interrogation and had been advised of, and apparently voluntarily, knowingly, and intelligently waived his Miranda rights. The question is whether or not Gus' statement "Do you think I should have a lawyer with me?" was a request for an attorney.

If during a custodial interrogation a suspect says that he wants to speak to an attorney, all questioning must immediately cease until that person is given the chance to speak with his attorney. The only exception to this is when the accused voluntarily re-initiates the conversations with no active involvement of the officer.

A suspect's request for a lawyer must be clear and unequivocal. Here, the questions Gus asked were not a clear and unequivocal request for an attorney, so the police were not required to immediately cease questioning.

However, Deputy Turner's indication that the situation was not a big deal violated the spirit and intent of Miranda, and violates Gus' 5th Amendment rights against self-incrimination (as applied to the states via the 14th Amendment). In effect, Turner's statements negated the Miranda warnings by encouraging Gus to talk with the implied assurance that nothing bad would happen if he did. Gus was under arrest for a felony assault, yet Turner told him it was no big deal. This statement was the same as saying while giving the Miranda warnings, "You have the right to an attorney, but don't worry about it, you don't need one to talk to us."

Since Turner's statement negated the Miranda warnings, the incriminating statement by Gus was obtained in violation of Miranda and the 5th Amendment. The exclusionary rule excludes (generally) evidence obtained in violation of an accused's 4th, 5th and 6th Amendment rights, so the statement would be inadmissible in the state's case in chief.

PART C - QUESTION II

(12 Points 16 Minutes)

On a cold winter night Tom said goodnight to his family and went out to determine if the pipes had frozen in a vacant house he owned. On the way, Tom sought added protection against the cold in the form of repeated swigs from a bottle of whiskey.

Earlier that evening Dick, having no fixed address, sought refuge from the cold in Tom's vacant house, gaining entry through an unlocked door.

Tom entered the dark house through a kitchen door and turned on a light. When Tom walked through the still dark living room, where Dick was sleeping on a sofa, Dick awakened and suddenly sat up. Tom, startled by Dick's motion, turned and fired his .38 caliber revolver (for which he had a permit) five times in rapid succession at the barely visible silhouette. All five shots struck Dick in the chest. Dick died immediately.

A blood alcohol test was administered at the scene of the crime with Tom's consent, which indicated blood alcohol content of .13% (well over the level sufficient to support a conviction of driving while intoxicated). Tom is indicted for murder, which, by statute, permits a conviction for murder in the first degree, murder in the second degree or manslaughter, as well as a complete acquittal.

Discuss the defenses, if any, which Tom might assert at trial and the likelihood of an acquittal on each charge.

REPRESENTATIVE ANSWER 1

Tom can assert the defenses of voluntary intoxication, self defense, and defense of property. Voluntary intoxication should be supported by the results of the blood alcohol test. Self-defense may be found if it is determined that Dick, in fact, represented a chance of "deadly force" against Tom. Defense of property will probably be insufficient (deadly force not allowed) if the self defense fails.

On the charge of murder in the first degree (requiring specific intent), the voluntary intoxication should represent a sufficient defense to win acquittal. An intoxicated person cannot form the required specific intent.

Murder in the second degree requires a general intent to kill, to do serious bodily harm, or requires a depraved heart. The facts do not show that Tom possessed any of these. He should be acquitted on second degree murder.

The voluntary intoxication should make Tom liable for nothing more than manslaughter. The self defense should fail because there is no indication that Dick represented a potential for harm to Tom. Tom should be convicted of manslaughter because his actions did result in the death of a human being.

A complete acquittal seems out of the question.

REPRESENTATIVE ANSWER 2

Lack of intent: Tom did not have premeditation or deliberation required for first degree murder.

If he was significantly reckless – "acted with malice heart" – regarding human life (Dick), then perhaps second degree murder okay.

Voluntary intoxication: Good as a defense to specific intent crimes, but not okay for general intent crimes. Thus, acceptable for murder 1 charge but not useable for second degree murder or manslaughter.

Self-defense: Probably not adequate since Tom was the aggressor. Dick was a trespasser but still was the occupant or possessor. Was Tom fearful of death or immediate serious bodily injury, as inflictable by Dick? -- Probably not. And 5 shots by Tom – probably a bit excessive. Again, Tom had and used a revolver, which requires re-depressing the trigger before and during each shot.

Defense of property: Inadequate, since positions were reversed. Tom was intruder, Dick was possessor (although unlawfully).

Insanity: Modern Penal Code Test – did not know criminality or wrongfulness of actions, nor was able to comport with required standard of conduct. Probably not arguable, since gun was registered, and therefore, Tom must have had some knowledge about acceptable uses of guns, and obvious misuses. Also – to get the registration – he probably had to show he was of sound mind (i.e., sane, or at least not insane).

Temporary insanity: probably not, since not provided by circumstances strong enough, such as catching wife in bed with another man.

In sum: First degree murder charge will probably fail, since it does not appear that Tom had requisite intent, nor acted with premeditation or deliberation. Of course – 5 individual shots?, although fired in rapid succession. Also, Tom was intoxicated.

Second degree murder: Tom probably cannot gain acquittal on this one since he was significantly reckless, and showed near complete disregard for human life as per his actions.

Manslaughter: This would serve as a reduced charge of murder, applicable if Tom was provoked into the killing. In other words, it is an allowance made for provocation. It does not appear that Tom was provoked (e.g., wife in bed) and acted merely recklessly. If the second degree murder charge could not succeed, then voluntary manslaughter would probably work.

PART C - QUESTION III

(10 Points 12 Minutes)

On routine patrol on July 15, 1999 at approximately 4:30 a.m., Officer David saw a van parked behind an abandoned store in Upper Marlboro, Prince George's County, Maryland. He approached the van and found Jason asleep in the driver's seat of the van. The officer noticed through

the side windows in the back of the van three cartons marked Zenith Television and labeled "LaPlata Television Center, Attn: Jim Smith, President, LaPlata, Maryland". Officer David called the station to determine if any thefts had been reported. He was informed that LaPlata Television Center had reported to the Charles County police, the county in which the store is located, the theft of twenty Zenith television sets at 11:30 p.m., July 14, 1999. Officer David tapped on the van window and Jason woke up. The officer asked Jason if he needed any assistance; Jason said he wanted a lawyer.

Jason was charged with possession of stolen property, that is, the three television sets, in the Circuit Court for Prince George's County, Maryland, under Article 27, section 342(c) of the Maryland Annotated Code because that is the county where he was found with the property.

In the Circuit Court for Charles County, Maryland, Jason was charged with storehouse breaking of the LaPlata Television Center with intent to steal under Article 27, section 30 (a) because Charles County is the county where LaPlata Television Center is located.

Jason with the assistance of a public defender in Prince George's County entered into a plea bargain with the State on the possession of stolen Property charge in the Prince George's County case and received a one-year sentence.

You are the assistant public defender assigned to represent Jason in the Charles County case. Through discovery from the State, you have learned that the State has no witness that can place Jason at or in the vicinity of the LaPlata Television Center on July 14 or 15, 1999. You have further learned that the State's case will be based on the inference that, because Jason was in exclusive possession of the stolen property in Prince George's County, it could be inferred that Jason committed the storehouse breaking in Charles County with intent to steal that property. Assume that the parties have stipulated to all of the above facts.

State in detail (a) the arguments you will make for a motion to dismiss the storehouse breaking charge against Jason in the Charles County case; (b) the arguments against the motion to dismiss that would be made by the State; and (c) include in your analysis whether or not the motion to dismiss will be granted.

REPRESENTATIVE ANSWER 1

(a) As attorney for Jason, I would first argue for dismissal based on double jeopardy. Jason has already pled guilty and been sentenced in Prince George's County for possession of stolen property which arises out of the same transaction as the B&E in Charles. This motion will probably fail because each offense requires proof of a different element that the other offense does not have. B&E and possession of stolen property are two completely different crimes.

The second motion to dismiss would be based on the state having no probable cause to prosecute Jason, much less proof beyond a reasonable doubt. Here, the state has no witnesses that can place Jason in the vicinity of La Plata TV, and their case is based solely on the inference that Jason committed the B&E because he was in possession of the goods. The State will argue this is sufficient to proceed because it is a proper inference, which may be rebuked at trial, that a person in possession of stolen property is the person that stole the property. As such, the motions to dismiss will likely be denied, and Jason will have to stand trial in Charles County.

(b) and (c) are answered in the discussion above.

REPRESENTATIVE ANSWER 2

(a) Motion to dismiss for lack of evidence; since there was no trial in Prince George's County, Jason can refuse to testify against himself (5th Amendment), and, therefore, the State will have no grounds to prove its case (i.e., no evidence). Jason cannot be compelled to incriminate himself in a criminal case, and he will not do so voluntarily. Mere possession of stolen property does not signify its theft. Also, the plea bargain agreement was designed to enable Jason to avoid a trial in which possibly the sentence – if convicted! – might have been much more severe. Although this new trial would not imperil "double jeopardy" doctrine, Jason made the agreement fully expecting the second case to be dropped.

I would, therefore, argue that res judicata (claim preclusion) and collateral estoppel (issue preclusion) would preclude the State from trying Jason in Charles County. I would also question whether a speedy trial was administered in this instance, depending on the State's delay.

(b) The State would argue that the charges are completely separate, and that double jeopardy would not apply, since Jason never went to trial, and even if he did – and within any county within same state – the crimes were separable. Of course, I would argue that they stem from same source, and, therefore, were not separable.

(c) The motion to dismiss should be granted, since the State's circumstantial evidence is relatively week. Without a witness and without the Defendant testifying, the State's case is probably not provable beyond a reasonable doubt.

PART D

COMMON FACTS

Grace Jackson rents a row home in one of Baltimore City's poorest neighborhoods from Red Dog, Inc., a Maryland corporation. The President and sole stockholder of Red Dog, Inc. is Jim Stone, who has been recently characterized by newspaper articles as one of Baltimore's worst slumlords.

Red Dog owns over 200 rental homes. All are managed by White Tiger, LLC, a Maryland limited liability company, of which Jim Stone is the sole member. Under the terms of a written management agreement, White Tiger employees perform all daily business activities for Red Dog, Inc. These services include advertising, leasing and maintaining houses, collecting rents, paying bills and evicting tenants. The management agreement states that White Tiger, LLC is an "independent contractor," and is "wholly responsible" for property management. The management agreement allows White Tiger, LLC to retain 95% of rents collected for its management services. All of White Tiger's net revenue is paid to Jim Stone for services he renders to White Tiger, LLC. Thus, White Tiger, LLC has minimal assets.

On June 1, 1999, Bo Roberts, an employee of White Tiger, LLC, went to Grace Jackson's home in the normal course of his duties, to collect the rent due Red Dog, Inc. Grace let Bo in, but refused to pay the rent until the Landlord repaired a defective electric outlet. Bo grabbed Grace's handbag and emptied the contents, looking for rent money. When Grace tried to take her wallet, Bo pushed her away. Grace fell and struck her head on a table. As a result, Grace suffered brain damage, which left her with severe, permanent injuries.

Grace has filed suit in the appropriate Maryland court against Bo, alleging the above facts and claiming damages on account of her injuries. White Tiger, LLC and Red Dog, Inc. have been sued as Co-Defendants based on allegations that Bo was their agent. Stone is also a Co-Defendant, alleged to be liable as the sole director and stockholder of the two entities, both of which are in good standing.

PART D - QUESTION I

(12 points, 15 minutes)

Jim Stone asks you, a Maryland attorney, to defend him, White Tiger, LLC and Red Dog, Inc. in the suit filed by Grace Jackson. Stone says he and the entities will waive any conflict of interest. Stone gives you a check for $10,000, as a retainer for fees, to be charged at your standard hourly rate. Stone wants you to meet with Bo that day and take a statement from him. Bo has not been served with the lawsuit and is unrepresented.

What actions, if any, should you take to comply with the Rules of Professional Conduct? Explain the reasons for your answer.

REPRESENTATIVE ANSWER 1

To comport myself with the Rules of Professional Conduct I must do the following:

First, ensure that Jim Stone, White Tiger, and Red Dog have made an intelligent and knowing waiver of their conflict of interest. This should be possible since they are in effect the same person, but I will not need to inform Jim Stone that he personally and each of the entities are subject to differing standards of behavior and thus a conflict could possibly develop.

Assuming that Jim agrees and does so properly, I should (but don't have to) put our fee agreement in writing and ensure that Jim is clear as to the scope of our relationship and his obligation to pay costs associated with my representation.

The $10,000 cannot go into my firm's general account but must be separately kept in an escrow account for my clients – to be transferred only as the money is earned by me.

When I visit Bo, I must ensure that he is aware that I represent a party which in all likelihood will be adverse to him and I should recommend that he seek the advice of counsel in this matter. Only if Bo makes an intelligent and informed decision to speak with me in the absence of counsel may I speak with him.

Only after talking to each of these steps have I met the standards required for the Rules of Professional Conduct.

REPRESENTATIVE ANSWER 2

First, I should deposit Jim's retainer in a separate account for client funds and keep an accurate record of the deposit so his retainer can be distinguished from monies to and from other clients. Second, I would send Jim a written statement regarding my standard hourly rate and any estimate of hours I was able to make based on the proposed scope of representation to date.

Second, in this letter I would also need to clarify who my client is exactly, Jim, Red Dog, White Tiger, or any combination thereof.

Third, with regard to the present and/or potential conflicts of interest, I would need to have a more thorough discussion with Jim. In fact, this discussion may lead me to be unable to undertake either or both of the first two steps mentioned above, depending on the outcome of the discussion. Specifically, I would need to determine whether I reasonably believed I could represent all three (or any combination of the three) clients without adversely impacting my representation of any of them. Next, I must discuss the matter thoroughly with Jim so that he could give informed consent if he chose to waive the conflict of interest (if any). I should discuss with him any foreseeable future/potential conflicts of interest and explain that if an

actual conflict arose, I would have to withdraw from all representation on the case. Finally, I shouldn't ask Jim to waive any potential conflict, if an objective attorney (not involved in the case) would think the client shouldn't waive any conflict. However, as Jim is the sole member of both entities representation seems possible in this case.

Finally, with regard to Bo, I must reveal to him whom I represent and in what capacity before asking him any questions. Even though he is Jim's employee he may be an opposing party (through a counterclaim).

PART D - QUESTION II

(23 points, 30 minutes)

Jim Stone tells you that he had specifically directed Bo, and all other White Tiger employees, never to use force in collecting rent.

Assess the potential liability of White Tiger, LLC, Red Dog, Inc. and Jim Stone based on the facts available to you. Explain the reasons for your answer.

REPRESENTATIVE ANSWER 1

White Tiger, LLC

An employer is liable for the torts of its employees when the employee is acting within the scope of his/her employment. This is the doctrine of respondent superior ordinarily, the intentional tort of an agent is not within the scope of employment and the employer would not be liable for such actions of its agent. However, if violent conduct is done to further the interests of the employer or such conduct is part of the job (i.e. bouncer), then the employer will be liable for the agent's intentional torts.

In this case, Bo, as agent of White Tiger, committed an intentional tort while on the job. This was probably done to further the interests of his employer. In addition, the job of rent collection, in certain circumstances, may be classified as a job in which an intentional tort is ordinarily not expected. White Tiger will argue that Bo was instructed to never use force, and his tort is therefore not within the scope of employment. However, since in the ordinary course, a rent collector could come to use force, and Bo acted to further his employer's interest. White Tiger will be held liable for Bo's actions.

Red Dog, Inc.

White Tiger was an independent contractor of Red Dog. This is so, not necessarily because of the management agreement says so, but because Red Dog did not exercise day-to-day control over White Tiger's actions. An employer is only liable for the torts of an independent contract where the employer held the independent contract but as an employee (cloaked with authority) or if estoppel applies. Neither of

these theories applies and Red Dog should not be liable under respondent superior for the torts of its independent contractor's agent.

Jim Stone

As sole shareholder of Red Dog, Inc. – Even if Red Dog would be held liable, Jim Stone will not be liable because of the limited liability provided by the corporate form. Under extreme circumstances where the corporation was used as a mere puppet of the shareholder and unconscionable results would occur, a Maryland court may "pierce the corporate veil" and hold a shareholder liable. The facts in this case do not indicate sufficient facts to allow the piercing of the corporate veil.(Corporation was in good standing).

As sole member of White Tiger – A Maryland LLC provides limited liability to its members. Ms. Jackson could argue that Jim Stone structured the agreement in a way to insure that White Tiger would always have minimal assets. Jim Stone didn't get a salary, he just received all leftover money. This left little to no assets in White Tiger. Any potential plaintiff would never be able to get a recovery from White Tiger for this reason. I would agree that a court should pierce this relationship and hold Stone personally liable for the torts of White Tiger and its agent. An LLC is not created to shield a person from liability in all cases. This is especially true when the LLC has only one member.

Stone as a director - the facts do not indicate any reason why Stone should be liable as a director. A director is not liable for the torts/actions of the corporation's/LLC's employees.

REPRESENTATIVE ANSWER 2

White Tiger, LLC

An employer is vicariously liable for the torts of its employees committed within the scope of employment. Generally, an employer will not be held liable to the intentional torts of its employees unless the employer authorized use of force, it was necessary to the job, or it was done to serve the employer.

In this case, White Tiger (vin Jim Stone) instructed all its employees "never to use force in collecting rent." Thus, although rent collection is a job that may cause some friction, Bo was not authorized therefore in collecting rent. His use of force against Grace Jackson on the occasion which lead to her injuries was outside the scope of employment. White Tiger will not be held liable.

Red Dog, Inc.

As discussed, an employer will not be held liable for the intentional torts of its employees. Where an independent contractor is hired to discharge functions, generally, there is no agency relationship present

to hold the employer/principal liable for the torts of the independent contractor. The agency relationship requires three (3) elements: assent, benefit, and control. Typically, the first two (2) will be present, but the principal will usually lack control over the manner in which the independent contractor discharges its duties and therefore will not be liable. An employer/principal will be liable, however, where the independent contractor is engaging in an ultra hazardous activity or attempts to delegate a non-delegable duty. Neither situation is present here.

Nonetheless, an argument for control can be made because both companies are owned and managed by Jim Stone. Neither White Tiger nor Red Dog have any other shareholders or officers. As such, an argument can be made that because Jim Stone is the only person behind both White Tiger and Red Dog. Stone exerts total control over how the operations are fundamental duties are discharged. If such an argument is successful, Red Dog, Inc. will be liable provided it can be shown that the tort was committed within the scope of employment. As discussed above, this is doubtful because the conduct was specifically unauthorized.

Jim Stone

Stone is protected from personal liability as shareholder and also officer of the corporations. He may be personally liable as a shareholder only to the extent of his contribution and officer only for his own intentional torts. This is not the case here.

It is possible that Stone may also be accountable if Grace Jackson is able to "pierce the corporate veil." She can do so by showing that the corporations are shell corporations, essentially alter ego of Stone, established to provide him immunity from liability. This is a decent argument but likely to be unsuccessful against due to the fact that Stone specifically instructed his employees never to use force.

Suit against Stone, White Tiger, and Red Dog will fail. Grace must go against Bo to be successful, although any judgment received will likely go unsatisfied. Bo will not receive any indemnification from Stone, White Tiger, or Red Dog because his act went beyond the scope of employment.

PART E - QUESTION 1

(17 Points 25 Minutes)

PRELIMINARY FACTS FOR QUESTION I

On April 1, 1998, Plaintiff, a resident of Carroll County, Maryland, was driving her 1998 Harrier SUV on Interstate 70 in Howard County, Maryland. Plaintiff was traveling at approximately 60 miles per hour and was in the process of passing another vehicle when, suddenly and without warning, the left front tire of Plaintiff's vehicle separated from the wheel rim causing loss of control. The Harrier rolled over in the median between the East and West bound lanes. Plaintiff was severely and permanently injured.

Initial investigation following the accident indicated that neither the Plaintiff nor any roadway condition or object caused or contributed to the happening of the accident. Examination of the tire and wheel rim revealed no obvious defect in either.

Plaintiff purchased the Harrier from Howard County Sports Vehicles, Inc., a Maryland Corporation of Ellicott City, on March 10, 1998. Howard County Sports Vehicles is a new car dealer for Sayanara Motor Company of New York, Inc., the manufacturer of Harriers and other vehicles which are produced at various Sayanara manufacturing plants in the United States and elsewhere.

Plaintiff's Harrier was produced by Sayanara's plant in Paducah, Kentucky. The tires were manufactured by Peerless Rubber Company, Akron, Ohio, and the wheel and rim assemblies were fabricated by Metal Parts, Inc. of BelMar, California. Peerless Rubber also makes tires for the secondary market with dealerships throughout the country, including one in Baltimore, Maryland. Metal Parts, Inc. sells its products only to auto makers in accordance with the manufacturer's specifications. Metal Parts, Inc., has a contract with Sayanara to supply wheel rims exclusively for the Harrier SUV.

On October 1, 1998 Plaintiff filed suit in the Circuit Court for Carroll County against Howard County Sports Vehicles, Inc., Sayanara Motor Company of New York, Inc., Peerless Rubber Company and Metal Parts, Inc., claiming breach of express and implied warranties, strict liability and negligence, all properly alleged in the Complaint. Based on the facts given:

a) Can Plaintiff obtain personal jurisdiction over the defendants or any of them in Maryland?

b) Is venue appropriate in Carroll County?

c) How may Plaintiff obtain service of process on each of the defendants.

Answer fully with appropriate references to the Maryland Rules.

ADDITIONAL FACTS FOR QUESTION I

Assume for this part the following:

i. Each of the Defendants were served with a summons and complaint on November 1, 1998.

ii. Sayanara's engineering test and analysis of the tire and wheel rim assembly of Plaintiff's Harrier, conducted on June 1, 1998, indicated that both the left front tire and wheel demonstrated latent defects which contributed to a sudden loss of air pressure. Sayanara's analysis and conclusions were based in part on data generated by the use of computer models.

(d) Based on these facts what pleading or pleadings should Sayanara file in this case and when should they be filed?

(e) At trial, can Sayanara introduce the computer generated data and conclusions? If so, under what circumstances?

Representative Answer 1

(a) Personal jurisdiction over Howard County Sports (HCS), Sayanara Motor Co. (SMC), Peerless Rubber Co. (PRC) and Metal Parts, Inc. (MPI).

(i) Personal jurisdiction over HCS is obtainable as HCS does business in Ellicott City, Howard County. Plaintiff must have a person over eighteen years of age serve the Summons and Complaint. HCS's resident agent, president, secretary or treasurer. If she tries to serve the above has in good faith failed she can serve the manager, director, vice president, assistant secretary/treasurer or other person authorized to receive service. Section 2-121 and 2-124.

(ii) Personal jurisdiction over SMC, Section 6-103, is obtainable because SMC, while the facts show that it is incorporated in New York and has a place of business in Kentucky and throughout the US, its potential tortuous activity conducted outside Maryland, they contracted to supply goods to Maryland through HCS, its dealer. In addition SMC, through HCS, solicits business in Maryland, has persistent course of conduct in Maryland by selling its cars herein and derives substantial revenues from its cars sold in this state. In addition, constitutionally, its contacts are continuous and plentiful in Maryland and Maryland has an interest in applying its laws. It would be reasonable for SMC to come to Maryland to defend as its place of businesses are all over the US so it wouldn't be unduly burdensome. Service must be made in accordance with Maryland law or the laws of the state where it is served.

(iii) PRC is subject to personal jurisdiction as it directly supplies tires to dealerships in

Maryland. PRC's principal place of business is Ohio so we must again apply Section 6-103. Here, PRC directly supplies tires (goods) to Maryland and engages in a persistent course of conduct in Maryland by supplying tires here as well as deriving substantial revenues from this state.

Constitutionally, PRC has contacts with Maryland and are persistent and regular. Maryland has an interest in applying its laws and it is reasonable to ask the defendant to come to Maryland as Ohio is not far away and PRC comes to Maryland to deliver tires anyway.

(iv) MPI is not subject to personal jurisdiction. MPI's principal place of business is in California and it does not appear from the facts that it has other places of business. However, its supply to auto makers all over the country thrusts its goods into the stream of commerce. Under 6-103(4) it is arguable that it derives substantial revenue from its goods sold in Maryland.

Constitutionally, MPI's contacts in the state do not pass constitutional muster. By supplying parts to auto makers MPI has not thrust itself into Maryland. MPI has no true contacts with the State of Maryland. In addition, it sill not be reasonable for MPI to come and defend suits in Maryland as they have no contacts here and they are in California.

(b) Venue. Plaintiff may sue the out of state corporations in Carroll County. Section 6-202(3). Thus, for SMC and PRC this is appropriate. Plaintiff could also sue in Howard County where the accident occurred and where HCS has its place of business. Section 6-202(8) and 6-201. Since there is more than one defendant, plaintiff can sue in any county where venue is appropriate for any or all parties which is Howard County or Carroll County. Section 6-201(b), 6-202(3), 6-207(8).

(c) To serve the corporation defendants plaintiff must have either the sheriff or a person not a party over eighteen serve the corporation by first attempting to serve the resident agent, president, secretary or treasurer. If in good faith this service fails she may serve the manager, director, vice president, assistant secretary/treasurer, or any other person authorized to receive service. Section 2-124(c). If plaintiff fails in good faith to serve the second tier of agents, plaintiff may substitute service upon the State Department of Assessments & Taxation. (2-124(m)).

The Plaintiff must serve the defendants in accordance with Maryland laws directly to the person or mailed, return receipt requested, restricted delivery (2-121(a)). The plaintiff must then file an affidavit of service or return receipt with the court. In addition, plaintiff may have to serve the defendants in accordance with the state in which they reside.

(d) Within thirty days of the date its answer is due (60 days after receipt of the Complaint). SMC must file a cross claim against PRC and MPI. The answer is due sixty days from the date of service because the defendant is an out of state party. SMC should raise preliminarily the issue of venue by a motion to dismiss.

(e) SMC may admit the computer evidence if it files written notice within the time provided in the scheduling order and not later than ninety days before the trial Section 2-504.3(a)(2). The scheduling order or notice must contain a description of the evidence, how it is to be used at the trial, what it will prove and make the same available along with the equipment needed to present evidence in court. The computer generated evidence must be preserved for use on appeal. Notice is not required if the computer generated evidence was used only for impeachment.

Representative Answer 2

(a) Plaintiff can certainly obtain personal jurisdiction over HCS as they are a Maryland corporation and thus subject to Maryland jurisdiction. To gain personal jurisdiction over the rest of the defendants it must be demonstrated (since they are out of state corporations) that each had enough minimal contacts that maintenance of a suit would not violate the notion of fair play and substantial justice. If it is found that by SMC selling its vehicles within Maryland it has minimum contact sufficient for jurisdiction, then the Maryland courts can obtain personal jurisdiction. Otherwise, Sayanara would be subject to the personal jurisdiction in New York, its place of incorporation, or perhaps Kentucky, the location of its manufacturing plant. However, by selling the SUV's in Maryland, Sayanara may have availed itself of the laws and protections of Maryland, thus making it personally liable for a suit filed in Maryland. Also, since the tort caused tortuous injury inside the State, suit can be brought in Maryland (Sec. 6-103).

Although PRC is a company in Ohio it manufactures rubber tires for a company in Maryland. Although this is not necessarily the company that supplied the rubber for the SUV, it still availed itself of the laws of Maryland and has enough minimum contacts to be held to personal jurisdiction.

Finally, Metal Parts probably is not subject to personal jurisdiction in Maryland since its contacts are less than minimal. It sells its metal to Sayanara, a New York corporation. Of course, since it is the sole middle room supplier for the Harrier SUV, perhaps it would be held to Maryland's personal jurisdiction.

(b) Venue is proper where the defendant resides, Sec. 6-201, is employed, or carries on a trade or business. Since none of the defendants have any locale in common, then the action can be brought where the cause of action arose (Sec. 6-201(8), or where anyone of the defendants resides or carries on a trade or business. The action took place in Howard County and the only defendant who resides in Maryland is also in Howard County; therefore, the action should have been brought in Howard County. Venue is a defendant's claim and if not raised will be waived. Venue can also be proper, however, where plaintiff resides for a corporation outside the state. Since the dealer is in Maryland, however, venue should be in Howard County. (Sec. 6-201).

(c) Plaintiff can serve the dealer in Maryland by delivering it to the agent personally, including a copy of the summons, complaint and all other papers (Sec. 2-121(a). For the out of state defendants, if service of process is authorized outside the state, it can be done in person or by restricted delivery mail (which will be complete when delivered). Of course, for out of state defendants, the court may prescribe

the manner to serve if reasonably calculated to give notice (Sec. 2-121(a).

Howard County Sports Vehicles, Inc. can also be served by mail to the agent or attorney but in person service of process is better. Any of the out of state defendants can be served where it is found that personal jurisdiction is proper (Sec. 6-304).

(d) Sayanara should file an answer, counter claim, cross claim or third party claim within sixty days after being served. It can also file a motion for improper venue.

Sayanara can also file cross claims against the other defendants, Metal and Peerless, as tests indicate a latent defect in the front tire and wheel. Sec. 2-331(b).

Sayanara must file these claims within thirty days after the time its answer is due.

(e) At trial, Sayanara can introduce the computer generated data if notice is given within the time in the scheduling order or no later than ninety days before the trail Sec. 2-504.3(b). The computer generated evidence must be available to the opponent within five days of notice. Sec. 2-504.3(e). Sayanara must also preserve the evidence so that it can be presented on appeal if necessary.

PART E - QUESTION II

(13 Points 20 Minutes)

Carl, while driving his vehicle, picked up Bob who was "thumbing" a ride. Shortly thereafter, Carl had to pull over because of a flat tire. Carl requested Bob to assist him in repairing the tire. Bob replied, "I don't do tires, man,": shoved Carl up against the car and walked on down the highway.

After repairing the tire, Carl proceeded down the highway. Upon viewing Bob walking on the shoulder, Carl swerved and struck Bob with the right front end of the vehicle and fled the scene. Pursuant to a Maryland State Police investigation, Carl was located and returned to the scene. Carl admitted to the other officer that he had picked up Bob, admitted they had an argument, and further admitted that he was very angry with Bob.

Carl was later convicted of second degree assault in the District Court of Maryland for Kent County. Thereafter, Bob filed a civil suit against Carl.

Jurisdiction is proper in the State of Maryland; venue is proper in Kent County.

1. Bob seeks to introduce the criminal conviction of Carl for second degree assault.

Bob seeks the introduction of the statement that Carl made to the Maryland State Police, and contends as follows:

2. That the statement by Carl is not hearsay.

He further contends even if the statement is hearsay, it is an exception to the hearsay rule for the following reason/reasons:

3. State of Mind.

4. Business record.

5. Admission of party opponent.

6. Declaration against interest.

How should the Court rule on each of the matters raised? Support your answer.

Representative Answer 1

1. Prior Assault Conviction

Admission of this evidence in a civil suit is not allowed because it is inadmissible character evidence of prior bad acts. It is not needed to show control of the vehicle or for any purpose other than to show Carl is assaultive. Criminal conviction is also under different circumstances and for different reasons and so is too prejudicial. The prejudice outweighs the probative value and is likely to confuse the jury so it will not be admissible.

2. State of Mind

This is an exception to the hearsay rule but the evidence may not be admissible to show Carl's anger because the statement was not contemporaneous with his feeling. Moreover, state of mind is often to show effect on the hearer rather than an after the fact statement of anger, etc. These statements are not indicative of state of mind and should not be admitted for this reason.

3. Business Records

A police report is not a business record but rather a public record kept in accordance with a public duty. In any event, police reports are deemed inherently unreliable and not admissible as exceptions to the hearsay rule. Exceptions to the hearsay rule are exceptions because of indicia of reliability. Police reports are deemed prone to "puffing" or inaccurate reporting and they are not always

prepared right away. The statements would not be admissible for this reason.

4. Admission Against Interest

Admission of a party opponent is an exception to the hearsay requirement. This admission is an express admission by the Defendant, Carl, a party to the case, of his anger with Bob. Admissions are deemed reliable because they are generally against the interest of the declarant and they often have independent meaning. These statements would be admissible under this rationale.

5. Declaration Against Interest

A declaration against interest is like an admission but must be against the declarant's pecuniary, proprietary or penal interest when made. That is the case here, but to come at court under a hearsay exception the declarant must be unavailable. Unavailability does not appear to be present here but if Carl refuses to answer, dies, is out of state and beyond subpoena power, etc., he will be unavailable. This will only come in under this exception if Carl is not available.

Representative Answer 2

(1) Carl's Conviction - Generally convictions may be used for impeachment if there is a crime involving honesty or felonies within fifteen years of conviction. In civil suits, character evidence is generally excluded unless character is an element of the offense. Here, character is not an element but Bob can still try to get it in under the MIMIC Rule. (motive, intent, absence, mistake, identity, or common scheme). Here Bob can argue it should come in as motive evidence. Either way the Court will weigh the probative value versus the prejudicial effect. Here, since character is not an element of the civil action, the court will probably rule against admission based on prejudicial effect.

(2) Bob would be incorrect - The statements by Carl are hearsay under Maryland rules since they are out of court statements offered for the truth of the matter asserted. They would not be considered hearsay under the federal rules since they are admission of a party opponent. However, Maryland does recognize admissions of a party opponent as a hearsay exception. Therefore, the court would rule Carl's statements are hearsay but admissible under the hearsay exception of admission of party opponent. Which answers number 5 below.

(3) State of Mind - The court may admit Carl's statement under the state of mind exception if it is offered to show that Carl is angry and not that he actually did what he is accused of. It is likely that the statement would be inadmissible under this exception since it does not appear that it was contemporaneous but after the fact.

(4) Carl's statement would not be admitted as a business record if he was a criminal defendant.

However, since this is a civil suit the offeror's report documenting the statement may be admitted since they are records normally kept in the course of police business. They were recorded contemporaneously to the event.

(5) See above discussion Number 2 answer.

(6) Declaration Against Interest - The court will not allow in. First the declarant must be unavailable to testify which the facts do not indicate Carl is unavailable. It must be a statement against penal interest. There is no indication that Carl's statements are in any way incriminating other than that he was angry with Bob. He did not admit to the assault and thus would not be saying anything that would subject him to jail. (against penal interest). Therefore, the court would not admit the statement under this exception.

PART F- QUESTION I

(20 Points 25 Minutes)

In order to capitalize on the new professional athletic sport complexes that have been built in the State of Maryland, several local food vendors (the "outside vendors") have set up shop on the public sidewalks and streets around the complexes to sell food to the fans as they enter the complexes. The vendors who operate food stands within these complexes (the "inside vendors") have lost one half of their revenue, and they hire a lobbyist to try to get the Maryland General Assembly to enact a law to prohibit these competing food sales on game days. The Maryland General Assembly enacted a law that says in pertinent part:

> "All permits issued for food vendors on state or county public streets or rights-of-way in jurisdictions throughout the state, shall be issued with the specific exclusion of vending rights on Sundays or other days when an athletic event is scheduled. A person who conducts a food vending operation without a valid permit or in violation of the terms thereof is guilty of a misdemeanor punishable by a fine of $50,000 and/or incarceration for a period not to exceed 6 months. Notwithstanding the above, this ordinance does not pertain to vending conducted by churches, synagogues or similar organizations."

The outside vendors are furious since two of them have had their equipment confiscated and have been issued criminal citations for selling food outside of the complex on the same day the local professional team had a home game scheduled within the State of Maryland. They come to you, a respected member of the Maryland Bar, to institute action to challenge the legality of this legislation.

What constitutional arguments might you raise to successfully challenge this ordinance? What defenses do you expect the State to raise in support of the ordinance?

Discuss fully.

REPRESENTATIVE ANSWER 1

I would raise the following constitutional arguments against the ordinance.

The law is not rationally related to a legitimate government interest and it is overbroad. While it is a legitimate government interest to regulate the time, place and manner of commercial activity, this law punishes violators beyond a rational basis. The statue is meant to punish commercial vendors who are outsiders.

The fine is extremely high and would likely allow the non-payment of the fine to be a means of incarcerating the violators of the statute. It is similar to excessive bail, which is not permitted.

The law attempts to favor religion. The exclusion of churches, synagogues or similar organizations may be argued to be a government endorsement of, or favored treatment of, religious organizations. For those vendors near state borders, the law may impact interstate commerce in a negative way and, therefore, violate the Commerce Clause.

The two vendors who have had their equipment confiscated have a takings claim and the statute does not permit confiscation.

If the statute has an effect on a suspect class (such as racial minorities) and the law benefits non-minorities, the law may be found unconstitutional under the equal protection clause of the 14th Amendment. For example, where a statute in San Francisco required laundries to be made of materials other than wood, and the impact of the ordinance was to run the Chinese laundries out of business, the law failed under rational basis scrutiny.

The State will counter that it may make laws concerning permits and exercise its police powers. It is a legitimate interest of the State to create laws touching on these issues. State may create a "charitable purposes" exception to a regulation where it is rationally related to a legitimate governmental interest. Here, religious organization vending activities are not part of the problem, but local outdoor vending is.

REPRESENTATIVE ANSWER 2

I would raise the following constitutional arguments. I have listed each and immediately thereafter I have listed the defense I expect will be raised by the State.

Establishment Clause – First Amendment violation. I would argue that the statute, as drafted, is in violation of the First Amendment's prohibition against the state's establishment of religion. The First Amendment applies to the State of Maryland through the Fourteenth Amendment. The statute exempts churches, synagogues and other religious organizations from the ban on vendors on the street during game times. I will argue that this violates the Establishment Clause because it benefits religion. To determine if there is a violation of the Establishment Clause, the Court will look at whether the law has a secular purpose; whether the law inhibits or endorses religion; and whether excessive governmental entanglement with religion results. I will argue that although as a whole the primary purpose is not to advance religion the section which exempts churches does just that. The State will argue that this statute's primary purpose is economic in nature and does not advance or inhibit religion, but merely allows the government to remain neutral with respect to religion.

Takings Clause violation – I will argue that this law amounts to a taking of the property of the street vendors in violation of the Takings Clause which requires that takings must be for public use and cannot occur without just compensation. I will argue that this regulation denies street vendors of all economic uses of their property. The State will argue that a regulation or statute can only amount

to a taking where the statute leaves property owners with absolutely no economically viable use of their property. This statute merely restricts the use of property, thus cannot be considered a taking. Street vendors have many other opportunities to make economic use of their property.

Equal Protection - I will argue that the statute's delineation between street vendors and inside vendors is irrational and thus is in violation of the outside vendors equal protection rights. The State will argue that distinguishing between inside and outside vendors must only meet a rational basis test, as opposed to strict scrutiny. Here, however, the state need only show that the statute is rationally related to a legitimate government interest. Although I will argue there is no rational basis, and that money was the root of this law, under the rational basis test the State will be able to come up with a legitimate interest – such as keeping the sidewalks clear.

Burden upon interstate commerce – I will argue that a restriction on street vendors, in the aggregate, necessarily burdens interstate commerce. This is because the lost business of the vendors impacts many interstate businesses – food producers, manufacturers of the carts, etc. The State will argue, and probably successfully, that this law does not unduly burden any interstate commerce, it merely restricts some use of specific sidewalks by the vendors.

Cruel and Unusual Punishment – I will argue that the fine of $50,000 or 6 months in jail is excessive in relation to the violation. In addition I will argue that having their carts confiscated is certainly excessive (and not even part of the statute). The State will argue that the punishment is not excessive and is meant to deter violators.

PART F - QUESTION II

(15 Points 20 Minutes)

On December 26, 1999, "We-Are-Toys" had a "1-hour only 6 a.m. 50% off" holiday sale on the entire line of the immensely popular Smokemon toys. Paula Poundrock arrived at 6:30 a.m. only to learn that all of the Smokemon toys had been grabbed. She quickly glanced at the cashier line and saw Mary Meek at the end of the line with 3 Smokemon toys. Determined not to return home empty handed, Poundrock intentionally bumped into Meek from behind, knocking her to the floor and all 3 Smokemon toys out of her hands. Poundrock immediately shouted to Meek, "Why don't you watch where you're going! Security, this thief accosted me and is trying to steal my Smokemon toys."

Upon hearing the commotion, an off-duty Howard County police officer in full uniform who was shopping for toys, rushed over as Poundrock continued to scream that Meek accosted her and tried to steal her Smokemon toys. Stunned and distraught, Meek just started crying and didn't respond. Believing Poundrock's version of events, the police officer forcibly escorted Meek out of the store and

warned that further attempted theft would subject her to prosecution.

After two months of therapy for injuries resulting from Poundrock's actions and repeated sessions with a psychologist, Meek comes to you, an attorney licensed to practice in Maryland, to see whether she has any causes of action arising from the December 26th incident.

What action(s), if any, could you bring on Meek's behalf and against whom? Discuss fully.

REPRESENTATIVE ANSWER 1

Meek may bring the following claims against Poundrock:

Intentional Infliction of Emotional Distress – Poundrock engaged in outrageous and extreme conduct which she knew or should have known was likely to cause emotional distress, and which did cause emotional distress. Poundrock yelled at Meek in public, accused her of a crime in the middle of a store and alerted security that Meek had tried to steal her items. Poundrock either knew or should have known her behavior would cause a person emotional distress. Her behavior was extreme and outrageous – she acted in public in a way that could have led to Meek's arrest. Meek can prove damages, as she had been in therapy for two weeks.

Defamation – Poundrock made a defamatory statement concerning Meek which a reasonable person would have found objectionable. This statement was published to at least one other person and was the cause of her damages. Meek must prove all of these elements as well as fault and falsity. In this case fault and falsity are clearly present. Poundrock lied when she told the police officer that Meek stole the toys. Poundrock knew her statement was false. In addition Meek must prove damages.

Battery – Poundrock used force against Meek and intentionally caused an objectionable and offensive touching of Meek.

Meek may bring the following claims against the police officer:

Negligence – The police officer had a duty to ensure that he knew the facts before escorting Meek from the store and before accusing her of theft. He was negligent in not finding out what occurred and breached his duty. His breach may have caused some of Meek's emotional distress. Meek must be able to prove some damages as a result of his actions.

False Imprisonment – Meek may be able to bring an action for false imprisonment for the detaining of Meek through the police officer's actions in forcibly escorting her from the store. The officer

restrained my client, who could not leave even if she wanted to. False imprisonment occurs even when the restraint is for a short period of time.

Battery – The police officer forcibly escorted Meek from the store. This might be a battery since it was an offensive and/or harmful touching without her consent.

REPRESENTATIVE ANSWER 2

Claims that may be brought against Poundrock:

Battery – The intentional, unlawful touching of another is a battery. Because P intentionally bumped into Meek she is guilty of battery.

Assault – The putting of the victim in reasonable apprehension of imminent harm is assault. In this case, because P yelled at Meek and scared her P is liable for assault.

Defamation (slander) – Defamatory language of and concerning the Plaintiff which is published to a third person is slander. Slander requires spoken words that impugn the character of the Plaintiff. In this case P is liable for defamation because she yelled out and at least one other person (the officer) heard her.

Intentional Infliction of Emotional Distress – This is extreme conduct that causes the Plaintiff serious illness or harm. Because P was yelling remarks to Meek and acting in an extreme and outrageous manner she is liable. Moreover, Meek suffered actual harm because she had to go to therapy for her injuries.

Meek may bring the following actions against the Police Officer:

False imprisonment – This is the unlawful confinement of a person to a bounded area with no reasonable means of escape. Because the officer grabbed Meek she was confined and he may be liable.

Battery – Because the officer intentionally touched Meek without her consent he too may be liable for battery.