JULY 2003 BAR EXAMINATION

QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 1

Reel Deal, Inc. is a manufacturer of fishing equipment and supplies located in Annapolis, Maryland. Reel Deal has a stellar reputation and has been very profitable over the past years and has always made timely payments on its loans. Catch All Products, Inc. is another manufacturer of fishing equipment and supplies located in Ocean City, Maryland. Catch All has been experiencing some financial difficulties.

Billy Ray is an officer with Earl Gordon & Blair, Inc. ("EGB"), a financial management company that both Catch All and Reel Deal use. Billy Ray is responsible for advising clients on their financial matters including the financial feasibility of business transactions. EGB has a relationship with National Bank. Unknown to any of EGB's customers, National Bank pays Billy Ray a fee for any loans he refers to National Bank.

As part of one of his regular consultations, Billy Ray urges Reel Deal to expand its company by purchasing Catch All. Although hesitant at first, Reel Deal agrees and follows Billy Ray's constant urgings that Catch All could be purchased for a steal because it has been losing money. Billy Ray also convinces Catch All it should consider a buy-out by Reel Deal. Catch All agrees. Billy Ray urges Reel Deal to use National Bank to finance the transaction although Best Bank offers significantly lower rates. As a part of the transaction, Reel Deal acquires all of Catch All's assets including account receivables and outstanding purchase orders for equipment.

After the transaction was completed, Reel Deal discovered that the manufacturing and retail products formerly of Catch All were defective and malfunctioned. As a direct result, Reel Deal was unable to timely produce ordered products. This caused Reel Deal to lose sales, good will with its customers, and face many warranty claims. Reel Deal began to miss the high monthly loan payments to National Bank and suffered its worst financial year since it first began business. Reel Deal later discovered that Billy Ray was aware that Catch All had significant customer relations problems prior to the transaction.

Against whom can Reel Deal assert a cause of action? In your answer evaluate the theories under which Real Deal may assert a cause of action and the likelihood of recovery.

REPRESENTATIVE ANSWER 1

Reel Deal, Inc. (“RD”) may assert the following claims:
Against Billy Ray (“BR”):

Negligence occurs when there is a breach of a duty, proximately causing injury. Here, as RD’s financial advisor, BR owed his client a duty to give sound financial advice. BR breached that duty when he repeatedly urged RD into the poor purchase decision of company with “significant customer relations problems.” As a direct consequence of BR’s negligence, RD suffered lost sales, goodwill and extra loan interest payments.

Fiduciary Duty

Agents owe duties of care, loyalty and information. Here, BR served as RD’s agent for purposes of financial advice. BR breached his duty of care by his “constant urgings” to go through with a deal that could not reasonably be seen to be in RD’s best interests.

BR breached his duty of loyalty in two respects. First, he urged RD to purchase Catch All, another of his clients, without apparently informing of RD of his existing relationship with Catch All. Secondly, he urged RD to use National Bank, despite knowing it would result in higher payments and with a personal financial interest in the transaction (BR stood to get a fee for the loan.) The duty of information was also breached when BR failed to fully disclose Catch All’s dismal track record w/ its customers. BR had a duty to disclose all relevant information of which he was aware. While BR might claim that he complied by disclosing that CA had “been losing money,” the additional significant fact of CA’s customer relation problems should have been disclosed.

RD against EGB

RD may raise all of the above claims against EGB as well. Under the doctrine of respondeat superior, an employee’s negligence will be imputed to his employer when he is acting in the scope of his employment. Here, BR was already acting in the scope of his employment w/ EGB by giving financial advice. Thus, EGB will be liable for BR’s negligence.

Additionally, EGB owed an independent duty to RD which it breached through the poor financial advice. BR’s knowledge of Catch All’s shaky history/customer dealings will be imputed to EGB as well.

Both BR and EGB will defend on the grounds that RD was contributorily negligent in entering into a purchase w/ a company known to be losing money. However, because BR & EGB were paid precisely to advise clients on the “financial feasibility of business transactions,” RD’s reliance on BR’s advice is reasonable.

Misrepresentation occurs when an agent misrepresents a material fact, knowing that another will rely on the misrepresentation and the injured party actually relies to their detriment. Here, BR misrepresented the status of Catch All by failing to disclose the “significant customer relations problems.” Although BR may claim that he did not actually say anything misleading, his omission amounts to a misrepresentation because of his fiduciary obligation to RD.

REPRESENTATIVE ANSWER 2

Reel Deal ("R") may assert the following causes of action:

Reel Deal v. Billy Ray: **Breach of Fiduciary Duties**. Billy Ray ("B"), as R's financial advisor, has a relationship of trust with his clients, and as their agent, he has fiduciary duties, which he breached in this case. These duties include: the duty of care, the duty of openness, the duty to provide information and to disclosure material facts, and the duty of loyalty.

Here, B breached his duty of care by failing to act with the ordinary prudence of a financial advisor, by his "constant urgings" that R purchase a company that had "significant customer relations problems" and had "been experiencing some financial difficulties." Here, B failed to use due care by not fully investigating C's status to make sure it was a wise purchase on R's part.

Further, B breached his duty of disclosure and information by presumably not providing R with sufficient facts to make an informed decision. He also breached this duty by failing to disclose to R that the reason he "urged" R to use a bank with higher rates was because the bank paid him a fee if he did so.

Finally, B breached his duty of care to his client. As a financial agent, he had a duty to act and advise in an unbiased way, and to refrain from mixing his interests in transactions involving his clients. Here, he had an interest on both sides of the transaction, as he was trying to encourage both R and Catchall from entering into the transaction. B did not remain loyal to R, as he also had interests with Catchall. B also breached his duty of loyalty by urging R to use a bank that charged R higher rates than R could have gotten elsewhere. B's fee from National Bank was also inappropriate and a breach of his duty of loyalty.

Reel Deal v. Billy Ray: **Negligence**. R may also have a cause of action in tort for negligence. Negligence arises when a duty is breached, causing damages. Here, B had a duty to R not to act negligently and in self-interest in his financial advisements, and he breached that duty by his "urgings" without adequate investigation (or, alternatively, with adequate investigation, but w/o adequate disclosure of material information to R). But for his breach, R would not have entered into the ill-advised transaction, and loss to its company would not have occurred.

R v. EGB: **Negligence**. R may bring a c.o.a. under negligence against EGB under the theory of respondeat superior. Employers/principals are liable in tort for the negligent/tortious conduct of their employees/agents if acting w/in the scope of their employment. Here, B acted negligently while advising a client financially. Thus EGB may also be liable for negligence.

EGB and B may argue that R was contributorily negligent in failing to properly investigate the transaction. R has a good chance of recovery primarily for breach of fiduciary duties because of the relationship of trust that exists between a financial advisor, who is in a position of greater experience and control of information, and his client. Negligence may also be a strong claim as well, as the elements can be established.

QUESTION 2

The Town of Conservative, Maryland, has experienced a recent rash of "outside agitators" who have descended upon the Town on weekends to hand out literature and conduct peaceful sit-ins in opposition to prayer at the Town's public meetings.

The Town Commissioners have asked you, the Town's attorney, whether you foresee any legal prohibition against enacting legislation that would:

1. Prohibit any person from canvassing upon Town property to promote any cause without first obtaining a permit from the Town Commissioners;
2. Prohibit any non-resident of the Town from canvassing upon Town property for any reason;
3. Prohibit any person not affiliated with a civic or religious organization from staging sit-ins on Town property.

The violation of any of the laws would be a misdemeanor punishable by a fine of $50,000.

WHAT ADVICE WOULD YOU GIVE AS TO EACH PIECE OF LEGISLATION? DISCUSS FULLY.

REPRESENTATIVE ANSWER 1

I would first inform the Town Commissioners that most of the proposed legislation is violative of the Constitution.

Law 1
The prohibition banning canvassing on Town property for any cause is vague and overbroad. It is vague and overbroad because a blanket prohibition of this kind does not permit for emergencies or exceptions and will thus likely be stricken as unconstitutional. This prohibition is also a prior restraint that bans speech before it is made. There is no compelling state interest for this prohibition- it will be stricken.

This prohibition is also in violation of the 1st Amendment, made applicable to the States via the 14th Amendment's Due Process Clause. On public property, the government is permitted to enact viewpoint and content neutral legislation pertaining to speech. Nonetheless, the legislation is subject to intermediate scrutiny. The burden will be on the Town to establish that this statute is substantially related to an important governmental interest. It is doubtful that the Town will be able to sustain this burden because the prohibition is too broad and would restrict too much speech.

Law 2

The prohibition banning non-residents from canvassing Town property would not prevail either because it violates both the Privileges and Immunities Clause of Article IV and the Equal Protection Clause. The Privileges and Immunities Clause prevents states or state governments from denying benefits to non-residents that are afforded to residents. Here non-residents are not permitted to canvass for any reason and are not even given a chance to obtain a permit. In order to prevail the Town would have to establish that the ban is necessary and closely related to an important government goal. The Town will be unable to sustain this burden because this ban is not the least restrictive means by which the Town could achieve its objective. Thus, this prohibition should be stricken.

Because this prohibition disparately distinguishes between residents and non-residents it will be subject to an Equal Protection challenge. The Equal Protection clause requires that all similarly situated people should be treated equally. This prohibition will be subject to a rational basis analysis since it does not directly target a suspect class or infringe on a guaranteed right. The burden will be on a potential plaintiff to establish that the ban is not rationally related to a significant governmental interest. While laws subject to the rational basis test are presumptively valid, this ban will probably be held invalid because it is not rationally related and is unreasonable.

Law 3

This prohibition against non-civic or religious organizations staging sit-ins will be stricken as well. The Establishment Clause dictates that government action not result in a preference. Seemingly this ban which permits only religious organizations and civic organizations to engage in sit-ins prefers religious groups over non-religious groups. Thus the ban will be subject to strict scrutiny. The Town will be unable to carry its burden because the ban is not necessary to further a compelling state interest. Even if the Town were able to sustain this burden, the ban would be subject to the Lemon test. To prevail under this test State action must be: 1) secular in purpose; 2) its primary effects should not advance nor inhibit religion; 3) and should not involve excessive government and religious entanglement. There would be no excessive entanglement because the Town does not affirmatively authorize, facilitate, or encourage religion. However, while the ban is seemingly secular in purpose, it advances religion because only a select few groups are permitted to engage in sit-ins.

Penalty

The misdemeanor fine of $50,000 is unreasonably excessive and a court would probably find that it violates the 8th Amendment's protection against excessive fines. This fine may also be violative of procedural Due Process if an offender is not given notice and a hearing.

REPRESENTATIVE ANSWER NO. 2

Each piece of legislation has problems:

Law 1 – The first problem with this law is that it is a violation of the 1st Amendment's right of free speech, made applicable to the States through the Due Process Clause of the 14th Amendment since it could be deemed void for vagueness and overbroad. It prohibits the promotion of any cause without first getting a permit – this could have a chilling effect on speech as the public may not know what exactly is prohibited by this language. The ordinance is overbroad in that it goes beyond what is necessary to achieve its end.

This permit or license requirement may be an unconstitutional prior restraint on speech. Requiring a license before allowing a person to speak may be permitted if the licensing requirement is narrowly drawn, definite, and necessary. There must also be procedural safeguards in place for the individuals who are responsible for issuing the license to insure they don't have too broad discretion.

I would tell the Town Commissioners to narrow the breadth of the legislation and clarify what exactly is prohibited. I would also advise them to have standards and procedural safeguards in place to ensure that the licensing requirement is constitutional. Also, because this ordinances seems to be a content-neutral ordinance and not based on race or origin the Town must meet intermediate scrutiny and the law must have a substantial interest and be narrowly tailored to achieve this important interest.

Law 2 – This piece of legislation may violate the Commerce Clause or the Privileges and Immunities Clause of Article IV. If the ordinance discriminates against non-residents in favor of residents of the Town without some important government interest in doing so there may be a violation of the P&I Clause if it affects the non-residents economic livelihoods or their civil liberties.

This law could also violate the Commerce Clause if it is discriminatory and has an undue burden on interstate commerce. Congress has the power to regulate the channels of interstate commerce and if a state's action usurps this power it will be unconstitutional. Even if an activity is purely intra-state if its cumulative effect in on interstate commerce, it is within Congress' regulatory power.

I would advise the Town to not discriminate against non-residents in its legislation.

Law 3 – This ordinance may violate the 1st Amendment's Establishment Clause made applicable to the State's by the 14th Amendment if it does not meet the Lemon Test. The law is unconstitutional under that test: if the state or local action is not secular in nature; if it inhibits religion as its primary purpose; or if it promotes excessive entanglement between the government and religion. This ordinance seems to be allowing religious organizations to state and participate in sit-ins while prohibiting others from doing so. The fact that it also allows civic

organizations to do so does not make it secular in nature, and will not alleviate the fact that this is excessive entanglement with religion.

This ordinance violates the 1st Amendment and I would advise the Town to eliminate it.

Penalty – Finally, the $50,000 fine may be excessive and a violation of the 8th Amendment.

QUESTION 3

Bradshaw is the CEO of Fresh Air, Inc., a manufacturing company located in Westminster, Maryland. From time to time, Fresh Air uses Supplier Co. as a subcontractor on projects. Fresh Air does all of its banking at Carroll County National Bank. All checks for Fresh Air, Inc. are prepared and signed by its treasurer, Teresa. While visiting Teresa one day, Earl steals several corporate checks without her knowledge.

Although Earl is not an employee of Fresh Air, Inc. or Supplier Co., he prepares a check payable to the order of "Supplier Co." for $10,000 and then forges Teresa's signature on the check. Earl then takes the check and deposits it into an account at Best Baltimore Bank which he opened in the name of "Supplier Co.," listing himself as the authorized agent. The check is honored by Carroll County National Bank which debits Fresh Inc.'s account in the amount of $10,000. A few days later, Earl withdraws the money from the account at Best Baltimore Bank.

While timely reconciling the books, Teresa realizes what Earl has done and informs Bradshaw. After completing work on a project for Fresh Air, Supplier Co. demands payment for its work.

Give a detailed analysis of any civil claims that may be asserted, and against whom, under Maryland Commercial Law as a result of the forged check.

REPRESENTATIVE ANSWER 1

Supplier Co.

Supplier Co. can demand payment from Fresh Air for the services rendered and should receive it.

Liability of Earl

Under 3-110(a), the forged check was payable to Earl even though he was unauthorized to sign it and forged Theresa's signature. E made the check out to "Supplier Co." because he (Earl) intended that check to be paid to him (Earl) not to Supplier Co., thus Supplier Co. had no rights in the check.

Earl is an imposter under 3-404(b)(1). While Supply Co. is a real company; Earl (the person whose intent determines to whom the check is payable) does not intend Supply to have the money, even though it is listed as payee. Thus, according to 3-404(b) (1), any person in possession is a holder. Thus, Earl was a holder, and then so was Best Baltimore Bank, then so was Carroll Co. Bank (whether or not Earl endorsed, under 4-205).

Under 3-301, Earl and all the subsequent holders were entitled to enforce the instrument. However, because Earl forged Theresa's signature, it is unauthorized under 3-403. Thus, it would be ineffective against Fresh Air. However, it is effective as regards Best Baltimore Bank and Carroll Co. Bank because they in good faith paid the instrument (Best Balt. to Earl, Carroll Co. to Best Balt.).

Under 4-208(a), Earl breached the presentment warranty -- of 4-208(a) (3) –he clearly knew that he forged the signature. Thus he is liable to Best Baltimore Bank (drawer who accepted the draft) and to Carroll County National Bank (under 4-208(a) (ii)). Under 4-208(b), Earl is liable for that $10,000 plus compensation for expenses and loss of interest resulting from the breach.

Of course, Earl is liable to Fresh Air for conversion.

Best Baltimore's Liability

Under previous analysis, Best Baltimore Bank was a holder, and Earl's unauthorized signature was effective. Best Baltimore did not breach 4-208(a), since under 3-301(i) Best Baltimore was a holder and had no knowledge of forgery. Thus, Best Baltimore has no liability.

Carroll County Bank

Fresh Air would like to have Carroll Co. Bank be liable and pay back the $10,000 it withdrew from Fresh Air's account. However, Carroll Co. acted correctly under 4-401(a), if the check was properly payable. The check was properly payable if it was authorized by Fresh Air. While Teresa as treasurer, could authorize the checks, Earl could not. Thus, absent any special agreement between Fresh Air and Carroll Co. Bank, the check was not properly payable and Carroll Co. would then have to return $10,000 to Fresh Air (and then seek $10,000 back from Earl under 4-208).

Conclusion

Unless the parties find Earl and take $10,000 from him under 4-208(b) (or if the party is Fresh Air, conversion), Carroll Bank is likely to be the one stuck with the loss.

REPRESENTATIVE ANSWER 2

By presenting the forged check to Best Baltimore Bank, Earl made several implied warranties: 1) that Earl was entitled to enforce the draft (check), 2) the check had not been altered, and 3) that Earl did not know the draft was unauthorized (4-208(a)1-3). One and three were untrue and so the drawee bank, Carroll County, NB may recover damages against Earl. Fresh Air may recover from Earl for conversion.

Since the signature on the check was not Teresa's (rather, Earl's forgery of Teresa's signature) it is ineffective as an authorized signature except in cases involving a holder in due course (HDC) (3-403). A HDC must take in good faith, for value and without knowledge of any defects or defense. Because the check was not authorized (3-403), it was not properly payable from Fresh Air's account and therefore CCNB should recredit the account (4-401)(a).

The draft is payable to the person intended by the person signing as issuer regardless of the name used (3-110(a)). Here, Earl's intent was that he received the money under his Supplier Co. bank account. The real Supplier Co. was never intended to benefit, so "any person in possession of the instrument is its holder." (3-404 (b)(1)). This would make Earl a holder of the check and then

BBB became a holder when it received the check for collection (4-205(1)). As a holder BBB was entitled to enforce the instrument (3-301). Also, BBB had no knowledge of a problem with the check so it did not breach its warranties under (4-208). Therefore BBB is not subject to suit.

QUESTION 4

Alice, at the age of 35, decided it was time to get her life back on track starting with her physical condition. Her physical condition was poor in general and she had a history of significant low back problems including a herniated disk.

After checking out various health facilities she decided to join Superfit, a health club located in Howard County, Maryland. Superfit promised "appropriate fitness programs geared to the individual's fitness level supervised by health specialists." Alice was required to complete Superfit's membership agreement, which set forth the payment and other obligations of membership. She also disclosed her physical condition on the appropriate portion of the Agreement. The Agreement also contained the following clause:

"All exercise shall be undertaken by me at my sole risk and Superfit, its servants, agents or employees shall not be liable to me for any claims, demands, injuries, damages, actions, or causes of action whatsoever, to my person arising out of or connected with the use of the services and facilities of Superfit by me, and I expressly hereby forever release and discharge Superfit from all claims and injuries which may result from instruction, acts or actions of any kind of Superfit, its servants, agents or employees."

Christa, a Superfit employee, conducted an initial evaluation by asking Alice to perform various flexibility and strength testing. Alice was directed by Christa to use an upper-torso weight machine and lift a 90-pound weight one time with her arms. While performing this exercise, Alice felt significant pain in her right shoulder. She informed Christa who did not seek immediate medical attention but insisted that Alice keep going, saying "no pain, no gain."

Alice suffered pain following the incident and ultimately had to undergo shoulder surgery for a condition her doctor attributed to the upper-torso weight machine. He also informed her she should not have started with a 90-pound weight.

Alice has sued Superfit and Christa for negligence. Superfit files a motion for summary judgment based on the exculpatory clause.

What arguments can Alice make in her response to the motion?

How should the court rule and why?

REPRESENTATIVE ANSWER 1

A Motion for Summary Judgment will be granted where there is no genuine issue of material fact in the case, and the moving party is entitled to judgment as a matter of law. Superfit's Motion for Summary Judgment should not be granted for the following reasons:

Alice can argue that the exculpatory clause did not disclaim Superfit's express warranty that her fitness program would be geared to her individual fitness level. So, she can argue that

Superfit was negligent by not living up to their promise, and that their negligence actually and proximately caused her injuries.

Alice can also argue that the exculpatory clause is not valid on its face. First, exculpatory clauses are permissible under Maryland law if they limit recovery in negligence actions. However, Superfit's clause limits recovery in all actions, including in claims for intentional torts and reckless or grossly negligent behavior. The court would likely uphold the exculpatory clause if simple negligence is found, but would not uphold it if Superfit's conduct involved express negligence. This creates an issue of fact and is sufficient basis to deny the Motion.

Also, Alice can argue that the exculpatory clause was the product of grossly unequal bargaining and its result is clearly against a public policy mandate. While the former argument is unlikely, a sympathetic court might agree with the public policy argument.

In making these claims in response to Superfit's motion, Alice has placed material facts in dispute, so a court would not likely grant Summary Judgment at this phase.

Of note is the fact that Superfit might very well claim that Alice had a pre-existing condition and that (1) her alleged negligence was not the cause of her injuries, and/or (2) that she assumed the risk voluntarily and knowingly, therefore, barring any recovery. But, by making these arguments, Superfit would further be introducing a genuine issue of material fact, making the grant of summary judgment in their favor all the more unlikely.

REPRESENTATIVE ANSWER 2

Alice should make the following arguments in her Motion for Summary Judgment:

The exculpatory clause does not excuse grossly negligent conduct. A business open to the public has duties of care that cannot be avoided.

Christa's gross negligence in advising Alice overcomes the exculpatory clause, which is not and cannot cover gross negligence. Superfit is responsible for Christa's negligence due to respondeat superior.

The exculpatory clause does not overcome affirmative searches of duty. Christa and Superfit affirmatively gave Alice dangerous directions, causing their actions to go beyond mere negligence to Alice. The exculpatory clause is invalid as unconscionable. While in Maryland adhesive provisions are acceptable, this provision goes beyond adhesiveness and into unconscionability due to its breadth and scope.

The exculpatory clause does not attribute an assumption of risk to Alice.

The court should allow the cause to go forward. An exculpatory clause such as Superfit's should be considered protective against ordinary negligence, but not against the kind of behavior

inflicted upon Alice at Superfit. Christa put herself forward as an expert, causing Alice to rely on Christa's advice despite her shoulder pain. Superfit was also in a position to know of Alice's weakened physical condition.

The degree of negligence, if any, is the issue here. Since there is a material issue of fact, the court should deny the Motion for Summary Judgment.

QUESTION 5

Norn, Inc., a duly formed Maryland Corporation ("Norn") was engaged in the business of developing biomedical information for vaccines. Norn decided to borrow money to purchase a high powered microscope for its research facilities. The CEO and majority stockholder of Norn, Mr. Loman, requested that its certified public accountants, Debit, Credit and Balance, LLC, ("DCB") a duly formed Maryland limited liability company, perform an audit and prepare a financial statement to be used by Norn's bank in evaluating whether it should loan monies to Norn to purchase the microscope.

In June 2002, through the efforts of two certified public accountants employed by DCB, John Stubbs, member of DCB, ("Stubbs") and Tim Check ("Check"), the requested accounting services were performed. DCB chose Stubbs to manage the accounting services for Norn as it was DCB's most profitable client, and Check, a junior accountant, was chosen by Stubbs to assist him due to his familiarity with the operations of Norn.

In connection with the bank's review of Norn's loan application, the bank requested and received a letter from DCB that stated that the bank could rely on the financial statement and audit opinion in evaluating whether it would make the loan. Based on the information contained in those documents, the bank approved the loan to Norn.

Seven months after the bank and Norn consummated the loan for the microscope, Norn was unable to pay its expenses, and failed to make the required loan payments for the microscope to the bank. The bank sued DCB and each of its members individually for its damages due to DCB's failure to disclose in the financial statement and audit opinion that six additional substantial payments of earned and unpaid commissions were made to Norn's sales team prior to the date of the financial statement. The inclusion of these payments would have had a material adverse effect on Norn's financial condition.

You are counsel for the bank. What advice would you give to the bank on the legal liability of Stubbs, Check, DCB, and its other members, and the likelihood of success of a suit for damages against each of them?

REPRESENTATIVE ANSWER 1

Legal Liability & Stubbs

As a member of DCB, as a CPA, and as the Manager of the Norn accounting services, Stubbs is liable to the Bank for damages.

As counsel to the Bank, I would advise that Stubbs, as a licensed professional in Maryland, cannot escape personal liability for errors or malpractice. As a member of the LLC, Stubbs is liable also for the work conducted by DCB. Because of his personal involvement in managing the account of Norn, which failed to include the unpaid commissions, Stubbs is likely to be found liable for damages suffered by the Bank in reliance on DCB's letter.

Check

As a licensed CPA in the State of Maryland, Check will be personally liable for errors or malpractice related to his professional services. He had familiarity with the operations of Norn, as stated in the fact pattern, so he is likely to be found liable for his errors. He acted under the supervision of Stubbs, a Member, so Check's failures may be attributed to both Stubbs, and to DCB.

Civil Liability of DCB

DCB will be liable for the damages incurred due to the Firm's failure to disclose information material to the Bank's decision to loan money to Norn. It is bound by the actions of its members and employees acting within the scope of authority. Stubbs, a member, and Check, an employee, failed to meet their professional duties.

Other Members of DCB

Other members of DCB will probably not be held personally liable for the Bank's damages. Any member who joined the LLC after the flawed services were rendered are free from personal liability. Any members who had no connection or supervisory role to the services rendered are similarly free from personal liability. If however, other members were involved in any manner in the case, they may be liable to the extent of their personal involvement or oversight.

REPRESENTATIVE ANSWER 2

Limited Liability Company (LLC): An LLC is a business entity in Maryland with members as owners. The liability for members is limited to the financial capital contributions put into the LLC. Here, DCB is an LLC, so all individuals solely as members of LLC are not personally liable for damages.

Professional Services Exception: If an individual member of an LLC renders professional services to another individual, that member, in MD, may lose the personal liability shield. Here, accounting is a professional service, so such services may incur liability.

DCB: An LLC is liable for the debts incurred and torts committed by it or its agents acting under its authority. Here, DCB failed to disclose the additional substantial payments, and Stubbs and Check were agents working under its authority, so DCB will be liable since "material adversity" is shown and if the agents knew or should have known of payments. Here, it is up to jury to make the determination, but it is probable.

Other Members (OM): Regular members (owners) of the LLC are liable for capital contributions in addition to all of the LLC's other assets. Assuming claim goes beyond its assets, OM will only be liable for up to its capital contributions.

Check: Non-member employees of LLC are not personally liable for the debts/torts of the LLC, except he or she may be personally liable for own acts. Here, Check would not be liable for DCB's or Stubbs' actions, but Check would be liable for his conduct in offering professional services that were negligent.

Stubbs: As a member of an LLC, Stubbs is not normally personally liable; only liable for capital contributions. Here, he was working in accounting services at supervisor level, so it would have to be proven that he first knew or should have known of the substantial payments. Here, under the professional services exception and due to his supervisory services, Stubbs will be personally liable.

QUESTION 6

Big Bucks, Inc. (Big Bucks), an investment company, entered into an employment contract with Willie Buffet in January 2000. Buffet was hired as a vice president for a term of three (3) years. His pay was $200,000 per year. Buffet is well known in the investment community and brought with him a substantial number of investors.

A representative of the personnel department for Small Fry, Co. (Small Fry), another investment company, contacted Buffet and asked him to come work for Small Fry. Buffet declined, informing the representative that he had over two (2) years left on his employment contract with Big Bucks.

Small Fry continued to solicit Buffet. In January of 2002, Small Fry's representative told Buffet that Big Bucks was using improper accounting methods to inflate the price of their stock and that as a result they would be the subject of criminal and civil actions. The statements were not true. He also offered Buffet $300,000 per year to work for Small Fry. In January 2002 as a result of this discussion, Buffet quit Big Bucks to work for Small Fry. All of these events occurred in Maryland.

With the loss of the investors who followed Buffet to Small Fry, Big Bucks lost $500,000 in gross revenues for 2002.

In February 2003, the president of Big Bucks, Inc. comes to you, a Maryland attorney, for advice as to potential cause(s) of action and recovery of damages against Small Fry, Co.

What advice do you give? Explain your reasons.

REPRESENTATIVE ANSWER 1

Interference with Contract.

Here it is possible that Small Fry is liable for intentional interference with contract – specifically the contract between Big Bucks and Buffet.

Small Fry knew that there was a contract between the two because it contacted Buffet and he told them that he had two years left on his employment contract.

Small Fry interfered by making lies and accusations against Big Bucks it appears to known to have been false. Although an employee of Small Fry did this, Small Fry will be held liable on agent or respondent superior theories if the employee was acting within the scope of his employment.

As a result of Small Fry's actions, Buffet quit Big Bucks and went to work for Small Fry – breaching his contact with Big Bucks.

Defamation.

Big Bucks can also sue for defamation – the statements made by Small Fry against Big Bucks, published to Buffet resulting in damages. In Maryland the statements must be false and fault must be shown on the defendant's part. Fault can be shown by either showing the defendant (Small Fry) knew the statements were false or acted with reckless disregard for the truth.

Here it appears that Small Fry knew the statements were false – they published them to Buffet in hopes of encouraging him to quit. Further, the statements were false, so Big Bucks should be able to prove that.

Damages.

For Defamation, Big Bucks will be allowed to collect for damage to its reputation. Here Corporations can be defamed if it leads others (possible customers included) to distrust the entity or believe it engages in illegal conduct.

Because of Small Fry's arguably malicious conduct it is possible that Big Bucks could claim punitive damages to punish Small Fry.

Big Bucks can also get its expectancy damages from the breach of contract. It expected to gain $500,000 in gross revenue. However, it also expected to pay Buffet $200,000 for the final year of his contract. Therefore, Big Buck's damages should be $300,000 – or what it expected at the end of the year from its contract with Buffet.

REPRESENTATIVE ANSWER 2

Issue: Defamation, slander, intentional interference with business, damages, Agency.

I would advise Big Bucks about the cause of action against Fry for defamation. Here, Fry communicated an untrue statement about Big Bucks to a third party (Buffet). Because the statements were made in regards to Big Bucks' business, it would be slander per se. This slander cost Bucks an employee, who brought in $500k a year. Fry may argue that the statement was made to Buffet, who is a part of the company, and therefore, doesn't qualify as a third party. I do not think that argument would be persuasive. I would assert that Fry would be liable for slander with damages equal to the amount of money Bucks lost due to Buffet leaving ($500k) minus what he would have paid Buffet for salary ($200k) for total of $300k.

I would also discuss a cause of action for intentional interference with Buck's business. Buffet was an employee under a Contract for 3 years. He was well known in the investment community, and as such was a valuable asset to Bucks. Fry's repeated attempts to lure Buffet away when Fry knew Buffet was under Contract and Fry's use of malicious lies in order to get Buffet to work for him substantially interfered with Buck's business causing him damages when Buffet left. I would use the same valuation as earlier to determine the amount of damages. I would tell Bucks that it is likely that he would recover under both theories, but he may not be awarded all of the money because of the overlap in losses would be hard to attribute to either the loss of Buffet or the actual slander.

Small Fry's Company may also be vicariously liable for Fry's untrue statements because it was in the course of his business and furthering its goals by obtaining Buffet.

QUESTION 7

Marty "The Mule", known to the police as a drug courier, sat down on a bench in the common area of a mall in Anne Arundel County, Maryland. Marty placed a briefcase on the floor beside his seat, with his hand resting on the handle of the briefcase. Larry "The Lifter", a local pickpocket and petty thief, approached Marty from behind, grabbed the briefcase by the handle, sprinted around the corner and ducked into a fast food restaurant in the mall. Marty, suspecting police surveillance, did not pursue Larry.

Larry sat at a table until he was sure the coast was clear. Larry then got up and walked out into the common area. As he got up, Larry noticed an unusually ornate glass salt-shaker on the table and placed it is his pocket.

Marty's fear of surveillance was well-founded. As Larry exited the restaurant, he was arrested by two police officers who had observed the entire incident from a mezzanine. The officers lawfully seized the briefcase from Larry and lawfully discovered and seized the salt-shaker during a search of Larry incident to the arrest.

Much to Larry's surprise, the briefcase contained a pound of marijuana and the salt-shaker (left in the restaurant earlier by Marty and thought by Larry to contain salt) contained an ounce of cocaine.

The identity of the substances has been established by proper laboratory testing by qualified personnel. A proper chain of custody has been maintained.

Larry is charged with a robbery of Marty, possession of a controlled dangerous substance (cocaine) and possession of a controlled dangerous substance (marijuana). Larry asks you to represent him.

Discuss any substantive defenses that Larry may assert.

REPRESENTATIVE ANSWER 1

As Larry's defense counsel, I would present the following substantive defenses to the charges by the State:

1. Defenses to Charge of Robbery:

(a) Larry's actions, while meeting the statutory requirements for theft, do not meet all of the elements of robbery.

Robbery is the taking, and carrying away the property of another from the person's body or presence through force or intimidation.

Larry took Marty's briefcase from his person (Marty's hand was resting on the briefcase) but Larry did not use force or intimidation to achieve the taking of the property. Larry did not apply force and could not have intimidated or placed Marty in fear as Marty's back was turned at the time of the taking. Therefore, Larry's charge of robbery should be successfully defended on the grounds that his actions do not satisfy either the common law or statutory elements for robbery.

(b) I would also contend that Larry lacked the requisite mental state for robbery as he did not specifically intend to obtain the property (briefcase) through fear or force.

2. Possession of Marijuana/Cocaine.

(a) As to both charges for possession, I again would assert that Larry lacked the requisite mental state for possession. Larry's intent was not to be a possessor of drugs. This argument may be a little more difficult to prevail on because possession generally only requires knowledge that you possess but not necessarily knowledge that drugs are present in the things possessed.

As to the sale shaker, we could contend that Larry had a reasonable belief – though mistaken – that the salt shaker contained salt. The facts show that it was on a table in a common area of a mall.

Larry's reasonable, mistaken belief as to the shaker's contents should be sufficient to negate the specific intent to possess cocaine.

As to the briefcase, Larry was known as a petty thief and pickpocket. Marty was known to police as a drug courier. As police observed the entire incident, they had knowledge that Marty was the true possessor of the marijuana. As such, this coupled with the fact that Larry did not intend to obtain the marijuana, should be an adequate substantive defense to this charge.

REPRESENTATIVE ANSWER 2

Larry appears to be guilty of robbery, but he may resist the drug possession charges by arguing he lacked the requisite mens rea.

The crime of robbery applies whenever someone:

(1) Willfully
(2) takes property
(3) from the person of another
(4) by force, violence, or fear
(5) with intent to deprive the person of possession.

In Maryland, unlike some other states, the theft offenses, including robbery, do not require an intent to permanently deprive the owner.

Larry may assert several substantive defenses to a robbery charge, but none is likely to be successful. First, he may argue that he did not take from Marty's person; he merely took a briefcase laying beside him. This argument will fail because Marty's hand resting on the briefcase was enough to make it part of his "person" for purposes of a robbery charge.

Second, Larry may argue that he did not take Marty's briefcase by "force, violence, or fear" because he merely snatched it off the ground. Again, though the contact between Marty's hand and the case is enough to make snatching the briefcase away an act of violence.

Thus, it appears Larry is guilty of robbery based on his theft of the briefcase from Marty.

The drug possession charges are another matter. Were these crimes strict liability offenses, Larry could be guilty based on proof only of an actus reus (here, the fact that controlled substances were in his possession). Maryland, however, generally requires proof of some mens rea, in addition to actus reus, to support a criminal conviction. Here, Larry may be convicted on these charges only if he knowingly possessed the controlled dangerous substances in question. The State most likely can not satisfy its burden of proof on this point (the State must prove all elements of the crime beyond a reasonable doubt) because he had no idea there were drugs in the briefcase or the salt shaker when he took them.

The State might contend that Larry assumed the risk that there was contraband in the items he stole. Had the government merely waited until Larry had inspected the contents and discovered what he had in his possession, that argument might have prevailed, because at the point Larry's possession would have been knowing. On these facts, however, the government cannot prevail.

Beyond the government's inability to satisfy the elements of the offense, Larry also has a defense of mistake of fact with respect to the salt shaker. Because possession of a dangerous controlled substance is a general intent crime, reasonable mistakes of fact may afford a defense though not unreasonable ones. Here, Larry's assumption that the salt shaker contained salt rather than cocaine was reasonable so he has a defense to the crime.

Larry might also make the same argument with respect to the briefcase, but because the case was opaque and Larry had no idea what was inside, it will be harder for Larry to establish that his crime was predicated on a mistaken reasonable belief that the briefcase contained something else (say, papers and personal effects). In Maryland, however, criminal defendants need only satisfy a burden of production with respect to defense; once they do so, the burden shifts to the government to disprove the defense beyond a reasonable doubt. If Larry might be able to satisfy that relatively low burden here by arguing he assumed the case contained what briefcases normally contain, namely, papers and personal effects, not drugs.

QUESTION 8

During July and August 2002, businesses in Harford County, Maryland were plagued by a series of armed robberies. In the early stages of their investigation, the local police gathered physical evidence, eyewitness accounts, and videotape evidence, but were unable to identify a suspect.

In late August 2002, the police arrested Alfie on drug possession charges. Alfie was unable to make bail, and remained in the local jail, pending trial in November 2002. After Alfie's arrest, the robberies stopped immediately. Betty, the lead detective on the robberies, noticed the coincidence, and suspected that Alfie might be involved.

In September 2002, Betty interviewed Alfie's long time fiancée Celia, who is the mother of Alfie's three children. Celia told Betty that Alfie had admitted to Celia that he committed the robberies to support his drug habit, and gave Celia some of the cash stolen in the robberies as well as a gun that Celia claimed Alfie used to commit the robberies. Betty also interviewed the owner of the gun shop where Celia claimed that Alfie had bought the gun.

In October 2002, Celia married Alfie. Alfie never made any statement to the police about the robberies, and none of the physical evidence gathered at the crime scenes connects Alfie to the robberies.

Alfie was properly indicted for armed robbery in the Circuit Court for Harford County, Maryland. At trial:

a. The State calls Celia to testify that Alfie had admitted to committing the robberies. Celia refuses to testify on the grounds that she has recently married Alfie. The State asks the Judge to compel Celia's testimony.

b. To prove her marriage to Alfie, Celia produces a crumpled photocopy of her marriage certificate for review by the trial judge. The State objects to the admission of the photocopy.

c. The State calls the gun shop owner to testify that one of his clerk's told him that the clerk sold a gun to Alfie. Defense counsel objects to the testimony of the gun shop owner.

d. Alfie calls his brother to testify that Alfie is a good father. The State objects to this testimony.

How should the Court rule on these evidentiary issues, and why? Fully explain your answers.

REPRESENTATIVE ANSWER 1

a. Celia doesn't have to testify against Alfie. While she cannot assert the narrower spouse communications privilege, (which she and Alfie both hold) because the communication at

issue occurred prior to the marriage, Celia may assert the broader marital privilege. Spousal privilege may be asserted because this is a criminal act and if Celia wishes not to testify against her husband, the State of Maryland may not compel her to do so. It should be noted though, that if Celia wished to testify, she could. She alone holds the broader marital privilege.

b. Several hurdles must be overcome for the photocopy to be admissible. Admission raises issues of authentication, hearsay, and best evidence.

1. Authentication – The marriage certificate may be a self-authenticating document provided it is a public record issued and sealed by the State. If not, to introduce it, a foundation must be laid to establish its authenticity. Celia herself could likely take the stand to testify to its authenticity herself and this would provide sufficient evidence that the document is authentic.

2. Hearsay – The marriage certificate is hearsay because it is to be used to provide the truth of the matter asserted (that Celia and Alfie are married). Thus, for it to come into evidence, an exception must apply. The certificate should qualify under the public records exception to the hearsay rule.

3. Best Evidence Rule – Photocopies are subject to the best evidence rule. Assuming the photocopy is an accurate representation the fact that it is a photocopy should not exclude the certificate on best evidence grounds.

Should the certificate fail in any of the above three grounds, it would not be admitted.

c. The court will have to make the preliminary determination of whether the gun shop owner may testify to his clerk's statement. This statement is arguably hearsay as it appears to be presented for the truth of the matter asserted. It may however come in as non-hearsay (no exceptions are applicable) if the State can convince the Judge that it is introducing the gun not to show that Alfie bought a gun, but that because Alfie had possession of a gun, he had the opportunity to commit an armed robbery (admittedly, a shaky argument). This evidence is not likely to come in. Even if it's not hearsay, there are serious concerns since admission of the testimony is more prejudicial than probative arguably.

d. The State should be able to bar this testimony. While Alfie, as a criminal defendant, has the right to put his character in issue, it must be done in a limited way. He could introduce evidence of his good character for peacefulness in this matter, because it is a trait relevant to the commission of armed robbery, the crime charged. Being a good father is simply not a trait pertinent to armed robbery

REPRESENTATIVE ANSWER 2

a. The State cannot compel Celia's testimony implicating Alfie in the robberies. Although Alfie and Celia were not married at the time Alfie made the statements, spousal privilege protects Celia from having to testify to any statements made to her in confidence

during or before the marriage. Since Alfie and Celia are currently married, Celia may invoke the spousal privilege and not be forced to testify against her husband. The only possible way the State could force Celia to testify were if the State could show the marriage was entered into simply for the purpose of invoking the privilege. Marital privilege would not apply here because the privilege belongs to Alfie and only protects against disclosure of statements made during the marriage, not the engagement.

b. The State's objection to the admission of the photocopy should be overruled. The document is sought to be admitted to prove the truth of the matter asserted (that Alfie and Celia are married), and is therefore hearsay.

Vital records, such as a marriage certificate, are admissible as seen under the hearsay exception. Provided that the photocopy can be properly authenticated (i.e., it is a certified, stamped copy of the marriage certificate or a custodian of the original can be produced to testify as to the validity of the document, the photocopy should be admissible as a hearsay exception – a vital record of marriage. I do not believe the best evidence rule would apply here.

c. The gun shop owner's testimony containing "what one of his clerks told him" is inadmissible hearsay. The State is seeking to have the gun shop owner testify as to what someone else told him (i.e., that the clerk sold the gun to Alfie). The gun shop owner, while he may be reliable and while the evidence maybe relevant, has no personal knowledge or an independent basis of this knowledge that his clerk sold a gun to Alfie. The truth of his testimony depends on the credibility of the maker of the statement, the clerk, who is not testifying. The testimony is inadmissible hearsay.

d. In a criminal case, the accused is generally permitted to produce evidence of the defendant's good character trait provided it is relevant to the crime charged. The testimony that Alfie is a "good father" does nothing to rebut the character imputed to Alfie by being charged with robbery (i.e., that Alfie is dishonest, violent, uses weapons). The proposed testimony is irrelevant as to the crime charged, and there is no evidence Alfie's character has yet been attacked in any way. In this case the prejudice in admitting this irrelevant testimony from defendant's brother outweighs any possible probative value. One can still be a good father and commit armed robberies.

QUESTION 9

Tom brought a small claim action against Jerry in the District Court of Maryland in Prince George's County, Maryland, for accounting services rendered to Jerry in the amount of $1,500. Tom and Jerry both live and work in Prince George's County. Jerry contacted his attorney to represent him in the suit. In the office conference with his attorney, Jerry provided the following information about the case. Tom's fees are excessive and unreasonable. Tom failed to properly prepare financial statements for Jerry which resulted in a business loss to Jerry of $27,500.

A. Based on the given facts, does Jerry have options in deciding in which Court the case will be tried? Explain in detail what responsive pleadings will be filed for Jerry; the Court(s) in which those pleadings will be filed; and the reasons for the filings of those pleadings in that particular Court(s).

B. Assume the following additional facts: Jerry believes that several accountants who worked for Tom must be deposed in order to get the full story of the negligence of Tom in handing Jerry's matters. Based on the given facts, in which Court(s) can Jerry take the depositions? Explain in detail.

REPRESENTATIVE ANSWER 1

A. Jerry may choose to file a counterclaim against Tom for Jerry's $27,500 loss of business. If Jerry files a counterclaim for $25,000, the matter will be moved out of small claims court and moved onto a regular District Court docket pursuant to Rule 3-701 because the cross-claim exceeds the $2,500 limit for small claims actions.

Jerry may want to file a suit for the entire $27,500 in damages. If so, he cannot file a cross-claim because his cross-claim exceeds the $25,000 jurisdictional limit of District Court under 3-331 and 4-401. He may, however, move to have the action against him stayed so that he can file a separate action in Circuit court for the $27,500.

A notice of intent to defend, identifying Jerry's attorney shall be filed within 15 days of service on Jerry to the District Court. It will be filed in District Court because that is where Tom's action against Jerry is filed. If Jerry chooses to file a cross-claim not exceeding $25,000 that will be filed in District Court within ten days after the notice to defend. If Jerry wants to file separately, he should file a motion to stay the action in District Court because that is where Tom's suit against Jerry is.

B. Jerry can take the depositions of the several accountants if his case is filed in Circuit Court or if Tom stipulates to the deposition in writing if the case is in District Court.

If Jerry files in Circuit Court separately, 2-401 governs discovery and allows depositions. 2-411 says any party may depose a person.

If Jerry files in regular District Court, 3-401 governs discovery and allows for depositions only by written stipulation of the parties and will not likely stipulate.

There is no pre-trial discovery under 3-701 in small claims court, so Jerry cannot depose in District Court small claims.

REPRESENTATIVE ANSWER 2

A. The District Court has exclusive jurisdiction over a small claim action (below $2,500). Section 4-405. Consequently, Tom's suit for $1,500 was properly brought in District Court. However, Jerry does have the option of staying the proceedings begun by Tom and commencing action in Circuit Court, since he may in good faith counterclaim for $27,500, which exceeds the District Court's monetary jurisdiction of below $25,000. Section 4-401(1), 3-331(f). If Jerry wishes to remain in District Court, he should file a notice of intent to defend. Section 3-307(a). This should be done within 15 days of service of the complaint against him. Section 3-307(b). He should also counterclaim for an amount not exceeding $25,000. Rule 3-331(a) expressly allows a counterclaim exceeding the amount sought in Tom's original pleading. This must be done within ten days of filing his notice to defend. Section 3-331(d). If the counterclaim exceeds $2,500 (as is likely), the clerk shall transfer the action out of the small claims docket to the regular civil action docket. Finally, if Jerry wishes to sue for the full amount of his loss ($27,500), he will have to move for stay of the action in District Court and file suit in Circuit Court. Section 3-331(f). This is the action that he should take.

B. Pre-trial discovery is not permitted in a small claim action. 3-701(e). If the action is transferred to the District Court's regular civil docket under 3-701(d), Rule 3-401 allows depositions if a written stipulation is filed in the action. If Jerry commences an action in Circuit Court, Rule 2-401 allows for full discovery by deposition, generally without court interference.

QUESTION 10

Albert owned 200 acres of farmland and timber on the East side of Highway 7, which runs generally in a north-south direction in Garrett County, Maryland. In 1950 Bernard approached Albert about purchasing the easternmost 50 acres of Albert's land for the purpose of building a small cabin to hunt and "get away from it all." On April 1, 1950, Albert sold and conveyed to Bernard the 50 acres and conveyed to Bernard a 12-foot wide easement known as Tree Line Lane. Tree Line Lane extended approximately ½ mile over Albert's land and the easement recited that it was for the purpose of ingress and egress to Highway 7.

During the fall of 1970 Albert relocated the last 300 yards of Tree Line Lane where it joined Highway 7, in favor of a more convenient access to the Highway. The old access quickly grew up with trees and became impassable. Upon Bernard's next visit in December of 1970 he began using the new access from Highway 7 to where it connected with the remaining portion of the original Tree Line Lane.

By 2000 Albert found more and more people snooping around his property and he installed a gate at the new access entrance from Highway 7. As a "courtesy" he gave Bernard a key to the gate. In June of 2001, Bernard decided his hunting days were over and began timbering his property and a much larger tract he had purchased to the East.

Albert became very upset about the timbering operation as a result of damage to the lane caused by trucks and sought to prohibit Bernard from hauling timber over any part of Tree Line Lane. He also sought to prohibit Bernard from any use whatever of the relocated 300 yards between original Tree Line Lane and Highway 7.

Among other things, Bernard contends that he has a right to make full use of Tree Line Lane including the relocated Access to Highway 7. On November 10, 2001, Albert filed suit in the Circuit Court for Garrett County seeking a declaration that Bernard be prohibited from hauling timber across Tree Line Lane and declaring that Bernard has no right whatever to use the relocated 300 yard access to Highway 7. Regarding the relocated access Albert testified that he never saw Bernard use the relocated entrance before giving him a key to the gate and that Bernard's use was with Albert's permission, and could be withdrawn at any time.

Based on these facts, how should the court rule?

REPRESENTATIVE ANSWER 1

Bernard cannot be prohibited from using Tree Line Lane altogether but Albert might be successful in limiting Bernard's use of the road, and/or forcing him to maintain it. Bernard's new use of the road is causing damage and is exceeding the scope of the easement granted by Albert. When Albert granted the easement, he did so under the impression that Bernard would be using it solely for ingress and egress between the hunting cabin and the highway. The easement expressly recited the purpose of ingress and egress.

However, Bernard has a right to use the easement within reason. The easement has existed for over 50 years and Albert cannot expect the nature of the easement to remain static for five decades.

Ultimately, however, the court will likely prohibit Bernard from using the road in such a manner that causes damage (and Bernard might need to contract for repairs), but Bernard will not be prohibited from using the lane with trucks altogether. Such use and improvement is a foreseeable and reasonable change to the use of the land.

Relocated Portion:

Bernard will claim that his right to the use of the new portion was obtained through adverse possession. In order to claim a right through adverse possession, Bernard would need to show that the use was (1) open and notorious, (2) continuous for the 20 year statutory period, (3) actual and exclusive, and (4) hostile.

Bernard will have a difficult time satisfying all of the elements. Although the use appeared continuous to Albert for over 20 years, there is the question of whether the use was hostile. To meet the requirement Bernard would not need to show actual hostility, but would need to show that his actions were inconsistent with Albert's entitlement and ownership of the land in fee simple.

The fact that Albert claims he never saw Bernard use the portion until 2000 and that he granted Bernard permission to use the road by giving him a key to the gate demonstrate that the hostility requirement may have been lacking. Furthermore, although Albert claims that he never saw Bernard use the new portion, the open and notorious element is not necessarily defeated. Bernard apparently used the road for over 30 years before Albert saw him. Although Albert's (suspicions) subjective knowledge did not include awareness of Bernard's use, there also isn't evidence that Bernard was somehow "hiding" his use.

The ruling will likely be for Bernard because Albert's ignorance or lack of knowledge that Bernard was using the new road for over 20 years does not defeat the hostility requirement. His permission came after the 20-year period and Bernard had already gained a right to the easement by prescription. Thus, Bernard cannot be prohibited from using the new portion.

REPRESENTATIVE ANSWER 2

This case deals with the law of easements.

Prohibiting Bernard from hauling timber.

Albert granted to Bernard an express easement for the purpose of ingress and egress from Bernard's purchased property to the highway.

By using the easement to haul timber solely from the 50-acre parcel purchased from Albert, Bernard would not be violating the easement. However, use of land other than the dominant

parcel automatically overburdens the easement. Since Bernard was also hauling timber from land beyond the 50-acre parcel, he overburdened the easement and Albert may seek an injunction prohibiting Bernard from such use.

Right to 300 yards.

Bernard had an express easement to Tree Line Lane. Bernard did not have an express easement to the 300-yard relocation but did acquire an easement by prescription.

An easement by prescription requires that use of the land by open and notorious, adverse, continuous and for the statutory period of 20 years. Use need not be exclusive.

Bernard first began using the relocated entrance in 1970 and has continuously used it for 30+ years. Albert contends, however, that Bernard's use, if at all, was not open and notorious, nor was it adverse.

Open and Notorious: It is not necessary that Albert actually see Bernard use the entrance, only that Albert should have known of the use. Since Albert did know or had reason to know that the old access road became overgrown and impossible, Albert had constructive notice that Bernard was using the new access road to reach Tree Line Lane. In addition, Albert's presentation of a key to Bernard following the installation of the gate is evidence that Albert indeed had this knowledge.

Adverse: Albert contends that Bernard's use was with permission. However, the permission that occurred with the presentation of the key occurred after Bernard had already obtained an easement by prescription. In 2001, Bernard had been using the access road continuously, adversely, and in an open and notorious manner for over 30 years. Albert may not prevent Bernard from using the access road.

Court Ruling:

The court should enjoin Bernard's use of the road for hauling timber from any property other than his 50 acres purchased from A.

The court should dismiss Albert's claim that Bernard has no right to the access road.

QUESTION 11

Stan Star graduated from law school and worked exclusively these past 7 years in the State's Attorneys Office of Calvert County, Maryland. Stan was the ace prosecutor, winning all of his cases. He is widely known in Calvert County by all of the residents. The members of the bar association general consider him one of the best, if not the most talented, criminal lawyer in Calvert County.

Stan Star decides it is time to profit on his popularity and to make more money, so he enters into private practice, opening his own law office. The advertisement on the door says the "most talented lawyer in Calvert County specializing in all of your legal needs". Although he has no other attorneys working in his office, he does have a partnership with a non-lawyer real estate agent, and Stan hopes that his partner will teach him about commercial business transactions.

Mary Meek, who owns a very successful business, wanted to sell it to a prospective purchaser. She asked Stan to represent her. The transaction will include the transfer of a liquor license, the sale of stock, consideration of tax consequences and other business law issues. Stan has never handled a business transaction, but believes, with advice from his partner, he can represent Mary effectively.

Mary hired Stan, agreeing to pay him $200 per hour, plus a bonus of 10% of the purchase price in excess of $500,000 if a sale is completed.

For over one month, Mary has been unable to contact Stan to discuss her transaction, and Stan has not returned any of her many telephone calls. During that month, Stan has been lecturing to various business groups in Calvert County, telling his audiences about his experiences in private practice. He tells them that he is representing Mary in selling her business for at least $500,000.

Recognizing that he has to respond to Mary, and realizing that his partner hasn't been much help, Stan asks Paul, a Maryland lawyer experienced in business transactions, to join him as co-counsel in the matter. Stan and Paul agree that Paul will handle the legal aspects of Mary's business sale at a rate of $200 per hour, and Stan will receive the bonus he negotiated with Mary.

When Mary finds out that Stan has not worked on her case for a month and has brought in Paul to handle her sale, she becomes angry. Mary files a complaint with the Attorney Grievance Commission.

As a newly appointed Assistant Bar Counsel, you have been asked to write a memo outlining potential violations of Maryland's Rules of Professional Conduct.

Write a brief memorandum based on the stated facts. Explain your recommendations.

REPRESENTATIVE ANSWER 1

To: Supervisor

From: Assistant Bar Counsel

Based on the facts, there are a number of Rules of Professional Conduct that Stan Star has violated.

1. Stan's advertisement on his door is improper for three reasons. First, he claims to "specialize" which is a word that should not be used in advertisements. Second, he claims to have knowledge in every aspect of the law even though he does not. This is a misleading statement about his abilities. Third, he claims to be the "most talented" lawyer in Calvert County. This claim is an improper and unfair comparison to other lawyers.

2. A lawyer may not enter into a partnership with a non-lawyer. A lawyer may not share fees with a non-lawyer nor engage in a business where legal and non-legal services are rendered. Stan's partnership with a real estate agent therefore violated these rules.

3. Stan may represent Mary even though he has never handled a business transaction because he may become competent through research or by teaming up with a more knowledgeable lawyer. However, Stan may not become competent in the subject by getting advice from his non-lawyer partner. That would be a violation of the rules.

4. Stan may charge Mary $200 per hour if that is a reasonable fee – if other lawyers with the same experience charge this amount , if the case is complicated, if Stan has to give up other clients. The bonus of 10% may be excessive, however. Also, this bonus may be a contingency fee, which is permissible, but may be excessive when coupled with the hourly fee.

5. Stan's failure to keep Mary informed regarding the case is also a violation of a lawyer's duty to his client. He has not returned Mary's calls, which shows that he is uninterested in the case.

6. Stan's disclosure of his representation of Mary may constitute a failure to maintain the attorney-client confidentiality. He should not reveal any confidential information to third parties unless Mary waives the privilege.

7. Stan may enter into an agreement with Paul, but only after obtaining permission from Mary. This splitting of the fee would be permissible since Paul is a lawyer if Mary agrees to the association between the two attorneys.

REPRESENTATIVE ANSWER 2

To: Attorney Grievance Commission
Re: Complaint against Stan Star
From: Assistant Bar Counsel

1. Stan Star's advertisement on the door of his law office is probably not in violation of the Professional Rules of Conduct regarding advertising by lawyers. While the "most talented" label may be deemed today, it is unlikely that a reasonable person would be misled into thinking Stan Star has been certified as "most talented". It is more likely considered a form of self-bolstering and would be acceptable. If it is deemed that the sign indeed misleads most reasonable people into thinking Stan is a specialist of some sort he may be asked to remove the sign. Similarly, Stan may claim that he "specializes in all your legal needs" as this merely implies he can take any case. If he is not equipped to handle all, or even most matters, then the statement may be considered an advertisement that is deceptive. Given Stan's solely criminal practice experiences, his door sign may be in whole, misleading, and in violation of the Professional Rules of Conduct.

2. A more grave violation is Stan's partnership with a non-lawyer real estate person. Such partnerships with persons not lawyers are not permitted.

3. Stan may also be disciplined for taking a case he knew he was incapable of handling even with research and careful preparation. While it is not necessarily true that a criminal lawyer could not gain the requisite capacity to handle Mary's matter, since Stan did not believe he could handle the work without the assistance of his non-lawyer partner he has improperly taken the case.

4. Moreover, since Stan is not at all learned in the area of business law, his $200 hourly fee may be deemed unreasonable. In determining the reasonableness of an attorney's fee one looks at the skill required, time required, complexity of issues, and the client's deadlines. In light of Stan's lack of expertise and competency in the area, this per hour rate may be considered unreasonable. The bonus of 10% of the purchase price is valid if Stan is not taking advantage of Mary (see below).

5. Stan may receive the 10% bonus (a form of contingency fee) but only if this is fair to Mary. Stan may ensure fairness by counseling Mary to get independent legal advice as to the fairness of this item, so as to protect him from any claim of self-interest in his client's affairs. This may not be necessary, however, as the more money for the sale that Stan procures, the more money they both make.

6. Stan should be found in violation of his duty to zealously represent his client for failing to contact Mary, return her calls or consult with her on important matters regarding his representation of her. An attorney should reasonably keep his/her client apprised of their

legal representation and to avoid your client (and not work on the case) is a gross violation of your responsibility as counsel to your client.

7. Stan should also be disciplined for disclosing confidential and privileged information regarding Mary's representation, and falsely advertising that he has sold the business (or will sell it for more than $500,000). Any use of such privileged information in advertising must be bona fide and approved by the client.

8. Finally, while Stan may seek the assistance of co-counsel, he must first procure Mary's approval as Paul is not a partner. Mary must also agree to Paul charging her a fee. While Stan and Paul need not disclose how the fee will be computed, Mary should approve of the general arrangement of both attorneys working for and being paid by her.

QUESTION 12

Alice and Bob were married in 1982. A son, Charles, was born of their marriage in 1985. In 1995, they purchased a 4-bedroom brick colonial residence in an upscale subdivision in Baltimore County, Maryland.

Alice and Bob had many rocky times during their marriage, with constant bickering, nagging and dysfunctional behavior. In 2000, Alice began an extra-marital affair. Bob found out about the affair and was furious. He moved to a spare bedroom, refused sexual relations with Alice, and hired an attorney to advise him of his marital rights.

Alice sought counsel from a Maryland attorney, Hardley Able. With the assistance of counsel, Alice and Bob entered into a written Separation and Property Settlement Agreement, which provided in relevant part:

a) The parties mutually and voluntarily separated on December 1, 2001, the date the Agreement was signed;

b) The parties mutually waived grounds for divorce based on adultery;

c) Alice would have sole custody of Charles, subject to Bob's reasonable visitation rights;

d) Bob agreed to pay Alice the fixed sum of $2,000 per month as alimony for a period of 36 months, beginning May 1, 2002. The Agreement specified that alimony obligation could not be modified or changed by a court unless Bob was involuntarily terminated from employment;

e) Bob agreed to pay $1,000 per month child support for Charles, then age 16, until he attained the age of majority.

After separating, Bob went to live with his mother in Harford County, Maryland. On September 1, 2002, Bob lost his job due to downsizing by his employer. He immediately fell behind in his alimony and child support payments.

On November 1, 2002, Bob filed suit against Alice for an absolute divorce based on their voluntary separation and adultery. His Complaint also requested the Circuit Court for Harford County to eliminate the alimony obligation in the Separation Agreement and to reduce the child support obligation to $250 per month, effective September 1, 2002.

A distraught Alice retains you, a new Maryland attorney, to represent her.

Advise Alice as to the following issues:

A. Does Bob have grounds for an absolute divorce under the Complaint filed?

B. Can Alice be sued in the Harford County Circuit Court?

C. Does a Circuit Court have the power to modify alimony and/or child support, as Bob has requested?

D. Charles plans to start college in September, 2003, when he is 18. Can the Court require Bob to pay part of the college education costs?

Explain your answers.

REPRESENTATIVE ANSWER 1

A. Grounds for absolute divorce are 2 year separation, 1 year voluntary separation, adultery, desertion, cruelty and excessively vicious conduct. Bob has grounds for immediate divorce based on adultery (but he waived adultery); but not 1 year voluntary separation because they separated 12/01/01 and he brought the action on 11/01/02. Since he waived adultery, he needs to wait 1 more month for voluntary separation.

B. A complaint for divorce may be brought in the county where either the Plaintiff or Defendant resides, or where the Defendant is employed, conducts business or engages in a vocation. Because Bob now lives with his mom in Harford County, Alice can be properly sued there, once the one year lapses for voluntary separation.

C. A Circuit Court does have the power to modify alimony and child support. Alimony may not be modified by the Court if the Court has merged or incorporated an agreement that specifically states that alimony is not subject to modification. Further, child support can always be modified if it's in the best interest of the child, regardless of the existence of no-modification provision. Here, because the agreement says alimony can be modified only if Bob is "involuntarily terminated" from employment, which happened when Bob was laid off, the Court can modify the alimony and may modify the child support based on changed circumstances, while weighing the child's best interests.

D. A parent is obligated to pay child support only until the child reaches age 18, or age 19 if the child is still in high school. Once Charles is age 18, Bob cannot be required to pay Charles' college education costs unless it was provided for in the separation agreement.

REPRESENTATIVE ANSWER 2

A. A husband and wife can be granted an absolute divorce by a Circuit Court on the basis of mutual and voluntary separation for a period of 1 year without cohabitation, and with no reasonable chance of reconciliation. The parties separated on December 1, 2001. Only 11 months had run until November 1, 2002, which does not satisfy the one year requirement. Any time that Bob spent in the spare bedroom in the mutual home does not count for separation time.

Adultery is a ground for absolute divorce. The facts stipulate that Alice had an extra-marital affair. The Circuit Court may void the provision in the agreement waiving the adultery grounds. Thus Bob may file for absolute divorce based on adultery. However, he would have to amend his complaint, because the originally filed complaint does not list this grounds for divorce.

B. An action for divorce may be filed in the Circuit Court where the defendant works or lives, or in the Circuit Court where the plaintiff lives. Bob lives in Harford County, so venue in Harford County Circuit Court is proper.

C. The Circuit Court has power to modify alimony up to the time of divorce. The divorce in this case is not final, so the Court may modify alimony. However, the Court may not do so in this case because Alice and Bob have a binding contract (the Separation Agreement). The Circuit Court may modify child support whenever there is a change in material circumstances. Bob has been laid off, constituting a change in material circumstances. The Court will likely adjust the child support in accordance with the Maryland Child Support Guidelines.

D. Bob's legal obligation to Charles ends upon Charles' reaching the age of majority. The Court cannot compel Bob to pay part of Charles' college education, absent an agreement by the parties to do so.