

**FEBRUARY 2008 MARYLAND BAR EXAMINATION**  
**QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

**QUESTION 1**

At 2:00 a.m. Ace opened the back door of Diamonds Are Forever, a retail store in a shopping center in Charles County, Maryland. The back door was closed, but had been left unlocked intentionally by Bob, a store employee, who was also Ace's partner in crime. Ace went into the showroom and emptied the contents of the diamond display case, worth more than \$50,000, into a bag and exited with the bag through the same back door, closing it behind him. No damage was done to the back door at any time. Ace walked to his car, which was parked one hundred yards from Diamonds Are Forever. He stored the bag of diamonds in the trunk of the car, and retrieved a handgun that he had left in the trunk of the car, and walked away from the car, intending to return the next morning and pick up the car.

A shopping center security guard observed Ace walking away from the parked car and followed Ace for several hundred yards. The security guard then yelled "Stop where you are. I have a gun and I'll shoot." Ace turned and fired a single shot at the figure in the dark, killing the security guard.

Ace has been indicted in the Circuit Court for Charles County for burglary, theft and murder.

**What are the issues, based on these facts, regarding Ace's potential conviction on the charges of burglary, theft and murder? Explain your answer fully.**

**REPRESENTATIVE ANSWER 1**

Burglary – Second Degree is the breaking and entering a store of another with the intent to commit a crime therein. Here, Ace opened the back door of Diamonds Are Forever, which constitutes a breaking and entering a retail store of another with the intent to commit a theft of the contents of the diamond display case. The fact that Ace's co-conspirator, Bob, left the back door unlocked intentionally, or that there was no damage to the door, does not remove the breaking and entering element of Ace's burglary, especially since the door was closed. Ace will not be charged or convicted of First Degree Burglary because Diamonds Are Forever was not a dwelling house, Under Common Law, a burglary was required to take place at night, and while Ace's actions occurred at 2:00 am., the night element was not a requirement for Ace to be charged with 2nd degree burglary. Therefore, Ace will likely be convicted of 2nd Degree Burglary.

Theft (larceny form) is the trespassory taking and carrying away the personal property of another with the specific intent to permanently deprive. Here, Ace emptied the contents of the diamond display case, worth more than \$50,000, into a bag and exited with the bag. Therefore, Ace will be charged and likely convicted of felony theft.

Felony Murder (1st degree murder) is the killing of a human while in the commission of an enumerated felony, which includes burglary. Here, while Ace killed the shopping center security guard following a burglary, the killing was not in the commission of the burglary. Following the commission of the crime, Ace walked to his car, which was parked one hundred yards from Diamonds Are Forever, stored the bag of diamonds in the trunk of the car, and retrieved a handgun that he left in the trunk of the car, walked away from the car, intending to return the next morning and pick up the car. These facts indicate that Ace's commission of the crime was complete, and he had reached safety.

First Degree (Premeditated) Murder is the intentional killing of a human being, without excuse, provocation or mitigation, and with premeditation and deliberation. Here, while Ace intentionally turned and fired a single shot at the figure in the dark, killing the security guard, this action, while responding to an unknown figure yelling "Stop where you are. I have a gun and I'll shoot" will not be deemed premeditated or deliberate.

Second Degree Murder is the intentional killing of a human being, without excuse, provocation or mitigation, but not with premeditation or deliberation. Here, the facts discussed above will likely lead to a conviction of Ace for 2nd Degree non-premeditated murder.

Self-Defense. Here, Ace will attempt to use self-defense as a defense to murder since he was responding to a figure in the dark yelling "I have a gun and I'll shoot." This is a question for the finder of fact, and seems possible but unlikely.

Voluntary Manslaughter. Here, Ace may attempt, and be successful in attempting to mitigate this charge to manslaughter on an imperfect self-defense claim, since he responded to "I have a gun and I'll shoot." This is unlikely because if self-defense is found, then Ace will most likely be completely cleared of the killing.

## **REPRESENTATIVE ANSWER 2**

Burglary in Maryland occurs when there is a breaking and entering of a dwelling at night with the intent to commit a theft or crime of violence. Under these facts, a breaking has occurred even though the door was unlocked. The mere act of opening the closed door and entering the store constitutes breaking. Ace, when he entered the store at 2:00 a.m. as a result of his "partner in crime" leaving the door open had the intent to steal the jewelry, manifested by his plan with Bob. The mere act of breaking and entering with the intent to steal the jewelry will likely be sufficient to sustain a charge of burglary. The fact that there was no damage done to the door is irrelevant in our burglary analysis because one need not cause actual damage to commit burglary.

Theft occurs when a person has the intent to permanently deprive another of property. Here, because of the value of the jewelry, Ace's plan to sneak into the store, knowing of the valuables therein, and his subsequent taking of the valuables and removing them to the trunk of

his car will satisfy the elements required for theft. Because of the value of the items taken (over \$500), the most severe degree of theft will be charged. In order to defend against a theft action, Ace will have to show that he did not intend to permanently deprive the store of the jewelry at the time of the taking. This defense will likely fail.

Murder is the killing of another with the malice aforethought. The issue here is whether Ace should be charged with first degree premeditated murder and felony murder. Felony murder occurs when a felon, during the commission of an enumerated felony (burglary included), kills another in **furtherance of the felony**. The test to determine whether the killing occurred within the course of the felony looks at the foreseeability of the victim as well as whether the crime was still being committed. Under these facts, there is a clear case of burglary, an enumerated felony. It is a question of fact whether the burglary was over when Ace was walking away from the car. He was not a fleeing felon necessarily, and it can be argued that the burglary was over once he left the car. However, possession of a handgun in the commission of felon is a felony in and of itself, so this may keep Ace on the hook for felony murder. Ace will defend based on self defense, asserting that the security guard did not identify himself, that he threatened serious bodily harm or death (as the facts indicate), and that Ace himself may have thought he was being robbed. However, self-defense to murder or even the reduction of murder to voluntary manslaughter required a reasonable belief (objective standard) that deadly force was threatened and the only way to prevent that was to use deadly force. However, Maryland also follows the "duty to retreat" doctrine which Ace may be held to if he had a clear path of escape and could avoid shooting the security guard. Ace will likely be unsuccessful in defending against the murder charge. For the most part, the culpability of his conduct when the murder occurred (burglary, theft & possession of a handgun) will likely lead to his conviction for murder.

## QUESTION 2

On June 21, 2007 Amos entered into a written contract with John to sell his 10-acre parcel of land in Carroll County, Maryland known as “Cloverwood” for \$200,000. As required by the contract, John paid \$10,000 toward the purchase price with the balance to be paid at closing on August 21, 2007. The contract required Amos to convey good and marketable title to John at closing.

On August 15, 2007 Amos and John executed a written amendment to the contract extending the closing date to October 1, 2007. The amendment recited that John’s lender, Peoples Saving & Loan Assoc., as a matter of policy, required a current survey of any property, the recorded description of which was more than 60 years old, to assure that the grantor could convey good and marketable title to the grantee.

Amos died testate on September 10, 2007. On that date the required survey had not been completed.

His will, dated March 10, 2000, bequeathed all of his personal property and “...any monies I may have at the time of my death” to his housekeeper, Alice. Amos devised and bequeathed “Cloverwood” and the remainder of his estate equally to his children Betty and Dale. His will referred specifically to the recorded deed by which Amos obtained title to Cloverwood on February 1, 1942. Alice was appointed personal representative of his estate.

The survey of Cloverwood was completed on September 15, 2007 and confirmed the accuracy of the description of the 1942 deed.

Alice, as personal representative, conveyed “Cloverwood” to John on the scheduled closing date, October 1, 2007.

Section 1.301, Estates and Trusts Article, Maryland Code, provides that all property of a decedent passes directly to the personal representative who shall hold title for administration and distribution.

Section 7-401(v) provides that a personal representative may perform the contracts of the decedent that continue as obligations of the estate, and execute and deliver deeds and other documents under circumstances as the contract may provide.

**Who is entitled to the proceeds of the sale of Cloverwood?**

**Why?**

**REPRESENTATIVE ANSWER 1**

### Doctrine of Equitable Conversion

Alice is entitled to retain the proceeds of the sale of Cloverwood under the doctrine of equitable conversion because the bequest to her uncle Amos' will provided her with "all monies," and Betty and Dale will take nothing because the property was validly transferred to John.

In Maryland, when two parties enter into a written contract for the sale of land with a specified further date for the closing of the sale, the doctrine of equitable conversion applies. The doctrine of equitable conversion states that, as of the date of the land sale contract, the buyer is the equitable owner of the land, and the seller is the equitable owner of the purchase price. At closing, title to the land transfers to the buyer, who is already the equitable owner of the land, and the buyer now becomes the legal owner of the land upon lawful execution and delivery of the deed. The seller then obtains legal title to the purchase monies, which he already equitable owned under the doctrine of equitable conversion.

When land is sold in Maryland, the seller makes two promises to the buyer at closing. First, that he will convey marketable title as of the date of closing, and second, that there are no misrepresentations of material fact in the contract or deed.

When a seller dies during the period between his land sale contract and the closing date, the personal administrator becomes the equitable owner of the purchase price on behalf of the seller-decedent. Once the personal representative receives the proceeds of the sale, the personal representative is required to distribute the funds as dictated by the testator's will.

In this case, Amos entered into the written contract with John on June 21, 2007, and on that date, Amos became the equitable owner of the purchase price and John became the equitable owner of the property. When Amos and John amended the contract to extend the closing date, they correctly amended the contract in writing, as required by the Statute of Frauds. John's requirement that the property be surveyed is a reasonable request as Maryland law requires that Amos convey marketable title. A title search can assist the parties in determining whether Amos had marketable title to convey to John.

Although Amos' will is dated prior to the sale contract, Amos may freely alienate any land that he owns in fee simple absolute, and his will cannot stop him from doing so. Until Amos dies, Betty and Sale do not have any interest in Cloverwood as it belongs solely to Amos in fee. Once Amos signed the land sale contract, he effectively transferred equitable ownership of the land to John (as described above pursuant to the doctrine of equitable conversion), and Amos and any devisees under his will, were now only the equitable owners of the purchase price.

Alice acted correctly as the personal representative when she completed the closing and conveyed the land to John. As personal representative, she is the equitable owner of the proceeds from the sale on behalf of Amos' estate, and she is required to distribute the funds from the sale as dictated by Amos' will. The facts clearly state that Amos' will devised "any monies I may have at the time of my death" to Alice. Because Amos was the equitable owner of the purchase price at the

time of his death, the proceeds from the sale go to Alice and Betty and Dale get nothing.

Therefore, under the doctrine of equitable conversion, Alice is entitled to retain the proceeds of the sale of Cloverwood under Amos' will, and Betty and Dale are not entitled to anything.

### **REPRESENTATIVE ANSWER 2**

This questions regards when does the title to the property "convert" to personal property. When two parties enter into a contract for the sale/purchase of real property, it is deemed enforceable from the time the contract is made, not the date of closing. Thus, the rights and duties of the parties actually change prior to the actual physical possession that occurs after closing. Here, even through there was an amendment to the original contract, that amendment merely delayed the closing date and was mutually agreed upon by both parties. The amendment did nothing to change the rights and obligations of the parties in the original contract.

Here, on June 21, Betty and Dale's rights to Cloverleaf were extinguished. The fact that Amos included both of them in his will to convey Cloverleaf is irrelevant. Wills are only executed upon death, and if the property that has been promised to a party in a will is not around after the will is executed then the beneficiary of the will is left with no recourse.

At the time of contract, under the doctrine of equitable conversion, the proceeds of the contract are the property of the housekeeper, Alice. Under §7-401(v), she was legally obligated to continue forth with the land sale, and, according to the will dated March 10, 2000, proceeds from a land sale are considered personal property. Alice is entitled to the proceeds from the sale of Cloverwood.

### QUESTION 3

Phil and Rhonda were married on May 13, 2000. Rhonda gave birth to their son, Arlen, on October 11, 2001. Arlen was diagnosed with a nerve disorder a few months after his birth, and Rhonda stopped working to become a full-time care giver and stay-at-home mom. Shortly thereafter, Rhonda noticed a change in Phil's behavior. He became secretive and often accused Rhonda of various nefarious deeds. In 2005, Phil moved his things into the guest bedroom and would not have marital relations stating that he "couldn't stomach" her.

Rhonda began dreaming of leaving Phil and purchased lottery tickets weekly in the hope of winning the money to do so. On September 30, 2007, Rhonda won one million dollars paid as an annuity of \$50,000 per year for 20 years. A few weeks later, Phil shoved Rhonda while Arlen watched and told her she could not leave him because he would get her money if she did.

**The next day, Rhonda, upset and worried, comes to you, a licensed Maryland attorney, and asks if there is any way to immediately end her marriage, gain sole custody of Arlen, force Phil to pay child support, and deny him any of her lottery winnings.**

**What would you advise Rhonda? Discuss fully.**

### REPRESENTATIVE ANSWER 1

#### Divorce

A Maryland Circuit Court will have jurisdiction over a divorce action where the grounds occurred in Maryland or where one of the parties has been a resident of Maryland for at least one year. The facts do not state whether Rhonda and Phil lived in Maryland during this time; however, if they did, a Maryland Circuit Court could hear the divorce action.

I would first explain to Rhonda the difference between a limited divorce and an absolute divorce. A limited divorce is essentially a legal separation, where the parties live separately and do not cohabitate for a specified amount of time. An award of a limited divorce will allow the court to award temporary child support and alimony payments, but property is not divided and the divorce is not final. An absolute divorce, on the other hand, is a final and permanent divorce, and the court awards child support, alimony, and child custody, as well as distributing the marital and nonmarital property between the parties. In this situation, Rhonda should obtain an absolute divorce and not a limited divorce.

Rhonda has several possible grounds for an absolute divorce. Rhonda may file for an absolute divorce based on fault grounds of cruelty, excessively vicious conduct, and constructive desertion, or based on no-fault grounds of separation for more than 2 years. If Rhonda files for an absolute divorce based on cruelty grounds, she will need to show that Phil accused Rhonda of

nefarious deeds. The grounds of excessively vicious conduct can be shown by Phil's pushing Rhonda in front of their child. However, because the shove only occurred once, this will not likely be considered "excessively" vicious, and would better qualify as grounds of "cruelty." When Phil moved his belongings into the guest bedroom and ceased having marital relations with Rhonda, Phil's actions constituted constructive desertion. Constructive desertion exists where one spouse refuses to have marital relations with the other spouse and attempts to cease cohabitation. Although Phil and Rhonda live under the same roof, Phil has constructively deserted Rhonda. Furthermore, Phil's moving into the guest bedroom in 2005 could be considered the beginning of a separation; however, the court usually does not consider a couple to be "living separately" where the couple is simply residing in separate bedrooms under the same roof.

Therefore, Rhonda's best grounds for obtaining an absolute divorce are cruelty and constructive desertion.

### **Child Custody**

Rhonda will probably be able to obtain physical and legal custody of Arlen.

In Maryland, the court awards custody based on a "best interests of the child" standard. This standard includes factors such as: the child's preference (provided the child is old enough to state a preference), the environment of each home, the parenting ability of each parent, the age of the child, and any other factors the court deems relevant to providing a stable and safe home for the child.

In this case, Phil shoved Rhonda in front of Arlen, which shows that he does not have good parenting skills. Furthermore, Rhonda has been the main caretaker for Arlen in his disabled state for his entire life. Arlen is now 7.5 years old, and likely to be able to express a preference for which parent he would like to live with. Rhonda is better aware of Arlen's medical needs and more capable of providing him with a stable and safe environment.

Because Rhonda's custody of Arlen is a better fit with the "best interests of the child" standard, Rhonda will likely obtain physical and legal custody of Arlen based on these factors.

### **Child Support**

Rhonda will probably be able to obtain a child support payment from Phil.

The court also awards child support based on a "best interests of the child" standard, and the court takes into account an "income shares" ratio when determining child support payments. Phil was the family's breadwinner while Rhonda stayed home, and the court will award Rhonda a child support payment to keep Arlen at the same standard of living that he had during the marriage. Phil will be required to provide payments for Arlen's food, shelter, clothing, and medical care, and because Arlen is disabled, the court may award child support payments even after Arlen turns 18,



for his continued maintenance.

### **Property Distribution**

Rhonda probably will not be able to keep Phil from getting any of her lottery winnings because they will be considered marital property and divided between the spouses.

Maryland uses a system of “equitable distribution” to classify and divide marital property between the spouses. Marital property is defined as any property that was brought in by either spouse during the marriage. Non-marital property includes any gift or bequest to a single spouse, or stocks and bonds that appreciated without any active maintenance by the spouse during the marriage.

In this case, the court will classify Rhonda’s lottery annuity as marital property, because she purchased the lottery tickets during the marriage. Furthermore, because Rhonda was a stay at home mom, she must have bought the lottery tickets with Phil’s salary, because Rhonda did not bring in any salary for the family. The court will classify Rhonda’s winnings as marital property and will evaluate this property in its equitable distribution between the spouses. Because Rhonda does not work, the court will likely provide her with pendent elite, or temporary, alimony payments from Phil, to allow her time to obtain skills and find a job. Rhonda’s entitlement to alimony may be partially offset by the portion of lottery winnings to which she is entitled under equitable distribution.

### **Separation Agreement**

In order to avoid having the court classify her property as marital property and divide it with Phil, Rhonda should consider entering into a separation agreement with Phil. A separation agreement that is merged into the divorce award is presumed valid, and Rhonda could offer to take zero alimony in return for being able to keep her entire lottery annuity. Phil will need separate counsel in order to review and sign a separation agreement, as I would be conflicted out of representing both Phil and Rhonda, since they have opposite interests in this matter. A separation agreement can save both parties time and money. Any child support in a separation agreement may always be modified upon petition to the court.

I would advise Rhonda (R) of the following issues:

### **Grounds for Divorce**

Limited Divorce – is a separation but does not end the marriage. The grounds include: cruelty, excessively vicious conduct, desertion, voluntary separation.

Cruelty – Here R, has grounds for a limited divorce because Phil’s (P) behavior toward her is cruel. He made accusations of nefarious deeds, he moved out of the marital bedroom, he refused to have marital relations, and told R he “couldn’t stomach her.”

Excessively Vicious Conduct – Conduct which threatens the physical and emotional safety of a spouse such that it makes continuing the marriage impossible. Here R has grounds because P shoved her, which is physical abuse, in front of their son, Arlen and threatened her when he said “she could leave him because he would get her money if she did.”

Absolute Divorce – Cruelty and Excessively Vicious Conduct are also ground for an immediate and absolute divorce. R Should be able to end her marriage with P immediately based upon the above described acts by P.

Other Grounds – there is no evidence that O has committed adultery. He hasn’t deserted the family because he is still living in the house. Voluntary Separation has not occurred because P has threatened R that she can’t leave him and they are not living separate and apart. The grounds for a 2 year involuntary separation do not begin to accrue until the parties are living in separate houses and apart without cohabitation. Here, R and P are still living in the same house.

Sole Custody – the custody of children is measured by what is in the best interest of the child. Here, it may be Arlen’s best interest for his mother R to have sole custody for the following reasons: Arlen is handicapped potentially making it difficult for him to travel easily between two homes. R has been his primary care taker since he became disabled a few months after his birth when she gave up working at became his full-time caretaker and a homemaker. Phil’s character makes him suitable to have joint or sole custody. He is unable to communicate civilly with R. He was physically abusive to her when he pushed her. He is secretive and emotionally abusive. These characteristics would make him an unsuitable candidate for sole or joint custody.

Child Support – both parents have a duty to jointly and severally support their children, usually until 18, or if in high school, until graduation, unless the child is emancipated. In the case of disabled children, support can continue until the adult child if self-supporting. Here, P and R are both responsible for the support of Arlen. MD child enforcement guidelines must be applied by the judge. Adjustments between the parents depending upon who has custody and the needs of the child. Here, R will have sole custody, so P is responsible for a greater share of the child support.

Marital Property – is all property acquired by one or both parties during the marriage regardless of title. Its division is a three step process: classification what is and isn’t marital property, its value and an equitable distribution. Here, the lottery ticket was bought by R during the marriage with marital assets, therefore it is marital property. Its value will be assessed at the time of the divorce decree, so any interest will be included. R should be entitled a greater share of the distribution, because factors such as relative needs of the parties, each parties ability to be self-supporting, and the events leading up to the divorce are taken into account. Here, R was a stay at home mom without income of her own, she is unable to be self-supporting while she stays home to care for a disabled child. Finally, it was P’s vicious and cruel behavior which lead to the divorce. While he will get some of the winnings, it will be less that 50%.

## REPRESENTATIVE ANSWER 2

I would advise Rhonda (R) of the following issues:

### **Grounds for Divorce**

Limited Divorce – is a separation but does not end the marriage. The grounds include: cruelty, excessively vicious conduct, desertion, voluntary separation.

Cruelty – Here R, has grounds for a limited divorce because Phil's (P) behavior toward her is cruel. He made accusations of nefarious deeds, he moved out of the marital bedroom, he refused to have marital relations, and told R he "couldn't stomach her."

Excessively Vicious Conduct – Conduct which threatens the physical and emotional safety of a spouse such that it makes continuing the marriage impossible. Here R has grounds because P shoved her, which is physical abuse, in front of their son, Arlen and threatened her when he said "she could leave him because he would get her money if she did."

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Other Grounds – there is no evidence that O has committed adultery. He hasn't deserted the family because he is still living in the house. Voluntary Separation has not occurred because P has threatened R that she can't leave him and they are not living separate and apart. The grounds for a 2 year involuntary separation do not begin to accrue until the parties are living in separate houses and apart without cohabitation. Here, R and P are still living in the same house.

Sole Custody – the custody of children is measured by what is in the best interest of the child. Here, it may be Arlen's best interest for his mother R to have sole custody for the following reasons: Arlen is handicapped potentially making it difficult for him to travel easily between two homes. R has been his primary care taker since he became disabled a few months after his birth when she gave up working at became his full-time caretaker and a homemaker. Phil's character makes him suitable to have joint or sole custody. He is unable to communicate civilly with R. He was physically abusive to her when he pushed her. He is secretive and emotionally abusive. These characteristics would make him an unsuitable candidate for sole or joint custody.

Child Support – both parents have a duty to jointly and severally support their children, usually until 18, or if in high school, until graduation, unless the child is emancipated. In the case of disabled children, support can continue until the adult child is self-supporting. Here, P and R are both responsible for the support of Arlen. MD child enforcement guidelines must be applied by the judge. Adjustments between the parents are made depending upon who has custody and the needs of the child. Here, R will have sole custody, so P is responsible for a greater share of the child support.

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#### QUESTION 4

Paula Plaintiff's Labrador retriever, Old Yeller, won "Best In Show" at the Northminister Dog Show for the third consecutive year. Plaintiff, a resident of the State of Westover, was traveling home through Maryland with her pet when she noticed that Old Yeller seemed unwell. She stopped at the Maryland office of Dan Defendant, a veterinarian, who diagnosed Old Yeller as suffering from fatigue. Defendant's diagnosis was incorrect. Three days later, in Westover, Old Yeller died of an ailment which, if properly diagnosed, would have been easily cured.

Plaintiff filed suit against Defendant in the Circuit Court in Westover alleging that Defendant was negligent in his care and treatment of Old Yeller. Plaintiff arranged for the summons and complaint to be served on Defendant by Sam, a private process server. Sam took the summons to Defendant's office, found it closed and left the documents at the front door. Sam filed a return of process in the Westover Circuit Court stating that he had delivered the summons and complaint to Defendant's place of business, found it closed and left the documents there. Defendant did not file an answer and, on May 1, 2007, the Westover Circuit Court entered a judgment by default against him for \$35,000.

On June 1, 2007, Plaintiff filed a properly authenticated copy of the judgment against Defendant in the Circuit Court for Baltimore County, where Defendant resides and has his place of business. Defendant has retained you, an attorney practicing in Maryland, to prevent the judgment from being enforced against him.

Defendant was aware of the lawsuit pending against him in Westover, but took no steps to defend himself. Defendant's parents reside in Westover and he visits them on a monthly basis. He is not licensed as a veterinarian in Westover nor does he practice there, although he advertises in several regional publications that are distributed in Maryland, Westover and surrounding states.

**Based on these facts, what steps would you take on Defendant's behalf? Describe the grounds for each step. How is the court likely to rule? Explain your answer thoroughly.**

ASSUME THAT THE PROCEDURAL AND SUBSTANTIVE LAW OF WESTOVER IS IDENTICAL TO THAT OF MARYLAND.

#### REPRESENTATIVE ANSWER 1

Step 1: I would attempt to vacate the default judgment on the basis of improper and defective service.

I would draft a motion to vacate stating that Sam, the process server, had incorrectly tried to serve my client and thus service was improper and ineffective Rule 2-535. In accordance with Rule 2-121, process may be made by serving the defendant personally, or by leaving a copy at

his home with the defendant or a person of suitable age, or by mailing a certified copy of the summons and complaint. Sam did not comply with Rule 2-121, as he just nailed and posted the documents to Dan Defendant's workplace door. Sam did not try to serve Dan personally at his home. Service was thus defective. I would also ask Dan Defendant when and how he found out about the pending lawsuit. It may be that Dan Defendant has never received a full set of the summons, complaint and papers, and thus has not had a full, proper opportunity to respond and has also been deprived of his statutory time to answer the complaint.

Step 2: I would also file a motion, on Dan Defendant's behalf, stating that Westover does not have personal jurisdiction over this defendant and the suit should thus be dismissed. In accordance with Rule 6-103 of Personal Jurisdiction, jurisdiction may be obtained in Westover if the act that allegedly causes the tortious injury occurred in Westover.

If the "act" occurred outside Westover, Plaintiff must prove that the defendant has a sufficient personal nexus to Westover, as described in Rule 6-103. Here, defendant is a veterinarian in Maryland and is not even licensed to practice as a vet in Westover, nor does he practice there. While Plaintiff may argue that personal jurisdiction exists because Defendant advertises in Westover, I would argue that mere public advertisements do not establish a sufficient nexus to Westover to establish personal jurisdiction. This is not an example of a "persistent course of conduct" to solidly tie Dan to Westover. Rule 6-103.

As part of my motion for lack of personal jurisdiction, I would argue that the Defendant, due to ineffective and improper service has not been given an opportunity to respond on the merits. Courts are inclined to vacate defaults so that the defendant may be heard in Court and the matter may be tried on the merits.

I would not argue that the Westover judgment is somehow invalid, as foreign judgments are entitled to full faith and credit as long as they are properly enrolled and authenticated.

## **REPRESENTATIVE ANSWER 2**

Rule 2-535 on a motion, will allow Dan (Defendant party) to ask the court to exercise its revisory power and control over the Westover Circuit Court default judgment against Dan for \$35,000.00. Because the default judgment was entered on May 1, 2007 and after 30 days Paula (Plaintiff) on June 1, 2007 filed a properly authenticated copy of the judgment against Dan in the Circuit Court of Baltimore County, as counsel for Dan, counsel should file a motion under Rule 2-535(b) to pray the court to exercise revisory power and control over the default judgment in case of fraud, mistake, or irregularity because this motion can be filed at any time, and not 30 days as otherwise required under 2-535(a).

Dan has grounds to assert that Paula lacked personal jurisdiction (6-103) over Dan since Dan resides and has his place of business in Baltimore county, Maryland and not in the State Westover. Dan's veterinary office is in Maryland where he diagnosed Old Yeller. Rule 6-103 Maryland's long-arm statute states that jurisdiction over a person may be had if defendant causes

tortious injury in the State or outside the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the state or derives substantial revenue from goods, food, services, or manufactured products used in or consumed in the State (6-103(4)). Maryland courts definitely have jurisdiction over Dan because he resides and principally operates his vet business in Maryland. The issue is whether the State of Westover can exercise personal jurisdiction if the alleged tortious act of mis-diagnosis also occurred in Maryland. While Dan's parents reside in Westover and he visits them on a monthly basis, he is nonetheless not licensed as a veterinarian in Westover nor does he practice there to give Westover personal jurisdiction over Dan. Moreover, while Dan advertises in Westover, a court will likely find that the advertisement does not rise to deriving substantial business to warrant jurisdiction. Thus, due to lack of personal jurisdiction a court may exercise its revisory power under 2-535 for mistake. Also, Dan's counsel can make a motion to stay the enforcement of foreign judgment while a court reviews whether service of process was adequate and sufficient to give Dan notice and sufficient time to answer Paula's complaint in a timely manner under Rule 11-804 and Rules 2-121 and 2-126. Paula had Sam, a private process server serve Dan who never got the service personally or was not left by an agent of requisite age. Sam left the documents at the front door. Also, Dan's business was closed when the documents were left. Although Dan was aware of the lawsuit pending, the insufficient process of service is likely to be found by a court to warrant its exercise of revisory power and stay the default judgment in favor of Dan.

## QUESTION 5

On December 14, 2006, an insert in a Baltimore City daily newspaper announced that Big Box, a national retailer, would make available a limited number of approximately 600 MX3 Game Pods at its Baltimore store beginning at 7:30 AM on December 20, 2006, limited to one per customer.

The MX3 is the year's most coveted Christmas gift and is virtually impossible to find at any price.

Anticipating a large crowd, Pam arrived at Big Box at 5:30 AM on the designated date to find more than 200 customers standing in the rain in line ahead of her at the only entrance made available by Big Box. At 7:00 AM, more than 300 people were awaiting entry.

Also anticipating a large crowd, Big Box posted conspicuous signs both outside and within the store which read: "Please enter in groups of 20 as directed by your host. Walk, do not run upon entry." It also assigned two host employees to maintain crowd control.

Observing the large crowd, Sam, one of the designated host employees, decided to open the entrance doors fifteen minutes early in violation of the store manager's specific instructions to the contrary. When the doors were opened the line rushed in, ignoring the caution signs and overwhelming the host employees. In the crush that followed Pam tripped and fell, starting a chain reaction of falling customers. She suffered a broken leg and head trauma.

Pam's broken leg did not heal properly and doctors have recommended that it be refractured and straightened to correct an otherwise permanent limp. Pam has refused to undergo additional surgery.

**What cause or causes of action does Pam have, if any, against Big Box and Sam?**

**What defense(s) would you expect to be raised in this action? Explain your answers fully.**

### REPRESENTATIVE ANSWER 1

Pam would have a cause of action for negligence against both Sam and Big Box.

For Pam's cause of action against Sam, Pam would have to show that Sam failed to act with due care for the safety of Pam when he opened the doors to the Big Box store fifteen minutes earlier than the posted time and that this failure was the proximate cause of Pam's injuries. From the given facts, it does not appear that this claim would be successful because it would be very difficult to establish that Sam's early opening of the doors had any effect on what



the crowd was going to do (it was going to rush for the game systems at 7:15 or 7:30) and, therefore, Sam's actions were not the proximate cause of Pam's injuries.

Pam has two independent theories of recovery against Big Box. The first is that Big Box would be vicariously liable for Sam's negligence under the theory of respondeat superior because Sam is an employee and was performing duties within his scope of employment (even though he was disobeying instructions). Big Box might argue that Sam's decision not to obey took him outside of his scope of employment, but that argument would not be successful because it is ultimately Big Box' responsibility to exercise control over Sam.

The more promising theory of recovery against Big Box is that Big Box was negligent in its own right for failing to take adequate measures to control the crowd. Big Box has a duty to take reasonable care at all times for the safety of others, particularly those who come to its stores for business purposes. Big Box knew that these game systems would create a huge amount of interest and that significant numbers of persons would come to the store frenzied to get one. The signs and two "hosts" it used to attempt to control the crowd that appeared on its doorstep were inadequate to control the crowd and it was foreseeable that injuries such as the ones that Pam suffered would result when Big Box opened its doors.

Both Big Box and Sam might argue that Pam was contributorily negligent in that she contributed to her own injuries by being part of the crowd. All persons have a duty to take due care for their own safety. From the given facts, however, it appears that Pam could have been reasonably relying upon Big Box to control the entry of the crowd into the store in such a way that a mass rush did not occur. Therefore, this defense will probably not succeed.

Both Big Box and Sam would have a defense against at least one potential element of Pam's damages, however. If Pam asserts a claim for a permanent disability as a result of her limp, Big Box and Sam would be able to argue that this disability is only a result of Pam's failure to mitigate damages because she refuses to undergo the surgery. Therefore, Big Box and Sam would not be liable for that disability if they could establish to a reasonable degree of certainty that the surgery would remove the disability.

## **REPRESENTATIVE ANSWER 2**

Cause/Causes of action that Pam has against Big Box and Sam:

Pam could sue Big Box on a theory of negligence for failing to warn of a hazardous condition to an invited guest and for failing to safeguard against that condition which it created. For negligence to be proven one must prove a duty existed, the duty was breached, the actual cause of the breach and the proximate cause of the breach, and damages. Here, Big Box was the possessor of the property on which Pam was injured. Furthermore, Pam and the others were invited guests of Big Box for the purpose of purchasing the gaming system. When someone holds out his store to invited guests he has a duty to provide an area free from hazardous conditions or to adequately and conspicuously warn of dangerous conditions to the invited guests and take adequate safeguards

against those conditions injuring the guests. Big Box was aware of this danger that it created itself (another requirement for this theory of negligence) or should have been aware because it did anticipate such a large crowd and did post some warnings. Thus Big Box had a duty.

Big Box breached that duty in a few ways. First, Big Box did post warnings, however, the warnings were not adequate enough to warn of the dangers such a large crowd could create. The warnings merely asked patrons to walk and not run and asked people to enter in groups of 20 as directed by the host. Furthermore, not all of the warnings were outside where they should have been (because if Big Box wanted people to know that they were to enter in groups of 20, it is pointless to advise of this after the people have already entered the store).

The warnings were conspicuous in that they were easily seen, but they were inadequate because they didn't allow the invited guests to fully appreciate the dangers involved. The factual cause of Big Box's breach was that it did not adequately warn of the dangers and in this case it is also the legal/proximate cause of the breach because of the description above. The damages would be awarded based upon what Pam suffered and had to pay medically – basically, what amount would make Pam whole again. Another way Big Box may have breached the duty was that it provided only 2 employees to control such a large crowd. More were obviously needed and such knowledge would be imputed upon Big Box in such a case as a business open to the public.

Regarding Sam – Big Box would be vicariously liable for any negligent action on the part of Sam if it was found to cause or be a cause of the injuries suffered. Sam was an employee of Big Box and was acting in his employment capacity for the benefit of his employer (Big Box) at the time that he opened the doors earlier than allowed. Therefore, even though he was acting against his supervisor's instructions to the contrary, Sam's actions were taken and were reasonably foreseeable to be taken given the size of the crowd and the forewarning Big Box had of such a large crowd occurring. Furthermore, it appears that Sam was negligent in not limiting 20 people at a time. Although further knowledge would be required, it would appear that Sam could have acted better had he taken steps to limit it to 20 people at a time in such a way as to prevent the employees from being overwhelmed.

Defense(s) I would expect to be raised in this action:

1. Pam had adequate knowledge from the conspicuous in that she anticipated such a large crowd and the potential for a rush when she arrived at 5:30 AM.
2. Pam was contributorily negligent by entering such a large crowd that she should have foreseen would have reacted in such a way. If this held up then Pam could not recover any damages in Maryland.
3. Pam cannot recover for all of her medical expenses because she has ample opportunity to correct her permanent limp and has chosen not to do so – therefore, Pam should only recover for medical expenses incurred to heal the bone to its current state and not for anything above that amount.

4. Sam violated company policy by opening the doors early and, therefore, Big Box could not be liable.

## QUESTION 6

Hurricane Bob created such damage to the Maryland crabbing industry that the Maryland State General Assembly passed legislation stating that effective in January 2005 and until further notice, there will be a limit on crabbing in Maryland waters. The law included the following penalties: \$2,500 fine, loss of crabbing license, and forfeiture of any instrumentality used to assist in crabbing. The law limited the number of crabbing licenses to one per family residing in Maryland, and it limited crabbing activities to only Saturdays and Sundays.

By the time crabbing season arrived in June of 2007, the crab population was stable in Maryland but the General Assembly did not bother to amend the law. The professional crabbers attempted to get the law repealed, indicating that their livelihood was being hurt. However, the effect of the law was an increase in state revenues, so the law remained in effect.

**You are employed as counsel to the Maryland General Assembly and the Speaker of the House asks you to advise them as to what challenges might be raised to the law. What would you advise? Discuss fully.**

### REPRESENTATIVE ANSWER 1

The follow challenges might be raised to the law:

Standing requires actual or potential harm that is fairly traceable to government action. Here, the “professional crabbers” say their “livelihood was being hurt” as a result of state law, so they have standing.

The Procedural Due Process Clause of the 14<sup>th</sup> Amendment prohibits deprivation of freedom or property without notice and a hearing. Here, the law provides for “loss of crabbing license,” which is deprivation of property. “Forfeiture of any instrumentality” is also deprivation of property. The law itself provides notice, but there must be a hearing.

The Eighth Amendment and similar Maryland common law prohibit excessive punishment. A \$2,500 fine may be excessive punishment, especially in light of the fact there is no longer instability in the crab population.

The Fifth Amendment, incorporated to the States through the 14<sup>th</sup> Amendment, prohibits government taking of property for public purposes without just compensation. Here, “forfeiture of any instrumentality” is not a taking for public purposes so the Fifth Amendment is not implicated.

The Substantive Due Process Clause of the 14<sup>th</sup> Amendment limits the government’s ability to regulate citizen’s rights. Here the government is regulating the right to engage in a livelihood of crabbing. The right to engage in a livelihood is not a fundamental right so a rational basis test applies.

Under a rational basis test a law is valid if it rationally relates to a legitimate government interest, even if it is over or underbroad. Here the state had a legitimate interest in stabilizing the crabbing industry but the crab population has since stabilized. Also there is no rational relationship between saving the “crabbing industry” and limiting crabbing to recreational times of Saturdays and Sundays, which further hinders professionals’ ability to crab.

However, the current interest of increasing state revenues is still a legitimate interest and the law is rationally related because it generates state revenue, so it is valid under a rational basis test.

The contracts clause of the US Constitution prohibits states from interfering with existing contracts. Here if the professional crabbers had existing contracts, this law may be implicated.

If any of the crabbers are out of state, they can bring additional challenges. Maryland crabbers will not have such standing, but as the Assembly has asked about possible challenges, I will advise them as to these possible challenges also:

The Commerce Clause of the US Constitution provides that Congress has plenary power to regulate interstate commerce. Therefore states cannot enact laws that substantially burden interstate commerce without an important government interest. Here, licenses are limited to “famil[ies] residing in Maryland, “thereby burdening interstate commerce because out of staters cannot get licenses. Stabilizing the crab population and crabbing industry are an important state interest, but the population is now stable, so the only interest left is to get additional revenue, which is not important enough to burden interstate commerce.

Furthermore, when a state law facially geographically discriminates, there must be a non-discriminatory alternative. Here the law is facially geographically discriminatory because of the limit to “Maryland” families. There is a non-discriminatory alternative: to limit crabbing overall. The law limits crabbing to Saturdays and Sundays; such a restriction but without the limit to Maryland families could be effective. Also if the idea is to save the industry, it would make more sense to limit the window could be further narrowed, but a license could be granted to anyone. So it is invalid under the negative implications of the commerce clause.

The Privileges and Immunities Clause of Article 4 prohibits a state from treating out of staters differently in terms of basic rights of citizenship, such as right to contract or do business. Out of state crabbers cannot get contracts and continue crabbing. That is a violation of the clause.

The Equal Protection Clause of the 14<sup>th</sup> Amendment limits the government’s ability to purposefully discriminate. Here, out of state crabbers cannot get licenses whereas in state crabbers can. That is discrimination. Crabbers are not a suspect class so a rational basis test applies.

Under a rational basis test a law is valid if it rationally relates to a legitimate government interest, even if it is over or underbroad. Here the state had a legitimate interest in stabilizing the crab population but as mentioned, that interest is no longer present. Also if it were, there would be no rational relationship between saving the “crabbing industry” and limiting crabbing to recreational

times of Saturdays and Sundays. However, increasing state revenues is still a legitimate interest and the law is rationally related because it generates state revenue, so it is valid under a rational basis test.

## **REPRESENTATIVE ANSWER 2**

### **Crab License Legislation.**

As counsel to the Maryland General Assembly and Speaker of the House I would advise them that challenges may be made based on U.S. Constitutional Commerce Clause, Privileges and Immunities Clause under Art. IV, procedural due process, substantive due process, equal protection, 1<sup>st</sup> Amendment right of expression, and taxing authority.

**Commerce Clause.** The federal government may legislate instrumentalities, channels, and products in interstate commerce. When the federal government fails to legislate same, states may legislate so long as Congress did not intend to occupy the field. Here the General Assembly passed legislation limiting crabbing in Maryland waters. Crabs are products used in commerce. States may not discriminate against out of state residents unless on balance the burden on interstate commerce does not outweigh the legitimate state interest. The state is not a market participant. Here the law limits licenses to one per family residing in Maryland. Maryland wishes to preserve their natural resources, but the crab population is now stable. Therefore, the need to preserve no longer exists. As a result, a court will find that discrimination against out of state residents violates the dormant commerce clause. The crabbing population is stable, thus negating any need to discriminate against out of state residents.

**Privileges and immunities under Art. IV.** Under this clause states may not interfere with out of state residents to obtain employment and interstate travel. Crabbing activities are, however, not a fundamental right, therefore a court will likely find against any claim based on Privileges and immunities clause.

**Procedural Due Process.** Under 5<sup>th</sup> Amendment, extended to the states via the 14<sup>th</sup> Amendment, states may not deprive a person of life, liberty, or property without due process of law. If the law affects a protected liberty interest, then states must show the law is narrowly tailored to meet a compelling state interest. Here the law has a penalty of \$2500, loss of crabbing license, and forfeiture of any instrumentality used to assist in crabbing. Employment is a protected liberty interest that requires sufficient minimal process necessary to meet due process requirements. Because no procedure is established for alleged violators, this law violates procedural due process.

**Substantive Due Process.** Under the 5<sup>th</sup> Amendment, extended to the states via the 14<sup>th</sup> Amendment, states may not act arbitrarily without justification. If the law pertains to a fundamental right, then states must show the law is narrowly tailored to meet a compelling state interest. Again, employment is a fundamental right requiring strict scrutiny. As demonstrated

above, states will be unable to show a compelling need restricting employment when the crab population has stabilized.

**Equal Protection.** Under the 5<sup>th</sup> Amendment, extended to the states via the 14<sup>th</sup> Amendment states may not discriminate against groups without justification. If the law affects a suspect class or fundamental right, states must show the law is narrowly tailored to meet a compelling state interest. Again, employment is a fundamental right requiring strict scrutiny. As demonstrated above, states will be unable to show a compelling need restricting employment when the crab population has stabilized.

**Taxing authority.** Government may tax for general welfare so long as the tax will reasonably raise revenue. Here the effect of the law is that states revenues have increased. Therefore, a plaintiff would lose under this argument.

## QUESTION 7

Donald inherited an antique map of Europe ("Map"). Donald met with Louis Lawyer, a member of the Maryland Bar, in Annapolis, Maryland. Donald asked Louis to represent him in a transaction for the sale of the Map. On April 16, 2007, he gave Louis a copy of an independent appraisal of value, and he asked that Louis keep confidential the Map and the original independent appraisal of value so that Donald could find an appropriate buyer. Immediately upon Donald's departure, Louis put the items into a file on top of a bookshelf in his office.

On June 15, 2007, government officials announced that an early summer hurricane was developing and threatened to hit the Atlantic seaboard in a few days. As managing partner of his law firm, Louis closed the office immediately so that everyone could protect their homes.

As a result of the damage caused by the hurricane, Louis was unable to locate any of the files that he had kept in his office. Several days later, Donald found a buyer for the Map, signed a contract and advised Louis to bring the Map and appraisal to the closing of the sale on July 16, 2007.

At closing, Louis told Donald that he could not find either the Map or the appraisal. Donald became angry, and he told Louis that he would be hearing from another lawyer about the mess that Louis caused.

Louis is anxious about Donald's threat. He comes to you, a Maryland lawyer, to advise him of the possible ethical violations that he may have committed.

**What advice would you give to Louis regarding his possible ethical violations?**

### REPRESENTATIVE ANSWER 1

This question is governed by the Maryland Rules of Professional Conduct. I would advise Louis that he may face the following ethical violations:

Duty of Confidentiality. A lawyer owes a duty of confidentiality to its client in all matters associated with the representation. Here, when Louis was asked by Donald to represent him and Donald asked that Louis keep confidential the Map and the original appraisal, Louis was under this duty not to disclose. This duty was never intentionally violated by Louis; however, by the loss of the MPA, Louis may be deemed to have violated this duty.

Duty to Keep Secure/Protect Client's Possessions. A lawyer has a duty to protect and ensure the safety of a client's possessions if the client entrusts the lawyer. Here, when Donald granted Louis possession of Map and the appraisal, he was under this duty. By placing items in a file on top of a bookshelf in his office and leaving them there while a hurricane was due to hit the area, Louis



violated his duty to protect Donald's possessions. A more appropriate method would have been to place the client's items in a secure safe. The fact that a superseding hurricane was the cause of the files being missing will not excuse Louis of his violations.

Duty of Communication. A lawyer owes a duty to keep his client clearly and fully informed with matters concerning their representation. Here, once Louis returned and was unable to locate any of the files that he had kept in his office, he should have contacted Donald and told him of this development. Following the hurricane, Donald "several days later" found a buyer and advised Louis to bring the Map and appraisal to the closing, At no time did Louis inform Donald that the items were missing. Therefore, Louis violated his duty to communicate information to Donald.

Duty of Diligence. A lawyer also owes a duty of diligent representation to his client. Here, by waiting "several days" to inform Donald that the items were lost, Louis violated his duty to represent Donald with diligent service.

Duty Upon Discharge. Following a discharge, a lawyer must protect his client's interests, allow the client to obtain independent counsel, and return all property belonging to the client. Here, the property is already lost, but Louis must protect any remaining interests Donald may have, and should assist in Donald's obtaining of another attorney.

I would also advise Louis that he must fully comply with the Maryland Attorney Grievance Commission's investigation, and must respond immediately to any correspondence he may receive by the AGC.

## **REPRESENTATIVE ANSWER 2**

Louis has, in fact, violated numerous Rules of Professional Conduct. First of all, Louis apparently agreed to represent Donald in the sale of an antique map. Donald requested that Louis keep safe the map and the independent appraisal value. Donald further requested that Louis keep these confidential. In response to these requests, Louis put the items in a file on top of his bookshelf in his office. This is arguably not a confidential or safe area. The file should have been placed under lock and key (and Louis may argue that he keeps his office locked at all times but the facts do not suggest this). The file should also be placed somewhere safe from the elements. A file cabinet may have sufficed, but clearly not on top of a bookshelf.

Louis, as a Maryland attorney, has a duty to zealously represent his clients. This includes making sure that all files and information are safe from harm. When Louis closed his office and sent everyone home, he should have made sure his office was as safe from harm as possible. From the facts it sounds as if he kept many files in his office. Those files should have all been kept safe in a solid, locked, file cabinet. Louis breached his duty to zealously represent Donald by losing his file.

Additionally, Louis has a duty to remain in contact with his clients and inform them of anything with regard to their cases. Louis did not contact Donald from April 16<sup>th</sup> to July 16<sup>th</sup>, the day of closing. In fact, Donald contacted Louis regarding having a buyer, and at that time, Louis should

have come clean regarding having misplaced his file. Louis did not. After the hurricane, Louis should have contacted Donald regarding the missing file, Louis did not. Louis breached his duty to keep the lines of communication open between him and his clients.

Louis never should have let the closing day arrive before telling Donald that the closing could not occur because the file was missing. By waiting until this point, he breached the duty of communication and his duty to diligently represent his client.

Louis is the managing partner of his law firm, therefore, I would advise him he is held to a high standard of conduct and his ethical violations could impact his law firm. The fact that the government officials warned of a hurricane that wasn't even going to hit for a few days shows that Louis had plenty of time to secure all files in his office. He chose not to. He should have supervised the other lawyers in his law firm to protect as was reasonably possible, the interests of the clients.

If Louis was truly representing his clients properly he would not have shut the office down for two days and spent that time securing all confidential legal documents. Because Louis acted with such haste and disregard for his client's property, he is in violation of the rules of ethics.

## **QUESTION 8**

Misty Moore and Julie Brown decided to open a tanning salon in Mt. Airy, Maryland, and they signed an agreement that provided for three matters: (i) each of them must contribute \$10,000 to the new business and each would own a fifty percent (50%) interest, (ii) Julie would be a limited partner, and (iii) Misty would serve as the general partner. A certificate of limited partnership for Mystic Tans LP ("Salon") was signed by Misty as the general partner, and it was filed and accepted by the State Department of Assessments and Taxation in August 2007.

After deciding on the location, Misty and Julie both signed a five year lease on a property in the name of "Mystic Tans," and opened the Salon for business. As business increased, they hired Anne to work in the Salon part time.

In November 2007, a new customer entered the Salon, and demanded that Anne immediately hang up the telephone. Anne was upset by the customer's arrogant and discourteous attitude. However, she assisted the customer and set the timer on the customer's tanning booth. Later, the customer emerged from the booth injured as a result of excessive exposure. Anne had set the customer's timer for three times the amount of tanning that is customarily given to first time users.

The customer complained to a reporter of the local newspaper, and the newspaper published an unfavorable article about the Salon.

As a result, Julie wants to withdraw from the Salon, and she consults with you, a Maryland lawyer, to advise her on whether she is responsible for (i) any future unpaid rent for the Salon, and (ii) the damages that the customer sustained from the burn. She also wants advice on the likelihood of obtaining the return of her investment in the Salon.

**What advice would you give to Julie? Explain the reasons for the advice fully.**

## **REPRESENTATIVE ANSWER 1**

As stated, Misty and Julie formed a valid limited partnership. The partnership is thus a valid entity unto itself, able to contract and own property, and commit torts. The partners will share in the profits of the limited partnership in accordance with their respective capital contributions. In general, the limited partners (Julie, in this case) are shielded from liability for the acts and omissions of the partnership that occur within the scope of the partnership. However, in a limited partnership, the general partner is supposed to manage and run the business, with the authority as the agent of the partnership to bind the partnership, while the limited partners are not supposed to manage or have the authority to bind.

A problem here is that both Misty (the general partner) and Julie signed the five-year lease in the name of “Mystic Tans.” In so doing, Julie has probably incurred personal liability for the lease because, absent any apparent representations to the contrary, the landlord was under the impression that he was dealing with individuals signing on behalf of a partnership. Thus, she is personally liable for the leasehold contract.

(i) Therefore, Julie may be held personally responsible for any future unpaid rent.

As for the allegedly tortious conduct on the part of employee Anne, Julie will fare better. Assuming Julie did not personally engage Anne to work personally for herself (Julie), Anne will be deemed to be an employee of the limited partnership, Mystic Tans LP. The facts suggest that Anne was working within the scope of her employment at the time of her allegedly tortious conduct, so both Anne and the master, Mystic Tans LP, will be liable in tort (the master on the theory of respondeat superior). However, because Julie is a limited partner and not responsible for the management of the limited partnership—including hiring and employee supervision—she will be shielded from tort liability because of her status as limited partner. Unless evidence is introduced that Julie was personally responsible for the hiring or supervision of Anne, which might lead to a cause of action for negligent hiring or negligent supervision, Julie should be off the hook for the burned customer.

(ii) Therefore, Julie is probably not liable for the damages sustained by the customer.

A limited partner may not withdraw from a partnership until after it is dissolved and the winding up of its affairs.

If Julie seeks to dissolve the partnership, she would normally be entitled to her pro-rata share of the assets after winding up, meaning after the liquidating of assets and paying of creditors.

(iii) Dissolve the partnership now by filing with SDAT. Get your pro-rata share of the assets (which is fifty percent, as given) after the payment of all debts of the limited partnership. Find a new tenant for the building and sublease or be prepared to pay the rent until the five years are up because in Maryland, commercial landlords have no duty to mitigate by reletting.

## **REPRESENTATIVE ANSWER 2**

### Liability for Future Rent

Generally, a limited partner in a partnership that has complied with the filing requirements under the laws of the State of Maryland is not personally liable for claims against the partnership beyond the limited partner’s initial investment (or subscription) of capital. Here, Julie is a purported limited partner and a certificate of limited partnership was validly issued by the SDAT. Consequently, Julie’s liability is normally limited to her initial \$10,000 investment of

capital and nothing more. However, the facts here indicate that they both signed a five-year lease on the property. A limited partner historically is not permitted to be involved in the actual operations and management of a limited partnership. This includes such actions as signing the lease. However, some courts have indicated a willingness to expand the role that a limited partner may play. Maryland courts thus far stick to the traditional rule. Further, the lease was made to “Mystic Tans” without indication of the limited status of the partnership.

Because Julie has acted inconsistently with the status of a limited partner and the lessor was not given any notice of the limited nature of the partnership, Julie will be joint and severally liable with Misty as to future rent payments.

### Liability for Agent’s Torts

An employee is an agent of the employer. When an agent is acting within the scope of employment and commits an unintentional tort, the agent’s employer will be held liable under the doctrine of respondeat superior (a/k/a vicarious liability). Here, Anne was working as an employee of the tanning salon. Consequently, Anne was an agent. If Julie and Misty both participated in the hiring of Anne, it is very likely that Julie again acted inconsistently with the status of a limited partner. Consequently, a court may find that Anne was the agent of both Julie and Misty as general partners, resulting in Julie being vicariously liable for unintentional torts of Anne (within the scope of employment). If, however, it is determined that Anne was hired by Mystic Tans LP by Misty acting as a general partner, then Anne is an agent of Mystic Tans LP. When it is determined that Anne is an agent of the limited partnership, Julie, its limited partner, is not personally liable for the torts (beyond the amount of her initial investment of capital.)

### Return of Capital

As a general rule, partnership may be terminated at any time by the withdrawal of a partner. As Mystic Tans LP, limited partnership agreement is silent as to a right to withdrawal, default statutory (and case law) rules will fill the gaps in their agreement. Even when there are limitations on the right to withdrawal, a partner may usually withdraw nonetheless, but be subject to a breach of contract action. Withdrawal does not, however, mean that Julie will automatically receive her capital investment back. A partnership may survive the withdrawal of a partner upon the agreement of the remaining partners. Here, however, Misty would be the only surviving partner after the withdrawal of Julie. A partnership cannot exist without 2 or more partners. Consequently, Julie’s withdrawal will force the termination of the partnership. Misty, as general partner, would have to begin the process of winding up the partnership (selling off the assets and performing an accounting of the property subject to payment to creditors and distribution according to their respective interests). Consequently, Julie would be entitled to receive 50% of the net liquidation assets of the partnership after termination. Because the business has been so successful, there may be net assets greater than her investment. If so, Julie would be entitled to her pro-rata share. However, as there is the risk of pending litigation between the limited partnership and the customer, Misty, as general partner, may be entitled to hold back a reasonable reserve from Julie’s share or to later seek contribution for any money

damages paid to the customer. If Misty seeks contribution, Julie will be forced to pay up to the amount of her original capital contribution (unless Julie is deemed a general partner per above, resulting in her being joint and severally liable with Misty for all damages).

### LLCs

This problem illustrates the more versatile approach of LLCs, where members may be active in the management without sacrificing their limited liability status by virtue of that active management.

## **QUESTION 9**

Jones obtained a civil judgment against Mary for \$45,000 in the Circuit Court for Talbot County. On January 3, 2007, after it became final, the judgment was properly indexed and recorded by the Clerk's Office for Talbot County.

On March 1, 2007 Mary purchased a home in Talbot County for \$225,000. Mary financed \$210,000 of the purchase price with a loan from the Bank. The Bank secured its loan with a deed of trust lien (the "Deed of Trust"). The Deed of Trust stated that it was a purchase money deed of trust. Mary paid the balance of the purchase price in cash. On March 5, 2007, the Deed of Trust was properly recorded among the Land Records of Talbot County, Maryland.

Mary was unable to make her payments to the Bank. The Bank initiated foreclosure proceedings in July, 2007. Jones learned of the foreclosure action and, on July 10, 2007, filed a legally sufficient motion in the foreclosure proceeding challenging the validity of the Deed of Trust on the grounds that it was improperly signed, acknowledged and notarized.

The Deed of Trust is valid in every respect, except that Mary's signature was not properly notarized. Mary has no other creditors. The Circuit Court has stayed further proceedings in the foreclosure action pending its determination of the validity of the deed of trust and the rights of the parties.

- a. What rights does the Bank have to enforce the Deed of Trust?**
- b. Does the judgment of Jones take priority over the Deed of Trust?**

**Please explain your answers fully.**

### **REPRESENTATIVE ANSWER 1**

Regarding the Bank's rights to enforce the Deed of Trust, the grant from Mary to Bank was defective. Pursuant to 4-109 of the Maryland Code, the failure to include a notary seal renders the grant defective if it is challenged in a judicial proceeding within six months after it is recorded. In this case, the facts indicate that the Deed of Trust was valid except that Mary's signature was not notarized. Further, the Deed of Trust was recorded on March 5, 2007 and Jones filed a motion challenging the validity of the Deed of Trust on July 10, 2007, within 6 months after the deed is recorded. Although the Deed of Trust as filed was defective because Mary's signature was not notarized, the Court may invoke its equitable power and regard as done what ought to be done in order to provide the Bank with the ability to enforce its properly attached and perfected security interest. This would then allow the Bank to go forward with its foreclosure proceedings and allow both parties to receive monies due and owed at the foreclosure sale.

Regarding whether Jones' judgment takes priority over the Deed of Trust, the Court will have to make a determination whether the grant to the Bank is defective due to its failure to include a notarized signature. Under 7-104 of the Maryland Code, the Bank had a properly attached and perfected purchase money mortgage or deed of trust which afforded its superiority. Jones, on the other hand, was a judgment lien creditor. Under ordinary circumstances if the deed was not found defective, the Bank would have priority as a purchase money mortgage holder over Jones' judgment lien. The Bank may further be able to rely upon Code Section 4-101 regarding sufficiency of deeds in order to argue that the deed of trust is valid and contains a minor defect. Bank can further argue that the deed was valid to provide notice to the world of its interest. The Court should determine that Bank will maintain its priority status and not allow Jones to take priority. Bank has fulfilled its obligations in all major respects regarding attachment and perfection. Therefore, Bank still has priority over Jones.

## **REPRESENTATIVE ANSWER 2**

### **Bank's rights to enforce**

Bank has the right to foreclose on the property. When a mortgagor defaults on a mortgage, the mortgagee has the right to foreclose to satisfy their debt. With a mortgage in MD, the mortgagee holds title to the property that is covered in the mortgage. As such, it can sell the property to satisfy its debts.

Under 4-101 the deed is sufficient. It contained Mary and the Bank's name, described the land, the interest to be granted (a mortgage) and was signed and recorded. Because Bank fulfilled these requirements the mortgage is valid and they can foreclose when Mary does not pay.

Under 4-109, where there is the omission of a notary seal and the deed is challenged within 6 months of its recordation, the grant may be defective. Here Mary's signature was not properly notarized. The recording was on March 5, 2007 and Jones challenged it on July 10, 2007. So the failure to comply with 4-109 by not having a notarized signature may make it defective if that is what the court decides when its challenged. Most likely, the court will find that under principles of equity, the mortgage was valid. Bank paid \$210,000.00, a considerable sum. It would not be fair to now tell the Bank that the contract with Mary was void.

### **Jones's Priority**

Bank has priority over Jones in this case as it is a Purchase Money Mortgagor who recorded, under 7-104 where a purchaser gives a deed or mortgage to secure partial payment of the purchase money (or purchase price of the home), the mortgage shall be preferred to any previous judgment or decree for payment of money. As required, the deed must recite sum received is part purchase money. The facts state that the deed was valid and therefore, it must have stated the sum received for purchase money.



Although Jones obtained a judgment against Mary on January 3, 2007, it is secondary to Bank's purchase money security interest. Judgment creditors are subordinate to purchase money mortgagees who recorded.

In the foreclosure action, any proceeds will first pay off debt of Bank and then pay Jones if money is remaining. If it is not enough to pay Bank's debt they may bring an action in personam against money for the deficiency.

## QUESTION 10

Al was properly charged in Montgomery County, Maryland, with rape and various other sex offenses stemming from an encounter with Beth. At trial Beth testified Al forced her to have sex with him. Al claimed that the sex was consensual.

At trial, Beth testified Al had stopped her on the street on November 1, 2006, and asked for directions. Al suggested Beth get in his car and show him how to find his destination. Beth obliged. Beth testified Al then locked the doors, took her to a wooded area; said he had a knife but would not hurt her if she complied with his directions and forced Beth to have vaginal intercourse. Beth testified Al then dropped her off at a nearby gas station.

In his testimony, Al denied any threat or force and denied stating he had a knife. He maintained the sexual activity was consensual.

The prosecutor at Al's jury trial, in the Circuit Court for Montgomery County, called Carol as a rebuttal witness. Al's attorney asked for a proffer of Carol's testimony out of the presence of the jury. The prosecutor made the following proffer as to Carol's testimony: Carol would testify that in 1990, Al had approached her in Montgomery County, Maryland, asking for directions. After Carol told him she was unable to provide him with directions, Al told her he had a knife in his pocket. He forced Carol to get into her car and then forced his way into the car. Carol said Al stated everything would be alright if she did what she was told and Carol would further say that Al raped her. Al then had Carol drop him off. The prosecutor also proffered that Al had pled guilty to Second Degree sex offense with respect to the incident in 1990.

After hearing the proffer, Al's attorney objected to the prosecutor's effort to have Carol testify.

- a. **State the arguments Al's attorney would reasonably give in support of his objection.**
- b. **How should the prosecutor respond?**
- c. **How should the Judge rule on the objection and why?**

## REPRESENTATIVE ANSWER 1

Al's Defenses Against Admissibility of this Evidence

Al's attorney should argue that for testimony to be admissible, it must first be relevant, and this proffered testimony is not. Relevant information should tend to prove or disprove some material fact that is in controversy. Here, the fact that is controversy is not whether Al and Beth

had sex, but whether the sex was consensual. Any relevant testimony then should tend to prove or disprove that Beth consented to the intercourse.

Under the facts given, the proffered testimony would not. Whether Al forced Carol sixteen years ago to submit to nonconsensual sex does not help a fact finder determine whether Beth gave consent, so it is not relevant.

Even though the facts of the proffered testimony closely resemble what Beth alleges, they are not so close as to fall within an exception such as the 'signature' exception where crimes committed are done by a substantially similar and very unique manner. The testimony is further barred as evidence of a prior bad act that may unduly prejudice Al. The fact finder, upon hearing of the prior incident may decide Al has a bad character. They may then convict him because they do not like him, rather than because they are convinced beyond a reasonable doubt that he did in fact force Beth to commit to sexual intercourse against her will. The possible prejudice of this testimony would far outweigh its probative value, and must be deemed inadmissible.

Additionally, the event with Carol that resulted in his conviction for second degree sexual offense was very remote in time, having happened sixteen years before the incident with Beth. It is too old to be admitted as a prior conviction. For all these reasons, the proffered testimony should not be admitted.

#### Prosecutor's Responses:

The prosecutor should respond that the events are in fact very similar in nature - in both, Al used the ruse that he was in need of directions. He used the threat of having a knife to obtain compliance from his victims, and also assured them he would not hurt them as long as they did. Both were then forced to have intercourse. In 1990 he was convicted for this act, A prosecutor may assert that his eliciting sex from a stranger in a *vehicle* with a knife after asking for directions showed a modus operandi for rape, and that the conviction should have given him an awareness of the error of his acts so that he could not claim he believed Beth would have consented.

#### Ruling

The judge should bar all of Carol's testimony. Al's counsel is correct that the probative value of the testimony is far outweighed by its potential unfair prejudice. As a prior bad act, this is only impermissible character evidence. Whether Carol consented has no real bearing on whether Beth did; Carol's actions cannot predict Beth's. It falls within no exception. Additionally, the conviction is too remote to be admitted, even if the information given was limited just to disclosing that he was convicted of a second degree sexual offense.

## REPRESENTATIVE ANSWER 2

### Part A = Al's Objections

Generally, all relevant evidence is admissible, unless otherwise excludable on other grounds. Here, the testimony of Carol as to an encounter with Al that mimics the encounter with the victim in this present trial is relevant to the issue of whether Al committed the same crime against Beth. However, there are other issues with this evidence, as explained below:

#### Objections to Carol's Testimony

In a criminal trial, character conformity evidence is inadmissible to show that the defendant has a propensity to commit bad acts. Here, Carol's testimony is being used to show that Al is a "bad man" who commits bad acts, and is therefore inadmissible at trial. A very narrow exception to this rule applies in the case of the MIMIC exception. If the proffered character evidence is not being used to show character, but rather to show, inter alia, identity of crime or intent, such evidence may be admitted only if the judge finds by clear and convincing evidence that the "prior bad act" in fact occurred, and if the prejudicial effect of such evidence does not outweigh its probative value. Here, Al's attorney will argue that there is no "identity" MIMIC exception to which Carol's testimony applies. Although there are some similarities between the 1990 incident with Carol, and the 2006 incident with Beth (Al asking for directions, saying he had a knife in his pocket, indicating he would not hurt the victim if she "did what she was told" or "complied with his directions"), there are enough differences to render the identity MIMIC exception inapplicable. In the 1990 incident, Al approached someone with a car. In the 2006 incident, Al had his own car. The mere coincidence of threatening language or a knife is commonality amongst many sex offenders and does not indicate sufficient identity of crime to justify this exception.

If the judge finds that Carol's testimony does fit within the "identity" of crime MIMIC exception, the judge may find by clear and convincing evidence that the 1990 incident occurred in light of the fact that Al pled guilty to 2<sup>nd</sup> degree sex offense with respect to the incident.

However, Al's attorney could argue that the prejudicial effect of such evidence substantially outweighs its probative value. Here, as explained above, there are sufficient differences between the two crimes to raise doubts and concerns about whether this is in fact an "identical crime," but the jury will be so persuaded and prejudiced by the idea that Al is a "bad man" that it will give undue weight to such evidence, particularly in light of the emotionally charged responses to accusations of sex offenses. Because this may deny Al's right to a fair trial, it should be excluded. Hearsay is an out of court statement used for its truth, and is generally inadmissible unless an exception applies. Here, Carol would testify as to what Al said to her in the 1990 incident, constituting hearsay. However, under the statement of a party opponent exception, statements of a party opponent offered by the adverse party, that are adverse to the party's opponent's interest at the time of trial, are admissible as an exception to the hearsay rule. Here, Al's statements indicating force or

threat of force against Al are admissible since they are offered by the State and adverse to Al's interests at trial.

### Objections to the Evidence of the 1990 Guilty Plea

The guilty plea is also hearsay because it is an admission out of court by Al as to his involvement in the sex offense. However, a final guilty plea in Maryland is not excludable on public policy grounds, and can come in under the statement of party opponent exception (see above). Therefore, there are no valid objections to this guilty plea coming in.

### Part B = Prosecutor's Response to Al's Objections

#### Carol's Testimony

MIMIC. Although character evidence generally is inadmissible to show propensity to commit bad acts, this evidence falls within the MIMIC exception to the rule. First, there is sufficient identity between the 1990 and 2006 incident. Al used the same general common scheme to perpetrate the sex offense (approaching a single woman, asking for directions, using a car as an instrumentality of the crime, giving the same sorts of threats, using the same weapon (a knife)). Second, this prior bad act occurred by clear and convincing evidence (see above). Third, the probative value outweighs the prejudicial value. Here, Al's defense is that sex was consensual, that he did not use force, and that he did not state that he had a knife. Al's testimony is central to the defense theory of the case, and there are no eyewitnesses to the crime against Beth. Particularly in sex offense cases, where there is an identity of crime, that identity is extremely relevant and probative as to a pattern of sex offense conduct, and any prejudice to Al can be mitigated by Al's cross-examination of Carol.

#### Hearsay

For the reasons stated in Part A, any objections by Al to either Carol's testimony or the guilty plea on hearsay grounds are inapplicable in light of the statement of party opponent exception to the hearsay rule, and the fact that the 1990 plea is a finally entered guilty plea (i.e., no public policy objections).

#### Impeachment

The Prosecutor might further argue in this case that because Al testified in this case, that the State ought to be allowed to impeach his credibility by evidence of a prior criminal conviction. However, this argument would fail because the time for using such a conviction for impeachment purposes has passed. While a guilty plea may be considered a prior conviction, the conviction can only be used in a later trial within 15 years of the conviction. Here, Al pled guilty in 1990, but this is now a 2008 trial, rendering this beyond 15 years and inadmissible.

Furthermore, any other impeachment uses of this evidence (impeachment by character for truth and veracity by specific instance of conduct, for example) could only be accomplished on

intrinsic, cross examination of Al, and the prosecutor would be stuck with the answer (i.e., can't bring in Carol's extrinsic evidence to impeach by a specific instance of conduct).

### Part C Judge Ruling

For the reasons stated above, the court should allow Carol's testimony on the basis of the MIMIC arguments raised by the State, and deny any MIMIC or hearsay objections by the defense. The court should not grant the use of the testimony on impeachment grounds raised by the prosecutor, as those grounds are inapplicable. The Court may, in its discretion and at the request of Defendant, give a limiting instruction to the jury to instruct them as to the limited purpose of MIMIC testimony (i.e., it is not to be considered "propensity" evidence) and limit any undue prejudice to Al.